Instant Replay: A Review of the Case of Maurice Clarett, the Application of the Non-Statutory Labor Exemption, and Its Protection of the NFL Draft Eligibility Rule

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Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol73/iss5/13
COMMENT


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INTRODUCTION

Maurice Clarett wants to play in the National Football League ("NFL").¹ He feels that he is physically mature and skilled enough to do so.² The fact that he led his college team, The Ohio State University, to a national championship as a true freshman³ only adds credence to his belief. He is not alone in believing himself ready to compete in the NFL. Numerous commentators and NFL player-personnel executives also feel that Clarett is ready for the NFL.⁴ While there were varied opinions on when Clarett might have been selected in the 2004 NFL draft had he been deemed eligible, most predictions had him being drafted no later than the third round.⁵

* J.D. Candidate, 2006, Fordham University School of Law. This Comment is dedicated to the memory of Edward Joseph Schmeltz (1986-2005). The “best kid” I have ever had the pleasure of knowing. His work ethic, desire, and relentless pursuit of his goals has and will continue to serve as a shining example to all of us lucky enough to have known him.


2. Id.

3. The term “true freshman” refers to a college athlete who is in his first year of both athletic and academic eligibility. It is common for college football players to “redshirt” a year, during which they go through a year of school with limited athletic participation. A redshirt freshman would be in his first year of athletic eligibility but his second year academically.


5. Maske, supra note 4.
The NFL, however, has long had an eligibility rule that restricts when an amateur athlete is eligible for the annual draft. Since 1990, this rule has required that all draft applicants be three years removed from their high school graduation. The eligibility rule prohibited Clarett from entering the draft, and he responded by bringing suit in federal court challenging the rule as a violation of antitrust law. The United States District Court for the Southern District of New York found that the rule violated the antitrust laws, and that the non-statutory labor exemption offered it no protection. The U.S. Court of Appeals for the Second Circuit reversed, holding that the non-statutory labor exemption shielded the rule from antitrust liability.

Part I of this Comment provides the necessary background for understanding both the antitrust issues raised by this case and the non-statutory labor exemption. Part II of this Comment examines the Clarett decisions and the issues that they present regarding the applicability of the non-statutory labor exemption and the operation of antitrust laws. Part III argues that the Second Circuit’s Clarett decision was incorrect under existing non-statutory exemption case law, and proposes a new requirement to help govern the applicability of the non-statutory labor exemption.

I. ANTITRUST LIABILITY AND THE NON-STATUTORY LABOR EXEMPTION

Maurice Clarett has challenged the NFL’s eligibility rule as a violation of the Sherman Act. The Sherman Act is an antitrust statute that prohibits restraints on trade. The non-statutory exemption, however, removes some union-employer agreements from the operation of antitrust law. If the exemption is inapplicable and antitrust law controls, two threshold requirements must be met—an agreement between parties and an effect on interstate commerce—to invoke a Sherman Act analysis. Once the threshold requirements are met, courts will generally employ the “rule of reason,” which declares that unreasonable restraints on trade are violations of the

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6. Clarett, 369 F.3d at 126.
8. Id. Antitrust law generally prohibits restraints on trade and commerce. See infra Part I.A.
10. See Clarett, 369 F.3d at 125.
11. There are two decisions in this case. The district court decision granted Clarett entry into the draft. Clarett, 306 F. Supp. 2d at 379. The Second Circuit decision overturned the district court and upheld the NFL’s eligibility rule. Clarett, 369 F.3d at 124.
12. See infra Part II.A.
However, some agreements have been declared to be per se violations of the Sherman Act, eliminating the need for any inquiry into their reasonableness.\footnote{17}

Part I.A addresses the antitrust issues implicated by Clarett, and Part I.B delves into the nature and applicability of the non-statutory labor exemption.

\section{A. Antitrust}

Antitrust law finds its early roots in English common law.\footnote{18} The United States first passed antitrust legislation in 1890\footnote{19} in the form of the Sherman Act,\footnote{20} which is a statute prohibiting restraints of trade on interstate commerce.\footnote{21} The generality of the statute left much of the development of antitrust law up to judicial decisions.\footnote{22}

Antitrust law has had a profound impact on professional sports.\footnote{23} The NFL has had to defend antitrust suits over sixty times between 1966 and 1991.\footnote{24} In addition, two of the three other major sports leagues,\footnote{25} as well as a number of now-defunct sports leagues,\footnote{26} have frequently faced antitrust challenges.\footnote{27}

\footnotetext[16]{16. See infra Part I.A.3.}
\footnotetext[17]{17. See infra Part I.A.3.}
\footnotetext[19]{19. Id. at 43, 52.}
\footnotetext[21]{21. See Areeda & Kaplow, supra note 18, at 4.}
\footnotetext[22]{22. Id. The fact that there is no federal agency charged with administering the antitrust laws could also have led to its predominantly judicial development.}
\footnotetext[24]{24. Id.; see, e.g., Powell v. NFL, 930 F.2d 1293, 1295 (8th Cir. 1989) (holding that the non-statutory labor exemption shielded the NFL's free agent compensation rule from antitrust attack); L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1385, 1390, 1401 (9th Cir. 1984) (holding an NFL rule requiring that three-quarters of the member teams approve any move of a team into the home territory of another team in violation of the Sherman Act); Smith v. Pro Football, Inc., 593 F.2d 1173, 1175-76 (D.C. Cir. 1978) (holding the NFL draft, which, as then constituted, prohibited drafted players who could not agree on a contract with the team that drafted them from ever playing in the NFL, was an unreasonable restraint on trade in violation of the Sherman Act); Mackey v. NFL, 543 F.2d 606, 622 (8th Cir. 1976) (holding the NFL rule requiring compensation for the signing of another team's free agent an unreasonable restraint of trade in violation of the Sherman Act); Zimmerman v. NFL, 632 F. Supp. 398, 401 (D.D.C. 1986) (holding that the non-statutory labor exemption shielded from antitrust liability a supplemental draft held by the NFL for players already under contract to another professional football league); Kapp v. NFL, 390 F. Supp. 73, 86 (N.D. Cal. 1974) (holding certain employment restraints used by the NFL unreasonable restraints of trade not shielded by the non-statutory labor exemption because there was no agreement in place at the time of the alleged violations).}
\footnotetext[25]{25. For the purpose of this Comment, "major sports leagues" include the NFL, Major League Baseball, the National Basketball Association, and the National Hockey League.
A large part of antitrust law derives from the first two sections of the Sherman Act. The first section makes it illegal to contract or combine in the restraint of trade among the states or with a foreign nation. The second section outlaws monopolies. One of these sections, if not both, is implicated in virtually all sports-related antitrust cases.

Generally, there are two types of antitrust cases brought against professional sports leagues. The first involves disputes arising between leagues or between member teams of a league. The second arises when someone challenges an action of a league as an illegal conspiracy among the member clubs in violation of section 1 of the Sherman Act. This second type is the more common and more often litigated of the two.

In order to succeed in an antitrust challenge, a plaintiff must show an “antitrust injury.” Once this standing has been established, a court must determine if the alleged behavior violates antitrust law.

Part I.A.1 examines the qualifications of an “antitrust injury,” Part I.A.2 discusses the requirement for the application of the antitrust laws, Part I.A.3 addresses the rule of reason (the standard by which alleged violations are judged), and Part I.A.4 presents the relevant sports related antitrust cases.

26. Defunct sports leagues that have been sued on antitrust grounds include the World Hockey Association, American Basketball Association, and the United States Football League.

27. See Roberts, supra note 23, at 135. The lone exception among major sports leagues is Major League Baseball which enjoys a broad exemption to the antitrust laws. See Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953) (per curiam); see also infra Part I.A.2.a.


29. 15 U.S.C. § 1 (stating that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal”).

30. Id. § 2 (stating that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony”).


32. Id.

33. Id.

34. Id.; see infra Parts I.A.4, I.B.3.b-c.


37. See infra Part I.A.2.
1. Antitrust Injury

An antitrust injury is one "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."38 It is not sufficient to merely prove an injury which is "casually linked to an illegal presence in the market."39 For an injury to qualify as an antitrust injury it "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."40

The Supreme Court has identified a number of factors that are relevant when assessing the antitrust standing of a particular plaintiff.41 These factors include (1) the causal connection between the antitrust violation and the injury,42 (2) the nature of the plaintiff's injury,43 (3) the "directness or indirectness of the asserted injury,"44 (4) the existence of a more direct party that would be motivated to challenge the alleged violation,45 and (5) the interest in avoiding duplicate recoveries or complex apportionment of damages.46

39. Id.
40. Id.
42. Id. at 537. Although there must be a causal connection between the alleged violation and the plaintiff's injury, this relationship is not sufficient to invoke antitrust standing. It does, however, weigh in favor of recognizing the standing of a particular plaintiff. Id. The analysis under this factor is very similar to the overall analysis of antitrust injury discussed above.
43. Id. at 538. This inquiry is largely one that looks to the legislative history and the intent of Congress. See id.; see also Blue Shield of Va. v. McCready, 457 U.S. 465, 484 (1982) (concluding that the plaintiff's injury "falls squarely within the area of congressional concern"). The case for standing grows stronger when the plaintiff's injury is one that Congress intended to be covered by the antitrust laws. However, this intent should be clearly expressed as the congressional purpose. See Brunswick Corp., 429 U.S. at 488; Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972).
44. Associated Gen. Contractors, 459 U.S. at 540. An injury which is merely an indirect result of the harm that may result from an alleged violation does not weigh in favor of finding antitrust standing. See id. at 540-41.
45. Id. at 542. This factor becomes relevant in cases where an organization, such as a union, is bringing an antitrust challenge. The existence of a class of persons likely to bring the antitrust challenge alleviates the need to allow the more remote organization or party to bring the challenge. Finding a plaintiff to lack standing in this situation will "not [be] likely to leave a significant antitrust violation undetected or unremedied." Id. "The existence of an identifiable class of persons whose self interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of a private attorney general." Id.
46. Id. at 543. This factor looks to questions of judicial economy. See id. at 543-44. Complex apportionment of damages will "often require additional long and complicated proceedings involving massive evidence and complicated theories." Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 493 (1968). Similarly, the chance of duplicate recoveries will cause courts to spend time and energy evaluating damage claims, thus undermining the effectiveness of the suit in the first place. See Associated Gen. Contractors, 459 U.S. at 544.
2. Statutory Triggers

If a claimant has standing, the statutory language of the Sherman Act sets up two threshold requirements. Before a Sherman Act analysis can take place there must be an effect on interstate commerce, and an agreement between parties.\textsuperscript{47}

a. Effect on Interstate Commerce

The requirement of an effect on interstate commerce brings the Sherman Act under the Commerce Clause powers of Congress.\textsuperscript{48} The broad judicial interpretation of the Commerce Clause has provided a far reach to the antitrust laws.\textsuperscript{49} Most modern businesses fall under the contemporary definition of interstate commerce.\textsuperscript{50}

Professional sports were originally viewed as local in nature, and thus outside the purview of the federal antitrust laws.\textsuperscript{51} This view, however, was promulgated in the 1920s at a time when the only popular professional sport was baseball.\textsuperscript{52} As the other sports leagues developed and expanded their operations, the effect on interstate commerce increased.\textsuperscript{53} Thus in 1954, the issue was revisited by the Supreme Court, which limited application of its earlier decision to baseball only.\textsuperscript{54} That decision, \textit{Toolson v. New York Yankees}, was not based on baseball's lack of an effect on interstate trade, but rather on the congressional silence on the issue since the earlier ruling.\textsuperscript{55} Because baseball had been allowed to develop for thirty years under the assumption that it was immune from antitrust laws, the Court reasoned that any change in policy should be the result of congressional action and not judicial decree.\textsuperscript{56}

\textsuperscript{48} See Areeda & Kaplow, supra note 18, at 4.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208-09 (1922) (holding that the interstate travel of sports teams did not change their local nature).
\textsuperscript{53} See id.
\textsuperscript{55} Toolson, 346 U.S. at 356-57.
\textsuperscript{56} Id.
Since then, the Court has repeatedly applied the antitrust laws to professional sports.$57$ The NFL, in particular, has been involved in numerous antitrust actions over the years, and the courts have consistently declined to even analyze the effect of the league’s business on interstate commerce.$58$ This suggests that the courts have thought it obvious that the NFL is involved in interstate commerce.$59$

b. Agreement Between Parties

The agreement necessary for a violation of section 1 of the Sherman Act “may be found when ‘the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.’”$60$ The wording of the Sherman Act, requiring an agreement,$61$ makes it inapplicable to unilateral action. When a single entity acts in anticompetitive ways, it does not run afoul of section 1 of the Sherman Act because it fails to satisfy the first threshold requirement.$62$

Most common business organizations are considered single entities and thus cannot conspire with themselves within the meaning of the Sherman Act.$63$ Employees or divisions of corporations can never illegally conspire with each other,$64$ neither can partners in a recognized partnership.$65$ The Supreme Court has even held that wholly owned subsidiaries can never conspire with their parent company because the basic interests of the two are identical.$66$ The joint venture, however, is the single business entity that the courts have yet to classify as a unilateral actor for the purposes of antitrust liability.$57$

$57$. See Radovich v. NFL, 352 U.S. 445, 452 (1957) (holding the antitrust laws applicable to professional football); United States v. Int'l Boxing Club, 348 U.S. 236, 240-41 (1955) (holding the antitrust laws applicable to professional boxing).


$59$. See Koch, supra note 58, at 310.


$63$. See Roberts, supra note 23, at 142.

$64$. Id.

$65$. Id.


The NFL has attempted to avoid antitrust liability by arguing that it is a single economic actor and thus immune from the Sherman Act. This argument has been rejected because the member teams in the NFL are distinct independent business entities who compete with each other to acquire players, and for fan support. These factors demonstrate that each team is an entity distinct from the NFL, and thus susceptible to the antitrust laws.

