

---

---

# Antitrust Versus Labor Law in Professional Sports: Balancing the Scales after *Brady v. NFL* and *Anthony v. NBA*

Gabriel Feldman\*

*We are in the midst of a transformational period for labor negotiations in professional sports. Early last year, the National Football League (“NFL”) players dissolved their union and challenged the NFL owners’ lockout as an illegal boycott under section 1 of the Sherman Act. The resulting case, Brady v. NFL, was a landmark legal battle that raised complex, unprecedented issues that lie at the intersection of antitrust and labor law. The application of antitrust law in Brady v. NFL could fundamentally change the application of labor law and collective bargaining in professional sports. A similar legal battle — Anthony v. NBA — played out in the NBA after its collective bargaining agreement expired on June 30, 2011.*

*This Article analyzes the difficult balance between labor and antitrust law presented by Brady and Anthony and argues that the NFL’s and the NBA’s (collectively, the “Leagues”) reliance on a faulty underlying premise undermines their positions in the cases. In particular, the implicit foundation of the Leagues’ argument is that the Rule of Reason in section 1 of the Sherman Act — the test for determining the legality of restraints under antitrust law — should not apply to labor restraints in professional sports because member teams are uniquely interdependent. The Leagues also contend that the Rule of Reason is unpredictable and incoherent such that antitrust scrutiny would automatically render illegal any and all concerted action by the owners.*

---

\* Copyright © 2012 Gabriel Feldman. Associate Professor of Law and Director, Tulane Sports Law Program, Tulane Law School. I am grateful for helpful comments and suggestions from William Gould, Bob Batterman, Mark Levinstein, Adam Babich, and Abigail Gaunt. I am also thankful for the invaluable help from my research assistant, Jon Phelps.

*The Leagues' attacks on the Rule of Reason disregard the balance between antitrust and labor law, and represent yet another misguided attempt to achieve the "Shangri-la of everlasting immunity from the antitrust laws." The assault on the Rule of Reason and antitrust law is misplaced for three reasons. First, courts consistently have held that the Rule of Reason applies to professional sports leagues, despite the interdependence of their member teams. Second, reasonable owner-imposed player restraints can, and have, survived antitrust scrutiny under the Rule of Reason. Third, although the Rule of Reason is an imperfect method for determining the legality of restraints, these imperfections do not justify elevating labor law over antitrust law after the dissolution of a players' unions. The imperfections in the Rule of Reason test can be eliminated, or at least minimized, through the formulation of a more coherent, predictable, and workable Rule of Reason. This Article proposes a new model for streamlining the Rule of Reason test that will aid courts in applying the doctrine and allow for a more appropriate balance between federal antitrust and labor policy.*

#### TABLE OF CONTENTS

INTRODUCTION .....	1223
I. THE ORIGIN AND EVOLUTION OF THE LABOR EXEMPTIONS TO ANTITRUST LAW .....	1227
II. THE EVOLUTION OF THE NONSTATUTORY LABOR EXEMPTION IN PROFESSIONAL SPORTS .....	1232
A. <i>Multi-Employer Bargaining and Antitrust Scrutiny</i> .....	1232
B. <i>The Unique Nature of Sports Unions</i> .....	1236
C. <i>The Evolution of the Nonstatutory Labor Exemption in Professional Sports</i> .....	1238
D. <i>The Latest Stage in the Evolution of the Nonstatutory Labor Exemption: Brady v. NFL and Anthony v. NBA</i> ..	1249
1. <i>Brady v. NFL</i> .....	1249
2. <i>Anthony v. NBA</i> .....	1251
III. THE NONSTATUTORY LABOR EXEMPTION MUST TERMINATE AFTER THE DISSOLUTION OF A UNION .....	1252
A. <i>Extending the Nonstatutory Labor Exemption to Cover Post-Dissolution Agreements Would Subvert Both Federal Labor and Antitrust Policy</i> .....	1253
B. <i>No Conflict Exists between Antitrust and Labor Law After the Dissolution of a Union</i> .....	1259
C. <i>The Leagues Are Attempting to Manipulate the Nonstatutory Labor Exemption to Gain Broad Immunity from Antitrust Law</i> .....	1266

IV. EVOLUTION AND CONFUSION OF THE RULE OF REASON AND A PROPOSAL FOR A MORE WORKABLE APPROACH ..... 1278

A. *The Supreme Court’s Formulation of the Rule of Reason and Its Short Comings* ..... 1279

B. *The Addition of the Less Restrictive Alternative as an Independent Prong of the Rule of Reason*..... 1281

C. *Towards a New Rule of Reason Standard*..... 1289

    1. Market Power Filter as a Heuristic..... 1289

    2. Use of the Less Restrictive Alternative Inquiry to Help Determine Competitive Effects ..... 1291

    3. Seeking Guidance from Proportionality Analysis .... 1295

CONCLUSION..... 1300

INTRODUCTION

Earlier last year, the National Football League (“NFL”) players dissolved their union in order to challenge the NFL owners’ lockout as an illegal boycott under section 1 of the Sherman Act. The case, *Brady v. NFL*,<sup>1</sup> was a landmark legal battle that raised complex, unprecedented issues that intersect antitrust and labor law in a way that could fundamentally alter collective bargaining in professional sports. A similar legal battle — *Anthony v. NBA*<sup>2</sup> — ensued in the NBA after its collective bargaining agreement with its players expired on June 30, 2011.

*Brady* and *Anthony* represent a core disagreement regarding the role of antitrust and labor law in professional sports. The two areas of law inherently conflict.<sup>3</sup> Antitrust law — in particular, section 1 of the Sherman Act<sup>4</sup> — encourages competition and prohibits cooperation among competitors. Labor law, by contrast, encourages cooperation among employees (i.e., competitors for employment) and between employers and employees.<sup>5</sup> To reconcile this conflict and to promote collective bargaining, Congress and the courts have immunized the

---

<sup>1</sup> 644 F.3d 661, 663 (8th Cir. 2011).

<sup>2</sup> Complaint, *Anthony v. NBA*, No. 11-5525 (N.D.Cal. Nov. 15, 2011).

<sup>3</sup> See, e.g., Douglas L. Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1184 (1980) (“[T]he antitrust statutes promote competition and economic efficiency, while the federal labor statutes sanction activity that is arguably anticompetitive.”).

<sup>4</sup> Section 1 of the Sherman Act, 15 U.S.C. § 1 (2006), provides in relevant part: “Every 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 declared to be illegal.”

<sup>5</sup> See *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Jewel Tea Co., Inc.*, 381 U.S. 676, 711 (1965).

collective bargaining process and resulting agreements from antitrust claims through a doctrine known as the “nonstatutory labor exemption.”<sup>6</sup> Absent this immunity, many of the terms contained in collective bargaining agreements in professional sports — including salary caps, player drafts, and restrictions on free agency — would be subject to antitrust scrutiny.<sup>7</sup>

Courts have extended this immunity beyond the expiration of a collective bargaining agreement. The Supreme Court held in *Brown v. Pro Football, Inc.*<sup>8</sup> that the NFL owners’ unilateral post-impasse<sup>9</sup> imposition of employment terms was protected from antitrust attack. In *Brown*, the NFL players and owners negotiated to an impasse regarding the salary for “developmental squad” players.<sup>10</sup> The owners, as permitted under labor law, then unilaterally implemented their last, best offer — a fixed salary scale for all players on the developmental squad.<sup>11</sup> Although this fixed salary was not part of a collective bargaining agreement, the Supreme Court held that the nonstatutory labor exemption doctrine immunized the owners’ offer from antitrust claims.<sup>12</sup> The Court reasoned that a collective bargaining relationship existed between the owners and the players, and that the application of antitrust law would interfere with federal labor policy and the collective bargaining process.<sup>13</sup>

*Brady* and *Anthony* raised the question of whether the rule announced in *Brown* shields a lockout or other concerted owner conduct from antitrust attack, even after the players have dissolved their union. The NFL and NBA (the “Leagues”) portray these cases as

---

<sup>6</sup> A statutory labor exemption is contained in the Clayton Act, 15 U.S.C. § 17 (2006), and the Norris-LaGuardia Act, 29 U.S.C. §§ 52, 105 (2006). The “nonstatutory labor exemption” is a judicially created addition to the statutory exemption. *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621-22 (1975).

<sup>7</sup> See, e.g., *Mackey v. NFL*, 543 F.2d 606, 620-22 (8th Cir. 1976) (applying the Rule of Reason to restrictions on player movement in the NFL); *Smith v. Pro-Football Inc.*, 420 F. Supp. 738, 746-47 (D.D.C. 1976) (applying the Rule of Reason to the college player draft).

<sup>8</sup> 518 U.S. 231, 250 (1996).

<sup>9</sup> An “impasse” in negotiations occurs when “good faith negotiations have exhausted the prospects of concluding an agreement, leading both parties to believe that they are at the end of their rope.” *NLRB v. Whitesell Corp.*, 638 F.3d 883, 890 (8th Cir. 2011) (citing *TruServ Corp. v. NLRB.*, 254 F.3d 1105, 1114 (D.D.C. 2001) (citations and footnotes omitted)).

<sup>10</sup> *Brown*, 518 U.S. at 235.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 250.

<sup>13</sup> *Id.*

labor disputes and argue that concerted league conduct subsequent to a players' union dissolution should be exempt from antitrust scrutiny. The Leagues' argument is twofold. First, the Leagues contend that they have a statutorily protected right to implement a lockout to put economic pressure on the players.<sup>14</sup> Second, the Leagues argue that thrusting antitrust law into these disputes would destroy multi-employer bargaining and interfere with the labor process.<sup>15</sup>

This Article argues that immunizing concerted owner conduct (such as a lockout) from antitrust attack after the dissolution of a union is inconsistent with *Brown* and the rationale underlying the nonstatutory labor exemption. A basic tenet of labor law holds that employees have a right to choose not to be represented by a union and to refrain from collective bargaining.<sup>16</sup> If employees choose to forego collective bargaining and opt to negotiate and compete for employment opportunities individually, antitrust — and not labor law — applies.<sup>17</sup> Depriving employees of their right to sue under section 1 of the Sherman Act on the grounds that they chose *not* to engage in collective bargaining would frustrate both antitrust and labor policy.

This Article also argues that the Leagues' view of the appropriate balance between antitrust and labor law rests on a faulty premise. In particular, the implicit foundation of the Leagues' argument is that the Rule of Reason in section 1 of the Sherman Act — the test for determining the legality of restraints under antitrust law — should not apply to labor restraints in professional sports because teams are uniquely interdependent. The Leagues also contend that the Rule of Reason is unpredictable and incoherent, and that antitrust scrutiny would automatically render illegal any and all concerted owner action. Courts have consistently rejected these arguments over the past several decades.<sup>18</sup>

The Leagues' expansive interpretation of the nonstatutory labor exemption in *Brady* and *NPA* is little more than a repackaging of these arguments. Once again, the Leagues' arguments represent yet another misguided attempt at achieving the "Shangri-la of everlasting immunity from the antitrust laws."<sup>19</sup> That interpretation disregards the

---

<sup>14</sup> See *Brady v. NFL*, 644 F.3d 661, 673 (8th Cir. 2011); Complaint at 17-20, *NBA v. NBPA*, No. 11 Civ. 5369 (S.D.N.Y. Aug. 2, 2011).

<sup>15</sup> See *Brady*, 644 F.3d at 667; Complaint, *supra*, note 14 at 17-20.

<sup>16</sup> 29 U.S.C. § 157 (2006).

<sup>17</sup> See *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1057 (D.C. Cir. 1995); see *infra* Part IV.

<sup>18</sup> See, e.g., *American Needle v. NFL*, 130 S. Ct. 2201, 2216-17 (2010).

<sup>19</sup> *Powell v. NFL*, 930 F.2d 1293, 1309 (8th Cir. 1989) (Lay, C.J., dissenting).

balance between antitrust and labor law, and is misplaced for three reasons. First, courts consistently have held that the Rule of Reason applies to professional sports leagues, despite the interdependence of their member teams.<sup>20</sup> Second, reasonable owner-imposed player restraints can, and have, survived antitrust scrutiny under the Rule of Reason in past cases.<sup>21</sup> Third, although the Rule of Reason is an imperfect method for determining the legality of restraints on trade,<sup>22</sup> these imperfections do not justify elevating labor law over antitrust law after the dissolution of a union. The imperfections in the Rule of Reason can be eliminated, or at least minimized, through the formulation of a more coherent, predictable, and workable test. This Article proposes a model for streamlining and improving Rule of Reason. The proposed model will aid courts in applying the Rule of Reason and allow for a more appropriate balance between federal antitrust and labor policy.

This Article proceeds as follows: Part I provides an overview of the conflict between antitrust and labor law, and examines the statutory and judicial exemptions created to reconcile the inherent tension between these areas of law. Part II explores the unique aspects of collective bargaining in professional sports and analyzes the evolution of the nonstatutory labor exemption through sports antitrust cases. Part III discusses the issues raised in *Brady* and *Anthony*, and analyzes the Leagues' argument that the nonstatutory labor exemption shields team owners from antitrust scrutiny after the players have dissolved their union. Part IV explains that the Leagues' interpretation of the exemption frustrates both antitrust and labor policy. Moreover, the Leagues' interpretation relies on the faulty premise that the Rule of Reason in section 1 should not apply to labor restraints in professional sports. This Part also explores other contexts in which sports leagues have unsuccessfully argued that their conduct should be immune from antitrust law. Part V discusses the evolution of the Rule of Reason and the confusion surrounding the application of the test in addition to providing a model for creating a more coherent and streamlined Rule of Reason analysis. This Part explains that this new model will aid

---

<sup>20</sup> See *Radovich v. NFL*, 352 U.S. 445, 449-52 (1957); *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1257 (2d. Cir. 1982); *Smith v. Pro-Football, Inc.*, 593 F.2d 1173, 1177-82 (D.C. Cir. 1978).

<sup>21</sup> See, e.g., *Neeld v. NHL*, 594 F.2d 1297, 1298-1300 (9th Cir. 1979) (holding legal under the Rule of Reason a rule that barred partially blind players).

<sup>22</sup> See, e.g., Richard Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 15 (1981) (commenting that the Rule of Reason is "[a] standard so poorly articulated and particularized, applied by tribunals so poorly equipped to understand and apply it").

courts in applying the Rule of Reason and clarify the issues raised when antitrust conflicts with labor law.

I. THE ORIGIN AND EVOLUTION OF THE LABOR EXEMPTIONS TO ANTITRUST LAW

*Brady* and *Anthony* present the latest conflict between antitrust and labor law. Both cases raise complex and novel issues that could dramatically shift the balance between antitrust and labor law, as well as the balance of power between players and owners in collective bargaining. Before delving into *Brady* and *Anthony*, it is necessary to understand the nature of the conflict between federal antitrust and labor policy, and how Congress and the courts have reconciled this conflict over the last several decades.

The starting point of the analysis is the recognition of the inherent tension between federal antitrust and labor law. Antitrust law promotes competition and condemns cooperation among competitors. Section 1 of the Sherman Act explicitly prohibits “[e]very contract . . . or conspiracy, in restraint of trade or commerce among the several States.”<sup>23</sup> Federal labor law, by contrast, encourages cooperation among competitors in employment.<sup>24</sup> One of the fundamental principles of federal labor policy is that employees may eliminate competition among themselves through the formation of a union to serve as their exclusive bargaining representative.<sup>25</sup> The impact of this

---

<sup>23</sup> 15 U.S.C. § 1 (2006). Antitrust law is a powerful weapon in that it provides private plaintiffs with “treble” damages. *See, e.g.,* Sean W.L. Alford, *Dusting Off the AK-47: An Examination of NFL Players’ Most Powerful Weapon in an Antitrust Lawsuit Against the NFL*, 88 N.C. L. REV. 212, 213 (2009) (referring to antitrust litigation as “the collective bargaining equivalent of an AK-47”).

<sup>24</sup> *See id.* at 666.

<sup>25</sup> *See* *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 666 (1965) (“This Court has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards.” (citation omitted)).

Section 9(a) of the National Labor Relations Act provides that “[r]epresentatives designated or selected . . . by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining.” 29 U.S.C. § 159(a) (2006). Labor law thus permits employees to seek the best deal for the greatest number by exercising collective rather than individual bargaining power. Once an exclusive representative has been selected, the individual employee is forbidden by federal law — unless specifically permitted by the collective bargaining representative — from negotiating directly with the employer absent the representative’s consent. *See, e.g.,* *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (finding that an individual employee’s bargaining rights are

conflict is notable. For more than twenty years after the passage of the Sherman Act, courts routinely held that unions do not illegally restrain trade in violation of antitrust law.<sup>26</sup>

To alleviate this inherent conflict (and in response to court rulings), the Norris-LaGuardia Act<sup>27</sup> and sections 6 and 20 of the Clayton Act<sup>28</sup> created what has become known as the “statutory labor exemption” to antitrust claims. Section 6 of the Clayton Act declares that “the labor of a human being is not a commodity or article of commerce” and provides that the antitrust laws do not prohibit labor organizations.<sup>29</sup> The Norris-LaGuardia Act and Section 20 of the Clayton Act limit the ability of federal courts to enjoin certain labor-related activities.<sup>30</sup> The Supreme Court has interpreted these provisions to protect unilateral union conduct from antitrust challenge.<sup>31</sup>

In *United States v. Hutcheson*, the Supreme Court affirmed that the Norris-LaGuardia Act immunizes labor unions from the Sherman Act.<sup>32</sup> *Hutcheson* allows labor unions to assert economic pressure on employers “[s]o long as a union acts in its self-interest and does not combine with non-labor groups.”<sup>33</sup> The case also ensures the right of unionized employees to engage in concerted activity — such as pickets and boycotts — in attempts to achieve more favorable terms and condition of employment without fear of antitrust scrutiny.<sup>34</sup> Thus, the statutory exemption makes clear that “labor unions are not

---

“extinguished” where a collective bargaining unit represents the employee’s interests). This prohibition exists even if that employee may actually receive lower compensation under the collective agreement than he or she would have through individual negotiations. *See, e.g., J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944) (reasoning that the fact that such situations do not serve as “ground for holding generally that individual contracts may survive or surmount collective ones”). Labor law also permits other concerted activity among employees, including the right to strike, boycott, and picket.