3. Application of Antitrust Law: The Rule of Reason

The language of the Sherman Act appears to extend antitrust liability to all combinations in restraint of trade. The Supreme Court, however, did not adopt this interpretation. The Court, instead, limited the Sherman Act to prohibit only those agreements that were an unreasonable or undue restraint on interstate commerce. "Thus, the 'rule of reason' became the standard by which antitrust violations would be measured, and the Court undertook to regulate rather than prohibit private combinations."

The rule of reason analysis looks to the contested rule's effect on competition. A reasonable rule will regulate and potentially promote competition, not suppress and destroy it. This test "is not [meant] to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry."

There are some concerns, however, in implementing a rule of reason standard. It causes judges to engage in lengthy factual inquiries and make the type of policy-based decisions that are indicative of legislative, not judicial, responsibilities. Realizing that this inherent difficulty will, in some cases, require such complex computations that the cost of doing those computations may outweigh

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69. Id. at 1390.
70. Id. For a complete argument as to why sports leagues should be considered single entities, see Roberts, supra note 23, at 140-48.
73. Id. at 1063 (citing Standard Oil Co. v. United States, 221 U.S. 1 (1911)).
74. Id.
76. See id. In determining the legality of a challenged rule "[t]he true test . . . is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." Id. (quoting Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)).
77. Id. at 692.
78. See Denver Rockets, 325 F. Supp. at 1063.
79. Id.
any benefit that accrues, the Supreme Court has declared certain practices, including group boycotts, to be per se illegal.\textsuperscript{80}

4. Relevant Antitrust Cases in Sports

The Clarett case is not the first time that these antitrust issues have been litigated.\textsuperscript{81} Multiple lower court cases have focused on the choice between using the rule of reason and the per se approach to illegality, as well as the analysis under each.\textsuperscript{82}

a. Denver Rockets v. All-Pro Management, Inc.\textsuperscript{83}

In the case most factually similar to the current controversy, the United States District Court for the Central District of California declared illegal a National Basketball Association ("NBA") eligibility rule, which required that a prospect be four years removed from his high school graduating class.\textsuperscript{84} Although the NBA's rule is strikingly similar to the NFL's eligibility rule that Clarett challenges, there is one important difference—the NBA had enacted its rule unilaterally, thus it was not part of a collective bargaining agreement ("CBA").\textsuperscript{85} Since the NBA's rule was not the product of a union-employer agreement, the non-statutory exemption offered it no protection, and

\textsuperscript{80} See N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958). The Court stated the following:

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of \textit{per se} unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements.

\textit{Id.} (citations omitted).

\textsuperscript{81} See NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 88 (1984) (holding the NCAA's college football television plan illegal, as an unreasonable restraint of trade); Neeld v. NHL, 594 F.2d 1297, 1298 (9th Cir. 1979) (holding that an NHL rule prohibiting one-eyed players was reasonable under the rule of reason); Denver Rockets, 325 F. Supp. at 1066-67 (holding the per se approach applicable to the NBA's draft eligibility rule).

\textsuperscript{82} See infra Parts I.A.4.a-c.

\textsuperscript{83} 325 F. Supp. at 1049.

\textsuperscript{84} Id. at 1059.

\textsuperscript{85} See id. at 1059-60 (the court in describing the implementation of the rule makes no mention of any agreement or even the existence of a player's union); see also Koch, supra note 58, at 298.
it was evaluated under antitrust law. The case's relevance to the current controversy is thus limited to the operation of the antitrust laws only if the non-statutory exemption is found inapplicable.

The district court in *Denver Rockets* found that the antitrust laws govern all professional sports except baseball. The NBA's eligibility rule was found to constitute a primary concerted refusal to deal, otherwise known as a group boycott. After finding that the action met the two threshold requirements for the application of antitrust law, the court went on to apply the per se rule of illegality for group boycotts. Thus the NBA's draft eligibility rule was declared a violation of section 1 of the Sherman Act.

b. NCAA v. Board of Regents of the University of Oklahoma

In 1981 the National Collegiate Athletic Association ("NCAA") adopted a television plan for the 1982-1985 seasons that was intended to minimize reductions in game attendance due to live broadcasts. The plan was put into contracts with both the American Broadcasting Company ("ABC") and the Columbia Broadcasting System ("CBS"). Each network was allowed to televise fourteen games per year in accordance with certain rules set out in the plan.

The plan dictated the price the networks paid to the member schools for the rights to televise their game. An NCAA representative would set a recommended price for each type of telecast; national telecasts would be the most expensive followed by regional telecasts and then by Division II or III games. There was no adjustment in the fee for the size of the television market, the number of markets in which the game would be seen, or for the particular characteristics of teams involved in the game. The networks would alternate selecting games they wished to televise and would be paying

87. For a discussion of the non-statutory labor exemption, see infra Part I.B.
89. *Id.* at 1061.
90. *See supra* notes 47-69 and accompanying text.
92. *Id.* at 1066-67.
94. *Id.* at 91 (describing the purpose of the plan as minimizing "the adverse effects of live television upon football game attendance").
95. *Id.* at 92.
96. *Id.*
97. *Id.* at 93. The practice was not expressly spelled out in the plan, but the Supreme Court adopted the opinion of the district court that the parties expected that the preexisting practices would be carried out under the plan. *Id.*
98. *Id.*
99. *Id.*
essentially a set rate that followed the recommendation of the NCAA representative.\textsuperscript{100}

In addition to the price fixing, the plan also demanded the networks air games of at least eighty-two different schools during each two-year period.\textsuperscript{101} No team could exceed six television appearances per year, four nationally, and the games had to be divided evenly between the networks.\textsuperscript{102} No NCAA member school was allowed to sell television rights to their games outside of the NCAA plan.\textsuperscript{103}

The Court found that this was a clear restraint of trade.\textsuperscript{104} In addition, it was a horizontal restraint,\textsuperscript{105} which traditionally has invoked the per se rule of illegality.\textsuperscript{106} The Court, however, rejected the per se approach in favor of the rule of reason.\textsuperscript{107} This determination was based on the fact that college football was “an industry in which horizontal restraints on competition are essential if the product is to be available at all.”\textsuperscript{108}

Under the rule of reason the Court found that the NCAA television plan was unreasonable because it restricted, rather than enhanced, competition.\textsuperscript{109} Of importance to this determination was the fact that the NCAA plan had significant anticompetitive effects.\textsuperscript{110}

c. Neeld v. NHL\textsuperscript{111}

Gregory Neeld was a “one-eyed hockey player” who wanted to play in the NHL.\textsuperscript{112} The NHL’s by-laws contain a provision that prohibits a player with certain visual impairments from playing.\textsuperscript{113} The court rejected the per se approach to illegality, instead enlisting the rule of

\textsuperscript{100.} Id. (explaining that the selection would result in the network “obtain[ing] the exclusive right to submit a bid at an essentially fixed price to the institutions involved”).

\textsuperscript{101.} Id. at 94.

\textsuperscript{102.} Id.

\textsuperscript{103.} Id.

\textsuperscript{104.} Id. at 98.

\textsuperscript{105.} A horizontal restraint is “an agreement among competitors on the way in which they will compete with one another.” Id. at 99. The group boycott at issue in Clarett is a type of horizontal restraint.

\textsuperscript{106.} Id. at 99-100.

\textsuperscript{107.} Id. at 100.

\textsuperscript{108.} Id. at 101.

\textsuperscript{109.} Id. at 119-20.

\textsuperscript{110.} Id. at 107. Among these effects were “raising the price the networks pay for television rights,” id. at 105, “create[ing] a price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market,” id. at 106, “[i]ndividual competitors los[ing] their freedom to compete,” id., and that “[p]rice is higher and output lower than they would otherwise be,” id. at 107.

\textsuperscript{111.} 594 F.2d 1297 (9th Cir. 1979).

\textsuperscript{112.} Id. at 1298.

\textsuperscript{113.} Id. By-Law 12.6 states “[a] player with only one eye, or one of whose eyes has a vision of only three-sixtieths (3-60ths) or under, shall not be eligible to play for a Member Club.” Id. at 1298 n.1.
reason because the primary purpose of the rule was to promote safety and not restrain competition.\textsuperscript{114}

Under the rule of reason analysis, the NHL rule was found to be reasonable.\textsuperscript{115} The court found that the by-law was not motivated by anticompetitiveness, and that any anticompetitive effect it might have would be de minimis and incidental to promoting the safety of Neeld and other players that he would be playing with and against.\textsuperscript{116}

While \textit{Denver Rockets, NCAA v. Board}, and \textit{Neeld} may shed some light on the antitrust issues implicated in \textit{Clarett}, they will only be useful if the non-statutory exemption is inapplicable.

\section*{B. The Non-Statutory Labor Exemption}

Federal antitrust law may not govern a challenged practice if one of two exemptions apply.\textsuperscript{117} When unions enter into agreements or contracts with nonlabor groups, the non-statutory labor exemption operates to allow those agreements to withstand antitrust challenges.\textsuperscript{118} Part I.B.1 examines the congressional background and purpose of the non-statutory exemption, Part I.B.2 presents the Supreme Court case law regarding the exemption, and Part I.B.3 provides lower court case law relevant to \textit{Clarett}.

\subsection*{1. Congressional Background and Purpose}

The non-statutory labor exemption was derived from the statutory exemption\textsuperscript{119} contained in provisions of the Clayton and Norris-La Guardia Acts.\textsuperscript{120} The statutory exemption provides that labor unions are not conspiracies in restraint of trade and allows certain unilateral union activities.\textsuperscript{121} The exemption does not, however, protect

\begin{itemize}
\item \textsuperscript{114} \textit{Id.} at 1300.
\item \textsuperscript{115} \textit{Id.}
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{118} Anderson, \textit{supra} note 117, at 98.
\item \textsuperscript{120} Connell, 421 U.S. at 621-22 (detailing the statutory exemption as being represented in sections 6 and 20 of the Clayton Act and in the Norris-LaGuardia Act); \textit{see also} Lock, \textit{supra} note 119, at 351.
\item \textsuperscript{121} Connell, 421 U.S. at 621-22 (stating that the Clayton and Norris-La Guardia Acts “declare that labor unions are not combinations or conspiracies in restraint of
agreements between employers and labor unions that restrain trade.\textsuperscript{122} This is where the difference between the statutory and non-statutory exemptions lie. The statutory exemption protects certain unilateral union activities while the non-statutory exemption protects certain agreements between unions and nonlabor groups.\textsuperscript{123}

Derived from the statutory exemption, the purpose of the non-statutory exemption tracks that of its predecessor: "[T]o protect unions and their legitimate organizing activities from antitrust attack."\textsuperscript{124} In the context of the non-statutory exemption, this protection preserves the union's ability to collectively bargain.\textsuperscript{125} In order to achieve this goal, both bargaining parties must be protected from antitrust exposure.\textsuperscript{126} Thus, although the non-statutory exemption has been used to protect nonlabor groups, its original purpose—to benefit unions—continues to influence judicial decisions.\textsuperscript{127}

Before Congress added the provisions establishing the statutory exemption to the relevant statutes, courts viewed unions as a group of competitors pursuing common goals, and thus a combination in restraint of trade within the meaning of the Sherman Act.\textsuperscript{128} The development of the statutory exemption clearly shows congressional intent to provide for the operation of labor unions.\textsuperscript{129} The non-statutory exemption tracks this intent when unions and employers come to agreement.\textsuperscript{130}

Generally, the non-statutory exemption reflects the intersection of federal antitrust policy and the national labor policy.\textsuperscript{131} The Supreme Court has recognized that to effectuate the congressional labor policy (which favors collective bargaining) in light of antitrust law (promoting free competition in the marketplace), "some union-employer agreements [must] be accorded a limited nonstatutory exemption from antitrust sanctions."\textsuperscript{132}

Since the purpose of shielding some agreements from the operation of antitrust laws is to effectuate the national labor policy, it is

\textsuperscript{122} Id. at 622 (stating that the Clayton and Norris-LaGuardia Acts "do not exempt concerted action or agreements between unions and nonlabor parties").

\textsuperscript{123} See supra notes 119-22 and accompanying text.

\textsuperscript{124} See Lock, supra note 119, at 353.

\textsuperscript{125} Id.

\textsuperscript{126} Id.

\textsuperscript{127} Id.


\textsuperscript{130} Id. at 622; see also Brown v. Pro Football, Inc., 518 U.S. 231, 236-37 (1996).

\textsuperscript{131} Connell, 421 U.S. at 622.

\textsuperscript{132} Id.
necessary to discern the limits of that policy. The policy "favor[s] free
and private collective bargaining."133 However, the labor policy is not
so broad as to capture all agreements struck between labor groups and
employers, for it is only "some" agreements that must be afforded this
protection.134

Supreme Court precedent lends insight into the national labor
policy and the purpose of the exemption.135 The non-statutory
exemption has been derived from statutes that were enacted "in part
to adopt the views of dissenting Justices in Duplex Printing Press Co.
v. Deering, which... had urged the Court to interpret broadly a... labor exemption that Congress... had written directly into the
antitrust laws."136 In that case, Justice Brandeis's dissent argued for
broader protection of union activity.137 The union deserved the
broader protection because "the contest between the company and the... union involves vitally the interest of every person whose
cooperation is sought."138 In addition, the labor policy was intended
"to equalize before the law the position of workingmen and employer
as industrial combatants."139

In Brown v. Pro Football, the Court stated that when Congress
enacted the labor statutes, adopting the dissent in Duplex Printing, its
intent was "to prevent judicial use of antitrust law to resolve labor
disputes [because they are] normally inappropriate for antitrust law
resolution."140 The Court went on to state that "[t]he implicit
('nonstatutory') exemption interprets the labor statutes in accordace
with this intent, namely, as limiting an antitrust court's authority to
determine, in the area of industrial conflict, what is or is not a
'reasonable' practice."141

In addition, the Court in United Mine Workers of America v.
Pennington,142 when discussing the scope of the non-statutory
exemption, explicitly commented on the friction between antitrust law
and the national labor policy. The Court found the inquiry was based
on "harmonizing the Sherman Act with the national policy expressed
in the National Labor Relations Act of promoting 'the peaceful

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133. Brown, 518 U.S. at 236.
134. See supra text accompany note 132.
135. See Brown, 518 U.S. at 235-43; United Mine Workers of Am. v. Pennington,
136. Brown, 518 U.S. at 236 (citations omitted).
137. See Duplex Printing Press Co. v. Deering, 254 U.S. 443, 479 (1921) (Brandeis,
J., dissenting).
138. Id. at 481.
139. Id. at 484.
140. Brown, 518 U.S. at 236.
141. Id. at 236-37.
settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.\(^\text{143}\)

Because the Court has looked to the National Labor Relations Act ("NLRA") to determine the labor policy, some of its provisions are relevant to the current controversy.\(^\text{144}\) The NLRA's statement of findings and policies states that commerce will be benefited by protecting collective bargaining about wages, hours, and other working conditions and by restoring equality of bargaining power between employers and employees.\(^\text{145}\) The Act goes on to define "labor organization" as meaning "any organization... in which employees participate and which exists for the purpose, in whole or in part, for dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."\(^\text{146}\) It also defines "labor dispute" as "includ[ing] any controversy concerning terms, tenure or conditions of employment."\(^\text{147}\) The Act also sets forth an obligation on unions and employers to bargain collectively.\(^\text{148}\) This obligation, however, "does not compel either party to agree to a proposal or require the making of a concession."\(^\text{149}\)

2. Supreme Court Case Law Regarding the Non-Statutory Exemption

In 1965, the Supreme Court decided companion cases that established the non-statutory labor exemption.\(^\text{150}\) Although the outcomes in the cases differed, they laid the foundation for the Court to apply the exemption in the later cases of Connell Construction\(^\text{151}\) and Brown.\(^\text{152}\)

\(^{143}\) \(\text{Id.}\) at 665 (quoting Fibreboard Paper Prods., Corp. v. NLRB, 379 U.S. 203, 211 (1964)).
\(^{144}\) \(\text{See id.}\)
\(^{145}\) 29 U.S.C. § 151 (2000). The NLRA states that:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

\(\text{Id.}\)

\(^{146}\) \(\text{Id.}\) § 152(5).
\(^{147}\) \(\text{Id.}\) § 152(9).
\(^{148}\) \(\text{Id.}\) § 158(d).
\(^{149}\) \(\text{Id.}\).
\(^{150}\) \(\text{See Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965); United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965).}\)
a. Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.\textsuperscript{153}

The \textit{Jewel Tea} controversy arose out of a collective bargaining agreement between a butchers union and a number of grocery stores in the greater Chicago area.\textsuperscript{154} The agreement provided that the meat departments would only be open from 9 a.m. to 6 p.m., Monday through Saturday, and prohibited the sale of meat at any other time.\textsuperscript{155} The majority of the stores accepted the terms of the union's proposal at the end of the bargaining sessions.\textsuperscript{156} Jewel Tea, however, only signed the agreement later, under threat of a strike.\textsuperscript{157} Jewel Tea then brought suit against the union, claiming that the night restrictions violated sections 1 and 2 of the Sherman Act.\textsuperscript{158}

The Supreme Court found the alleged violations exempt from the antitrust laws.\textsuperscript{159} The \textit{Jewel Tea} Court found that the particular hours of the day and days of the week were well within the mandatory subjects of collective bargaining set out by the NLRA.\textsuperscript{160} As such, the agreement was immune from the antitrust laws.\textsuperscript{161}

b. United Mine Workers of America v. Pennington\textsuperscript{162}

\textit{Pennington} was decided on the same day as \textit{Jewel Tea}, however, the Supreme Court declined to use the exemption they had just created. In \textit{Pennington}, a coal workers union agreed to abandon their efforts to control the working time of the miners, not to oppose increases in mechanization, to help fund those increases, and to impose these terms on "all operators without regard to their ability to pay."\textsuperscript{163} In return, the union received increased wages resulting from the increases in productivity as a result of the mechanization.\textsuperscript{164}

The Court, in declining to apply the \textit{Jewel Tea} exemption, found that a union can come to a wage agreement with a nonlabor group and seek to apply its terms on other employers as a matter of its own policy.\textsuperscript{165} The Court, however, went on to say that "a union forfeits its

\begin{itemize}
\item 153. 381 U.S. at 676.
\item 154. Id. at 679-80.
\item 155. Id.
\item 156. Id. at 680.
\item 157. Id. at 681.
\item 158. Id.
\item 159. Id. at 689-90.
\item 160. Id. at 691.
\item 161. Id. (reasoning that "the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work").
\item 162. 381 U.S. 657 (1965).
\item 163. Id. at 660.
\item 164. Id.
\item 165. Id. at 664.
\end{itemize}
exemption from the antitrust laws when... it has agreed with one set of employers to impose a certain wage scale on other bargaining units." In *Pennington*, the objective of the agreement was to drive the small operators out of business. The fact that the agreement was collectively bargained and concerned a mandatory subject of bargaining was not sufficient to justify it legally.

c. Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100

In *Connell*, a steamfitters union engaged in a campaign to convince general contractors to only hire subcontractors that had a collective bargaining agreement with the union. When Connell refused to sign, the union staged a single picket causing 150 workers to walk off the job, thereby halting construction. Connell subsequently signed the agreement under protest and sued under the Sherman Act.

The Supreme Court refused to apply the non-statutory exemption to the agreement between Connell and the union. The Court found that "[l]abor policy clearly does not require... that a union have freedom to impose direct restraints on competition among those who employ its members." The Court found that the protection offered by the statutory exemption—antitrust immunity—for unilateral union activity was not offered by the non-statutory exemption "when a union and a nonlabor party agree to restrain competition in a business market."


In 1989, the NFL decided to implement a developmental squad of players, outside of their regular rosters, that would include up to six first-year players all being paid the same weekly salary of $1000. The NFL presented the plan to the National Football League Players Association ("NFLPA") during collective bargaining. The union refused to agree to the proposal, insisting that development squad players receive the same benefits as regular players and be free to

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166. *Id.* at 665.
167. *Id.* at 660.
168. *Id.*
170. *Id.* at 620.
171. *Id.*
172. *Id.* at 620-21.
173. *Id.* at 622.
174. *Id.* at 622-23.
176. *Id.* at 234.
177. *Id.*
negotiate their own salaries. After negotiations reached an impasse, the NFL unilaterally implemented the rule. Less than one year later 235 developmental squad members filed suit, alleging that the owner’s agreement to pay them a set wage violated the Sherman Act.

The Court found that the non-statutory exemption shielded the NFL from antitrust liability. The exemption applied to the unilateral action of the league because “[i]t grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship.”

3. Lower Court Non-Statutory Exemption Cases in Sports

Although there are a limited number of Supreme Court cases that discuss the non-statutory labor exemption, there are many more in the lower courts. The lower court cases that are relevant to the current controversy are presented below.


In Mackey, the Eighth Circuit refused to apply the non-statutory exemption to an NFL free agent compensation rule. The compensation rule, known as the Rozelle Rule, provided that when a player’s contract with one team expired, any other team that wished to sign that player would have to pay compensation to his former team. If the teams could not agree on suitable compensation, the Commissioner was empowered to mandate compensation in the form of one or more draft picks. The Rozelle Rule was unilaterally imposed in 1963, and contained within the 1968 collective bargaining agreement (“CBA”) only by incorporation.

178. Id.
179. Id. at 235.
180. Id.
181. Id. at 250.
182. Id.
183. See supra part I.B.2.
184. For a comprehensive listing of these cases see A.S. Klein, Annotation, Union Activities Violating The Federal Antitrust Laws—Federal Cases, 20 L. Ed. 2d 1528 (1969).
185. 543 F.2d 606 (8th Cir. 1976).
186. The rule was named after the then-Commissioner of the NFL, Alvin Ray “Pete” Rozelle.
187. Mackey, 543 F.2d at 609 n.1.
188. Id. It is important to note that the draft is an essential element in constructing teams and ensuring they remain competitive, especially within the confines of the salary cap. As such, the potential loss of draft picks is a major impediment and harsh penalty.
189. Id. at 613, 616.
The court found that although not explicitly stated in the CBA, the Rozelle Rule was still within that agreement because it was incorporated by reference and because the CBA stated that the free agent rules would be unchanged. The court, however, went on to espouse a three-part test for the applicability of the non-statutory exemption in order to reach the proper accommodation between the antitrust laws and the labor policy: (1) the restraint must primarily effect only the parties to the collective bargaining relationship; (2) the agreement must concern a mandatory subject of collective bargaining; and (3) the agreement must be the product of bona fide arm's-length collective bargaining.

In Mackey, the court held that, although the Rozelle Rule fulfilled the first two prongs of the test, it failed the third prong. The court found that there was not bona fide arm's-length bargaining because the rule predated the CBA and there was no quid pro quo for its inclusion in the CBA.

After finding that "[t]he union's acceptance of the status quo by the continuance of the Rozelle Rule in the initial collective bargaining agreements under the circumstances of this case cannot serve to immunize the Rozelle Rule from the scrutiny of the Sherman Act," the court turned to the antitrust analysis. It found that the Sherman Act was applicable but rejected the per se approach to group boycotts, choosing instead to apply the rule of reason. Under the rule of reason, the Mackey court found that the interest in maintaining competitive balance was a legitimate purpose, but struck down the rule because it was more restrictive than necessary to serve this purpose.

b. Powell v. National Football League

In Powell, the Eighth Circuit was again confronted with the Rozelle Rule, which it previously struck down in Mackey. After the Mackey decision, the Rozelle Rule was bargained over and appeared in the 1977 CBA. The 1982 CBA continued the Rozelle Rule, but with substantial modifications. When the 1982 CBA expired in 1987, the NFL maintained the current state of the provisions, including the
Rozelle Rule. In September 1987, after failed attempts to achieve a new CBA, the players went on strike. The strike ended after about a month and a half without producing a new CBA. The court held that the protection of the non-statutory labor exemption survived the bargaining impasse and thus shielded the Rozelle Rule from antitrust laws.

c. Wood v. National Basketball Ass’n

Wood involved a settlement agreement between the NBA and its players from a prior suit, which modified the college draft and created a system of free agency for veterans. The window in which a team owned the exclusive rights to a draftee was limited to one year, and veterans, after their contractual obligations were fulfilled, could sell their services to the highest bidder with their prior team having a right to match any offer. This settlement was then incorporated into the 1980 CBA. That agreement expired before the 1982-1983 season, which began before a new agreement could be reached. The NBA and the NBA Players Association then reached an agreement in principle, just days before a strike deadline. The agreement continued the one-year limit on draft rights and the free agency system and established a minimum for individual salaries and a minimum and maximum for aggregate team salaries. Under this agreement, a team that had reached its maximum team allowance was only allowed to offer its first round draft choice a one-year contract for $75,000.

200. Id.
201. Id.
202. Id. The union then moved for a preliminary injunction enjoining the NFL teams from abiding by the terms of the 1982 collective bargaining agreement (“CBA”), and for partial summary judgment declaring that the league’s imposition of the Rozelle Rule was no longer protected by the non-statutory exemption. Id. The parties agreed that both the 1977 and 1982 agreements met the requirements of the Mackey test, and that they were properly protected by the exemption. Id. at 1298-99. The union, however, contended that the protection of the exemption ended at the point of impasse. See id.
203. Id. at 1304. This position was further substantiated in 1996 when the Supreme Court decided Brown v. Pro Football. See supra Part I.B.2.d.
204. 809 F.2d 954 (2d Cir. 1987).
205. The settlement agreement came from an earlier antitrust action brought by the players. In that case, the players challenged the merger of the NBA with the American Basketball Association, as well as the college draft and other employment practices. Id. at 957.
206. Id.
207. Id.
208. Id.
209. Id.
210. Id.
211. Id.
212. Id.
Leon Wood was a first round draft choice of the Philadelphia 76ers; the 76ers team payroll exceeded the salary cap and therefore could only offer Wood a one-year, $75,000 contract.\(^{213}\) Wood refused to sign the contract and brought suit claiming that the salary cap and player draft constituted group boycotts, in violation of section 1 of the Sherman Act.\(^{214}\)

The court refused to address the legitimacy of Wood’s claim under the Sherman Act, instead holding that the non-statutory exemption shielded the contested agreement from antitrust liability.\(^{215}\) In applying the exemption, the court found that the NLRA espouses the fundamental principle that employees may limit competition among themselves through collective bargaining done by an exclusive bargaining representative.\(^{216}\) The challenged rules were held to be mandatory subjects of collective bargaining because they were “intimately related to ‘wages, hours, and other terms and conditions of employment.’”\(^{217}\)

In addition, the court rejected Wood’s claim that the draft and salary cap were illegal because they affected parties outside the collective bargaining unit.\(^{218}\) The NLRA and the prior case law were determined to include workers from outside the bargaining unit.\(^{219}\) Furthermore, the court recognized that restricting collective bargaining to only those employees who were members of the bargaining unit would destroy the incentives for employers to bargain and cause the federal labor policy to collapse.\(^{220}\) While the court acknowledged that this system may place newer employees at a disadvantage, it found this was not at all unusual in the industrial context.\(^{221}\)

d. Zimmerman v. National Football League\(^{222}\)

In 1983, prior to the NFL draft, a number of collegiate football players signed contracts with teams in the now-defunct United States Football League (“USFL”).\(^{223}\) At that time, however, the USFL had

\(^{213}\) Id. at 958.
\(^{214}\) Id.
\(^{215}\) Id. at 959.
\(^{216}\) Id.
\(^{217}\) Id. at 962 (quoting 29 U.S.C. § 158(d) (2000)).
\(^{218}\) Id. at 960-61.
\(^{219}\) Id. at 960.
\(^{220}\) Id. at 961. If new employees could challenge agreements made between employers and collective bargaining representatives it would expose employers to suits for treble damages and destroy their incentives to collectively bargain in the first place. Id.
\(^{221}\) Id. at 962.
\(^{223}\) Id. at 401.
begun to distinguish itself as a viable competitor to the NFL.\textsuperscript{224} As a result, NFL teams were wary of drafting players in the regular draft that were under contract to USFL teams, fearing that those picks would be wasted if the USFL did not go out of business.\textsuperscript{225}