<sup>26</sup> *See, e.g., United States v. Hutcheson*, 312 U.S. 219, 237-39 (1941) (Stone, J., concurring) (noting the application of antitrust law to unions).

<sup>27</sup> 29 U.S.C. §§ 101-115 (2006).

<sup>28</sup> 15 U.S.C. § 17 (2006); 29 U.S.C. § 52 (2006).

<sup>29</sup> 15 U.S.C. § 17 (2006). *See Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1048 (D.C. Cir. 1995).

<sup>30</sup> *See Brown*, 50 F.3d at 1048.

<sup>31</sup> *See id.* (citing *H.A. Artists & Assocs., Inc. v. Actors’ Equity Ass’n*, 451 U.S. 704, 714-15 (1981) and *Hutcheson*, 312 U.S. at 232).

<sup>32</sup> *Hutcheson*, 312 U.S. at 235-36.

<sup>33</sup> *Id.* at 232.

<sup>34</sup> *See Michael C. Harper, Multiemployer Bargaining, Antitrust Law, and Team Sports: The Contingent Choice of A Broad Exemption*, 38 WM. & MARY L. REV. 1663, 1669-70 (1997).

combinations or conspiracies in restraint of trade, and exempt specific union activities . . . from the operation of the antitrust laws.”<sup>35</sup>

As the labor movement matured, the emphasis of labor policy shifted from employee organization to collective bargaining and the relationship between employee and employer.<sup>36</sup> The National Labor Relations Act (“NLRA”) and the Labor-Management Relations Act (“LMRA”)<sup>37</sup> established collective bargaining as the regime to govern the relationship between employers and unionized employees. Labor laws require employers and employees to negotiate in good faith with respect to wages, hours, and other terms and conditions of employment.<sup>38</sup> Congress designed the collective bargaining process to encourage the parties to reach voluntary agreement regarding these economic terms.<sup>39</sup>

The statutory exemption, however, did not immunize the collective bargaining process or collective bargaining agreements themselves from potential antitrust liability.<sup>40</sup> Rather, the statutory exemption only protected a labor organization’s unilateral actions and not “agreements between unions and nonlabor parties.”<sup>41</sup> Recognizing the need for a proper accommodation between labor law (and collective bargaining) and antitrust law (and free competition), the Supreme Court created what is commonly known as the “nonstatutory labor exemption.”<sup>42</sup> As the Supreme Court stated:

---

<sup>35</sup> *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621-22 (1975).

<sup>36</sup> See John C. Weistart, *Judicial Review of Labor Agreements: Lessons from the Sports Industry*, 44 *LAW & CONTEMP. PROBS.* 109, 114 (1981) (noting the shift in focus from unionization to collective bargaining).

<sup>37</sup> 29 U.S.C. §§ 141-197 (2006). The NLRA is commonly referred to as the Wagner Act. The LMRA is commonly referred to as the Taft-Hartley Act.

<sup>38</sup> See, e.g., *NLRB v. Am. Nat. Ins. Co.*, 343 U.S. 395, 401-03 (1952).

<sup>39</sup> *Id.*

<sup>40</sup> See *Connell*, 421 U.S. at 622.

<sup>41</sup> *Id.*

<sup>42</sup> See, e.g., *id.* (stating that the nonstatutory labor exemption represents a “proper accommodation between the congressional policy favoring *collective bargaining* under the NLRA and the congressional policy favoring free competition in business markets” (emphasis added)); see also, e.g., Harper, *supra* note 34, at 1673-74 (“The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws . . . . Under this view, the purpose of the nonstatutory exemption, like that of the statutory exemption, is to accommodate the antitrust laws to a central purpose of the labor laws, allowing workers to organize and freely take concerted action in attempts

[a]s a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other *any* of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable.<sup>43</sup>

The Court thus held that “some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions . . . to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place.”<sup>44</sup> Put simply, the nonstatutory labor exemption acts as a limited, implied repeal of the antitrust laws so that the “statutorily authorized collective-bargaining process [can] work.”<sup>45</sup> The exemption also recognizes a preference for resolving collective bargaining disputes through voluntary agreement and labor remedies rather than judicial intervention.<sup>46</sup> Furthermore, the exemption “has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions.”<sup>47</sup>

In the landmark case that developed the nonstatutory labor exemption, *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Co. (Jewel Tea)*, the Court applied the nonstatutory labor exemption to immunize terms of a

---

to raise wages and other terms of employment to levels higher than could be achieved by individual, noncollective bargaining in a free labor market.”); Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 395 (1989) (“To foster collective bargaining, the courts have willingly subordinated antitrust policies and immunized otherwise unlawful restraints contained in bona-fide arm’s-length agreements. . . . In this context, the proper accommodation of the antitrust and labor laws requires that the labor laws control.”).

<sup>43</sup> *Brown v. NFL*, 518 U.S. 231, 237; *see also Connell*, 421 U.S. at 622 (noting that the goals of federal labor law could not be achieved if the anticompetitive effects of collective bargaining were held to violate the antitrust laws); *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Jewel Tea Co.* 381 U.S. 676, 711 (1965) (explaining that federal labor policy would be “virtually destroyed” by subjecting collective bargaining to antitrust scrutiny).

<sup>44</sup> *Brown*, 518 U.S. at 237.

<sup>45</sup> *Id.*; *see, e.g., Harper, supra* note 34, at 1674 (“*Jewel Tea’s* nonstatutory exemption recognized that such concerted action ultimately cannot be meaningful if collective agreements securing higher wages and other benefits are themselves subject to antitrust attack.”).

<sup>46</sup> *See Brown*, 518 U.S. at 237. *See also Weistart, supra* note 36, at 131 (“Federal labor policy accepts that the prevailing principle should be freedom of contract: the parties can agree to whatever terms they wish, and courts will not inquire into the wisdom or reasonableness of the bargain struck.”).

<sup>47</sup> *Connell*, 421 U.S. at 622.

collective bargaining agreement from antitrust attack.<sup>48</sup> In *Jewel Tea*, employers challenged a term in the collective bargaining agreement prohibiting meat markets from operating before 9 PM and after 6 PM under the Sherman Act.<sup>49</sup> In a plurality opinion, Justice White balanced the interests of the union against the potential impact on the product's market. The Court held the agreement exempt from the employers' antitrust claims because the restriction was "of immediate and direct" concern to the employees.<sup>50</sup> The agreement, the Court reasoned, sought to protect workers from long working hours, and not to restrain competition in the product market.<sup>51</sup> Justice Goldberg, authoring a separate plurality opinion, concluded that the exemption immunizes from antitrust attack all "collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act."<sup>52</sup>

In later cases, the Court emphasized that the nonstatutory labor exemption only serves as a limited repeal of antitrust law in certain instances. In *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local No. 100*,<sup>53</sup> the Court held that the exemption does not apply to terms of a collective bargaining agreement that only restrain competition in the product market and not competition among the employees in the collective bargaining relationship. Specifically, the Court held that the exemption does not apply where the challenged restriction is a "direct restraint on the business market [and] has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions."<sup>54</sup> Extending the exemption to such a restraint would "contravene[] antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a

---

<sup>48</sup> *Jewel Tea Co.*, 381 U.S. at 711. In *United Mine Workers v. Pennington*, a companion case to *Jewel Tea*, the Court refused to grant an exemption from the antitrust laws to an agreement between union and large coal companies that was part of an effort to disadvantage smaller, competitor coal companies. *United Mine Workers v. Pennington*, 381 U.S. 657, 661 (1965). Twenty years earlier, in *Allen Bradley Co. v. Local No. 3, Int'l Bhd. of Elec. Workers*, the Court denied immunity from the Sherman Act for a term of a collective bargaining agreement that was designed to exclude competitor manufacturers in the product market. *Allen Bradley Co. v. Local No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 808-09 (1945).

<sup>49</sup> *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Jewel Tea Co.* 381 U.S. 676, 679-90 (1965).

<sup>50</sup> *Id.* at 691.

<sup>51</sup> *See id.*

<sup>52</sup> *Id.* at 710.

<sup>53</sup> *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 625-26 (1975).

<sup>54</sup> *Id.* at 625.

nonstatutory exemption from the antitrust laws.”<sup>55</sup> *Connell* recognized that “a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions.”<sup>56</sup> The contours of such an exemption, however, remained murky, and only started to take shape in a series of cases involving the sports industry.

## II. THE EVOLUTION OF THE NONSTATUTORY LABOR EXEMPTION IN PROFESSIONAL SPORTS

Much of the nonstatutory labor exemption’s development occurred through a series of antitrust cases in which professional athletes sued professional sports leagues. To understand how and why these cases arose so frequently, it is necessary to understand the atypical collective bargaining relationship that exists between professional sports leagues and unions as well as the unique antitrust issues presented in the sports context.<sup>57</sup> This Part takes a brief look at two areas — multi-employer bargaining in the sports industry and antitrust scrutiny of multi-employer agreements involving sports unions — before exploring the evolution of the exemption in professional sports.

### A. Multi-Employer Bargaining and Antitrust Scrutiny

Professional sports leagues engage in multi-employer bargaining, pursuant to which separately owned team joins together to bargain as one with the players.<sup>58</sup> Multi-employer bargaining has a long history that predates the federal labor laws in United States<sup>59</sup> and is a common practice in labor negotiations in numerous industries.<sup>60</sup> As the

---

<sup>55</sup> *Id.*; see *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1051 (1995) (concluding that “the case for applying the [nonstatutory labor] exemption is strongest where a restraint on competition operates primarily in the labor market and has no anti-competitive effect on the product market”); see also Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 26 (1971) (“From *Allen Bradley* to *Pennington*, the majority of the Court has insisted that one factor be present before the Sherman Act applies to arrangements arrived at through collective bargaining: one group of employers must conspire to use the union to hurt their competitors.”).

<sup>56</sup> *Connell*, 421 U.S. at 622.

<sup>57</sup> See *Lock*, *supra* note 42, at 356.

<sup>58</sup> See *NBA v. Williams*, 45 F.3d 684, 689 (2d. Cir. 1995).

<sup>59</sup> See *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 409 (1982).

<sup>60</sup> See, e.g., *Brown*, 518 U.S. at 240 (“Multiemployer bargaining itself is a well-

Supreme Court has held, multi-employer bargaining is a “vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining.”<sup>61</sup> Multi-employer bargaining is a more efficient process because it reduces the costs of multiple negotiations and allows employers to offer programs jointly that they would otherwise be unable to offer as single employers.<sup>62</sup> Thus, multi-employer bargaining units in traditional industries form voluntarily and with the consent of all members of the employer group.

Professional sports leagues, however, are nontraditional multi-employer bargaining units.<sup>63</sup> Professional sports teams form such coordinated units because of the long-recognized interdependence of teams and the need for these teams to reach agreements for the league to exist.<sup>64</sup> For example, to have an NFL season, the individual NFL

---

established, important, pervasive method of collective bargaining, offering advantages to both management and labor” and that “multiemployer bargaining accounts for more than 40% of major collective-bargaining agreements, and is used in such industries as construction, transportation, retail trade, clothing manufacture, and real estate, as well as professional sports.” (citation omitted)).

<sup>61</sup> NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 95 (1957).

<sup>62</sup> See NBA v. Williams, 45 F.3d 684, 689-89 (2d. Cir. 1995). Labor policy also supports multi-employer bargaining because it allows smaller employers to gain bargaining leverage with large unions. For example, multi-employer bargaining has allowed small trucking companies to bargain on relatively equal footing with the Teamsters, a large and particularly powerful union. Additionally, this type of bargaining prevents unions “from whipsawing employers by shutting them down one-by-one, a tactic that forces each employer to give in to the union’s most extreme demand.” *Id.* at, 688 (citing *Bonanno Linen*, 454 U.S. at 409-10 & n.3).

<sup>63</sup> See *Williams*, 45 F.3d at 692 (noting that “sports leagues are an exception to the principle of voluntariness” that typifies multi-employer bargaining in other industries). See also, e.g., Jeffrey L. Harrison, *Brown v. Pro Football, Inc.: The Labor Exemption, Antitrust Standing and Distributive Outcomes*, 42 ANTITRUST BULL. 565, 585 (1997) (recognizing that “opting out of multiemployer bargaining would add even further to the antitrust exposure of the owners” and stating that “it is either impossible or impractical for owners to opt out of a regime of collective bargaining with multiemployer bargaining”); Gary R. Roberts, *Brown v. Pro Football, Inc.: The Supreme Court Gets It Right for the Wrong Reasons*, 42 ANTITRUST BULL. 595, 630 (1997) (“A sports league and its joint venture partners are not a multiemployer bargaining group in the traditional sense of that term.”).

<sup>64</sup> See *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2216 (2010) (“The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions.”); *N. Am. Soccer League v. NRLB*, 613 F.2d 1379, 1382 (5th Cir. 1980) (finding that a multiemployer bargaining unit was appropriate because the “League exercises a significant degree of control over essential aspects of the clubs’ labor relations”); *Reynolds v. NFL*, 584 F.2d 280, 287 (8th Cir. 1978) (“Precise and detailed rules must of necessity govern

teams must agree on the rules of the actual game, schedules, mechanisms for signing and trading players, and other terms and conditions of employment.<sup>65</sup> As the Second Circuit explained:

In the sports industry, multiemployer bargaining exists [in part] because some terms and conditions of employment must be the same for all teams . . . . Unlike the industrial context in which many work rules can differ from employer to employer . . . sports leagues need many common rules. Number of games, length of season, playoff structures, and roster size and composition, for example, are just a few of the many kinds of league rules that are typically bargained over by sports leagues and unions of players.<sup>66</sup>

These agreements among the teams are subject to scrutiny under section 1 of the Sherman Act.<sup>67</sup> The role of section 1 — and antitrust law in general — is to act as a gatekeeper, ferreting out anticompetitive conduct.<sup>68</sup> While the literal language of section 1 condemns “[e]very contract . . . in restraint of trade,” courts have held that it only prohibits contracts that “unreasonably” restrain trade.<sup>69</sup> The test that the courts developed to determine the “reasonableness” of restraints under section 1 of the Sherman Act is the Rule of Reason.<sup>70</sup> Under the Rule of Reason, a restraint is unreasonable if its

---

how the sport is played . . . . While some freedom of movement after playing out a contract is in order, complete freedom of movement would result in the best franchises acquiring most of the top players. Some leveling and balancing rules appear necessary to keep the various teams on a competitive basis, without which public interest in any sport quickly fades.”).

<sup>65</sup> See, e.g., *North Am. Soccer League*, 613 F.2d at 1383 (affirming the NLRB’s determination that teams in a soccer league must bargain as a “joint employer”).

<sup>66</sup> *Williams*, 45 F.3d at 689.

<sup>67</sup> See 15 U.S.C. § 1 (2006). For a discussion of section 1 challenges to sports leagues, see Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 657-58 (1989).

<sup>68</sup> See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 898 (2007) (noting that section 1 “is designed and used to eliminate anticompetitive transactions from the market”); see also, e.g., David S. Evans, A. Jorge Padilla & Christian Ahlborn, *The Antitrust Economics of Tying: A Farewell to Per Se Illegality*, 49 ANTITRUST BULL. 287 (2004) (explaining that antitrust law “ferrets out anticompetitive ties from procompetitive ones”).

<sup>69</sup> 15 U.S.C. § 1 (2006). See *Nat’l Soc’y. of Prof’l Eng’rs v. United States*, 435 U.S. 679, 690 (1978).

<sup>70</sup> See *infra* notes 302-312 and accompanying text.

anticompetitive effects outweigh its procompetitive benefits — if it is net anticompetitive.<sup>71</sup>

In applying the Rule of Reason to sports leagues, courts have recognized that sports teams are interdependent and that sports leagues cannot exist without a variety of multi-employer agreements.<sup>72</sup> These sports team agreements, however, are still subject to scrutiny under section 1 of the Sherman Act,<sup>73</sup> and professional sports leagues have faced a number of antitrust lawsuits over the last several decades.<sup>74</sup> Most of these lawsuits involved claims by players, owners, prospective owners, and competitors challenging league player restraints, ownership restrictions, and a variety of alleged anticompetitive practices.<sup>75</sup>

---

<sup>71</sup> See *Leegin*, 551 U.S. at 885.

<sup>72</sup> See, e.g., *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005) (recognizing that sports leagues function as multi-actor joint ventures with members who act in concert to promote league rules); *Sullivan v. NFL*, 34 F.3d 1091, 1102-03 (1st Cir. 1994) (noting that joint ventures enable pursuit of common goals that separate entities cannot pursue alone); *L.A. Mem'l Coliseum Comm'n v. NFL (Raiders I)*, 726 F.2d 1381, 1392 (9th Cir. 1984) (“Collective action in areas such as League divisions, scheduling and rules must be allowed, as should other activity that aids in producing the most marketable product attainable.”); *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1258-59 (2d Cir. 1982) (explaining that legitimate purposes may exist for agreements between members of a joint venture and cross-ownership ban in NFL could exist without violating Sherman Act); *Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106, 1121 (E.D. Cal. 2002) (stating procompetitive justifications for eligibility rules require application of Rule of Reason); *United States v. NFL*, 116 F. Supp. 319, 323 (E.D. Pa. 1953) (noting that “it is both wise and essential that rules be passed to help the weaker clubs in their competition with the stronger ones and to keep the [NFL] in fairly even balance”); see also Daniel E. Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 *FORDHAM L. REV.* 157, 176 (1984) (“Courts have recognized the unique interdependent relationship of teams in a league and their need — unlike ordinary competitive businesses — to regulate competition among themselves in order to survive.”).