To allay the fears of its member clubs, the NFL sought to establish a supplemental draft for the players who had signed contracts with USFL teams.\textsuperscript{226} The draft, however, was covered by the CBA with the NFLPA, which set a maximum allowance of 336 players drafted per year. Therefore, to hold the supplemental draft, the NFL had to garner the consent of the union.\textsuperscript{227}

The union was open to the idea of a supplemental draft, but made it clear that it would have to receive something in return for the concession.\textsuperscript{228} The NFL and the union eventually came to an agreement allowing a three-round or eighty-four selection draft.\textsuperscript{229} In return, the NFLPA obtained certain concessions with regard to roster sizes, pension fund contributions, and the sharing of contract terms.\textsuperscript{230}

Gary Zimmerman, the third player taken in the supplemental draft, filed suit after playing two seasons in the USFL.\textsuperscript{231} He alleged that the supplemental draft violated section 1 of the Sherman Act.\textsuperscript{232} The court applied the three-part test established in Mackey, noting it was particularly relevant because the test involved the "unique labor and product markets of professional sports."\textsuperscript{233}

\begin{footnotes}
\textsuperscript{224} Id.
\textsuperscript{225} Id. The importance of the draft picks to the success of NFL franchises is discussed supra note 188.
\textsuperscript{226} Zimmerman, 632 F. Supp. at 401. The supplemental draft would address the concerns of NFL teams by allowing them to maintain all of their regular draft picks.
\textsuperscript{227} Id.
\textsuperscript{228} Id.
\textsuperscript{229} Id. at 402.
\textsuperscript{230} See id. The NFL had a contractual right to reduce the roster size from forty-nine to forty-five before the 1984 season. In addition, the union was concerned that the NFL would not make its $12.5 million contribution to the pension fund because the fund was over funded and the NFL was concerned that its contribution would not be tax deductible. Finally, the NFLPA felt that the NFL was in violation of a section of the CBA which required the member teams to provide copies of player contracts to the NFLPA. The NFL management committee had objected to providing the contracts because they had been leaked to the USFL and the press. Id.
\textsuperscript{231} Id.
\textsuperscript{232} Id.
\textsuperscript{233} Id. at 403. It is also worth noting that in this case the NFL conceded that the Mackey test was the appropriate test under which to evaluate the scope of the non-statutory exemption. Id. at 403-04. As stated earlier, the three requirements are "(1) [t]he trade restraint must affect primarily only the parties to the collective bargaining relationship; (2) the agreement must concern a mandatory subject of collective bargaining; and (3) the agreement must be the product of bona fide, arm's-length bargaining." Id.; see also supra notes 185-95 and accompanying text.
\end{footnotes}
The court found that all three prongs of the test were satisfied. In analyzing the first prong, the court included potential NFL players in the bargaining relationship because "'[a]t the time an agreement is signed between the owners and the players' exclusive bargaining representative, all players within the bargaining unit and those who enter the bargaining unit are bound by its terms.'" In addition, the court found it clear, under the facts, that bona fide bargaining took place.

e. Caldwell v. American Basketball Ass'n

Joe Caldwell was a player in the American Basketball Association ("ABA"). He was a two-time all-star and served as his team's player representative to the players' union. Caldwell also served as vice president and president of the union. During the 1974-1975 season, Caldwell had been suspended by his ABA team because they believed he played a role in another player's intentional absence from the team. Caldwell's contract expired in 1975, and he never played professional basketball again. After the 1975-1976 season, the ABA merged with the NBA and Caldwell's team ceased operations.

Caldwell then brought suit alleging that the ABA—and subsequently the NBA—conspired to keep him out of professional basketball because of his involvement with the union. The ABA and the NBA claimed that Caldwell's failure to secure further employment was due to physical limitations, and not because of

234. Zimmerman, 632 F. Supp. at 405-06. The court went into an analysis of the first and third prongs, but did not discuss the second prong because both parties conceded that the second prong was satisfied. Id. at 404-06.

235. Id. at 405 (quoting Wood v. Nat'l Basketball Ass'n, 602 F. Supp. 525, 529 (S.D.N.Y 1984)).

236. Id. at 406.

237. 66 F.3d 523 (2d Cir. 1995).

238. Id. at 525. The American Basketball Association ("ABA") was an alternative league to the NBA. It merged with the NBA in 1976 with four teams joining the NBA: the New Jersey Nets, Denver Nuggets, Indiana Pacers, and San Antonio Spurs. The other two ABA teams, the St. Louis Spirits and the Kentucky Colonels, were bought out. Kelley King, Nothing but Net Profits: Two Former ABA Owners are Getting Superrich from a Long-Ago Dream Deal, Sports Illustrated, June 16, 2003, at 24.

239. Caldwell, 66 F.3d at 525.

240. Id.

241. Id. at 525-26. The other player, Marvin Barnes, was dissatisfied with his contract and skipped an important game as a negotiating tactic. Id. After being suspended, Caldwell filed a federal lawsuit, which was resolved in his favor awarding him his entire salary for the 1974-1975 season. Id. at 526.

242. Id.

243. Id.

244. Id. In addition to the alleged incident involving Marvin Barnes, Caldwell, as president of the union, had also refused to sign a collective bargaining agreement with the ABA. Id.
retribution for his union activities.\textsuperscript{245} The Second Circuit found that the "circumstances under which an employer may discharge or refuse to hire an employee" was a mandatory subject of bargaining.\textsuperscript{246} The court refused to address the Sherman Act claim because it was preempted by the non-statutory exemption.\textsuperscript{247}

f. McCourt v. California Sports, Inc.\textsuperscript{248}

\textit{McCourt} confronted the version of the Rozelle Rule adopted by the National Hockey League ("NHL").\textsuperscript{249} The NHL’s rule was embodied in the NHL by-laws, and made applicable to the players through the Standard Players Contract which was expressly approved by both the league and the National Hockey League Players Association ("NHLPA").\textsuperscript{250} Under the rule, when a free agent player signs a contract with a new team his original team has the right to compensation from the signing team.\textsuperscript{251} The compensation can be in the form of an assignment of existing contracts, draft picks, or cash.\textsuperscript{252} If the two teams cannot agree on appropriate compensation, they each submit a proposal to an independent arbitrator who then chooses one of the two proposals.\textsuperscript{253}

In 1978, the Detroit Red Wings signed a free agent from the Los Angeles Kings.\textsuperscript{254} The Red Wings and the Kings could not come to an agreement on compensation so the case went before an arbitrator.\textsuperscript{255} The arbitrator selected the Kings’ proposal, which assigned Dale McCourt’s contract to the Kings.\textsuperscript{256} McCourt refused to report to the Kings and filed suit.\textsuperscript{257}

The court adopted the \textit{Mackey} test to decide the applicability of the non-statutory labor exemption.\textsuperscript{258} The court found that the compensation rule was part of a valid agreement between the NHL and the NHLPA that was the result of good faith arm’s length bargaining.\textsuperscript{259} As such, the rule was protected from the antitrust laws.\textsuperscript{260}

\begin{itemize}
\item \textsuperscript{245} Id.
\item \textsuperscript{246} Id. at 529.
\item \textsuperscript{247} Id. at 527.
\item \textsuperscript{248} 600 F.2d 1193 (6th Cir. 1979).
\item \textsuperscript{249} Id. at 1194.
\item \textsuperscript{250} Id. at 1194-95.
\item \textsuperscript{251} Id. at 1195.
\item \textsuperscript{252} Id.
\item \textsuperscript{253} Id.
\item \textsuperscript{254} Id. at 1195-96.
\item \textsuperscript{255} Id. at 1196.
\item \textsuperscript{256} Id.
\item \textsuperscript{257} Id.
\item \textsuperscript{258} Id. at 1203.
\item \textsuperscript{259} Id.
\item \textsuperscript{260} Id.
\end{itemize}
As shown, multiple lower courts have adopted the *Mackey* test in defining the contours of the non-statutory exemption in sports related cases. However, some lower courts have also used a more amorphous balancing approach. In the Clarett cases, the courts differed on the appropriate analytical doctrine to evaluate the scope of the exemption.

II. THE PROPER REQUIREMENTS FOR THE APPLICABILITY OF THE NON-STATUTORY LABOR EXEMPTION AND THE ANTITRUST LIABILITY OF THE NFL

In *Clarett*, the district court and the Second Circuit came to different conclusions regarding the legality of the NFL’s draft eligibility rule. This part presents both courts’ opinions. In addition, this part discusses the main issues that arise regarding the applicability of the non-statutory labor exemption to Maurice Clarett’s case.

A. Clarett v. NFL

Maurice Clarett has been excluded from the 2004 NFL draft because the league has an eligibility rule that restricts access to the draft to players that are at least three years out of high school. He asserted that the non-statutory exemption does not shield the NFL’s eligibility rule from the antitrust laws, and that the rule is a violation of the Sherman Act.

1. The District Court

The district court held that the non-statutory exemption was inapplicable to the NFL’s draft eligibility rule. The court referenced, but did not expressly adopt, the three-prong test from

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262. They use an approach that, without specific guidelines, looks to make the balance between the national labor policy and the antitrust laws. See supra Part I.B.3.c; infra Part II.A.2.
263. The district court followed the principles espoused in *Mackey*, while the circuit court choose to follow a more general balancing test. See infra Part II.A.
265. See infra Part II.B.
266. See supra note 7 and accompanying text.
268. Id. at 393.
The district judge, however, went on to find that the exemption was inapplicable because the NFL's rule was not a mandatory subject of collective bargaining, Clarett was outside the bargaining unit, and the rule was not a product of bona fide arm's-length bargaining.

After finding the exemption inapplicable, the court analyzed the antitrust issues. Clarett was found to have antitrust standing because his injury was a direct result of the anticompetitive effects of the rule. The court then applied the “rule of reason.” The eligibility rule was held to be unreasonable because it was a “naked restraint of trade,” had “no legitimate procompetitive justification,” and because there were “less restrictive alternatives” available to the league.

2. The Second Circuit

The Second Circuit reversed the district court's holding on the applicability of the non-statutory labor exemption. As such, the

269. See id. at 391-92.
270. See id. at 393-97. The court found that an eligibility restriction is not a mandatory subject because it makes a class of potential employees unemployable, and wages, hours, and working conditions can only apply to those who are employed or eligible for employment. Id. at 393. The court also considered Clarett to be outside the bargaining unit because “those who are categorically denied eligibility... even temporarily, cannot be bound by the terms of employment they cannot obtain.” Id. at 396. Finally, the court found that the rule did not arise from arm's length bargaining because the rule was not negotiated during the bargaining process. Id. This analysis is similar to the reasoning employed by the Eighth Circuit in its Mackey test. See supra Part I.B.3.a.
272. Id. at 398-99.
274. Clarett, 306 F. Supp. 2d at 406. The court found that a policy which excludes certain competitors from the market altogether is anticompetitive and “precisely the sort of conduct the antitrust laws were designed to prevent.” Id. at 406, 408.
275. Id. at 408. The NFL offered four justifications for the rule: (1) protecting younger players, who are less mature physically and mentally, from increased risk of injury; (2) protecting the value of the NFL's television rights and game attendance revenue from the effects of such injuries; (3) protecting the teams from the costs of such injuries; and (4) protecting amateur athletes from overtraining, including the use of steroids, to gain entry to the NFL. Id. The court found that none of the NFL's justifications were reasonable. Id. The NFL's concern for the health of younger players, justifications one and four, failed because they did not promote competition. Id. The second justification failed because the procompetitive effects of the rule would be in a different market than the anticompetitive effects. Id. at 408-09. The third justification failed because the desire to keep down costs is not a legitimate procompetitive justification. Id. at 409.
276. Id. at 410. The less restrictive alternative would be to administer individual testing to assess NFL readiness instead of using age as a proxy for readiness, which the court found to be a poor substitute. Id.
277. Clarett v. NFL, 369 F.3d 124, 125 (2d Cir. 2004), petition for cert. filed, 73
court expressed no opinion on the validity of the antitrust conclusions of the district judge.\textsuperscript{278}

The Second Circuit rejected the Eighth Circuit's Mackey test.\textsuperscript{279} Instead, it framed the issue as "whether subjecting the NFL's eligibility rules to antitrust scrutiny would 'subvert fundamental principles of our federal labor policy.'"\textsuperscript{280} The court decided that the eligibility rule was a mandatory subject of collective bargaining, because it was either a condition of employment or it was intimately related to wages and working conditions.\textsuperscript{281}

After finding that the eligibility restriction was a mandatory subject, the court decided that it would damage the fundamentals of federal labor policy to allow antitrust laws to apply.\textsuperscript{282} According to the court, Clarett's disagreement with the NFL and the NFLPA's initial criteria for employment was a claim rightfully evaluated under labor law.\textsuperscript{283} Thus, the NFL eligibility rule was upheld.\textsuperscript{284}

\textbf{B. Points of Controversy: The "Mandatory Subject" Debate}

Following the Clarett decisions, two primary issues exist concerning the applicability of the non-statutory labor exemption. The first issue concerns the scope of the exemption, including whether it should be limited to the mandatory subjects of collective bargaining.\textsuperscript{285} If the exemption is limited to mandatory subjects, then the second issue arises: whether the NFL's eligibility rule qualifies as a mandatory subject of collective bargaining.\textsuperscript{286} If the exemption is found inapplicable, then the NFL rule is susceptible to antitrust law, and the court must decide whether to apply the rule of reason or per se illegality to determine if the NFL has violated antitrust law.\textsuperscript{287} Part II.B.1 presents the doctrine used to determine the scope of the exemption, Part II.B.2 examines the classification of the NFL rule as a mandatory subject of bargaining, and Part II.B.3 discusses the rule of reason and the per se approach to antitrust liability.
1. The Scope of the Non-Statutory Exemption

In Mackey, the Eighth Circuit examined the Supreme Court non-statutory exemption case law and determined that those precedents provided the appropriate principles to determine the limits of the exemption. In refining the non-statutory exemption doctrine, the court sought to balance the "proper accommodation of the competing labor and antitrust interests." The result of this analysis was the three-prong test discussed earlier. When a challenged rule meets all three prongs of the test, it properly accommodates both the national labor policy and federal antitrust laws. Conversely, if a rule fails any of the three prongs, then it is not protected by the exemption.

The Second Circuit expressly rejected the Mackey test in Clarett, holding that the test did not properly describe the boundaries of the non-statutory exemption. In addition, the Second Circuit found that the Supreme Court precedent relied on in Mackey did not apply to Clarett's situation, because the Supreme Court precedent involved claims of exclusion from competition in the product market by employers.

The court also asserted that the Mackey factors were inconsistent with Brown, the most recent Supreme Court decision on the exemption. The Second Circuit considered the Supreme Court's reasoning in Brown to be similar to its own analysis in sports industry non-statutory exemption cases—that the exemption was necessary to protect the goals of the labor policy.

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289. Id. at 613-14.
290. Id. at 614.
292. See Mackey, 543 F.2d at 614.
293. See id.
295. Id. at 133-34. The court stated as follows:
Moreover, we disagree with the Eighth Circuit's assumption in Mackey that the Supreme Court's decisions in Connell, Jewel Tea, Pennington, and Allen Bradley dictate the appropriate boundaries of the non-statutory exemption for cases in which the only alleged anticompetitive effect of the challenged restraint is on a labor market organized around a collective bargaining relationship.
296. Id. at 134.
297. Id.
298. See id. The court stated as follows:
[T]his to permit antitrust suits against sports leagues on the ground that their concerted action imposed a restraint upon the labor market would
The Second Circuit took particular issue with the third prong of *Mackey*, which requires the agreement to be the result of quid pro quo bargaining. The requirement disregards "prior decisions recognizing that the labor law policies that warrant withholding antitrust scrutiny are not limited to protecting only terms contained in collective bargaining agreements." The Second Circuit held that the NFL rule at issue was a mandatory subject and therefore avoided the question of whether the exemption applies beyond mandatory subjects. The Third Circuit, however, has suggested that the exemption applies to permissive subjects of bargaining, although that court did not present any analysis to support its conclusion.

2. Is the Eligibility Rule a Mandatory Subject?

It is well settled that the mandatory subjects of collective bargaining are wages, hours, and conditions of employment. The Second Circuit in *Clarett* found that the eligibility rule was a mandatory subject of collective bargaining, because it affected conditions of employment and/or because it had a tangible effect on wages and working conditions.

To support the finding that the eligibility rule could be a condition of employment, the Second Circuit cited only one case, *Caldwell v. American Basketball Ass'n*. *Caldwell* held that hiring conditions were a mandatory subject.

seriously undermine many of the policies embodied by these labor laws, including the congressional policy favoring collective bargaining, the bargaining parties' freedom of contract, and the widespread use of multi-employer bargaining units. Subsequent to our decisions in this area, similar reasoning led the Supreme Court in *Brown v. Pro Football*... to hold that the non-statutory exemption protected the NFL's unilateral implementation of new salary caps for developmental squad players after its collective bargaining agreement with the NFL players union had expired and negotiations with the union over that proposal reached an impasse. We need only retrace the path laid down by these prior cases to reach the conclusion that Clarett's antitrust claims must fail.

*Id.* at 135 (citations omitted).
299. *Id.* at 143.
300. *Id.* at 142.
301. *Id.* at 139 n.17.
304. *Clarett*, 369 F.3d at 139 n.17.
305. *Id.* at 139-40.
306. 66 F.3d 523 (2d Cir. 1995); see also supra Part I.B.3.e.
308. *Id.* at 138.
The Second Circuit also found the tangible effects on wages and working conditions to include the possibility that the elimination of the eligibility rule could alter underlying assumptions upon which the agreement was made.\textsuperscript{309} In addition, due to NFL roster limits, the reduction in competition afforded by the rule affects the job security of veteran players.\textsuperscript{310}

The district court in \textit{Clarett}, however, had a different view.\textsuperscript{311} The district judge held that “the [r]ule makes a class of potential players \textit{unable} to be employed. Wages, hours, or working conditions affect only those who are employed or eligible for employment.”\textsuperscript{312} Thus, the district court found that eligibility restrictions were not conditions of employment and so could not be classified as mandatory subjects of bargaining.\textsuperscript{313} The court found that \textit{Caldwell} concerned conditions under which one may be fired and, thus, was not applicable to a case involving job eligibility restrictions.\textsuperscript{314} The district court also determined that the rule was not intimately related to wages, as the only way in which the rule affects wages is “that a player subject to the [r]ule will earn none.”\textsuperscript{315}

In addition to the \textit{Clarett} opinions, there is statistical evidence that is relevant to the effect the rule will have on wages and working conditions, specifically job security of veteran players. Since the 1990 NFL draft (the first to allow players less than four years removed from high school to be eligible) an average of thirty-five underclass players per year have entered the draft.\textsuperscript{316} In the first year of the increased eligibility, 1990, thirty-five underclass players entered the draft.\textsuperscript{317} Before the Second Circuit reinstated the NFL’s eligibility rule (restricting draft access to players three years removed from high school), only nine players who would not have been eligible under that eligibility rule declared for the draft.\textsuperscript{318} Of these nine only two,
Clarett and Mike Williams of the University of Southern California\textsuperscript{319} were serious about entering the NFL.\textsuperscript{320} In addition, from 1990-2003, an average of fewer than five underclassmen per year have gone undrafted and then signed a free agent contract.\textsuperscript{321}

If the resolution of the scope of the exemption and the classification of the NFL rule as a mandatory subject does not support the application of the non-statutory exemption, then a court must determine the proper approach to antitrust liability.

3. The Rule of Reason v. Per Se Illegality

The Supreme Court has found group boycotts to be per se violations of the Sherman Act, and thus any inquiry into their reasonableness or benefits would be wholly irrelevant.\textsuperscript{322} Of course the per se rule only applies after the two threshold requirements are met and the Sherman Act is invoked.\textsuperscript{323}

There have been instances where the Supreme Court indulged the rule of reason analysis in the context of group boycotts.\textsuperscript{324} The per se

\textsuperscript{319} Williams is an All-American receiver who was widely considered to be a first round draft pick before the Second Circuit reinstated the NFL's eligibility rule. See Mark Maske, Executives Eye USC's Williams: Front-Office Personnel May Rethink Draft Order if Wideout Declares, Wash. Post, Feb. 22, 2004, at E3.

\textsuperscript{320} Apparently, the other seven declared their eligibility as no more than a novelty. See Early Hopefuls, supra note 318. Of the other seven to declare themselves eligible for the draft five were still in high school. Of that group, one was from a school for the developmentally disabled, one was from a school that did not even have a football team, another never played varsity high school football, and the last two were not on their school's varsity rosters during the 2003-2004 school year. Id. The only other college player to declare for the draft was a defensive back from Pasadena City College, where he had zero interceptions for a team that went 0-10. Id. Additionally, there is no evidence that when the NFL first allowed juniors into the draft, those newly eligible players that declared for the draft were anything other than serious about playing in the NFL. It seems much less likely that juniors in college would declare for the draft as a joke than it is that high school kids would. NCAA eligibility rules allow players to declare for the draft once during their collegiate career and still potentially regain their collegiate eligibility; thus, it would be strange for a college junior (especially a “redshirted” player who still has two years of collegiate eligibility remaining) to waste this opportunity on a joke. See infra notes 469-71 and accompanying text. Also, because the 1990 rule change was implemented by the league and not by a court's decision, there was no legal uncertainty surrounding it.

\textsuperscript{321} See NFL Players Ass'n, supra note 316 (sixty-five underclassmen over fourteen drafts have signed as rookie free agents).

\textsuperscript{322} See Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 466 (1941) (holding that there was no judicial error by the lower courts in refusing to hear evidence as to the reasonableness of a boycott by certain garment and textile manufacturers of others who copied their designs). The Court found that this information would be wholly irrelevant and that even if design copying was tortious under the laws of all states it would still not justify a group boycott. Id. at 468.

\textsuperscript{323} See supra Part I.A.2.

\textsuperscript{324} See Silver v. N.Y. Stock Exch., 373 U.S. 341, 348-49 (1963) (recognizing that a “justification derived from the policy of another statute or otherwise” could overcome the illegal per se approach to group boycotts).
rule has traditionally been applied to player restraint cases in the sports context. This, however, has not been universal and recently courts have been more willing to apply the rule of reason approach.

III. AN UNREASONABLE RULE ABOUT A PERMISSIVE SUBJECT OF BARGAINING AND A PROPOSAL FOR A NEW REQUIREMENT TO THE NON-STATUTORY EXEMPTION DOCTRINE

A court wrongfully applying an exemption to the antitrust laws has excluded Maurice Clarett from the NFL. This part demonstrates that the Second Circuit erred, under its own analysis, in holding that the non-statutory labor exemption shielded the NFL from antitrust liability. Additionally, under the antitrust laws the NFL eligibility rule should be declared illegal, as an unreasonable restraint on trade. Finally, this part proposes a new requirement to be added to the non-statutory exemption doctrine that would stop the exemption from protecting the NFL’s rule in this case even if the Second Circuit had correctly analyzed it.

A. The Non-Statutory Exemption Should Not Apply: The NFL Eligibility Rule Is Not a Mandatory Subject

The Supreme Court has never defined, with precision, the non-statutory labor exemption. The Court, however, has repeatedly referenced only the mandatory subjects in justifying the application of the exemption. As such, agreements that do not implicate the

325. See Michael Tannenbaum, A Comprehensive Analysis of Recent Antitrust and Labor Litigation Affecting the NBA and NFL, 3 Sports Law. J. 205, 209 (1996); see also Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1064-66 (C.D. Cal. 1971) (holding that the NBA’s player restraint rule, that a player must be four years removed from his high school graduating class, did not fall into the one narrow exception to the per se rule, and was thus a group boycott illegal on its face).


327. See infra Part III.A.

328. See infra Part III.B.

329. See infra Part III.C.


331. See Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965). The Court stated that:

[The Supreme Court] pointed out in Pennington that the exemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws. Employers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects.

Id.; see also Brown v. Pro Football, Inc., 518 U.S. 231, 240-41 (1996) (stating that “to subject the [challenged agreement] to antitrust law is to require antitrust courts to answer a host of important practical questions about how collective bargaining over
mandatory subjects should not be afforded the protection of the exemption.\textsuperscript{332}

The mandatory subjects of bargaining are wages, hours, and other terms and conditions of employment.\textsuperscript{333} The purpose of classifying something as a mandatory subject "is to 'promote the fundamental purpose of the [NLRA] by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.'"\textsuperscript{334}

In \textit{Clarett}, the Second Circuit decided that the NFL's eligibility rule was a mandatory subject of collective bargaining.\textsuperscript{335} The court found that the rule possibly fell under this protection as a condition for initial employment, but was definitely protected because it "[has] tangible effects on the wages and working conditions of current NFL players."\textsuperscript{336} However, as demonstrated below, neither of these assertions justifies the use of the non-statutory exemption to protect the NFL's eligibility.

1. The Eligibility Rule Is Not a Condition of Employment

Conditions of employment are limited to those conditions under which one has to perform his job.\textsuperscript{337} To include eligibility restrictions as a condition of employment would be inconsistent with the NLRA because it extends the coverage of "conditions of employment" beyond just employees, its elimination does nothing to harm collective

\textsuperscript{332} See McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1196-97 (6th Cir. 1979) (adopting the test laid down in Mackey); Mackey v. NFL, 543 F.2d 606, 614 (8th Cir. 1976) (requiring that the agreement be over a mandatory subject to invoke the exemption). But see Feather v. United Mine Workers of Am., 711 F.2d 530, 542 (3d Cir. 1983) (stating that the exemption applies when agreements are about mandatory or permissive subjects).

\textsuperscript{333} NLRB v. Yeshiva Univ., 444 U.S. 672, 702 (1980).


\textsuperscript{335} Clarett, 369 F.3d at 139-40.

\textsuperscript{336} Id. at 140.

bargaining, and by its very nature can only apply to ineligible potential employees.\textsuperscript{338} In addition, the Second Circuit's support for its holding is limited and distinguishable.\textsuperscript{339}

\begin{enumerate}
\item \textit{The National Labor Relations Act \textit{“Speaks”}}

The NLRA contemplates its own applicability to be limited to employees.\textsuperscript{340} It does, however, consider the term "employee" to be broader than just describing the employees of a particular employer.\textsuperscript{341} As the Second Circuit noted in \textit{Wood v. NBA}, this is necessary to facilitate collective bargaining.\textsuperscript{342} As such, potential employees in some situations must be included in the bargaining unit to protect bargaining.\textsuperscript{343} Neither this necessity nor the NLRA, however, suggests that those in Clarett's position be included in the bargaining unit.\textsuperscript{344}

The NLRA defines an employee as

\begin{quote}
\textit{[includ[ing] any employee, and shall not be limited to the employees of a particular employer ... and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment ...].} \textsuperscript{345}
\end{quote}

This definition suggests that the Act views employees as broadly including more than just those working for a specific employer at a specific point in time, but not so broad as to cover all potential employees.\textsuperscript{346}

The definition describes "any employee," but does not reference those who are not employees at all.\textsuperscript{347} The definition goes on to use the term "any individual," which applies to people "whose work has ceased."\textsuperscript{348} This, at least implicitly, requires that the person must have

\begin{itemize}
\item \textsuperscript{338} See 29 U.S.C. §§ 151, 152(3) (2000).
\item \textsuperscript{339} See infra notes 360-69 and accompanying text.
\item \textsuperscript{340} See supra note 145. The introductory section to the NLRA repeatedly references the need to protect employees and workers. In addition, it speaks of restoring equal bargaining power between employees and employers. See supra note 145.
\item \textsuperscript{341} See \textit{Wood v. NBA}, 809 F.2d 954, 960 (2d Cir. 1987) (the court looked to the definition of "employee" under the NLRA to extend the coverage of the exemption beyond just current employees).
\item \textsuperscript{342} Id. If collective bargaining agreements only applied to current employees and employers had to separately deal with each new employee, there would be no reason for them to bargain collectively in the first place.
\item \textsuperscript{343} See id.
\item \textsuperscript{344} See infra notes 345-59 and accompanying text.
\item \textsuperscript{345} 29 U.S.C. § 152(3) (2000).
\item \textsuperscript{346} See infra notes 349-59 and accompanying text.
\item \textsuperscript{347} See supra note 345 and accompanying text. Although this mandates that an employee is not limited to a particular employer, it still describes the person as an employee.
\item \textsuperscript{348} See supra note 345 and accompanying text.
\end{itemize}
already been an employee. Clarett is no one’s employee, he is an amateur athlete.