<sup>73</sup> See *American Needle v. NFL*, 130 S. Ct. 2201, 2216 (2010).

<sup>74</sup> See, e.g., *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976) (challenging NFL enforcement of Rozelle Rule as conspiracy in restraint of trade denying players right to freely contract); *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972) (determining whether NHL violated antitrust laws through reserve clause, affiliation agreements, and market power dominance to detriment of World Hockey Association); *Wash. Prof'l Basketball Corp. v. NBA*, 131 F. Supp. 596 (S.D.N.Y. 1955) (seeking injunction to restrain purchase of Baltimore Bullets in violation of antitrust laws).

<sup>75</sup> See MICHAEL COZZILLO, MARK LEVINSTEIN, MICHAEL DIMINO & GABE FELDMAN, *SPORTS LAW: CASES AND MATERIALS* 301-15 (2d ed. 2007).

B. *The Unique Nature of Sports Unions*

Sports unions bear little resemblance to traditional industrial unions. In traditional (non-sports) industries, employees seek to form a union to gain bargaining leverage with their employers. The formation of a union allows these employees to restrain competition, cooperate, and collectively bargain for higher salaries and better terms and conditions of employment. From the employer's perspective, employees are fungible and possess relatively homogenous skills in traditional non-sport industries.<sup>76</sup> In the sports industry, however, the employees (i.e., the players) are not fungible to employers and do not possess homogenous skills. Rather, professional athletes are highly paid, uniquely talented, and possess specific skill sets.

Professional sports unions — particularly in the NFL and NBA — are uniquely disadvantaged in terms of job security and employment opportunities. Professional athletes have highly specialized skills that are rarely transferable to any other industry.<sup>77</sup> In the NFL, the vast majority of players have limited job security because most NFL contracts are not guaranteed and do not contain injury protection beyond the season in which the injury occurs.<sup>78</sup> Additionally, all professional athletes, and NFL players in particular, have extremely short careers on average.<sup>79</sup> One study indicated that the NFL Players Association (“NFLPA”) experiences an almost twenty-five percent turnover in its bargaining unit on an annual basis, “a rate unheard of in industrial unions.”<sup>80</sup>

These problems are exacerbated by the fact that the NFL and the NBA hold a monopoly in the professional sports product market and a monopsony in the labor market for professional athletes.<sup>81</sup> In other

---

<sup>76</sup> See, e.g., *Brown v. Pro Football*, 518 U.S. 231, 249 (1996) (finding that football players have “special individual talents” that make them unique when compared to many unionized workers in other industries).

<sup>77</sup> Often times, these are not transferrable within the particular sport. Compare, for example, the skill set of an offensive lineman with the skill set of a quarterback.

<sup>78</sup> Richard Sandomir, *N.F.L. Salary-Cap Math: Deals Full of “Funny Money,”* N.Y. TIMES, March 8, 2006, D1, available at <http://www.nytimes.com/2006/03/08/sports/football/08guarantee.html?pagewanted=all>.

<sup>79</sup> Depending on years of service, the minimum salary for NFL players in 2011 ranges from \$375,000 to \$910,000. In the NBA, the minimum salary ranges from \$473,604 to \$1,352,181. These salaries likely far exceed the minimum that players would achieve in a free market. See *NFL Hopeful FAQs*, available at <https://www.nflplayers.com/about-us.aspx?section=about-us&levels=3&lvl2=FAQs&lvl3=NFL-Hopeful-FAQs&menuName=NFL-Hopeful-FAQs&parentName=FAQs>.

<sup>80</sup> Lock, *supra* note 42, at 355.

<sup>81</sup> A monopoly is present where a dominant seller controls the market and has the

words, there are no other “sellers” equivalent to professional sports leagues and no equivalent “buyers” for professional athletes’ skills.<sup>82</sup> This lack of external competition for the players deprives them of the ability to defect, or threaten to defect, to a rival employer.

These factors render strikes a nonviable option for professional athletes.<sup>83</sup> As Professor Lock has noted:

Strikes . . . jeopardize a disproportionate percentage of career earning potential for players with short careers and, in many cases, few alternative career opportunities. The [absence of other employment options] of the players further limits their ability to withstand a strike and, consequently, the union’s leverage at the bargaining table. With no competing league, most players have no legitimate alternative job opportunity and thus, are unlikely to outlast management in a labor dispute.<sup>84</sup>

Similarly, the short careers and lack of substitutes for professional athletes increase the potency of an employer lockout. In non-sports industries, lockouts are powerful weapons because they allow an

---

ability to control prices. A monopsony is the mirror image, where a dominant buyer controls the market and has the ability to control prices. *See* Jocelyn Sum, *Clarett v. National Football League*, 20 BERKELEY TECH. L.J. 807, 824, & 824 n.121 (2005).

<sup>82</sup> *See* *NFL v. USFL*, 644 F. Supp. 1040, 1056-58 (S.D.N.Y. 1986). In fact, the NFL’s monopoly is congressionally sanctioned. The NFL has been granted two congressional exemptions from antitrust law to facilitate (or at least allow) the league’s dominant market position. In 1961, the NFL received an exemption from the antitrust laws from Congress permitting the league to pool the broadcast rights to its games and sell them as a package, with the revenues to be shared equally by the teams. In 1966, Congress granted an antitrust exemption to the NFL and the American Football League that allowed them to merge into a single league. The two leagues had been competing for the services of elite professional football players. Not surprisingly, this competition led to a large increase in average player salaries. The exempted merger eliminated competition for players, and a significant drop in player salaries followed. Since that merger, all attempts to compete directly with the NFL have been unsuccessful. *See* Lock, *supra* note 42, at 404.

<sup>83</sup> *Brown v. NFL*, 50 F.3d 1041, 1057 (D.C. Cir. 1995) (noting that the NFL players union “cannot effectively strike”).

<sup>84</sup> Lock, *supra* note 42, at 403; *see also* *Powell v. NFL*, 930 F.2d 1293, 1306 n.8 (8th Cir. 1989) (Heaney, J., dissenting) (“Thus, a strike jeopardizes a significant portion of the career and earning potential of many athletes. Moreover, most professional athletes possess highly specialized skills that are rarely marketable in any other industry. As a result, players are extremely vulnerable to explicit and implicit management pressure.”); Lock, *supra* note 42, at 404 (“Few other employers or multi-employer bargaining units enjoy the type of monopoly and monopsony power enjoyed by the NFL owners. Not surprisingly, few unions face the same disadvantages at the bargaining table as the NFLPA.”).

employer to withhold pay and prevent an employee from working. In the sports industry, this weapon is even more powerful because a lockout, like a strike, will jeopardize a disproportionate percentage of earning potential for players with short careers and few alternative employment opportunities.

C. *The Evolution of the Nonstatutory Labor Exemption in Professional Sports*

The unique aspects of the collective bargaining relationship in professional sports present the potential for significant conflict between players and owners and between antitrust and labor law. These conflicts have arisen from the very inception of collective bargaining in sports and have led to a number of lawsuits between players and owners. In such cases, courts must balance the inherent conflict between antitrust and labor law, helping lead to the gradual expansion of the scope of the nonstatutory labor exemption. In the early cases, the exemption was held to protect the terms of negotiated collective bargaining agreements between players and owners.<sup>85</sup> The exemption grew in the later cases — primarily involving the NFL and NBA — to cover the implementation of non-negotiated terms after the expiration of a collective bargaining agreement.

The first cases in the sports industry addressing the nonstatutory labor exemption established that the terms of a collective bargaining agreement are immune from antitrust claims. In *Mackey v. NFL*, NFL players challenged the “Rozelle Rule” — a term in the collective bargaining agreement that severely restricted the ability of players to sign with new teams upon the expiration of their contracts.<sup>86</sup> The Eighth Circuit held that the exemption protected the terms of the collective bargaining agreement so long as three factors were met.<sup>87</sup> First, the terms of the agreement must “primarily affect[] only the parties to the collective bargaining relationship.”<sup>88</sup> Second, the agreement must relate to a mandatory subject of bargaining.<sup>89</sup> Third, the agreement must be the product of good faith, arm’s-length negotiations.<sup>90</sup> When these factors are met, federal labor policy deserves preeminence over antitrust policy.<sup>91</sup>

---

<sup>85</sup> *Mackey v. NFL*, 543 F.2d 606, 610-11 (8th Cir. 1976).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 614.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* The court determined that the Rozelle Rule was not protected by the

The NBA faced a similar scenario in *Wood v. NBA*, where a player challenged the player draft and salary cap provisions of the NBA collective bargaining agreement.<sup>92</sup> The Second Circuit rejected the challenge, explaining that if “the antitrust claim were to succeed, all of these commonplace arrangements would be subject to similar challenges, and federal labor policy would essentially collapse.”<sup>93</sup> The court added that the exemption must be interpreted to immunize the terms of a valid collective bargaining agreement.<sup>94</sup> Otherwise, the court reasoned, “[e]mployers would have no assurance that they could enter into any collective agreement without exposing themselves to an action for treble damages.”<sup>95</sup>

The scope of the exemption expanded in *Powell v. NFL* when the Eighth Circuit held that antitrust immunity remains even when owners unilaterally implement terms of employment after a collective bargaining agreement expires.<sup>96</sup> In *Powell*, NFL players challenged a system of free agency restrictions that, *inter alia*, gave owners a “right of first refusal” when a player’s individual contract expired.<sup>97</sup> This system was part of the 1982 collective bargaining agreement, which expired in 1987.<sup>98</sup> After the expiration of the agreement, the parties

---

exemption because it was not the product of bona fide, arm’s-length bargaining, but rather was unilaterally implemented by the League. *See id.* at 615-16. In *McCourt v. California Sports, Inc.*, a player for the Detroit Red Wings challenged under antitrust law the NHL’s version of the Rozelle Rule, which was contained in the collective bargaining agreement. *See* 600 F.2d 1193, 1194 (6th Cir. 1979). The Sixth Circuit, relying on *Mackey*, held that the nonstatutory labor exemption applied. *Id.* at 1203; *see also* *Zimmerman v. NFL*, 632 F. Supp. 398, 401 (D.D.C. 1986) (holding that the nonstatutory labor exemption immunized from antitrust attack the “supplemental draft,” which was contained in an amendment to the collective bargaining agreement).

<sup>91</sup> The court ultimately held that the Rozelle Rule was not protected by the exemption because it was not the product of good faith, arm’s-length negotiations. *See Mackey*, 543 F.2d at 615-16.

<sup>92</sup> *Wood v. NBA*, 809 F.2d 954, 956-57, 961 (2d Cir. 1987).

<sup>93</sup> *Id.* at 961.

<sup>94</sup> *See id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Powell v. NFL*, 930 F.2d 1293, 1299-1304 (8th Cir. 1989) (determining that labor exemption applies “as long as there is a possibility that proceedings may be commenced before the [NLRB], or until final resolution of Board proceedings and appeals therefrom”).

<sup>97</sup> Under this system, a team could retain a veteran free agent whose contract had expired by exercising a right of first refusal and matching the offer from a competing club. *Id.* at 1295-97. If the player’s incumbent team did not to match the offer, they would lose the player but receive compensation from the new team in the form of additional draft choices. *Id.*

<sup>98</sup> *Powell*, 678 F. Supp. at 780-81.

were unable to negotiate a new deal.<sup>99</sup> The NFL maintained the status quo from the 1982 agreement by unilaterally re-instituting the right of first refusal system (and all other terms and conditions of employment) from the expired agreement.<sup>100</sup>

The players challenged the NFL's continued imposition of the right of first refusal system as an illegal restraint of trade under section 1 of the Sherman Act.<sup>101</sup> The district court held that the players could proceed with their antitrust suit because the nonstatutory labor exemption expired when the collective bargaining agreement expired and the parties had reached an impasse<sup>102</sup> in the negotiations over a new agreement.<sup>103</sup>

A divided Eighth Circuit court reversed, holding that the nonstatutory labor exemption immunizes restraints in an expired collective bargaining agreement from an antitrust challenge.<sup>104</sup> As long as there is a collective bargaining relationship between the parties, the Circuit court reasoned, the imposition of expired collective bargaining agreement terms is permissible even after the parties bargained to impasse on a new agreement.<sup>105</sup> As the Circuit court explained, following the expiration of a collective bargaining agreement, union and employer conduct is governed by "a comprehensive array of labor law principles."<sup>106</sup> After the agreement expires, each side has a continuing obligation to bargain, and employers are required to maintain the status quo with respect to wages and other terms and conditions of employment before the parties reach impasse.<sup>107</sup> These

---

<sup>99</sup> *Id.*

<sup>100</sup> *Powell*, 930 F.2d at 1296. After a series of negotiations failed to produce a new deal, the players went on strike. The owners responded by using "replacement players" to play in NFL games, and the strike ended in October. *Id.*; see Elizabeth Merrill, *NFL Replacements Part of History*, ESPN.COM (June 9, 2011 5:04 PM), <http://sports.espn.go.com/nfl/news/story?id=6642330>.

<sup>101</sup> *Id.* at 778, 781-82.

<sup>102</sup> Impasse is defined as "a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 411 (1982) (citing *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 243 N.L.R.B. 1093, 1093-94 (1979)).

<sup>103</sup> *Powell*, 678 F. Supp. at 788.

<sup>104</sup> *Powell v. NFL*, 930 F.2d 1293, 1303-04 (8th Cir. 1989).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1300.

<sup>107</sup> See, e.g., *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962) (explaining duty to negotiate and to negotiate in good faith); *Producers Dairy Delivery Co. v. W. Conference of Teamsters Trust Fund*, 654 F.2d 625, 627 (9th Cir.1981) (stating employer requirement to maintain status quo for wages, working conditions, and

continuing obligations after the expiration of a collective bargaining agreement (but before impasse) are a critical aspect of labor law, as they are “often conducive to further collective bargaining and to stable, peaceful labor relations.”<sup>108</sup>

If the parties are unable to reach an agreement and do bargain to an impasse, a comprehensive array of labor law principles still applies post-impasse.<sup>109</sup> An employer may continue to adhere to the status quo or it may implement its “last, best offer,” which encompasses any new terms of employment that were “reasonably contemplated within the scope of their pre-impasse proposals.”<sup>110</sup> Likewise, employees have a range of labor law rights available to them — including the ability to file a range of unfair labor practice charges — if employers fail to fulfill their obligations post-impasse.<sup>111</sup>

The Circuit court in *Powell* concluded that allowing the players to bring an antitrust suit challenging the owners’ decision to maintain the status quo post-impasse with respect to the first refusal/compensation system would “improperly upset the careful balance established by Congress through the labor law” because “labor law provides a comprehensive array of remedies to management and union, even after impasse.”<sup>112</sup> According to the Circuit court, allowing the players to bring an antitrust suit attacking the owners’ concerted conduct after impasse would “treat[] a lawful stage of the collective bargaining process as misconduct by [the owners], and in this way conflicts with federal labor laws.”<sup>113</sup>

---

pension fund contributions after expiration of collective bargaining agreement until negotiations reach impasse).

<sup>108</sup> *Powell*, 930 F.2d at 1300.

<sup>109</sup> *Id.* at 1301-02.

<sup>110</sup> *Id.* at 1300-01.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1302. In *Powell*, the court added that the “labor arena is one with well-established rules which are intended to foster negotiated settlements rather than intervention by the courts. The League and the Players have accepted this ‘level playing field’ as the basis for their often tempestuous relationship, and we believe that there is substantial justification for requiring the parties to continue to fight on it, so that bargaining and the exertion of economic force may be used to bring about legitimate compromise.” *Id.* at 1303.

<sup>113</sup> *Id.* at 1302. The Second Circuit reached a similar conclusion in *NBA v. Williams*, 45 F.3d 684, 688 (2d Cir. 1995). *Williams* arose after the collective bargaining agreement between the NBA and the NBPA expired on June 23, 1994. *Id.* at 686. That expired agreement contained a draft for entering players, a right of first refusal system for teams when their “restricted” free agents sought to sign with other teams, and a salary cap. *Id.* During a negotiation session before the expiration of that agreement, the NBPA expressed their view that the draft, right of first refusal, and salary cap would “be subject to successful challenge under the antitrust laws” if the

In the wake of the Eighth Circuit's extension of the nonstatutory labor exemption in *Powell*, the NFL players took an extreme measure to gain access to antitrust law in *McNeil v. NFL*.<sup>114</sup> The players chose — as they did in *Brady* — to dissolve their union and negotiate as individuals with the NFL owners in order to bring an antitrust suit challenging the NFL's latest restriction on free agency.<sup>115</sup> The district court granted the players' motion for summary judgment, holding that the nonstatutory labor exemption expired upon dissolution of the union, which terminated the collective bargaining relationship.<sup>116</sup> A jury then found that the NFL's restrictions on player movement

---

owners continued to implement them after the expiration of the agreement. *NBA v. Williams*, 857 F. Supp. 1069, 1072 (S.D.N.Y. 1994). Before the agreement finally expired, the NBA brought a declaratory judgment action, seeking a declaration that these player restraints were protected from antitrust attack — even after the expiration of the agreement — by the nonstatutory labor exemption. The NBPA counterclaimed, alleging that the nonstatutory labor exemption expires after a collective bargaining agreement expires, and that these player restraints violated the Sherman Act. The district court concluded that the restraints were immune from antitrust attack because the nonstatutory labor exemption survives “as long as the collective bargaining relationship exists” between the NBA and the NBPA. *Id.* at 1078. The district court also held, in the alternative, that the restraints were legal under the Rule of Reason even if the nonstatutory labor exemption did not apply. *Id.* In ruling for the owners, the district court concluded: “I am convinced that this is a case where neither party cares about this litigation or the result thereof. Both are simply using the court as a bargaining chip in the collective bargaining process. Each is truly guilty of this practice.” *Id.* at 1071. On appeal, the Second Circuit affirmed, concluding that the nonstatutory labor exemption applies to terms implemented after the expiration of a collective bargaining agreement because permitting an antitrust challenge to those terms would interfere with and threaten the multiemployer bargaining process. *Williams*, 45 F.3d at 688; *Bridgeman v. NBA*, 675 F. Supp. 960, 967 (D.N.J. 1987) (holding that the nonstatutory exemption survived the expiration of the collective bargaining agreement “as long as the employer continues to impose that restriction unchanged [from the expired agreement], and reasonably believes that the practice or a close variant of it will be incorporated in the next collective bargaining agreement”).