To effectuate the congressional intent for collective bargaining, the NLRA must cover some potential employees to foster incentives for employers to bargain collectively. The NLRA definition, however, imposes limits on who should be considered an employee. Including all future potential employees within this definition would leave the definition of “employees” virtually limitless. If Congress intended such broad coverage it would have used the term “person” instead of “employee” when it wrote the statute.

This extension should be limited to eligible employees only, and not be so broad as to cover all potential future employees. This inference makes sense in light of the desire to protect the collective bargaining process. Limiting the extension to future and eligible employees would do nothing to dissuade employers from bargaining. Eligibility restrictions would be challengeable, but it would not open the door for potential employees to challenge all of the results of collective bargaining. Hours, wages, and working conditions would still be left up to labor policy and employers would still have all the same incentives to bargain over these subjects. This is precisely the outcome that the NLRA seeks to foster.

There is more evidence in the NLRA that suggests that an eligibility requirement should not be considered a mandatory subject of collective bargaining. The NLRA looks to foster collective bargaining between employers and labor organizations over the mandatory subjects of bargaining. As such, the NLRA’s definition of “labor organization” shines some light on what should be considered mandatory subjects.

The definition of “labor organization” extends to include labor groups that deal with disputes over "grievances, labor disputes, wages,"

349. See supra notes 341-43 and accompanying text. By extending the definition of employee beyond just those working for a particular employer, the Act does suggest that some nonemployees must be covered by its terms. See supra note 345 and accompanying text.

350. See supra note 345 and accompanying text.


352. See supra Part I.B.1. A labor-employer agreement must be applicable to future employees or the incentives to bargain would be destroyed. See supra notes 341-43 and accompanying text.

353. Future but ineligible employees would likely lack standing to challenge anything but the eligibility restrictions. Once the employees became eligible they would then be considered part of the bargaining unit and the union-employer agreements would cover them.

354. See supra note 353.


356. See supra note 145.
rates of pay, hours of employment, or conditions of work."\(^{357}\) Conspicuously missing from this list are requirements for employment. "Conditions of work" is preceded by the phrase "hours of employment," which suggests that "employment" and "work" are not synonymous. The term employment is broader than work. Accordingly, conditions of work must be limited to the conditions under which one must perform their job, and cannot describe the conditions one must meet to gain employment. Additionally, the statute does not use the terms "eligibility requirements" or "conditions for employment."

Furthermore, the NLRA definition of "labor dispute" includes any controversy concerning terms, tenure or conditions of employment . . .\(^{358}\) The use of "tenure" independent of conditions of employment shows the Act does not intend "conditions of employment" to include issues about how one may be terminated or required to cease working (for example mandatory retirement). If conditions of employment is not meant to cover the reasons one may be fired, it should not cover the conditions under which one can be hired. The fact that Congress did not specifically mention conditions for employment, as it did with "tenure," shows that the NLRA did not intend conditions of employment to cover eligibility restrictions.\(^{359}\)

b. The Reasoning of the Second Circuit

The Second Circuit, however, states that the eligibility rule may qualify as a condition of work.\(^{360}\) This statement is backed up with limited evidence and virtually no principled analysis.\(^{361}\) The lone case cited by the Second Circuit was Caldwell v. American Basketball Ass'n,\(^{362}\) in which "the circumstances under which an employer may discharge or refuse to hire an employee" were considered a mandatory subject of bargaining.\(^{363}\) In light of the NLRA principles presented above, the Second Circuit erred in Caldwell.\(^{364}\)

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357. 29 U.S.C. § 152(5) (2000); see also supra note 146 and accompanying text.
358. 29 U.S.C. § 152(9).
359. Of course it is possible that the omission of any reference to conditions for employment shows that Congress intended "conditions of employment" to cover them. This, however, seems unlikely because, if Congress intended the term to cover the conditions under which one can be hired, it is logical that it would also cover the conditions under which one may be fired. This would make the use of the term "tenure" redundant and unnecessary.
361. See id.
362. 66 F.3d 523 (2d Cir. 1995). For a summary of this case, see supra Part I.B.3.e.
363. Caldwell, 66 F.3d at 529.
364. The inclusion of rules regarding eligibility for employment as a mandatory subject is inconsistent with the NLRA. The definitions of both "labor organization" and "labor dispute" show that the Act did not contemplate conditions of work or
Additionally, even if Caldwell was consistent with the NLRA, it is factually dissimilar to Clarett, and the impetus behind the court's decision in Caldwell does not exist in Clarett.\footnote{365}

In Caldwell the claimant had already been employed as a professional athlete, unlike Maurice Clarett, who is being denied that opportunity. Caldwell was also refused further employment based upon his individual actions or abilities, and not banned from the marketplace by an across the board rule like in Clarett. The Caldwell court, in providing antitrust immunity, was concerned with the potential for "[e]very employee who is locked out by a multiemployer group, every striker who is not reinstated, and every employee who is discharged [to] bring an antitrust action . . . ."\footnote{366} These concerns do not apply to Clarett. He is not a striker that failed to get reinstated or a discharged employee. Allowing initial eligibility restrictions to be challenged on antitrust grounds would in no way permit strikers or discharged employees to bring suit, as both of these groups must have already been employed.

In addition, it is unfair to characterize Clarett as a locked-out employee, but even if he is, the circumstances are still distinguishable from Caldwell. The court in Caldwell was faced with an employee who had been "locked out" based upon his actions.\footnote{367} Accordingly, interpreting mandatory subjects not to include an across-the-board eligibility restriction would have no effect on plaintiffs like Caldwell.\footnote{368}

As such, the Second Circuit erred in Caldwell by broadly stating that the conditions under which one may be hired are conditions of employment. Additionally, even if Caldwell was properly decided, the Second Circuit still erred by extending its ruling in Caldwell to cover Maurice Clarett because his situation is sufficiently distinct as not to invoke the fears that drove the Caldwell court.\footnote{369}

\footnote{365. \textit{See supra} notes 356-60 and accompanying text.}

\footnote{366. \textit{Caldwell}, 66 F.3d at 530.}

\footnote{367. There was no across the board rule restricting access. Rather, Caldwell was being refused employment based on his individual actions. Whether those actions were based upon his physical limitations, as the district court held, or his union activities, which the circuit court focused on, is wholly irrelevant. Either way, he had been given individual consideration. \textit{See id.} at 526, 530.}

\footnote{368. The Caldwell court's concern with every employee who is locked out being able to bring an antitrust challenge would not be implicated. If initial eligibility restrictions, like the NFL rule, were declared permissive subjects, not every employee who has been locked out would be allowed to sue, just those denied the opportunity for employment by an across the board rule. This result would not create floods of antitrust litigation; it would not even have covered Caldwell.}

\footnote{369. \textit{See supra} notes 365-68 and accompanying text.}
2. The Eligibility Rule Is Not Intimately Related to Wages or Working Conditions

The Second Circuit, however, also determined that the NFL's rule is a mandatory subject because it is intimately related to wages and working conditions.370 The Supreme Court has interpreted issues intimately related to wages, hours, and working conditions as mandatory subjects of collective bargaining.371 The Court has described this relationship as "whether [the subject] vitally affect[s] the 'terms and condition' of [a worker's] employment."372 Even under a broad reading it is difficult to assert that the eligibility rule vitally affects wages or working conditions.373

The Second Circuit in Clarett found that the eligibility requirement had tangible effects on wages and working conditions.374 In support of this, the court merely stated that the "[eligibility rule's] elimination might well alter certain assumptions underlying the collective bargaining agreement between the NFL and its players union"375 and "[b]ecause the size of NFL teams is capped, the eligibility rules diminish a veteran player's risk of being replaced by either a drafted rookie or a player who enters the draft and, though not drafted, is then hired as a rookie free agent."376 An examination of these two assertions shows that neither supports classification as a mandatory subject, and thus cannot support the application of the non-statutory exemption to Clarett's case.377

a. Underlying Assumptions Cannot Qualify as Mandatory Subjects

The Second Circuit's assertion in Clarett that the eligibility rule is intimately related to a mandatory subject does not mesh with the Supreme Court's requirement that this relation must "vitally affect[]" a mandatory subject.378 Underlying assumptions may have some

370. See supra Part II.A.2.
372. Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179 (1971); see also NLRB v. USPS, 18 F.3d 1089, 1100 (3d Cir. 1994) (holding that a matter must "vitally affect" terms and conditions of employment to be considered a mandatory subject); Seattle First Nat'l Bank v. NLRB, 444 F.2d 30, 33 (9th Cir. 1971) ("A mere remote, indirect or incidental impact is not sufficient. In order for a matter to be subject to mandatory collective bargaining it must materially or significantly affect the terms or conditions of employment.").
373. See infra notes 375-93 and accompanying text.
374. See supra Part II.A.2.
376. Id.
377. See infra Parts III.A.2.a-b.
tangential effect on wages and working conditions, but not enough to rise to the level of "vitaly affecting." The potential is great for underlying assumptions to alter the basis upon which a CBA is made. Deciding what actually was an underlying assumption, and to what extent it affected a mandatory subject, is an extremely speculative inquiry that cannot dictate when the exemption will operate to effectuate the national labor policy.

Classifying underlying assumptions as mandatory subjects of collective bargaining would destroy any limit to the exemption that is created by the Supreme Court's focus on mandatory subjects. It would create an extremely broad doctrine, which would be inconsistent with the Supreme Court's description of the doctrine as "a limited nonstatutory exemption from antitrust sanctions." In addition, the Clarett court did not distinguish underlying assumptions that would qualify as mandatory subjects from those that would not; it simply defined agreements that may alter underlying assumptions as mandatory subjects. If this is the case there would be no point in defining and limiting mandatory subjects to begin with.

b. The Effect, or Lack Thereof, on Veteran Player Job Security

In addition to finding that the eligibility rule could have altered underlying assumptions to the NFL CBA, the Second Circuit also found that the rule was a mandatory subject because it affected the job security of veteran players. However, there is no indication that without the rule a large number of athletes will start leaving college before their junior year or skip college altogether. Since the NFL's eligibility rule was first changed in 1990—allowing players three years removed from their high school graduations to enter the draft—an average of just under thirty-five newly eligible players per year have entered the draft, which is the same amount of players that entered

379. See supra notes 371-72 and accompanying text.
380. See supra note 331.
381. Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975). It is likely that an underlying assumption to the NFL CBA is that there is not now, nor will there be, a professional football league that presents a legitimate competitor to the NFL. This assumption would not, however, immunize from antitrust liability concerted action taken by the league and its player association to remove the competitor. See id. at 622-23 (stating that "the nonstatutory exemption offers no... protection when a union and a nonlabor party agree to restrain competition in a business market"). It might be argued that the eligibility rule was a more direct assumption of the CBA than an assumption about alternative competitive leagues, and thus was a more closely linked assumption to the NFL CBA. If this was true, however, the NFL eligibility rule would have been explicitly stated in the CBA, which it was not.
383. See id.
384. See infra notes 386-87 and accompanying text.
the draft in the first year of the increased eligibility. These numbers show that the number of juniors declaring themselves eligible has remained relatively unchanged since they were first allowed to do so.

If the trend that exists among college juniors foregoing their final year of collegiate eligibility holds true for other underclassmen, the number that leave early in subsequent years will not grow exponentially from the initial year of the increased eligibility, which saw just two players enter the draft. Even if five players in a year were to declare themselves eligible, more than double the two that have declared in the initial year, it would represent less than 0.3% of NFL players. This certainly reflects an interest of the player's association to preserve some current jobs. However, this interest is not significant enough to rise to the level of "vitaly affects," which is required for classification as a mandatory subject.

The assumption that newly eligible players will replace veteran players also does not mesh with the reality of professional football. Rookies have a significant learning curve, and often need time to adjust to the NFL game. As such, they often are not capable of contributing right away. This learning curve would only be exacerbated by younger players with fewer years of college football experience entering the NFL. The pressure to win in professional sports is substantial, and it would be inconsistent to expect teams to replace veteran players capable of contributing at advanced levels with rookies who are not. It is more likely that rookies less than three

385. See supra note 316-17 and accompanying text.
386. Due to the legal proceedings that surrounded this year's draft, it can be argued that the number of players less than three years removed from their high school graduations that declared eligible for the draft was artificially depressed.
387. There are thirty-two teams in the NFL that each have a fifty-three player roster limit. This equals a total of 1696 players in the NFL. Even if the number of players that would have declared without the legal uncertainty was ten players it would only represent approximately 0.6% of NFL jobs; if it was twenty players it would be 0.12% of jobs, and if it was sixty players it would be 0.35% of jobs. However, these increases would seem unlikely given the fact that the media coverage of college players that would declare for the draft if the rule was declared illegal focused almost entirely on Clarett and Mike Williams. If more collegiate undergraduates were contemplating entering the draft in the wake of the district court's decision, it is certainly reasonable to assume that the national sports media would have written about them, in addition to writing about Clarett and Williams.
388. See supra notes 331-32 and accompanying text.
391. See id.
392. This is a possible reason why the NFL has the eligibility rule. It places college football in the position of providing the NFL with a cheap and efficient system for developing players to the point where they can contribute on a NFL team. See Koch, supra note 58, at 321.
years removed from high school will take the spot of other first year players or be placed on the practice squad, neither of which would implicate current union member jobs. Thus, the eligibility rule will have little more than a de minimis effect on the wages and working conditions of veteran players.\textsuperscript{393}

Removing eligibility restrictions from the protection of the exemption would not automatically declare them illegal. Courts are more frequently applying the rule of reason, especially in the sports context.\textsuperscript{394} As noted above, \textit{NCAA v. Board} may mandate the use of the rule of reason in the professional football context.\textsuperscript{395} Therefore, it would just change the lens through which courts analyze these rules.

\textbf{B. The NFL Rule Is an Unreasonable Restraint on Trade}

If the exemption is found inapplicable then the NFL’s eligibility rule becomes vulnerable to an antitrust attack. The NFL, while maintaining that the exemption applies, also asserted that Clarett does not have antitrust standing.\textsuperscript{396} Clarett has suffered an antitrust injury and has antitrust standing.\textsuperscript{397} His injury, the lost opportunity to play professional football and make a substantial income while doing so, flows directly from the conduct alleged to be in violation of the Sherman Act. Clarett challenged the eligibility rule, which is the direct cause of his injury.\textsuperscript{398}

\textsuperscript{393} A potential criticism of defining conditions of work as not including conditions under which one may be hired is that it is inconsistent with employer-labor agreements. For example, a rule that makes people with serious medical conditions or communicable diseases ineligible would surely be legal. The reason, however, would not be because the labor exemption shielded it from antitrust law, but rather because the restriction was legal under antitrust law because its purpose and effect was not anticompetitive but rather promoted player safety. \textit{See} Neeld v. NHL, 594 F.2d 1297, 1300 (9th Cir. 1979) (finding that an NHL rule banning players with sight in only one eye was legal; analyzing the rule under antitrust principles, rejecting a per se approach, and finding that the rule was reasonable as promoting safety). The NFL claims that its rule is also based on promoting safety. \textit{See supra} note 275. Its effect, however, is much broader than in the examples given above. The examples do regulate competition. However, because the regulation would be based on the condition that causes the threat, it would not threaten to exclude numerous viable candidates (those physically and mentally prepared to play in the NFL). As such, it could actually have the incidental effect of promoting competition. The NFL rule denies viable candidates the opportunity to join the league, thus suppressing competition.

\textsuperscript{394} \textit{See} NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 88 (1984) (applying the rule of reason to a restrictive NCAA television contract because horizontal restraints are necessary to make the product available at all in the college sports industry); \textit{see also} Tannenbaum, \textit{supra} note 325, at 209.

\textsuperscript{395} \textit{See supra} Part II.B.3.


\textsuperscript{397} \textit{See supra} Part I.A.

\textsuperscript{398} \textit{See supra} note 272 and accompanying text.
After establishing standing, Clarett's case is similar to *Denver Rockets v. All-Pro Management, Inc.* 399 The eligibility rule at issue in *Denver Rockets* was found to constitute a group boycott. 400 After finding that the action met the two threshold requirements for the application of antitrust law, 401 the court in *Denver Rockets* went on to apply the per se rule of illegality for group boycotts. 402

Since the district court decided *Denver Rockets*, the Supreme Court has repeatedly found the applicability of the per se approach to be inappropriate to group boycott cases. 403 In *NCAA v. Board of Regents of the University of Oklahoma*, the court refused to apply the per se approach to college football because it is an industry where some restraints are necessary if the product is going to be available. 404

The NFL eligibility rule should suffer the same fate as its counterpart in the NBA, although for a different reason. Professional football is an industry that requires some restraints if the product is going to be available, thus requiring the use of the rule of reason. 405 Practices such as the draft itself, 406 the salary cap, and television black out restrictions 407 are all restraints necessary to allow the product to be available.

The NFL's eligibility rule, however, is designed to keep an entire class of potential employees out of the league. It does not simply regulate to promote competition, but rather it suppresses competition. Perhaps if the NFL restricted access based upon individual consideration of an applicant's health, it may just regulate and thereby

400. *Id.* at 1066.
401. The statutory language of the Sherman Act sets up two threshold requirements: "(1) [t]here must be some effect on 'trade or commerce among the several States,' and (2) there must be sufficient agreement to constitute a 'contract, combination . . . or conspiracy.'" *Id.* at 1062 (quoting 15 U.S.C. § 1 (2000) (omissions in original)); see also *Telsat v. Entm't and Sports Programming Network*, 753 F. Supp. 109 (S.D.N.Y. 1990).
405. See Tannenbaum, *supra* note 325, at 209; see also Mackey v. NFL, 543 F.2d 606, 618-19 (8th Cir. 1976) (finding the rule of reason preferable to the per se approach for the unique situation of the NFL because the member teams each have a stake in the continued existence and success of the other teams). The court found this important in light of the fact that the line of cases that deployed the per se approach "generally concerned agreements between business partners in the traditional sense." *Id.* at 619.
406. This differs from the eligibility restrictions for the draft which are at issue in Clarett.
407. The NFL television contracts call for blackouts of games in the home team's local market if that game is not sold out by a particular time during the week before the game is to be played. *See Two Minute Drill: Blackout Rule Eased*, Wash. Post, Sept. 24, 2001, at D9.
promote competition. This, however, is not what the NFL has chosen to do. The NFL's eligibility restriction should be found an unreasonable restraint of trade in violation of the Sherman Act.

C. The Non-Statutory Labor Exemption Should Require that the Agreement Come from Adverse Interests

Even if the NFL's eligibility rule is a mandatory subject of collective bargaining, or if the exemption applies to issues beyond the mandatory subjects, the exemption should still be declared inapplicable to the eligibility rule. The Court has indicated that classification as a mandatory subject is not always sufficient to invoke the protection of the exemption. However, the Court has never articulated what besides classification as a mandatory subject is necessary to invoke the exemption. An examination of Supreme Court precedent and national labor policy reveals a common theme that the courts should adopt to govern the application of the non-statutory labor exemption. This Comment proposes that the exemption should only be applicable to agreements that the bargaining parties have adverse interests over.

1. The National Labor Policy Through the Lens of the National Labor Relations Act

The NLRA contemplates a relationship between employers and labor groups that is adversarial. The use of the terms "grievances" and "labor disputes" in defining a "labor organization," as well as "controversy" in defining a "labor dispute," shows that Congress envisioned a situation where collective bargaining would be needed to resolve issues over which labor and employers had adverse interests.

The Act sets out the mandatory subjects of collective bargaining as being "wages, hours, and other terms and conditions of

408. In that instance applicants would focus on developing themselves (both mentally and physically) to the point where they would be viable NFL candidates. This focus on one's mental and physical viability could increase the number of realistic applicants to the NFL and promote competition.

409. The Sherman Act requires an agreement between parties. 15 U.S.C. §§ 1-2 (2000). It has generally been held that sports leagues meet this requirement. See, e.g., L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1387-90 (9th Cir. 1984). One commentator, however, has argued that the relationship between the NFL and its member clubs should be viewed no differently than that of a parent company and one of its subsidiaries. See Roberts, supra note 23, at 140-48.


412. See supra notes 144-49 and accompanying text.
It is these topics over which employers and labor are likely to differ most vehemently, and so they are at the core of what the NLRA and our labor policy seeks to protect. A potential argument is that it is not necessary that everything bargained for be adversarial in nature, so long as the overall bargaining reflects opposing sides of the table. This, however, misconceives the inquiry. Contesting what may be a part of a CBA is not the issue presented here. What is presented is the assertion that inclusion in a CBA does not automatically make the challenged agreement exempt from the operation of the antitrust laws. The national labor policy, as viewed through the NLRA, is based upon this underlying concept of conflict between the parties bargaining. To be consistent with this view, the exemption must be limited to only those situations where the challenged rule, regulation, or agreement reflects the adversarial positions of the parties.

2. The National Labor Policy Through the Eyes of the Supreme Court

In addition to the NLRA, Supreme Court precedent has repeatedly pointed to the adversarial relationship, using terms such as “disputes,” “controversies,” “conflicts,” and “combatants” in defining the purpose of the national labor policy. All of these terms describe situations where the parties are in disagreement. This shows that the national labor policy was effectuated in order to allow meaningful bargaining to take place over issues on which the interests of the parties are opposed.

3. The Proposed Adversarial Requirement and Prior Case Law

Although the adversarial requirement is not expressly stated in the non-statutory exemption case law, it is nonetheless consistent with that history. The adversarial requirement underlies the reasoning behind decisions and is also consistent with the facts of the cases. Each of the following cases was presented in Part I, but they will now be revisited to demonstrate that the case law supports the adversarial requirement.

415. See Pennington, 381 U.S. at 661-63. For a summary of this case, see supra Part I.B.2.b.
418. See supra notes 135-43 and accompanying text.
419. See supra notes 135-43 and accompanying text.
420. See supra Part I.B.
a. Supreme Court Cases

i. Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.421

It is evident from the facts of this case that the interests of the butcher's union and Jewel Tea were adverse. The grocery store wanted the butchers to work at night so that they could sell meat after 6 p.m.422 The union wanted to limit the butchers' hours to daytime hours.423 This opposition can be traced back to 1919 when butchers went on strike to restrict working hours.424 The adversity is clear when you take into account that the union threatened to strike in order to obtain the restrictions, and Jewel Tea only signed the agreement under duress and then sued.425

ii. United Mine Workers of America v. Pennington426

The turning point of Pennington was that the agreement was meant to settle the wage scale for the whole industry.427 It is precisely this requirement that stopped the interests of the bargaining parties from being adverse. Normally when dealing with wage increases the interests of a union and an employer are adverse; unions usually want to increase wages and employers do not. When, however, the agreement also mandates that the wage increase be demanded across the board, the employer's interest changes. Here, the increased wage is intended to drive the smaller companies out of business, which reduces competition and benefits the large operators.428 As such the agreement would benefit both sides involved in the bargaining and align their interests with one another.

iii. Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100429

The Supreme Court refused to apply the non-statutory exemption to the agreement between Connell and the union.430 The Court found that "[l]abor policy clearly does not require... that a union have freedom to impose direct restraints on competition among those who

421. 381 U.S. 676 (1965).
422. See supra Part I.B.2.a.
423. See supra Part I.B.2.a.
425. See supra Part I.B.2.a.
427. Id. at 665-66.
428. See supra Part I.B.2.b.
430. See supra Part I.B.2.c.
employ its members.”\textsuperscript{431} The Court further stated that “the nonstatutory exemption offers no similar protection [compared with the protection that the statutory exemption provides to unilateral union activity that restrains competition] when a union and a nonlabor party agree to restrain competition in a business market.”\textsuperscript{432} This is precisely what the NFL and its player’s union are doing in Clarett. Clarett, like Connell, is being excluded from the business market because of an agreement between a union and employer that restrains competition.

Although the result in Connell appears inconsistent with the adversarial requirement, it is not. The interests in Connell are adverse, as indicated by the strike and subsequent lawsuit.\textsuperscript{433} The union benefits by ensuring that more jobs get awarded to subcontractors that hire union labor. Connell on the other hand would be restricting the subcontractors he can deal with, potentially raising the cost of his jobs. The adversarial requirement is not meant to, nor could it, define the precise boundaries of the non-statutory exemption. Rather, the requirement is meant to limit the exemption to ensure that it does no more than effectuate the national labor policy.\textsuperscript{434} There are additional requirements, like that in Connell, which may limit the application of the exemption in cases where interests are adverse. These additional requirements are wholly consistent with the adversarial approach. Inconsistency would be generated by precedent that applied the exemption to a situation where the interests were not adverse.

iv. Brown v. Pro Football, Inc.\textsuperscript{435}

In Brown, the Court applied the exemption past the point of impasse to protect the NFL’s implementation of a development squad with a uniform wage.\textsuperscript{436} The creation of the squad would add jobs, thus benefiting the union. However, the issue in this case was not the creation of the practice squad, but rather the wages that squad players would receive.\textsuperscript{437} An artificial cap on salary is not in the interest of the union, as it deflates salaries for squad players. Potential squad players can not shop their services around the league, thereby allowing competitive bidding to determine their salary. These provisions would be adverse to the membership of the union. This proved true as the union vehemently opposed these provisions to the point of

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{431}.] Connell, 421 U.S. at 622.
\item[\textsuperscript{432}.] Id. at 622-23.
\item[\textsuperscript{433}.] See supra Part I.B.2.c.
\item[\textsuperscript{434}.] See supra notes 131-49 and accompanying text.
\item[\textsuperscript{435}.] 518 U.S. 231 (1996).
\item[\textsuperscript{436}.] See supra Part I.B.2.d.
\item[\textsuperscript{437}.] See supra Part I.B.2.d.
\end{itemize}
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impasse after which the league implemented them unilaterally. 438 The league, however, was benefited by the limited wages by reducing the cost of operating the practice squad, as evidenced by its refusal to concede at the bargaining table and its subsequent unilateral post-impasse implementation. 439

b. Circuit Court Cases Applying the Non-Statutory Exemption in Sports

This Comment next reexamines the relevant circuit court cases in the sports industry that have implicated the non-statutory exemption to assess their consistency with the adversarial requirement. 440

i. Wood v. NBA 441

The result in Wood would go unchanged if the court had required that the opposing interests in the challenged rule be adverse. The draft and salary caps are measures that limit player choices and compensation. By limiting total salaries, the league not only depresses individual salaries, but also ensures its overall competitiveness. The draft, by assuring that the least successful teams get the first chance to select the best of the entering players, 442 also serves to promote the overall competitiveness of the league.