<sup>114</sup> See *McNeil v. NFL*, 1992 WL 315292, at \*1 (D. Minn. Sept. 10, 1992) (No. 4-90-976); *Powell v. NFL*, 764 F. Supp. 1351, 1358 (D. Minn. 1991). The player representatives of each team “unanimously voted to end the NFLPA's status as the players' collective bargaining representative and to restructure the organization as a voluntary professional association.” *Powell*, 764 F. Supp. at 1354. The NFLPA reconstituted itself as a trade association, filed a labor organization termination notice with the labor department and reclassified itself under the tax laws from of a labor organization to a business league. *Id.*

<sup>115</sup> This new system was known as “Plan B” free agency. Under Plan B, NFL teams had the right to protect thirty-seven of the players on the roster at the end of each NFL season, leaving the remaining players unprotected and unrestricted free agents. The protected players, however, were still subject to the right of first refusal system contained in the 1977 and 1982 Agreements. See *Powell*, 930 F.2d at 1295.

<sup>116</sup> *Id.*

violated the Sherman Act and awarded the players over \$30 million in damages.<sup>117</sup>

While the parties litigated the *McNeil* case, the NFL and NFLPA (at that point, still a union) were involved in a separate antitrust action: *Brown v. Pro Football, Inc.*<sup>118</sup> The *Brown* case led the Supreme Court to extend the nonstatutory exemption to cover *new* terms owners unilaterally implemented after the expiration of their collective bargaining agreement.<sup>119</sup> Before the NFLPA had dissolved their union in 1989, the NFL had presented a plan to the players during negotiations that would permit each team to establish a “developmental squad” of up to six rookie players who had failed to earn a position on the regular roster of a team.<sup>120</sup> The plan dictated that the teams would pay all members of the developmental squad a fixed salary of \$1,000 per week.<sup>121</sup> The NFLPA insisted that the individual players on the developmental squad be free to negotiate their own salaries, but the parties bargained to impasse on the issue.<sup>122</sup> As they are permitted to do as an employer upon impasse, the NFL then unilaterally implemented their last offer of a fixed \$1,000 salary.<sup>123</sup>

In 1990, 235 developmental squad players brought the antitrust suit in *Brown*,<sup>124</sup> claiming that the NFL teams’ agreement to pay them a fixed \$1,000 weekly salary violated the Sherman Act.<sup>125</sup> The district

---

<sup>117</sup> *McNeil*, 1992 WL 315292, at \*1. Soon after the jury verdict, a group of players filed another antitrust suit claiming that Plan B had injured them. See *Jackson v. NFL*, 802 F. Supp. 226, 228 (D. Minn. 1992). The court, relying on *McNeil*, granted the players’ motion for a temporary restraining order. *Id.* at 230-31. Subsequently, a class action, *White v. NFL*, was filed on behalf of all NFL players, challenging the continued implementation of the Plan B system. See *White v. NFL*, 822 F. Supp. 1389, 1394 (D. Minn. 1993). The NFL and the players eventually entered into a settlement agreement that “allowed for the recertification of the [NFLPA] and the resumption of the collective bargaining relationship between the players and the owners.” *White v. NFL*, 585 F.3d 1129, 1134 (8th Cir. 2008). The terms of the settlement agreement were then included in the new 1993 collective bargaining agreement between the parties. See *id.* For further discussion of the *McNeil* and *Powell* litigation, see MICHAEL COZZILLO, MARK LEVINSTEIN, MICHAEL DIMINO & GABE FELDMAN, *SPORTS LAW: CASES AND MATERIALS* 397-99 (2d ed. 2007).

<sup>118</sup> See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996).

<sup>119</sup> See *id.* at 250.

<sup>120</sup> *Id.* at 234.

<sup>121</sup> *Id.* at 235.

<sup>122</sup> *Id.* at 234.

<sup>123</sup> *Id.* at 235.

<sup>124</sup> *Brown v. Pro Football, Inc.*, 50 F.3d 1047, 1056 (D.C. Cir. 1995). Pro Football Inc. owns and operates the Washington Redskins.

<sup>125</sup> *Brown*, 518 U.S. at 235.

court denied the NFL's argument that the nonstatutory labor exemption protected the agreement.<sup>126</sup> The jury subsequently awarded the players more than \$30 million after finding that the agreement violated antitrust law.<sup>127</sup> On appeal, the D.C. Circuit (by a 2-1 vote) reversed, concluding that "injecting antitrust liability into the system for resolving disputes between unions and employers would both subvert national labor policy and exaggerate federal antitrust concerns."<sup>128</sup> The Circuit court emphasized that federal labor laws "stock[] the arsenals of both unions and employers with economic weapons of roughly equal power and leaves each side to its own devices."<sup>129</sup> These weapons include the employers' ability to make unilateral changes post-impasse that are "reasonably comprehended within [their] pre-impasse proposals [i.e., that are part of their last, best offer]."<sup>130</sup> The court concluded that the application of antitrust law to the owners' post-impasse terms would interfere with the carefully crafted balance between employees and employers that is at the core of federal labor policy.<sup>131</sup>

The Supreme Court affirmed, echoing the Circuit court's reasoning and noting that terminating the nonstatutory labor exemption at the point of impasse, and with a union still in existence, would put the NFL owners in a Catch-22. As the court stated:

If the antitrust laws apply, what are employers to do once impasse is reached? If all impose terms similar to their last joint offer, they invite an antitrust action premised upon identical behavior (along with prior or accompanying

---

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Brown*, 50 F.3d at 1056.

<sup>129</sup> *Id.* at 1052; *see also* *Powell v. NFL*, 930 F.2d 1293, 1302 (8th Cir. 1989) ("In particular, the federal labor laws provide the opposing parties to a labor dispute with offsetting tools, both economic and legal, through which they may seek resolution of their dispute.").

<sup>130</sup> *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1165 (D.C. Cir. 1992) (citing *Am. Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968)). Additionally, employers may not terminate workers engaged in economic strikes, and must rehire them at the conclusion of the strike absent "legitimate and substantial business justifications" for not doing so. *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378, (1967) (internal quotation omitted) (citing *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967)). Employers may, however, hire permanent replacements for strikers. *Brown*, 50 F.3d at 1051 (citing *NLRB v. Mackay Radio & Tele. Co.*, 304 U.S. 333, 345-46 (1938)). The labor laws also do not require the parties to agree; they only require that each side negotiates in good faith. *See id.* (citing 29 U.S.C. § 158(d)).

<sup>131</sup> *Brown v. Pro Football, Inc.*, 50 F.3d 1047, 1052 (D.C. Cir. 1995).

conversations) as tending to show a common understanding or agreement. If any, or all, of them individually impose terms that differ significantly from that offer, they invite an unfair labor practice charge.<sup>132</sup>

The conflict that the post-impasse situation in *Brown* presented was clear. If the owners exercised their statutorily protected right under labor law to maintain the status quo or implement their last, best offer of terms of employment, they would be subject to lawsuits under antitrust law.<sup>133</sup> If the owners modified their offer of terms of employment, they would be subject to attack under labor law.<sup>134</sup>

The Court emphasized that “[l]abor law itself regulates directly, and considerably, the kind of behavior here at issue — the post-impasse imposition of a proposed employment term . . . . These regulations reflect the fact that impasse and an accompanying implementation of proposals constitute an integral part of the bargaining process.”<sup>135</sup> The Court concluded that allowing the players to bring an antitrust challenge to the implemented post-impasse terms would “introduce instability and uncertainty into the collective-bargaining process, for antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective-bargaining process invites or requires.”<sup>136</sup>

The underlying rationale in both *Brown* and *Powell* is consistent with the Supreme Court’s original analysis of the nonstatutory labor

---

<sup>132</sup> *Brown v. Pro Football, Inc.*, 518 U.S. 231, 241-42 (1996). An employer commits an unfair labor practice if it unilaterally alters the terms and conditions of employment after a collective bargaining agreement expires. See *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962).

<sup>133</sup> *Brown*, 518 U.S. at 241-42.

<sup>134</sup> See, e.g., Robert C. Berry & William B. Gould, A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes, 31 *CASE W. RES. L. REV.* 685, 774 (1981) (noting that the “parties would be forced to enter into a collective bargaining agreement to avoid antitrust sanctions, when labor law is opposed to any such requirement”).

<sup>135</sup> *Brown*, 518 U.S. at 238-39. The Court further explained that

“[b]oth the Board and the courts have held that, after impasse, labor law permits employers unilaterally to implement changes in pre-existing conditions, but only insofar as the new terms meet carefully circumscribed conditions. For example, the new terms must be ‘reasonably comprehended’ within the employer’s preimpasse proposals (typically the last rejected proposals), lest by imposing more or less favorable terms, the employer unfairly undermined the union’s status.” *Id.* at 238.

<sup>136</sup> *Id.* at 242.

exemption in *Jewel Tea* and *Connell*.<sup>137</sup> Through the nonstatutory labor exemption, the Court has ruled that an implied repeal of the antitrust laws is warranted if necessary to protect federal labor policy and the labor process when labor law and antitrust law conflict.<sup>138</sup> Early cases establishing the exemption held that the implied repeal from antitrust law was necessary because an antitrust challenge the terms of a collective bargaining agreement would interfere with a process that is “regulated comprehensively and exclusively by the federal labor laws.”<sup>139</sup> In *Brown*, the Court considered the implied repeal of antitrust law necessary because the NFL players’ antitrust challenge would interfere with the statutorily protected right of a multi-employer bargaining group to unilaterally implement their last, best offer post-impasse.<sup>140</sup>

In each instance, the courts protected the “carefully defined bilateral process” of collective bargaining.<sup>141</sup> Employers’ rights to unilaterally implement certain terms post-impasse — much like the parties’ duty to negotiate in good faith pre-impasse — are an integral part of federal labor policy.<sup>142</sup> Congress designed the collective bargaining process to foster voluntary agreements between management and unions.<sup>143</sup> A “comprehensive array of labor law principles” that creates a balance between employers and employees governs all of these actions.<sup>144</sup> The Supreme Court determined that the application of antitrust law should not undermine this balance.<sup>145</sup>

---

<sup>137</sup> See *Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 625 (1975); *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of No. Am. v. Jewel Tea Co.*, 381 U.S. 676, 689-91 (1965).

<sup>138</sup> See, e.g., *Brown v. Pro Football, Inc.*, 50 F.3d 1047, 1051 (D.C. Cir. 1995) (“[T]he exemption must be broad enough in scope to shield the entire collective bargaining process established by federal law.”). This mirrors the rationale underlying the statutory labor exemption, which protects the ability of employees to form a union and engage in other conduct necessary for the labor process to work. See *supra* notes 27-35 and accompanying text.

<sup>139</sup> Shepard Goldfein & William L. Daly, *The Elimination of the “Antitrust Lever” from Collective Bargaining Negotiations in Professional Sports Is a “Return to Normalcy,”* 10 ANTITRUST 35, 36 (1995-96). Although the courts refer to this as an “exemption,” the exemption essentially operates as a limited, implied repeal of antitrust law.

<sup>140</sup> See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996).

<sup>141</sup> *Brown*, 50 F.3d at 1051 (emphasis removed).

<sup>142</sup> *Id.* at 1051, 1054.

<sup>143</sup> See *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of No. Am. v. Jewel Tea Co.*, 381 U.S. 676, 721-22 (1965).

<sup>144</sup> *Powell v. NFL*, 930 F.2d 1293, 1300 (8th Cir. 1989).

<sup>145</sup> *Brown*, 518 U.S. at 250; see also *Brown*, 50 F.3d at 1056 (“[W]e conclude that injecting antitrust liability into the system for resolving disputes between unions and

The Court did, however, signal that the nonstatutory labor exemption has its limits. In *Brown*, the Court explained that the exemption lasts only until the “collapse of the collective-bargaining relationship,”<sup>146</sup> and suggested that dissolution of the union — as occurred in *McNeil* — could be the cause of such a “collapse.”<sup>147</sup> Thus, *Brown* appears to present employees with an either-or proposition:<sup>148</sup> employees can choose labor law, form a union, and engage in collective bargaining, or they can give up their labor rights, refrain from collective bargaining, and choose antitrust law.<sup>149</sup> Forming a

---

employers would both subvert national labor policy and exaggerate federal antitrust concerns.”).

<sup>146</sup> In a parenthetical, the Court cited “decertification” as a means for ending the bargaining relationship. *Brown*, 518 U.S. at 250.

<sup>147</sup> *Id.* (finding that the nonstatutory labor “exemption lasts until collapse of the collective bargaining relationship, as evidenced by decertification of the union”); see *NBA v. Williams*, 857 F. Supp. 1069, 1078 (S.D.N.Y. 1994) (noting that the nonstatutory labor exemption is inapplicable once “Players . . . request decertification”), *affd.*, 45 F.3d 684 (2d Cir.1995); *Powell v. NFL*, 764 F. Supp. 1351, 1356-58 (D. Minn. 1991) (stating that the nonstatutory labor exemption is inapplicable when “plaintiffs are no longer part of an ‘ongoing collective bargaining relationship’ with the defendants”); see also *Brown*, 50 F.3d at 1057; *Powell v. NFL*, 930 F.2d 1293, 1303 n.12 (8th Cir. 1989) (noting the NFL’s “conce[ssion] that the Sherman Act could be found applicable, depending on the circumstances . . . if the affected employees ceased to be represented by a certified union”). The distinction between decertification and disclaimer of interest is discussed *infra* at notes 197-198 and accompanying text.

<sup>148</sup> The Court noted that its holding was “not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process.” *Brown*, 518 U.S. at 250. The Court had held that nonstatutory labor exemption applied to the owners’ postimpasse agreement because, *inter alia*, the “conduct took place during and immediately after a collective-bargaining negotiation.” *Id.* at 250. The Court also held that the conduct was protected. “It 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.” *Id.*

<sup>149</sup> See *Brown*, 50 F.3d at 1054-55 (“We think the inception of a collective bargaining relationship between employees and employers irrevocably alters the governing legal regime. Once employees organize a union, federal labor law necessarily limits the rights of individual employees to enter into negotiations with their employer. . . . [O]nce collective bargaining begins, the Sherman Act paradigm of a perfectly competitive market necessarily is replaced by the NLRA paradigm of organized negotiation — a paradigm that itself contemplates collusive activity on the parts of both employees and employers.”). See also *id.* at 1057 (“In our view, the nonstatutory labor exemption requires employees involved in a labor dispute to choose whether to invoke the protections of the NLRA or the Sherman Act. . . . [W]e

union and engaging in collective bargaining raises the nonstatutory labor exemption shield.<sup>150</sup> Opting out of a union and renouncing collective bargaining lowers the shield and allows for an antitrust challenge.<sup>151</sup>

Following *Brown*, neither the NFL nor the NBA tested the scope of the nonstatutory labor exemption for several years. The leagues experienced a relatively long period of labor peace following the spate of litigation in the 1990s. After their collective bargaining agreement expired in March 2011, however, the NFL players dissolved their union and filed *Brady v. NFL*, which placed the scope of the exemption squarely in conflict with antitrust law.<sup>152</sup> That same issue also came to the fore when the NBA collective bargaining agreement expired on July 1, 2011, and the NBA owners filed a declaratory judgment action in *NBA v. Anthony*.<sup>153</sup> In both cases, the Leagues

---

believe that employees, like all other economic actors, must make choices. If they choose to avail themselves of the advantages of the collective bargaining process, their protections are as defined by the federal labor laws.”)

<sup>150</sup> See *Brown*, 518 U.S. at 250 (finding that the nonstatutory labor “exemption lasts until collapse of the collective bargaining relationship, as evidenced by decertification of the union”); *NBA v. Williams*, 857 F. Supp. 1069, 1078 (S.D.N.Y. 1994) (noting that the nonstatutory labor exemption is inapplicable once “Players . . . request decertification”); *Powell*, 764 F. Supp. at 1356-58 (stating that the nonstatutory labor exemption is inapplicable when “plaintiffs are no longer part of an ‘ongoing collective bargaining relationship’ with the defendants”). The distinction between decertification and disclaimer of interest is discussed *infra* at notes 197-198 and accompanying text. See also *Brown*, 50 F.3d at 1057; *Powell v. NFL*, 930 F.2d 1293, 1303 n.12 (8th Cir. 1989) (noting the NFL’s “conce[ssion] that the Sherman Act could be found applicable, depending on the circumstances . . . if the affected employees ceased to be represented by a certified union”).

<sup>151</sup> See *Brown*, 518 U.S. at 250 (finding that the nonstatutory labor “exemption lasts until collapse of the collective bargaining relationship, as evidenced by decertification of the union”); *Williams*, 857 F. Supp. at 1078 (noting that the nonstatutory labor exemption is inapplicable once “Players . . . request decertification”); *Powell*, 764 F. Supp. at 1356-58 (stating that the nonstatutory labor exemption is inapplicable when “plaintiffs are no longer part of an ‘ongoing collective bargaining relationship’ with the defendants”). The distinction between decertification and disclaimer of interest is discussed *infra* at notes 197-198 and accompanying text. See also *Brown*, 50 F.3d at 1057; *Powell v. NFL*, 930 F.2d 1293, 1303 n.12 (8th Cir. 1989) (noting the NFL’s “conce[ssion] that the Sherman Act could be found applicable, depending on the circumstances . . . if the affected employees ceased to be represented by a certified union”).

<sup>152</sup> *Brady v. NFL*, 640 F.3d 785, 788 (8th Cir. 2011).