The union's interests, however, would be in opposition to the rules because they restrict both player choice and salaries. The draft limits the free choice of potential employees to choose where they will practice their trade. Additionally, the aggregate team salary is an artificial limit on spending that will deflate salaries when the market demands increase.

ii. Mackey v. NFL 443

The Rozelle Rule fulfilled parts one and two of the Mackey test, but it failed the third prong. 444 The court found that there was not bona fide arm's-length bargaining because the Rozelle Rule had been unchanged since it was unilaterally imposed by the league prior to its

438. See supra Part I.B.2.d.
439. See supra Part I.B.2.d.
440. For the initial discussion of these cases see supra Part I.B.3.
441. 809 F.2d 954 (2d Cir. 1987).
442. NFL teams draft in an inverse order to their standing at the end of the previous season. The team with the worst record in the league gets the first pick in each round of the draft while the team that wins the Super Bowl gets the last pick in each round. See NFL, Cincinnati Holds First Pick in the 2003 Draft, at http://www.nfl.com/draft/story/6087716 (last visited Feb. 12, 2005) (showing the 2003 draft order and team records).
443. 543 F.2d 606 (8th Cir. 1976).
444. See supra Part I.B.3.a.
representation in any CBA and because there was no quid pro quo for its inclusion in the CBA.445

The court created this three-part test in order to properly accommodate the labor and antitrust interests at stake.446 The test, however, does not accomplish this goal. Specifically, the third prong—the requirement for arm’s-length bargaining—overly focuses on the procedure by which agreement was reached instead of the agreement itself.447 Courts will be asked to make a subjective inquiry into whether there was a quid pro for every challenged rule. Although this was not viewed as a negative in Mackey, it is precisely the type of judicial determination that the Supreme Court, subsequently in Brown, said was inappropriate to resolution of industrial conflict.448 It would “require . . . courts to answer a host of important practical questions about how collective bargaining over wages, hours, and working conditions is to proceed—the very result that the implicit labor exemption seeks to avoid.”449

The adversarial requirement, on the other hand, does not focus on the procedure of bargaining. It does not seek to determine “in the area of industrial conflict, what is or is not a ‘reasonable’ practice.”450 This is a determination that the Supreme Court has directed be made by legislative decisions and not judicial ones.451 What it does do is ensure that the rule is in an “area of industrial conflict.”452 The adversarial requirement may dictate a different outcome in Mackey, but this would make the case more consistent with the national labor policy for the reasons already discussed.453 In addition, the adversarial requirement does not operate to ensure the protection provided by the exemption when the interests are adverse, but rather to ensure its inapplicability when the interests are not adverse.454

iii. Powell v. NFL455

The right of first refusal restricted players from deciding in which geographic area to pursue their trade. The compensation

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446. See supra Part I.B.3.a.
447. See Mackey v. NFL, 543 F.2d 606, 615-16 (8th Cir. 1976) (examining the procedures of the bargaining used for the inclusion of the rule).
449. Id. at 240-41.
450. Id. at 237.
451. Id.
452. Id.
454. See supra Part III.C.1.
455. 930 F.2d 1293 (8th Cir. 1989).
requirement, however, had a more daunting effect. It made it less attractive for teams to offer contracts to other players. In "scaring off" teams from pursuing free agents, the former team can dictate the salary the player has to accept. Controlling personnel costs and ensuring that a team will keep those players it develops certainly benefits the league. The players' interests, however, are damaged by a rule that will limit salaries and player mobility. In the five years after this rule was implemented, 600 players saw their contracts expire, thus becoming free agents, but fewer than fifty signed contracts with another team.456

Mackey and Powell are two cases about the same rule argued in the same court.457 Yet they came out differently due to the varying interpretations of the procedure of bargaining that was taken in each case.458 Enlisting the adversarial requirement would have avoided the inconsistent results.

iv. McCourt v. California Sports, Inc.459

Although replacing the problematic Mackey test460 with the adversarial requirement would change the outcome in Mackey, it would not change the decision in McCourt. Much like the NFL in Mackey and Powell, the NHL's interest lay in controlling player movement and salary increases that could have been gained through the free agency system.461 Free movement, on the other hand, would allow the marketplace to set salaries and provide players with a legitimate opportunity to choose where they want to work. Thus, the interests being adverse, the exemption would be applicable.

4. The Adversarial Requirement Applied to the NFL Eligibility Rule

The NFL eligibility rule did not result from collective bargaining between two adverse parties with respect to the rule. Restricting eligibility to players that are three years removed from their high school graduating class benefits both the union and the league.

The NFL advanced four reasons for the eligibility rule. The rule protects (1) the players deemed ineligible because they are not mentally or physically mature enough to endure the rigors of the NFL; (2) the teams from the financial damage that may result from drafting younger players more likely to be injured; (3) the league from the negative impact players' injuries could have on its entertainment

457. See supra Parts I.B.3.a-b.
458. See Powell, 930 F.2d at 1297-99.
459. 600 F.2d 1193 (6th Cir. 1979).
460. See supra Parts I.B.3.a, III.C.3.b.ii.
461. See supra Parts III.C.3.b.ii-iii.
product; and (4) players that would enter the draft, go undrafted, and lose their college eligibility. The first three reasons revolve around the health of the players entering the NFL, and therefore can be addressed together. The fourth, although no more persuasive than the first three, will garner a separate response.

If health and safety are really the concerns of the NFL, it should institute individualized testing of players, instead of using an across the board restriction. The league may argue that the expense of individualized testing makes it unrealistic and thus a bright line rule is the only practical option. Teams and the league, however, already put prospects through an exhaustive battery of tests, both physical and mental, at the annual draft combine. It would not be an additional burden for the NFL to adapt this testing, if it is not already suited, to gauge the physical and mental ability of applicants to the draft. In fact, the combine already includes in-depth medical tests that are aimed at assessing both prior injuries and future durability in the NFL.

The stated concern for the collegiate eligibility of players that go undrafted also seems poorly served by an across-the-board restriction. A collegiate player, who does not sign with an agent, is allowed to enter the NFL draft once during his collegiate eligibility and if undrafted still maintain his NCAA eligibility. This is also true

462. See supra note 275.
463. See infra notes 466-67 and accompanying text.
464. See infra notes 468-72 and accompanying text.
466. See Brian Ettkin, Brown Is a Giant in All Regards, Times Union (Albany, NY), Aug. 8, 2003, at C1. The draft combine is an organized group of tests run by the NFL to evaluate potential draft prospects. See id.
468. See supra note 275.

An enrolled student-athlete (as opposed to a prospective student-athlete) in the sports of Division I-A and I-AA football may enter the National Football League draft one time during his collegiate career without jeopardizing eligibility in that sport, provided the student-athlete is not drafted by any team in that league and the student-athlete declares his intention to resume intercollegiate participation within 72-hours following the National Football League draft declaration date. The student-athlete’s declaration of intent shall be in writing to the institution’s director of athletics.
for collegiate basketball players and the NBA draft. The NBA has even created a draft advisory committee that will assess an applicant's draft status and provide him with a prediction on when and if he will be selected, and a recommendation on whether or not to remain in the draft. In fact the NFL already has a committee that advises potential draft applicants to some degree. If the NFL was truly concerned with protecting the eligibility of players that might declare and go undrafted, it would focus on improving its draft advisory committee.

The reason for the eligibility restriction is not a concern for the well being of players, but rather a concern for the well being of owners' bank accounts and team win/loss records. College football provides an inexpensive system to develop players—a system in which teams get to watch the players compete for three or four years before they have an opportunity to draft them.

The NFL benefits greatly from restricting access to their draft, giving developing athletes no choice but to remain in college. The NFL is able to watch the players for a longer time, giving them more time to develop and mature. The fact that a rule benefits only one

Id.


An enrolled student-athlete in basketball may enter a professional league's draft one time during his or her collegiate career without jeopardizing eligibility in that sport, provided the student-athlete is not drafted by any team in that league and the student-athlete declares his or her intention to resume intercollegiate participation within 30 days after the draft. The student-athlete's declaration of intent shall be in writing to the institution's director of athletics.

Id.


473. See id.

474. See Koch, supra note 58, at 321.

475. This can be compared to the system that exists in professional baseball where teams have up to six minor league affiliates and many players are drafted straight out of high school. See MLB, Index of Minor League Teams, at http://mlb.mlb.com/NASApp/mlb/mlb/minors/list.jsp (last visited Feb. 12, 2005); MLB, 2004 First-Year Player Draft Tracker: Round 1, at http://mlb.mlb.com/mlb/draftday/y2004/tracker_round_1_1.html (last visited Feb. 12, 2005) (stating that thirteen players in just the first round of the 2004 draft were drafted directly out of high school). This system is not only expensive to run, but it also forces baseball teams to draft on potential, which in some cases is never fulfilled by the player. The teams also must take the risk that players will get seriously injured before they ever develop to the point where they can help the Major League club. In the NFL, a team runs a lesser risk that a high draft pick with enormous potential may never come close to meeting that potential. Teams in the NBA routinely run this risk, often to their detriment. See Wayne Drehs, High Risks with Drafting High School Players, Espn.go.com, June 18, 2001, at http://espn.go.com/nba/draft2001/s/2001/0618/1215712.html; see also David Noonan & N’Gai Croal, Fast Break to the Big Time, Newsweek, June 28, 2004, at 40.
side of a bargaining relationship, however, is common.\textsuperscript{476} The uniqueness of the eligibility rule is that it benefits both sides of the relationship. The number of players that, at any one time, can play in the NFL is capped due to roster limits for the member teams.\textsuperscript{477} Therefore, the addition of new players necessitates the elimination of existing ones. As such, the bargaining power of the union is inelastic; there will be the same number of players in the league with or without the eligibility rule. The union gets to protect current players at no cost to their overall bargaining power.\textsuperscript{478}

The NFL also has a hard salary cap that limits what each team can spend on its aggregate payroll.\textsuperscript{479} Generally, teams spend right up to the cap.\textsuperscript{480} Younger players entering the league therefore should have no effect on the aggregate salary made by players. The rule may change the distribution of that salary pool,\textsuperscript{481} but it will not decrease the pool. As such the union can again direct benefits to its current members without hurting its overall position in the industry.

However, the union does have an interest in keeping these young players out of the league. Unions commonly act to the benefit of their current or senior members.\textsuperscript{482} Because the NFL presents a unique situation where the addition of one employee necessitates the

\textsuperscript{476} See, e.g., Brown v. Pro Football, Inc., 518 U.S. 231 (1996). In Brown, the uniform wage for development squad players benefited the NFL, but not the union and the players. See also Powell v. NFL, 930 F.2d 1293 (8th Cir. 1989). The Rozelle Rule, at issue in Powell, benefited the league by controlling player movement and salaries. See also Wood v. NBA, 809 F.2d 954 (2d Cir. 1987). In Wood, the NBA draft and salary cap benefited the league by controlling player salaries and maintaining competitive balance by controlling the dispersal of new employees.


\textsuperscript{478} In most situations, restricting potential employees from entering the market would be adverse to the interests of the unions. Unions normally want new employees because it signifies the strength of the industry and results in increased bargaining power for the union.

\textsuperscript{479} The cap is described as a hard cap because teams are not allowed to exceed the cap for any reason, and any contract that exceeds the cap can be voided by the commissioner and result in steep penalties. See NFLPA, NFL-NFLPA Collective Bargaining Agreement Article XXV § 6(a)-(b), available at http://nflpa.org/Members/main.asp?subPage=CBA+Complete#art25 (last visited Feb. 9, 2005). Penalties can include fines of up to $3.5 million against the team and $250,000 against club executives, as well as a potential forfeiture of draft choices. Id.

\textsuperscript{480} See Mike O’Hara, \textit{Salary-Cap Restriction Squeezing NFL Rosters}, Detroit News, May 29, 2001, at E1 (describing numerous NFL players that are getting cut from their teams due to the lack of room under the salary cap).

\textsuperscript{481} Young players generally make lower salaries than veteran players. See Len Pasquarelli, \textit{Rookie Pool Providing Little Room for Pay Increases}, Espn.go.com, June 26, 2003, at http://espn.go.com/nfl/columns/pasquarelli_len/1573188.html. This may reflect the risk that rookies may never live up to their potential. It also redirects portions of available dollars under the salary cap from rookies to veteran players. See id.

\textsuperscript{482} See Wood v. NBA, 809 F.2d 954, 962 (2d Cir. 1987).
elimination of another, the eligibility rule benefits the members of the union. Each time a new player enters the league an existing union member must exit.

Both sides benefit from the NFL's eligibility rule. The league gets to take advantage of an already existing cheap and efficient system of developing players and the union is able to preserve the job status of its members in an employment context with a limited number of jobs. As such, the adversarial requirement would preclude the application of the non-statutory exemption and leave the challenged rule open to antitrust liability.

The fact that the union and the league both stand to benefit from the imposition of the eligibility requirement alters the bargaining relationship. Instead of parties sitting at opposing sides of the table resolving issues on which they differ, the parties are sitting on the same side of the table. This is not the type of situation that prior Supreme Court precedent or the NLRA seeks to protect.

Examination of the NLRA itself and Supreme Court case law makes clear that the NLRA does not classify an eligibility restriction as a mandatory subject. However, even if it did, the court should adopt the adversarial approach proposed herein and pair it with its existing jurisprudence mandating the use of the "rule of reason." The use of the "rule of reason" will allow, in some cases, a challenged rule that does not invoke the protection of the exemption to nonetheless remain legal.

CONCLUSION

Maurice Clarett has chosen the profession that he wishes to pursue, yet he is being prevented from realizing this dream. The NFL is not preventing him from competing based on inability or lack of talent, but rather on how long it has been since he graduated high school. The NFL's eligibility rule at issue in Clarett is an illegal restraint of trade. The NFL can not be allowed to invoke the non-statutory exemption to shield its eligibility rule from the Sherman Act. The rule does not represent a mandatory subject of collective bargaining, nor does it "vitaly affect" one. Furthermore, the eligibility rule would fail to meet the proposed adversarial requirement to the non-statutory

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483. The mere fact that the union has an interest should not be mistaken for the interest necessary to vitally affect a mandatory subject of bargaining. See supra notes 383-87 and accompanying text.
484. See supra notes 474-83 and accompanying text.
485. See supra Part II.B.1.
486. Rules that truly promote employee safety by declaring ineligible employees that have serious health conditions that pose risks to themselves and others would remain legal as reasonable restraints on competition. See Neeld v. NHL, 594 F.2d 1297, 1300 (9th Cir. 1979) (finding that an NHL rule banning players with sight in only one eye was legal, analyzing the rule under antitrust principles, rejecting a per se approach, and finding that the rule was reasonable as promoting safety).
exemption. If the non-statutory exemption is inapplicable then the eligibility rule must be evaluated under the antitrust laws. Thus, the NFL's rule should fail the rule of reason and be deemed a violation of the Sherman Act.