<sup>153</sup> Gabriel A. Feldman, *The Legal Issues Behind the NBA Players’ Decertification Strategy*, HUFFINGTON POST (Nov. 8, 2011, 8:27 AM), [http://www.huffingtonpost.com/gabriel-a-feldman/the-legal-issues-behind-t\\_2\\_b\\_1081107.html](http://www.huffingtonpost.com/gabriel-a-feldman/the-legal-issues-behind-t_2_b_1081107.html). See ESPN.com News Services, *CBA Expires, NBA Locks out its Players*, ESPN.COM (July 1, 2011, 1:56 PM), <http://sports.espn.go.com/nba/news/story?id=6723645>.

argued that *Brown* should be interpreted to extend the scope of the nonstatutory labor exemption to immunize employer agreements after the collective bargaining agreement expired and the union dissolved.<sup>154</sup>

D. *The Latest Stage in the Evolution of the Nonstatutory Labor Exemption: Brady v. NFL and Anthony v. NBA*

After more than a decade of labor peace for the NFL and NBA, the recent expiration of the collective bargaining agreements in both leagues spawned the latest battle between players and owners, and the next stage in the conflict between antitrust and labor policy.

1. *Brady v. NFL*

The labor battle in the NFL began shortly before the 2006 collective bargaining agreement was set to expire on March 11, 2011.<sup>155</sup> On the afternoon of March 11, the NFLPA<sup>156</sup> informed the NFL that it had disclaimed interest in representing the players in collective bargaining.<sup>157</sup> A substantial majority of the players voted to end the collective bargaining status of the NFLPA and to restructure itself as a professional trade association instead of a union.<sup>158</sup> A group of players

---

<sup>154</sup> *Brady v. NFL*, 779 F. Supp. 2d 992, 1005-06 (D. Minn. 2011), *vacated*, 644 F.3d 661 (8th Cir. 2011); Complaint at 17-21, *NBA v. NBPA*, (No. 11 Civ 5369). (S.D.N.Y. Aug. 2, 2011).

<sup>155</sup> The 2006 CBA between the parties provided the NFL players with approximately 50% of all NFL revenues, with a salary cap of 57.5% of "Total Revenues," as defined in the CBA, after the deduction of approximately \$1 billion in expenses. *Brady*, 779 F.2d at 1003. In May 2008, the NFL opted out of the last two years of the CBA for a number of reasons, including a desire to seek a greater share of revenues and to impose wage scale on incoming rookies. The players and the NFL were unsuccessful in negotiating a new CBA before the 2006 agreement expired. *Id.*

<sup>156</sup> Since 1970, the NFLPA has been the sole and exclusive collective bargaining representative of all NFL players. See *History*, NFLPLAYERS.COM, <https://www.nflplayers.com/about-us.aspx?section=about-us&levels=2&lvl2=History&menuName=History&parentName=about-us> (last visited Feb. 20, 2012). The 32 NFL teams bargain with the NFLPA through their multi-employer bargaining unit, the National Football League Management Council ("NFLMC"). *Clarett v. NFL*, 369 F.3d 124, 127 (2d Cir. 2004).

<sup>157</sup> In February, the NFL had filed an unfair labor practice suit with the NLRB, alleging that the union failed to bargain in good faith. See *Brady*, 644 F.3d at 667. The NFL contended that the NFLPA's dissolution strategy "amount[ed] to [an] unlawful anticipatory refusal to bargain." Maury Brown, *Complete Text of NFL Charges Against NFLPA for Unfair Labor Practices*, BIZ FOOTBALL (Feb. 15, 2011, 6:18 AM), <http://bizofffootball.com/index.php?limitstart=90>.

<sup>158</sup> *Brady*, 779 F. Supp. 2d at 1003. The 10 named plaintiffs were Tom Brady, Drew

then filed a class action antitrust suit on behalf of all NFL players.<sup>159</sup> The players alleged that a lockout would constitute a *per se* illegal group boycott and price fixing violation.<sup>160</sup> The players also alleged that a series of player restraints were anticompetitive and in violation of the Sherman Act.<sup>161</sup> The players moved for a preliminary injunction to prevent the owners from locking them out.<sup>162</sup> After the collective bargaining agreement's expiration the following day, the NFL instituted a lockout<sup>163</sup> and, thus, teed up the battle of antitrust law versus labor law in *Brady*.

The owners raised three defenses in response to the players' attempt to enjoin the lockout. First, the owners argued that the Norris-LaGuardia Act precludes federal courts from enjoining lockouts.<sup>164</sup> Second, the owners contended that the nonstatutory labor exemption immunizes the lockout (as well as any restraints contained in the collective bargaining agreement).<sup>165</sup> The owners maintained that the dissolution of the players' union was a "sham" and the collective bargaining relationship still existed.<sup>166</sup> Third, the owners claimed that, pursuant to the doctrine of primary jurisdiction,<sup>167</sup> the court should

---

Brees, Vincent Jackson, Ben Leber, Logan Mankins, Peyton Manning, Von Miller, Brian Robison, Osi Umenyiora, and Mike Vrabel. The NFLPA also amended its bylaws to prohibit it from engaging in collective bargaining with the NFL and filed notice with the Department of Labor to terminate its status as a labor organization. It also filed an application with the IRS to be reclassified as a professional association instead of a union. *Id.*

<sup>159</sup> *Id.* at 1004.

<sup>160</sup> *Id.* at 1040.

<sup>161</sup> *Id.* The complaint alleged that the NFL and its 32 teams had "jointly agreed and conspired — 'through a patently unlawful group boycott and price-fixing arrangement' or 'a unilaterally-imposed set of anticompetitive restrictions on player movement, free agency, and competitive market freedom' — to coerce the Players 'to agree to a new anticompetitive system of player restraints' that will economically harm the Plaintiffs." *Id.* at 1004 (citing Complaint at paragraphs 2-3). Five retired players — Carl Eller, Priest Holmes, Obafemi Ayanbadejo, Ryan Collins, and Antawan Walker — filed a similar antitrust claim on March 28, also moving for a preliminary injunction against the lockout. The two actions were consolidated. *Id.* at 997.

<sup>162</sup> *Id.* at 1004.

<sup>163</sup> *Id.* The owners also amended their unfair labor practice charge with the NLRB to include an allegation that the NFLPA's disclaimer was a "sham" and that the antitrust suit "subverted the collective bargaining process." NFL Opposition to Plaintiff's Motion for Preliminary Injunction, *Brady*, March 21, 1011, 2011 WL 956159, 779 F.2d 992.

<sup>164</sup> *Brady v. NFL*, 779 F. Supp. 2d 992, 1005 (D. Minn. 2011), *vacated*, 644 F.3d 661 (8th Cir. 2011).

<sup>165</sup> *Brady*, 779 F. Supp. 2d at 1005-06.

<sup>166</sup> *Id.* at 1005-07.

<sup>167</sup> Under the doctrine of primary jurisdiction, "matters of national labor policy

defer to the National Labor Relations Board's ruling on the validity of the NFLPA's disclaimer of interest before proceeding with the case.<sup>168</sup>

Presiding Judge Nelson rejected all of the owners' arguments and enjoined the lockout on April 25, 2011.<sup>169</sup> In particular, Judge Nelson held that the nonstatutory labor exemption expired — as it did in *McNeil*<sup>170</sup> — when the union dissolved because the parties had “moved beyond collective bargaining entirely.”<sup>171</sup>

The Eighth Circuit eventually issued a full stay pending resolution of the appeal of the preliminary injunction in *Brady*. On appeal, the panel reversed the district court's decision and held that the Norris-LaGuardia Act deprived the federal courts of jurisdiction to enjoin lockouts.<sup>172</sup> The panel remanded the case back to the district court without addressing the nonstatutory labor exemption (or primary jurisdiction) issues.<sup>173</sup> On July 25, 2011, the parties settled the case.<sup>174</sup> The players eventually re-formed the NFLPA as a union and reached a new collective bargaining agreement with the owners on August 4, 2011.<sup>175</sup>

## 2. *Anthony v. NBA*

The nonstatutory labor exemption issue arose again in *Anthony v. NBA*,<sup>176</sup> a brief legal battle between the NBA owners and the NBPA<sup>177</sup> that began shortly after a series of fruitless negotiation sessions led to the expiration of the 2005 NBA collective bargaining agreement on

---

[must be] decided in the first instance by the National Labor Relations Board.” *United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus., Steamfitters & Refrigeration Union, Local 342, AFL-CIO v. Valley Eng'rs*, 975 F.2d 611, 613 (9th Cir. 1992) (citing *Glaziers & Glassworkers Local Union No. 767 v. Custom Auto Glass Dist.*, 689 F.2d 1339, 1342 (9th Cir. 1982).

<sup>168</sup> *See id.*

<sup>169</sup> *Brady*, 779 F. Supp. 2d at 1043.

<sup>170</sup> *See McNeil v. NFL*, , 1992 WL 315292, at \*1 (D. Minn. Sept. 10, 1992) (No. 4-90-476); *supra* notes 114-117 and accompanying text.

<sup>171</sup> *Brady v. NFL*, 779 F. Supp. 2d 992, 1020, 1040-41 (D. Minn. 2011), *vacated*, 644 F.3d 661 (8th Cir. 2011).

<sup>172</sup> *See Brady v. NFL*, 644 F.3d 661, 680-81 (8th Cir. 2011).

<sup>173</sup> *Id.* at 682.

<sup>174</sup> *See* Judy Battista, *Deal Ratified By N.F.L. Players*, N.Y. TIMES, Aug. 5, 2011, at B10, [http://www.huffingtonpost.com/2011/07/25/nfl-lockout-over-owners-players-agree-deal\\_n\\_908408.html](http://www.huffingtonpost.com/2011/07/25/nfl-lockout-over-owners-players-agree-deal_n_908408.html).

<sup>175</sup> *See id.*

<sup>176</sup> Complaint, *Anthony v. NBA*, No. 11-5525 (N.D. Cal. Nov. 15, 2011).

<sup>177</sup> The NBPA was formed in 1954 and has been the sole and exclusive collective bargaining representative of all NBA players since 1964. *See About the NBPA*, NAT'L BASKETBALL PLAYERS ASSN., <http://www.nbpa.org/about-us> (last visited Jan. 25, 2012).

---

---

June 30, 2011.<sup>178</sup> Immediately following the expiration of the agreement, the NBA exercised its right to lock out the NBA players.<sup>179</sup>

On August 2, 2011, the NBA and its teams, anticipating that the NBPA would follow the NFLPA's lead and dissolve its union, filed a complaint in the Southern District of New York seeking a declaration that the nonstatutory labor exemption immunized their lockout from antitrust attack.<sup>180</sup> Although the NBPA did eventually dissolve its union, the parties settled the litigation and reached a new collective bargaining agreement before the non-statutory labor exemption issues were addressed by the court.<sup>181</sup>

In both *Brady* and *Anthony*, the Leagues argue that, under the rationale in *Brown*, the nonstatutory labor exemption must extend to protect owners from antitrust attack even after the players have dissolved their unions.<sup>182</sup> Such an extension, however, would be inconsistent with the rationale underlying the exemption and would interfere with both federal antitrust and labor policy.

### III. THE NONSTATUTORY LABOR EXEMPTION MUST TERMINATE AFTER THE DISSOLUTION OF A UNION

*Brady* and *Anthony* represent the latest stage in the evolution of the conflict between antitrust and labor law in professional sports. The critical question presented in *Brady* and *Anthony* is whether the nonstatutory labor exemption should extend to immunize concerted owner conduct from antitrust scrutiny after the expiration of a collective bargaining agreement and dissolution of an employee union. The Leagues argue that immunizing league-imposed player restraints

---

<sup>178</sup> Steve Aschburner, *NBA Heads Into Lockout After Sides Can't Get Deal Done*, NBA.COM (June 30, 2011, 7:52 PM), <http://www.nba.com/2011/news/06/30/aschburner-lockout/index.html>.

<sup>179</sup> The parties also filed unfair labor practice charges against each other with the NLRB, each arguing that the other had failed to bargain in good faith. Brian T. Smith, *NBPA has Little Hope of Ending NBA Lockout with Pending NLRB Charge, Analysts Say*, SLTRIB.COM (Nov. 9, 2011 1:23 PM), <http://www.sltrib.com/sltrib/blogsjazznotes/52768001-62/labor-nlr-b-law-lockout.html.csp>.

<sup>180</sup> The NBA also asked for a declaration that the Norris-LaGuardia Act deprives a federal court of jurisdiction to enjoin the owners' lockout and that a dissolution of the NBPA would render all player contracts void and unenforceable. Complaint at 19-21, *NBA v. NBPA* (S.D.N.Y. 2011) (No. 11 Civ. 5369).

<sup>181</sup> Larry Coon, *Breaking Down Changes in New CBA*, available at [http://espn.go.com/nba/story/\\_/page/CBA-111128/how-new-nba-deal-compares-last-one](http://espn.go.com/nba/story/_/page/CBA-111128/how-new-nba-deal-compares-last-one).

<sup>182</sup> See *Brady v. NFL*, 779 F. Supp. 2d 992, 1005-06 (D. Minn. 2011), *vacated*, 644 F.3d 661 (8th Cir. 2011); Complaint at 17-21, *NBA v. NBPA* (No. 11 Civ. 5369) (S.D.N.Y. 2011).

beyond the point of union dissolution is consistent with *Brown* and its progeny as a natural extension of the nonstatutory labor exemption.<sup>183</sup> The Leagues also contend that antitrust immunity post-dissolution of the union is necessary to reconcile the conflict between antitrust and labor law, and to promote federal labor policy.<sup>184</sup> According to the Leagues, without an extension of the nonstatutory labor exemption, the players will use a combination of union dissolution and antitrust litigation as a ploy to gain bargaining leverage, thereby destroying the collective bargaining process.<sup>185</sup>

The Leagues' arguments, however, are inconsistent with *Brown*, in addition to the basic rationale behind the nonstatutory labor exemption, and rely on a faulty underlying premise. Specifically, the Leagues' interpretation of the scope of exemption is misplaced for three primary reasons. First, the Leagues' approach would frustrate both labor and antitrust policy by interfering with an employee's basic right to choose whether to be in a union. Second, their approach ignores the fact that no conflict remains between antitrust and labor law after the dissolution of a union. Third, their interpretation of the exemption rests on the false premise that section 1 of the Sherman Act should not apply to professional sports leagues. This represents yet another misguided attempt by the Leagues to achieve the "Shangri-la of everlasting immunity from the antitrust laws."<sup>186</sup>

A. *Extending the Nonstatutory Labor Exemption to Cover Post-Dissolution Agreements Would Subvert Both Federal Labor and Antitrust Policy*

The basic rationale of the nonstatutory labor exemption is that a limited repeal of antitrust law is warranted when necessary to "make the [labor] process work."<sup>187</sup> The Supreme Court has held that antitrust law should not to interfere with or unduly undermine the labor law process,<sup>188</sup> a process that is "regulated comprehensively and

---

<sup>183</sup> Complaint at 3-4,18, *NBA v. NBPA*, (No. 11 Civ. 5369) (S.D.N.Y. 2011); Memorandum of Law of the National Football League and Its Member Clubs In Opposition to Plaintiffs' Motion for a Preliminary Injunction, *Brady v. NFL*, 779 F. Supp. 2d 992 (D. Minn. 2011) (No. 0:11-cv-00639-SRN-JJG), 2011 WL 956159 at \*29-35.

<sup>184</sup> Complaint at 3-4, 18, *NBA v. NBPA*, (No. 11 Civ. 5369) (S.D.N.Y. 2011).

<sup>185</sup> See *infra* Part IV.B.

<sup>186</sup> *Powell v. NFL*, 930 F.2d 1293, 1309 (8th Cir. 1989) (Lay, J., dissenting).

<sup>187</sup> *Brown v. Pro Football*, 518 U.S. 231, 234, 237 (1996).

<sup>188</sup> See, e.g., *Roberts*, *supra* note 63, at 607 (stating that the labor "exemption should apply if subjecting an employer's practices to antitrust scrutiny would unduly

exclusively by the federal labor laws.”<sup>189</sup> The Leagues assert that immunizing employer agreements from antitrust scrutiny after the dissolution of a union is necessary to protect collective bargaining and the comprehensive regulations of the labor process.<sup>190</sup> Yet, the inverse is true. Extending the nonstatutory labor exemption to protect post-dissolution conduct from antitrust claims would result in a perversion of the nonstatutory labor exemption and subvert both federal labor and antitrust policy.

A fundamental principle of federal labor law is “voluntary unionism.” NFL and NBA players, like all employees, have a statutorily protected right to choose whether to have a union represent them and to refrain from collective bargaining.<sup>191</sup> It is a basic tenet of labor law that, “just as employees have a right to bargain collectively through a labor organization, they also have a corresponding right not to do so.”<sup>192</sup> Labor laws have created an asymmetry — employees, and not employers, can choose whether a labor market will be organized through a union and governed by labor law, or organized through competition and governed by antitrust law.<sup>193</sup> Employees are thus free

---

undermine the labor law process established by the NLRA”).

<sup>189</sup> Goldfein & Daly, *supra* note 139, at 36.

<sup>190</sup> See *infra* Part IV.B.

<sup>191</sup> See, e.g., *BE & K Constr. Co. v. NLRB*, 23 F.3d 1459, 1462 (8th Cir. 1994) (“The right to refrain from joining or assisting a union is an equally protected right with that of joining or forming a union.”); see also *Lee v. NLRB*, 393 F.3d 491, 494-95 (4th Cir. 2005) (same). Section 7 of the Wagner Act, 29 U.S.C. § 157 (2006), grants employees the right to “refrain from any or all [concerted] . . . activities.” Employers are also prohibited from forcing employees to form (or join), or not form (or join) a union. See 29 U.S.C. § 158(b)(1)(A) (2006). And employer commits an unfair labor practice if it “restrain[s] or coerce[s] employees in the exercise” of their section 7 rights. *Id.* The Supreme Court has held that “[t]here could be no clearer abridgment . . . of Section 7 . . . than impressing [a union] upon the nonconsenting majority.” *Int’l Ladies’ Garment Workers’ Union v. NLRB*, 366 U.S. 731, 737 (1961); see also *Pattern Makers v. NLRB*, 473 U.S. 95, 100 (1985) (section 7 of the Wagner Act explicitly “grants employees the right to ‘refrain from any or all [concerted] . . . activities.’” (quoting 29 U.S.C. § 157. Employers (and unions) that restrain or coerce employees in the exercise of their section 7 rights violate the NLRA.

<sup>192</sup> *Powell v. NFL*, 764 F. Supp. 1351, 1358 (D. Minn. 1991). Congress passed the Taft-Hartley Act, 29 U.S.C. § 157 (2006), in part, to allow employees to choose whether they wished to join a union or not.

<sup>193</sup> The Supreme Court has held that restrictions on a union member’s immediate right to resign from a union violate federal labor law. See *Pattern Makers*, 473 U.S. at 104 (“[U]nion restrictions on the right to resign [are] inconsistent with the policy of voluntary unionism [in the NLRA.]”); *Scofield v. NLRB*, 394 U.S. 423, 430 (1969) (noting that unions may discipline members only because members are “free to leave the union and escape the rule”); see also *Corrugated Asbestos Contractors, Inc. v. NLRB*, 458 F.2d 683, 687 (5th Cir. 1972) (stating that a court “cannot force a union

to compete, rather than collectively bargain, for terms and conditions of employment.<sup>194</sup> And, although collective bargaining is an important part of federal labor policy, the ability of employees to choose free competition or collective bargaining is an integral part of that same policy.

Significantly, the right to choose not to form a union and not to engage in collective bargaining exists before and after a collective bargaining relationship forms.<sup>195</sup> That is, employees can simply choose not to form a union, or they can choose to dissolve their union and end the bargaining relationship, even while that union is engaged in collective bargaining with an employer or multi-employer bargaining unit.<sup>196</sup> Employees can exercise their right to dissolve their union in

---

to continue, against its wishes, a relationship that is in its very nature predicated upon voluntariness”). It is also a violation of the labor laws for an employer and union to negotiate a new CBA after the parties are given notice that a majority of workers no longer authorize the union to represent them in collective bargaining. *See Dura Art Stone, Inc.*, 346 N.L.R.B. 149, 149 n.2 (2005); *Levitz Furniture Co.*, 333 N.L.R.B. 717, 724 (2001).

<sup>194</sup> Any competition between employers for these employees, is, of course, subject to scrutiny under antitrust law. *See supra* notes 67-75 and accompanying text.

<sup>195</sup> *See Catherine Meeker, Defining “Ministerial Aid”: Union Decertification Under the National Labor Relations Act*, 66 U. CHI. L. REV. 999, 1000-01 (1999). This presents another asymmetry between management and labor in the context of professional sports. A multi-employer bargaining unit, like the owners of professional sports teams, cannot opt out of bargaining after bargaining has begun absent mutual consent from the union or “unusual circumstances.” *Id.* For example, early on, the Supreme Court recognized that a “critical question” existed regarding the ability of employers to terminate the multiemployer bargaining arrangement. *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 410 (1982). Until 1958, the NLRB permitted employers to terminate the multi-employer bargaining unit in the middle of bargaining. *Id.* But, the NLRB, and then the Supreme Court, announced that withdrawal from multi-employer bargaining *after* negotiations have begun is not permitted absent “mutual consent” or “unusual circumstances.” *See id.* at 411; *Retail Associates, Inc.*, 120 N.L.R.B. 388, 395 (1958). Despite the fact that multiemployer bargaining is a voluntary process, the NLRB and Supreme Court have severely limited the circumstances under which employers may dissolve the multiemployer bargaining unit once bargaining has begun. *See Bonanno Linen*, 454 U.S. at 411-12; *Retail Associates*, 120 N.L.R.B. at 395. The Leagues may find fault with the asymmetry and ability of union to opt out mid-bargaining, but that is a complaint about the labor process carefully set up by Congress. This asymmetry should not be altered by limiting the antitrust rights of employees, and can only be altered by Congress, not by expanding the scope of judicially created exemption from antitrust law.

<sup>196</sup> *See, e.g., Pattern Makers*, 473 U.S. at 116 (White, J., concurring) (“The right to join or not to join a labor union includes the right to resign.”); *Brady v. NFL*, 779 F. Supp. 2d 992, 1015 (D. Minn. 2011) (“Employees have the right not only to organize as a union but also to refrain from such representation and . . . ‘de-unionize.’” (citing 29 U.S.C. Sec. § 157)). The NLRB has even held that a valid disclaimer of interest can occur during the term of a CBA. *See Am. Sunroof Corp.*, 243 N.L.R.B. 1128, 1129-30

the middle of collective bargaining through a formal decertification process or a disclaimer of interest.<sup>197</sup> Both decertification and disclaimer of interest effectively terminates a union, the collective bargaining process, and the bargaining relationship between employers and employees.<sup>198</sup>

For professional athletes, the choice between forming a union and not forming a union is a real one. Unlike most other labor forces, professional athletes are not completely fungible to their employers. Rather, they have unique, high-level, and varying skill sets, which cause teams to actively compete for their services.<sup>199</sup> Given the

---

(1979).

The NFL argued that the NFL players bargained in bad faith because they had planned to dissolve their union in the middle of bargaining, but the NFL did not claim that the termination of the bargaining relationship through the mid-bargaining dissolution of a union violates labor law because it clearly does not.

<sup>197</sup> To decertify their union, at least 30% of the employees must sign cards expressing that they no longer desire to be represented by the union. An election will then be held, where at least a majority of the employees must vote in favor of decertification. Following that vote, the union will no longer represent the employees. See 29 U.S.C. § 159 (2006); Meeker, *supra* note 195, at 1001. A disclaimer of interest occurs when a showing has been made that more than 50% of the employees in the union do not wish to be represented by the union. See Brady, 2011 WL 1535240. For purposes of this Article, I refer to “disclaimer of interest” and “decertification” collectively as “dissolution.” Although the NFL argued in *Brady* that the NFLPA’s disclaimer of interest is fundamentally different than the decertification mentioned in *Brown*, both are recognized by labor law and the NLRB as mechanisms for terminating a union’s representation of a group of employees. See, e.g., *Powell v. NFL*, 764 F. Supp. 1351, 1358 (D. Minn. 1991) (explaining that no formal process is needed for employees to dissolve their union); *NLRB v. Fl. Citrus Canners Coop.*, 288 F.2d 630, 639 (5th Cir. 1961) (where majority of employees repudiates a union, employer’s duty to bargain ceases, and employer is “not required to indulge in a useless gesture of petitioning for decertification”), *rev’d on other grounds*, 369 U.S. 404 (1962); *NLRB v. Superior Fireproof Door & Sash Co.*, 289 F.2d 713, 719 (2d Cir. 1961) (holding that “[d]ecertification is a time-consuming endeavor,” which is not required to end the duty to bargain; employer may refuse to bargain if it “has reasonable grounds to believe [the union] has lost majority support”). A decertification election proceeding may be conducted when either an employer or a competing union seeks to contest a union’s majority status and the union disagrees. See *Briggs Plumbingware, Inc. v. NLRB*, 877 F.2d 1282, 1289 (6th Cir. 1989) (explaining that when relying on union’s actual loss of majority status to rebut charges of unfair labor practice, employer must prove either “loss of an actual numerical majority or a Board election or decertification”); *Leedom v. Int’l Bhd. of Elec. Workers, Local 108*, 278 F.2d 237, 244 (D.C. Cir. 1960) (permitting independent union to intervene in decertification proceeding).

<sup>198</sup> See *infra* notes 266-72 and accompanying text.

<sup>199</sup> See *supra* notes 77-82 and accompanying text. Because, in part, of the great variation of the skill level of professional athletes, sports unions have preserved for their employees the right to individually negotiate salaries. See, e.g., *Harrison, supra*

competition, a free market system may yield better salaries for many of these athletes than would a system of collective bargaining with a union as competition for scarce elite athletes tends to drive up salaries.<sup>200</sup> Employers of professional athletes, in contrast, often prefer a unionized labor force — and the antitrust immunity that comes with it — to restrain competition for athletes' services and, therefore, lower salaries.<sup>201</sup>

The employees' decision to forego a union and collective bargaining for free competition does, of course, come with a price. Without a union and the protection of labor law, employees lose the bargaining strength of the collective, the right to strike, negotiated grievance procedures, pooled benefit plans, and a variety of other benefits and protections that are only afforded to unionized employees.<sup>202</sup> Consequently, players must engage in a cost-benefit analysis and ask a difficult question: is it worth it to give up their protections and benefits under labor law to gain access to free competition under antitrust law? More importantly, that is a choice the employees — and the employees only — have a right to make.<sup>203</sup>

Extending the nonstatutory labor exemption to prevent employees from gaining access to antitrust law, even after dissolving their union, would interfere with that choice. Such an extension would achieve exactly the opposite result that *Brown* claimed as inappropriate — it would allow antitrust law to interfere with federal labor policy.<sup>204</sup> By

---

note 63, at 584 (identifying players as nonfungible due to their talent and explaining that creates temptation to engage in bidding wars for players). *See generally* J.I. Case Co. v. Labor Bd, 321 U.S. 332, 338 (1944) (“[W]here there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly leave certain areas open to individual bargaining.”). Labor unions in the entertainment industry share this unique characteristic.

<sup>200</sup> In professional sports, athletes have achieved significant gains through the free market and antitrust litigation. *See* MICHAEL COZZILLO, MARK LEVINSTEIN, MICHAEL DIMINO & GABE FELDMAN, *SPORTS LAW: CASES AND MATERIALS* 382-400 (2d ed. 2007).

<sup>201</sup> *See Brown v. Pro Football, Inc.*, 50 F.3d 1047, 1058-60 (D.C. Cir. 1995) (Wald, J., dissenting). As Professor Harper notes, multi-employer bargaining in professional sports “allow[s] employers to achieve through joint collective bargaining what the antitrust laws presumably would not allow them to achieve through collusion outside bargaining; the depression of employment terms below the level that would be set in a free, competitive market.” Harper, *supra* note 34, at 1697.

<sup>202</sup> *See Brown*, 50 F.3d at 1057.

<sup>203</sup> There is, of course, no guarantee that the union will ever be reconstituted after dissolution.

<sup>204</sup> It also conflicts with *Brown's* conclusion that players can choose labor law and the collective bargaining process, or antitrust law and free competition. *See supra* notes 147-149 and accompanying text.

denying the employees access to antitrust law after they have formed and later dissolved their union, the nonstatutory labor exemption would deprive employees of their fundamental right to return to a labor market under free competition principles. After all, if the employees had never formed a union, there is no question that free competition would govern their labor market. Nonunionized players would have had access to antitrust law to challenge employer agreements that unreasonably restricted competition in that market.<sup>205</sup> Under the Leagues' theory, the nonstatutory labor exemption would extend long term blanket immunity from antitrust liability to employers simply because collective bargaining had previously occurred. This theory subverts federal labor policy by effectively depriving employees of their statutorily protected right to opt out of a union by penalizing their initial involvement with a union.

Moreover, the extension of the exemption beyond the dissolution of the union would, in effect, deprive employees of their rights under labor law and antitrust law. The Leagues contend that it is unfair for the players unions to have the best of both worlds — they do not exist for purpose of antitrust litigation, but they can immediately reappear to engage in collective bargaining.<sup>206</sup> However, extending the exemption post-dissolution leaves employees with the worst of both worlds — no protection from antitrust or labor law.<sup>207</sup> Because the employees are no longer in a union and no longer engaged in collective bargaining, federal labor law governing unions and the collective bargaining process no longer protects them.<sup>208</sup> And, because of the expansion of the nonstatutory labor exemption, antitrust law

---

<sup>205</sup> In fact, Major League Soccer (“MLS”) players did just this, choosing not to form a union and instead bringing an antitrust suit against the MLS and its teams. The First Circuit eventually dismissed the antitrust claim because they players failed to prove a relevant market, but there was no question that the players had access to antitrust law. *Fraser v. MLS*, 284 F.3d 47, 61 (1st Cir. 2002) (contemplating the players' claims that were brought under the Sherman Act and dismissing them for failure to prove a relevant market).

<sup>206</sup> NFL's Opening Brief, *Brady v. NFL*, at \*45-52, 644 F.3d 661 (8th Cir. 2011) (No. 11-1898) 2011 WL 2003085 .

<sup>207</sup> In *Powell*, Judge Lay cautioned that a “union should not be compelled, short of self-destruction [through decertification], to accept illegal restraints it deems undesirable.” *Powell v. NFL*, 930 F.2d 1293, 1310 (8th Cir. 1989) (Lay, J., dissenting). In *Brady* and *NBPA*, the Leagues ask the courts to take one step further to compel employees to accept illegal restraints even after they have self-destructed their union.

<sup>208</sup> *Brady v. Nat'l Football League*, 779 F. Supp. 2d 992, 1040 (D. Minn. 2011), *vacated*, 644 F.3d 661 (8th Cir. 2011).

that governs free competition would no longer protect the players.<sup>209</sup> Extending the nonstatutory labor exemption past the dissolution of a union does “preserve the delicate balance” created by federal labor law by protecting the parties’ basic labor rights; instead, it disturbs that balance by interfering with employees’ basic right of voluntary unionism while also depriving them of their basic antitrust rights.<sup>210</sup>

B. *No Conflict Exists between Antitrust and Labor Law After the  
Dissolution of a Union*

The Leagues’ attempts to extend the nonstatutory labor exemption lack merit because no conflict remains between antitrust and labor law after a union dissolves. Through the nonstatutory labor exemption, the Supreme Court ruled that an implied repeal of the antitrust laws is warranted if necessary to protect the labor process and the comprehensive regulations<sup>211</sup> of federal labor policy when labor law and antitrust law conflict.<sup>212</sup> The necessary antecedent for the nonstatutory labor exemption is a conflict between federal antitrust and labor law.<sup>213</sup> There must be “a plain repugnancy between the two regimes . . . in which case repeal would be implied only to the extent of the repugnancy.”<sup>214</sup> The nonstatutory labor exemption only applies where a conflict renders it “difficult, if not impossible,” to enforce the

---

<sup>209</sup> *Id.*

<sup>210</sup> Congress, of course, is free to act to limit the ability of employees to dissolve their union in the middle of bargaining, but it is not for the court to stretch the limited antitrust immunity granted to joint-employer conduct to interfere with the labor process.

<sup>211</sup> *See supra* notes 136-41.

<sup>212</sup> *See supra* notes 120-36.

<sup>213</sup> *See, e.g.,* *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (“It is a cardinal principle of construction that repeals by implication are not favored. When there are two [federal] acts upon the same subject, the rule is to give effect to both if possible.”).

<sup>214</sup> *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 322 (1963); *see also* *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979) (recognizing that exemptions from antitrust law must be narrowly construed); *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963) (explaining that repeal of antitrust law “is to be regarded as implied only if necessary to make the [conflicting federal statute] work, and even then only to the minimum extent necessary”). Moreover, the Supreme Court has also made clear that entities seeking special dispensation from the antitrust laws should petition Congress. *See Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 689-90 (1978) (noting that requests for antitrust exemptions are “properly addressed to Congress”).

labor laws if the antitrust laws also applied.<sup>215</sup> Absent this conflicting statutory regime, antitrust law must be given full effect.<sup>216</sup>

In *Brown*, a clear conflict between antitrust law and labor law existed. The NFL owners were faced with a Catch-22 scenario: they had not only a right, but also an obligation under federal labor law, to unilaterally implement the terms of their last, best offer after the parties bargained to impasse.<sup>217</sup> Yet, the players attempted to challenge those terms as antitrust violations.<sup>218</sup> The Court deemed implied repeal of antitrust law necessary because the NFL players' antitrust challenge would have interfered with the NFL owners' labor law obligations to implement a particular set of terms.<sup>219</sup>

Similarly, the Court found an implied repeal of antitrust law necessary to protect the terms of a collective bargaining agreement from attack in *Mackey and Wood*.<sup>220</sup> The requirement under labor law that employers and unions bargain over terms of employment would have been futile if agreement on those terms could be held to violate antitrust law.<sup>221</sup> The courts created the nonstatutory labor exemption to protect critical labor law rights and obligations from antitrust attack.<sup>222</sup> The protections of the exemption, however, are triggered only when a repugnancy between labor rights and antitrust rights exists that necessitates an exemption from antitrust law.

There is no conflict, much less a repugnancy, between antitrust and labor law after a union dissolves. Dissolution of a union — accomplished through either decertification or disclaimer of interest<sup>223</sup> — ends the union's status as a representative in collective bargaining, the collective bargaining process, and the collective bargaining

---

<sup>215</sup> *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236-37 (1996).

<sup>216</sup> See, e.g., *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 862 (7th Cir. 1998) (noting that “fundamentally each federal statute has equal effect under the law”); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (“It is a cardinal principle of construction that repeals by implication are not favored. When there are two [federal] acts upon the same subject, the rule is to give effect to both if possible.”).

<sup>217</sup> *Brown*, 518 U.S. at 241-42.

<sup>218</sup> *Id.* at 234.

<sup>219</sup> *Id.* at 250.

<sup>220</sup> See *supra* notes 90-93 and accompanying text.

<sup>221</sup> See *Wood v. NBA*, 809 F.2d 954, 961 (2d Cir. 1987).

<sup>222</sup> See *id.*; *Mackey v. NFL*, 543 F.2d 606, 611-12 (8th Cir. 1976).

<sup>223</sup> See *supra* notes 197-198 and accompanying text. The dissolution of the union, either through decertification or disclaimer of interest, need not be permanent. In fact, if the employer consents, there is no limit on how quickly a dissolved union can reform. See, e.g., *Brady v. NFL*, 779 F. Supp. 2d 992, 1015 (D. Minn. 2011) (noting that “there is no legal support for any requirement that a disclaimer be permanent”).

relationship between the employees and employers.<sup>224</sup> The nonstatutory labor exemption is, therefore, no longer necessary “to make the collective-bargaining process work” because the collective bargaining process is over.<sup>225</sup> Additionally, if no union or collective bargaining relationship exists,<sup>226</sup> the comprehensive regulations of labor law governing collective bargaining do not apply. Free competition and antitrust law, not labor law, would govern the labor market in such instance.<sup>227</sup> At that point, there is simply no conflict between antitrust and labor law and, therefore, no justification for an exemption from antitrust law.<sup>228</sup>

There can be no Catch-22 situation without the conflict between antitrust and labor law.<sup>229</sup> In *Brown and Powell*, a Catch-22 existed because labor law required the owners to implement specific terms, but they faced antitrust scrutiny for implementing those terms.<sup>230</sup> In *Brady and Anthony*, by contrast, the owners only face one legal regime — antitrust law — after the unions dissolve. At that point, labor law neither protects employees nor restricts employers.<sup>231</sup> The players lose the benefits associated with being in a union, and the owners gain the ability to unilaterally implement terms and conditions of employment. Consequently, labor law places no requirements on the owners after the dissolution of a union, and the owners are not required to comply

---

<sup>224</sup> See *Powell v. NFL*, 764 F. Supp. 1351, 1356-57 (D. Minn. 1991).

<sup>225</sup> *Brown v. NFL*, 518 U.S. 231, 234 (1996).

<sup>226</sup> Either because employees have chosen not to form a union or have chosen to dissolve their union.

<sup>227</sup> *Brown*, 518 U.S. at 250 (citing *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1057 (D.C. Cir. 1995)).

<sup>228</sup> See *Brady v. NFL*, 779 F. Supp. 2d 992, 1040 (D. Minn. 2011) (holding that the nonstatutory labor exemption ends “once the union disclaims its role as the bargaining agent for its member or formally obtains decertification”); *Powell v. NFL*, 764 F. Supp. 1351, 1358 (D. Minn. 1991) (holding that the nonstatutory labor exemption ends when a union dissolves because the employees “are no longer part of an ongoing collective bargaining relationship with the defendants”); see also *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (“[T]he only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.”). As Professor Weistart noted in one of the seminal works on the nonstatutory labor exemption, “the ultimate objective of the labor exemption . . . [is] the furtherance of employees’ goals through collective action.” Weistart, *supra* note 36, at 114. Once employees choose *not* to engage in collective action, the exemption has no role.

<sup>229</sup> Unlike in *Brown*, agreements made by the teams after the dissolution of the union do not “invite an unfair labor practice charge” because employers are not statutorily bound by labor law to implement particular terms after the dissolution of a union. *Brown*, 518 U.S. at 241-42.

<sup>230</sup> See *supra* notes 120-135 and accompanying text.

<sup>231</sup> *But see Brown*, 518 U.S. at 234-38.

with the conflicting statutory frameworks of antitrust and labor law. Rather, the owners are solely required — like all other joint ventures — to comply with the Sherman Act.<sup>232</sup>

The Leagues nevertheless argue that *Brady* and *Anthony* present a conflict because the prospect of an antitrust challenge after the dissolution of a union would not allow the multi-employer bargaining process to work. As the NFL contended in *Brady*, “[e]ven the *threat* of antitrust exposure following a union’s pre-expiration disclaimer puts the member clubs of a professional sports league into precisely the sort of untenable Catch-22 that the Court in *Brown* refused to countenance.”<sup>233</sup> The Leagues assert that the inherently cooperative nature of professional sports leagues — teams must agree on certain rules for the league to exist<sup>234</sup> — puts them in a “heads you win, tails I lose” situation that would render any joint action taken by the Leagues post-dissolution vulnerable to attack under section 1 of the Sherman Act.<sup>235</sup> This, in turn, would cripple the league’s ability to make basic decisions necessary for the league to exist and would provide employees with a “powerful new weapon” to disrupt the balance labor law contemplates.<sup>236</sup>

---

<sup>232</sup> See *infra* Part IV.C. The Leagues cannot, of course, contend that dissolution of a union in the middle of bargaining violates the federal labor laws. See generally *supra* note 194 (considering applicability and contours of antitrust law, namely section 1 of the Sherman Act and the Rule of Reason test).

<sup>233</sup> Memorandum of Law of the National Football League and Its Member Clubs In Opposition to Plaintiff’s Motion for a Preliminary Injunction at 38, *Brady v. NFL*, 779 F. Supp. 2d 992 (D. Minn. 2011) (No. 0:11-cv-00639-SRN-JJG) .

<sup>234</sup> See *supra* notes 63-66 and accompanying text.

<sup>235</sup> As the NFL argued in *Brady*:

Necessary decisions designed to promote competitive balance on the football field and enhance the quality of the League’s entertainment product would expose the member clubs to treble-damage antitrust claims by players contending that the decisions unreasonably restrain competition in a purported market for player services; each suit would create a debilitating cloud of legal uncertainty over NFL clubs (to say nothing of the unrecoverable expense and burden of defending such suits).

Memorandum of Law of the National Football League and Its Member Clubs In Opposition to Plaintiff’s Motion for a Preliminary Injunction at 46, *Brady v. NFL*, 779 F. Supp. 2d 992 (D. Minn. 2011) (No. 0:11-cv-00639-SRN-JJG).

<sup>236</sup> In *Brady*, the NFL argued that

“a rule permitting instantaneous assertion of antitrust liability at the moment of disclaimer would sound the death knell for multiemployer bargaining. . . . If plaintiffs prevail here, disclaimer would become the tactic of choice at or even before impasse, resulting in disincentives for employers to engage in multiemployer bargaining in the first instance, and for unions

The Leagues further argue that the dissolution of the unions are shams that the players are using as a ploy to gain leverage at the bargaining table.<sup>237</sup> The argument is that the players would dissolve their union to pick up the antitrust “sword” in order to gain leverage at the bargaining table, but would subsequently re-form their union and re-engage in bargaining once they have achieved that leverage.<sup>238</sup> According to the Leagues, ending the nonstatutory labor exemption upon dissolution of the union would leave the owners with two choices: capitulate to any demands the union makes during collective bargaining, or unilaterally agree on terms and conditions of employment that will be found illegal under Section 1 of the Sherman Act.<sup>239</sup>

---

to bargain in good faith.”

NFL Reply Brief at 33, *Brady v. NFL*, 644 F.3d 661 (8th Cir. 2011) (No. 0:11-cv-00639-SRN-JJG).

<sup>237</sup> As the NFL argued in *Brady*,

“[i]n the context of multiemployer bargaining, the mere potential for antitrust scrutiny, activated at an unpredictable time by unilateral decision of the potential antitrust plaintiffs across the bargaining table, would frustrate federal labor law by inhibiting collective action and robust negotiations throughout the bargaining process. . . . If the leverage associated with potential antitrust claims were added to a union’s arsenal, its incentives to bargain in good faith and to reach agreements would be diminished.”

Opening Brief of Appellants at 45-47, *Brady v. NFL*, 644 F.3d 661 (8th Cir. 2011) (No. 0:11-cv-00639-SRN-JJG).

<sup>238</sup> See, e.g., *Powell v. NFL*, 764 F.Supp. 1351, 1354 (D. Minn. 1991) (claiming that the NFLPA decertification was a “sham”).

<sup>239</sup> For example, the NBA asserts that the “Union’s improper threats of antitrust litigation are having a direct, immediate and harmful effect upon the ability of the parties to negotiate a new collective bargaining agreement” and that the potential dissolution of the NBPA is a threat “to extract more favorable terms and conditions of employment in ongoing collective bargaining negotiations with the NBA.” Complaint at ¶ 1, *NBA v. NBPA*, (S.D.N.Y. Aug. 2, 2011) (No. 11 Civ 5369). Similarly, the NFL argued that a rule permitting antitrust intervention immediately upon dissolution of the union would not give sufficient “breathing room” to the bargaining process and would allow antitrust law to interfere with the balance the Supreme Court created between antitrust and labor law. Reply Brief of Appellants at 33, *Brady v. NFL*, 644 F.3d 661 (8th Cir. 2011) (No. 0:11-cv-00639-SRN-JJG).

The fallacy of this argument is explored in detail in this section, but to the extent that the dissolution of the union is a “strategic” decision to gain access to antitrust law, it is a strategic decision that was forced on the players by the Supreme Court’s decision in *Brown*. Rather than give employees access to antitrust law at some point after impasse, the Supreme Court’s decision in *Brown* “dr[o]ve employees to decertify their unions, as the only guarantee against threats by multiemployer groups to unilaterally impose industry-wide caps and unacceptable working conditions.” *Brown*

This argument, however, ignores the respective rights and obligations of players and team owners after a union dissolves. The motivation of the players in deciding to dissolve their union is irrelevant.<sup>240</sup> The players give up significant rights and protections under labor law when their union dissolves. At the point of dissolution, the comprehensive regulations governing collective bargaining no longer apply, and the owners are free to unilaterally impose terms of employment.<sup>241</sup>

From a labor law perspective, the point of dissolution is where the owners have the most leverage and the greatest freedom to implement their preferred labor restraints.<sup>242</sup> With no union and no collective bargaining process, the Leagues would be free to implement rules that would put significant pressure on the majority of the players. For example, the owners could agree to eliminate minimum player salaries, benefits, and health care rights. None of these agreements would raise serious antitrust concerns, though they would harm a significant majority (if not all) of the players. Thus, to the extent that the players gain an antitrust “weapon” by dissolving their union, the owners gain an equally — if not more — powerful weapon by acquiring a freedom from the restrictions of labor law.

The extent to which an antitrust suit serves as a weapon, it is a weapon designed by Congress and cannot be eliminated by an expansive view of a judicially created exemption from antitrust law.<sup>243</sup>

---

v. Pro Football, Inc., 50 F.3d 1047, 1058-60 (D.C. Cir. 1995) (Wald, J., dissenting); see also *Brown v. Pro Football*, 518 U.S. 231, 250 (1996) (suggesting decertification as a means to end the nonstatutory labor exemption); *Powell v. NFL*, 930 F.2d 1293, 1310 (8th Cir. 1989) (Lay, J., dissenting) (noting that allowing the exemption to continue after impasse “leads to the ineluctable result of union decertification in order to invoke rights to which the players are clearly entitled under the antitrust laws”).

<sup>240</sup> The NLRB’s General Counsel has concluded that “the fact that the disclaimer was motivated by ‘litigation strategy,’ i.e., to deprive the NFL of a defense to players’ antitrust suits . . . is irrelevant so long as the disclaimer is otherwise equivocal and adhered to.” *In re Pittsburgh Steelers*, No.6-CA-23143, 1991 WL 144468, at \*2 n.8 (N.L.R.B. June 26, 1991). The General Counsel further explained that for a disclaimer to be effective, it “must be unequivocal, made in good faith, and unaccompanied by inconsistent conduct.” *Id.* This Article assumes, as the court found, that the disclaimer of interest by the NFLPA was unequivocal, made in good faith, and unaccompanied by inconsistent conduct. See *Brady*, 779 F. Supp. 2d at 1018.

<sup>241</sup> Subject to scrutiny under antitrust law, of course.

<sup>242</sup> See, e.g., *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22 n.15 (1987) (referring to “the basic fact that a nonunion employer is freer to set employment terms than is a unionized employer”).

<sup>243</sup> Courts do not have the “authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of [their] assessment of that party’s bargaining power.” *Am. Ship Bldg. Co. v.*

The fact that owners may be willing to give concessions to players to enter into a collective bargaining relationship in order to strip the players of their antitrust weapon does not make antitrust law an unfair bargaining ploy.<sup>244</sup> It merely represents a cost to the owners entering into a collective bargaining relationship in exchange for players to forego their antitrust rights.<sup>245</sup>

More importantly, the argument presents a false choice that reveals the unstated and false premise underlying the Leagues' expansive interpretation of the nonstatutory labor exemption. *Brady* and *Anthony* present team owners with two choices: players can negotiate a collective bargaining agreement with a union that contains rules of employment, or, if the union dissolves, the owners can unilaterally impose rules of employment and defend them under antitrust law. That the Leagues claim they are put in an untenable position when faced with the latter option — antitrust scrutiny and *no* restrictions under labor law — is illuminating. Stripped to its core, the Leagues' argument is not that the antitrust laws should not apply post-dissolution of a union in order to protect the labor bargaining process.<sup>246</sup> Rather, the Leagues' real argument is that antitrust law should not apply to sports leagues in any context.<sup>247</sup> The Leagues are

---

NLRB, 380 U.S. 300, 317 (1965). Rather, that authority rests with Congress.

<sup>244</sup> In fact, it is perhaps the NFL that is using labor law as a ploy to protect it from antitrust law. See *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737 (1961) (“There could be no clearer abridgment” of section 7 of the NLRA than “impressing [a union] upon the nonconsenting majority.”).

<sup>245</sup> If the Leagues want the benefit of antitrust immunity that comes with the existence of a union and collective bargaining, the Leagues have to make it more beneficial for the employees (through terms offered with respect to conditions of employment) to be in a union than not.

<sup>246</sup> The dissolution of a union — even mid-bargaining — is part of the labor process and represents the employees' choice to move from a labor market governed by labor law to one governed by antitrust law. See *supra* notes 189-197 and accompanying text. The NFL's retort might be that the dissolution process is being *abused* by allowing the players to resort to antitrust law post-dissolution, but that relies on the premise that the free market and antitrust scrutiny is abusive. See *infra* Part IV.C.

<sup>247</sup> See *infra* note 248 and accompanying text. Commentators have similarly argued that application of the Rule of Reason to the internal rules of professional sports leagues is inherently arbitrary, unpredictable, and unfair. As Professor Roberts has stated, “a league, by virtue of its unique inherently wholly integrated nature, out never to have its internal conduct subjected to case-by-case Rule of Reason review” and that the application of Section 1 of the Sherman Act to sports leagues “is confusing, internally inconsistent, and at odds with the basic objective of Section 1—consumer wealth maximization.” Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 To Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219, 221 (1984); see also *id.* at 293 (“Judicial second-guessing about the wisdom of

merely trying to use the exemption as a “cat’s-paw to pull [their] employers’ chestnuts out of the antitrust fires.”<sup>248</sup>

C. *The Leagues Are Attempting to Manipulate the Nonstatutory Labor Exemption to Gain Broad Immunity from Antitrust Law*

The Leagues cloak their true argument — that antitrust law should not apply to professional sports leagues — in the guise of extending the nonstatutory labor exemption to prevent antitrust law from interfering with the collective bargaining process. The Leagues argue that ending the exemption at the point of dissolution provides players with tremendous leverage. But, the ability of the players to use the threat of antitrust attack to gain leverage for extracting concessions at the bargaining table hinges on the embedded argument that antitrust law should not apply to agreements between professional sports teams, and that such agreements cannot survive scrutiny under antitrust law.<sup>249</sup> After all, there simply is no employee bargaining leverage if the Leagues can unilaterally implement rules that will survive antitrust scrutiny.<sup>250</sup> The Leagues’ interpretation of the scope of the nonstatutory labor exemption is not shaped exclusively, or even primarily, by the impact of antitrust law on the labor process.

Rather, the Leagues’ interpretation of the nonstatutory labor exemption is driven by their longstanding belief that the inherently cooperative nature of professional sports leagues entitles them to immunity from section 1 of the Sherman Act.<sup>251</sup> In essence, the Leagues claim that antitrust law cannot be applied to them in a

---

[internal decisions of sports leagues] creates arbitrary and unproductive rules for restraining intraenterprise rivalry, and causes confusion as to what is lawful, thereby deterring efficiency-enhancing league conduct. Further, as a practical matter, courts and juries are not well equipped to determine what is in a league’s interests.”)

<sup>248</sup> U.S. v. Women’s Sportswear Mfrs. Ass’n, 336 U.S. 460, 464 (1949).

<sup>249</sup> The NFL players in *Brady* have thus argued that the “NFL plainly, and unlawfully, seeks to impose a collective bargaining obligation on an unwilling group of workers for the singular purpose of escaping liability for a blatant violation of the antitrust laws.” Brief of Appellants at 17, *Brady v. NFL*, 644 F.3d 661 (8th Cir. 2011) (No. 0:11-cv-00639-SRN-JJG).

<sup>250</sup> The Leagues will likely lose the ability to lock out their players after the dissolution of a union, because a lockout is a “group boycott” that is unlikely to survive scrutiny under section 1 of the Sherman Act. The players, however, will similarly have lost their ability to strike if their union dissolves.

<sup>251</sup> See Gabriel A. Feldman, *The Puzzling Persistence of the Single-Entity Argument for Sports Leagues: American Needle and the Supreme Court’s Opportunity to Reject a Flawed Test*, 2009 WIS. L. REV. 835, 846 n.67 (2009).

principled or coherent way.<sup>252</sup> That precise argument has manifested itself in five different theories in the Leagues' decades-long quest for the "Shangri-la of everlasting antitrust immunity."<sup>253</sup> The five arguments are as follows: (1) leagues are single entities incapable of violating section 1 of the Sherman Act; (2) agreements among the interdependent teams in professional sports leagues cannot survive scrutiny under section 1 and, thus, leagues should be exempt; (3) Congress did not intend to apply antitrust law to the unique industry of professional sports; (4) antitrust law was not intended to apply to labor markets; and (5) section 1 of the Sherman Act does not provide a meaningful framework for scrutinizing league agreements. All of these arguments, discussed in turn below, have been rejected, either by the courts, Congress, or both. The Leagues' manipulation of the nonstatutory labor exemption in *Brady* and *Anthony* is little more than the rehashing of these five theories.

The Leagues' also attempt a sixth bite of the antitrust immunity apple through the masked theory of attempting to balance the conflict between antitrust and labor law. The Leagues' first argument for broad antitrust immunity most closely mirrors the underlying, embedded argument in *Brady* and *Anthony* that the teams within the Leagues are not true competitors, but rather are "single entities" incapable of conspiring for purposes of Section 1 of the Sherman Act.<sup>254</sup> The common single entity argument raised both in *Brady* and *Anthony* is the claim that the interdependent nature of sports leagues entitles them to special treatment under the antitrust laws.<sup>255</sup> Specifically, the crux of the single entity argument is that individual teams within a league are economically interdependent<sup>256</sup> and that cooperation among the teams is necessary for the leagues' existence.<sup>257</sup>

---

<sup>252</sup> *See id.*

<sup>253</sup> *Powell v. NFL*, 930 F.2d 1293, 1309 (8th Cir. 1989) (Lay, J., dissenting).

<sup>254</sup> Because section 1 requires an agreement, and an agreement requires more than one entity, a single entity cannot, as a matter of law, violate section 1. *See* Gabriel A. Feldman, *The Puzzling Persistence of the Single Entity Argument for Sports Leagues: American Needle and the Supreme Court's Opportunity To Reject a Flawed Test*, 2009 WIS. L. REV. 895, 902 (2009) ("Section 1 explicitly requires an agreement, and an agreement requires the cooperation of at least two entities — Section 1, like the tango, requires multiplicity: A company cannot conspire with itself." (internal quotation omitted)).

<sup>255</sup> *See id.* at 846 n.67.

<sup>256</sup> Leagues also assert that the teams are interdependent because they share revenue with each other. Revenue-sharing agreements in the NFL do align the interests of NFL teams and provide them with a common purpose. But *Copperweld* explicitly rejects the argument that a "common purpose" is sufficient to render multiple companies a single entity. *Copperweld Corp. v. Independence Tube Corp.*,

First, the Leagues assert that professional sports are unique because no team can produce a game without the cooperation of at least one other team.<sup>258</sup> Teams must agree on a schedule, the number of games in a season, the size of the field, the number of players on the field, and other rules that define the game itself. Teams must also agree, according to the Leagues, on rules regarding roster limits, player salaries, player movement, and other player restraints.<sup>259</sup> As the NFL contended in *American Needle v. NFL*:

[n]o member club can produce even a single unit of production — one football game — on its own; only through their collective actions can the member clubs produce the full season of games, including the playoff and Super Bowl games, that make NFL Football a unique and valuable product.<sup>260</sup>

Because of this need for common rules and the inability of individual teams to produce the “league product” without reaching agreements with other teams, the Leagues argue that they are single entities. As such, it is inappropriate to subject the agreements among interdependent teams to scrutiny under section 1.

After nearly sixty years of staking their single entity claim (almost entirely unsuccessfully), the Supreme Court unanimously rejected it in *American Needle*. The Court held that each of the teams “is a substantial, independently owned, and independently managed business . . . [that] compete with one another, not only on the playing field, but to attract fans, for gate receipts and for contracts with

---

467 U.S. at 771 (1983) (“A section 1 agreement may be found when the conspirators had a unity of purpose or common design and understanding, or a meeting of minds in an unlawful arrangement.”). And, while the revenue sharing within each league does contribute to the teams’ unity of interests, the revenue sharing agreements themselves might be violations of section 1. The teams are not inherently unified; rather, much of the unity stems from the revenue sharing. *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1149 (9th Cir. 2003). (“Absence of actual competition may simply be a manifestation of the anticompetitive agreement itself.”).

<sup>257</sup> Major League Baseball made this argument in a recent case. See *MLB Brief, Salvino v. MLB*, 542 F.3d 290, 332 (2008) (No. 06-1867-cv) (“One Club does not individually create the value and appeal of the MLB Marks; rather the games, pennant races and World Series excitement contribute to consumer’s desire to purchase licensed merchandise.”).

<sup>258</sup> See *infra* note 262.

<sup>259</sup> See *Feldman, supra* note 254, at 857.

<sup>260</sup> Brief for American Needle at 6, *American Needle, Inc. v. New Orleans Saints*, 538 F.3d 736 (2008) (No. 07-4006), 2008 WL 937055 at \*6. The NFL also argued that “the economic value of any individual club derives almost entirely from its participation.” *Id.*

managerial and playing personnel.”<sup>261</sup> The Court also recognized the interdependent nature of sports leagues, but concluded that leagues are not single entities.<sup>262</sup> Rather, the NFL is a joint venture between thirty-two competitors, and agreements among these competitor-teams have the potential to achieve anticompetitive effects harmful to consumer welfare.<sup>263</sup> Thus, the Court confirmed that restraints among these interdependent teams must be scrutinized under section 1 of the Sherman Act.<sup>264</sup>

Under the guise of extending the nonstatutory labor exemption, the Leagues are essentially making the same argument in *Brady* and *Anthony* that the Supreme Court rejected in *American Needle*. In *Brady*, for example, the NFL argued that “the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival.”<sup>265</sup> The NFL further argued that subjecting post-dissolution agreements among teams to antitrust scrutiny is “especially pernicious in the context of professional sports leagues where, because of the need for common rules establishing terms and conditions of player employment, multi-employer bargaining is essential.”<sup>266</sup> In other words, in *Brady* and *Anthony*, the Leagues argue

---

<sup>261</sup> *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2012-13 (2010).

<sup>262</sup> *See id.* at 2213-14.

<sup>263</sup> *See id.* at 2215.

<sup>264</sup> *Id.* at 2013; *see also* Lazaroff, *supra* note 72, at 201 (“If [player] restraints are unnecessary to accomplish the legitimate ends of the joint venture, or are overbroad or severely anticompetitive,” they will be illegal under section 1 of the Sherman Act.).

<sup>265</sup> NFL Opposition to Preliminary Injunction at 37-38, *Brady v. NFL*, 644 F.3d 661 (8th Cir. 2011) (No. 11-639), 2011 WL 1535240, at \*13 (quoting *Brown*, 518 U.S. at 248-49).

<sup>266</sup> *Id.* Similarly, in the Eighth Circuit, the NFL argued that subjecting the league to antitrust attack immediately upon dissolution of the union is “especially pernicious in the context of professional sports leagues whose member clubs “must cooperate in the production and scheduling of games, [which] provides a perfectly sensible justification for making a host of collective decisions.” Brief of Appellants at 48 n.14, *Brady v. NFL*, 644 F.3d 661 (8th Cir. 2011) (No. 0:11-cv-00639-SRN-JJG) (quoting *Am. Needle*, 140 S. Ct. 2201, 2216 (2010)). Ironically, the NFL cites *American Needle* in making the argument that the nonstatutory labor exemption should be expanded to gain the antitrust exemption that the Supreme Court rejected in *American Needle*. In their brief to the Supreme Court in *Brown*, the NFL argued that “[b]ecause of the need for many common terms and conditions of employment,” scrutinizing league rules under antitrust law “would inevitably cause chaos, if not a complete shutdown of league operations, upon the expiration of every collective bargaining agreement . . . and . . . cripple the League’s ability jointly to produce its common product, which by its very nature requires that numerous terms and conditions of employment be common to all clubs.” Brief for Respondent at 47, *Brown v. Pro Football, Inc.*, 518

that the interdependent nature of sports leagues requires them to make certain agreements regarding player salaries, player movement, and other player restraints for their product (the league) to exist.<sup>267</sup> Accordingly, the Leagues contend that the players should not be able to challenge these restrictions under antitrust law.<sup>268</sup> That is not an argument about protecting federal labor policy from antitrust law, but rather it is an argument about protecting professional sports leagues from antitrust law. And, although cloaked in the rubric of the nonstatutory labor exemption, it is the precise argument that was rejected by the Supreme Court in *American Needle*.

The second argument embedded in the Leagues' attempted expansion of the nonstatutory labor exemption is the related contention that agreements among the uniquely interdependent sports teams simply cannot survive scrutiny under Rule of Reason.<sup>269</sup> Antitrust review would automatically render illegal any and all owner concerted action.<sup>270</sup> As discussed above, the Leagues argue that terminating the nonstatutory labor exemption at the point of dissolution traps them in an untenable Catch-22 situation<sup>271</sup> — if the teams do not capitulate to the players' demands at the bargaining table, the players will dissolve their union and challenge all league-imposed player restraints under antitrust law. Yet, the Supreme Court in *American Needle* made clear that “[professional sports] teams that need to cooperate *are not trapped by antitrust law*.”<sup>272</sup> Rather, as Justice Stevens held:

---

U.S. 231 (1996) (No. 95-388 ), 1996 WL 71820. Moreover, in its amicus brief to the Supreme Court, Major League Baseball explicitly argued that sports leagues should be considered single entities and, thus, exempt from scrutiny under section 1 of the Sherman Act. Brief of Major League Baseball as Amicus Curiae in Support of Respondents at 15 n.9, *Brown v. Pro Football, Inc.*, 512 U.S. 320 (1996) (No. 95-388); *see also* Brief of the National Basketball Association as Amicus Curiae in Support of Respondents at 16-17 n.9, *Brown v. Pro Football, Inc.*, 512 U.S. 320 (1996) (No. 95-388) (arguing that “the members of a professional sports league must act cooperatively in order to have any product to sell”); *id.* at 17 (arguing that it is “essential that the League and its players agree on uniform employment terms — such as the size of the team rosters, the NBA Draft, the Salary Cap, and free agency rules — designed to equalize each team’s ability to compete. . .”).

<sup>267</sup> *See* Brief of Appellants at 48, 48 n.14, *Brady v. NFL*, 644 F.3d 661 (8th Cir. 2011) (No. 0:11-cv-00639-SRN-JJG).

<sup>268</sup> *Id.*

<sup>269</sup> *See id.*

<sup>270</sup> *See, e.g., id.* at 47 (arguing that the nonstatutory labor exemption “cannot so immediately and easily convert collective conduct *encouraged* by the labor laws into collective conduct condemned by the antitrust laws”).

<sup>271</sup> *See* *Brown v. NFL*, 518 U.S. 231, 241-42 (1996).

<sup>272</sup> *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2216 (2010) (emphasis added).

[T]he special characteristics of this industry may provide a justification for many kinds of agreements. The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions . . . . We have recognized, for example, that the interest in maintaining a competitive balance among athletic teams is legitimate and important . . . [and is] *unquestionably an interest that may well justify a variety of collective decisions made by the teams.*<sup>273</sup>

Given the interdependence of professional sports teams and the value in achieving competitive balance through league-wide player restraints, Justice Stevens emphasized in *American Needle* that “the Rule of Reason may not require a detailed analysis.”<sup>274</sup> Instead, the Rule of Reason “can sometimes be applied in the twinkling of an eye.”<sup>275</sup> Although salary caps, free agency restrictions, roster limits and other player restraints can have the effect of restricting player movement, depressing salaries, and reducing the number of players in the market, these restraints can survive antitrust scrutiny if they are “reasonable” means of achieving the procompetitive benefit of (among other things) the efficient allocation of players and competitive balance. That is, if the post-dissolution league-imposed player restraints are procompetitive and essential to the successful operation

---

<sup>273</sup> *Id.* at 2216-17 (internal quotations omitted) (emphasis added). In addressing agreements to restraint the ability of individual colleges to broadcast college football games, the Supreme Court similarly noted that

“a certain degree of cooperation is necessary if the type of competition that [the NCAA] and its member institutions seek to market is to be preserved. It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.”

NCAA v. Bd. of Regents, 468 U.S. 85, 117 (1984).

<sup>274</sup> *American Needle*, 130 S. Ct. at 2217. Courts have consistently held that competitive balance is a legitimate — and unique — procompetitive benefit of professional sports leagues, and rules reasonably necessary to achieve that balance will survive Rule of Reason scrutiny. *See, e.g., NCAA*, 468 U.S. at 102-03; *Mackey v. NFL*, 543 F.2d 606, 820 (8th Cir. 1976); *United States v. NFL*, 116 F. Supp. 319, 326 (E.D. Pa. 1953) (recognizing the importance of competitive balance to the NFL). *See also Lazaroff, supra* note 72, at 174-75 (“The sui generis nature of professional sports organizations may well be relevant, or even determinative, in deciding [section 1 challenges].”).

<sup>275</sup> *American Needle*, 130 S. Ct. at 2217.

of professional sports, they should survive scrutiny under the Rule of Reason.<sup>276</sup> Of course, if the player restraints achieve anticompetitive effects and do not achieve competitive balance, they should be condemned under antitrust law.

The third approach embedded in the Leagues' argument in *Brady* and *Anthony* is a historical and broad appeal to the Supreme Court and Congress that the unique, interdependent nature of professional sports leagues warrants a broad federal exemption from antitrust law. Although the Supreme Court has granted Major League Baseball an exemption from antitrust laws,<sup>277</sup> the Court has explicitly and repeatedly declined to apply this antitrust exemption to other professional sports leagues, including the NFL and the NBA.<sup>278</sup>

Congress has also considered numerous bills that addressed the role of antitrust law in professional sports over the years.<sup>279</sup> Between 1951 and 1965 alone, members of Congress introduced more than sixty bills regarding the application of antitrust law to professional sports.<sup>280</sup> Many of these bills sought to provide broad antitrust immunity for

---

<sup>276</sup> Reasonable restraints imposed by sports leagues have been upheld under the Rule of Reason. See *Neeld v. NHL*, 594 F.2d 1297 (9th Cir. 1979); *Molinas v. NBA*, 190 F. Supp. 241 (S.D.N.Y. 1961); see also *Lazaroff*, *supra* note 72, at 174 (“[I]f these restraints, on balance, promote competition more than they hinder it, and contribute measurably to the realization of efficiencies, they should survive a Rule of Reason test.”); Gary R. Roberts, *The Evolving Confusion of Professional Sports Antitrust, the Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943, 1011, 1012-13 (1988) (contending that it will “not be difficult” for intra-league restraints to survive under the Rule of Reason because of the inherent interdependence of all teams).

<sup>277</sup> *Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208-09 (1922).

<sup>278</sup> In *Radovich v. NFL*, the Supreme Court held that Major League Baseball's antitrust exemption was “an exception and an anomaly” and that the Sherman Act applied to professional football. *Radovich v. NFL*, 352 U.S. 445, 447-48 (1957); see also *Haywood v. NBA*, 401 U.S. 1204, 1205 (1971) (“Basketball, however, does not enjoy exemption from the antitrust laws.”).

<sup>279</sup> For example, the House Judiciary Committee Antitrust Subcommittee conducted 15 days of hearings in 1958 to address the disparate antitrust treatment of professional baseball and professional football and to determine if antitrust law should apply to professional sports. See *Hearing on H.R. 5307 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 85th Cong. (1957). Despite repeated efforts, Congress has steadfastly refused to grant antitrust immunity to professional sports leagues. For a more detailed discussion, see Brief for Sports Fans Coalition as Amicus Curiae Supporting Appellees at 17-21, *Brady v. NFL*, 664 F.3d 661 (8th Cir. 2011) (No. 0:11-CV-00639-SRN), 2011 WL 2129892 at \*17-\*21.

<sup>280</sup> See Robert A. McCormick, *Baseball's Third Strike: The Triumph of Collective Bargaining in Professional Baseball*, 35 VAND. L. REV. 1131, 1161 (1982).

sports leagues.<sup>281</sup> Congressional testimony at a 1958 hearing reflected the sentiment of the Leagues:

Constant intervention in their affairs by paternalistic do-gooders will lead to nothing but trouble for all concerned. In our view the policy of decisions of sports should be made by people in sports — the owners and players alike. They should not be made by men in black robes who may never have been to a ball park.<sup>282</sup>

Although couched in a narrower context, the Leagues' interpretation of the nonstatutory labor exemption echoes the views of the proponents of these proposals that would have granted professional sports leagues broad congressional immunity from antitrust law. None of these proposals passed, however, and Congress has since chosen to pare back Major League Baseball's anomalous antitrust exemption rather than extend it to the other sports leagues.<sup>283</sup>

The fourth argument the Leagues put forth is that the Sherman Act should not apply to restrictions in the labor market for professional sports because antitrust law was not intended to apply to restrictions on *any* labor market.<sup>284</sup> The Leagues have argued that the Legislature

---

<sup>281</sup> *See id.*

<sup>282</sup> H.R. REP. NO. 85-1720, at 12 (1958).

<sup>283</sup> The Curt Flood Act, 15 U.S.C. § 12 (2006), repealed baseball's antitrust exemption as it applied to the market for Major League Baseball player services. Congress did grant a limited antitrust exemption to the NFL and the NBA through the Sports Broadcasting Act ("SBA"). 15 U.S.C. § 1291 (2006). The SBA exempts from antitrust scrutiny certain joint agreements among professional sports teams to pool their sponsored television broadcast rights for sale as package. As the Supreme Court has noted:

[It] is not without significance that Congress felt the need to grant professional sports an exemption from the antitrust laws. . . . The legislative history of this exemption demonstrates Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act.

NCAA v. Bd of Regents of the Univ. of Okla., 468 U.S. 85, 93 n.28. The SBA also approved the merger of the American Football League and the National Football League into a single league (the "NFL").

<sup>284</sup> For example, in *Brown*, the NFL explicitly argued that Section 1 of the Sherman Act does not apply to agreements that only restrain trade in labor markets. *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 234 (1996). Similarly, in a case involving an antitrust challenge to the NBA's entry draft, the NBA argued that antitrust law has no role with respect to restraints with purely intra-league labor effects, such as the draft. *See Robertson v. NBA*, 389 F. Supp. 867, 886 (S.D.N.Y. 1975) (quoting NBA Memorandum at 28); *see also Powell v. NFL*, 930 F.2d 1293, 1300 (8th Cir. 1989)

designed antitrust law to protect consumers and only condemns restrictions on competition in the product market.<sup>285</sup> The Leagues have, therefore, long contended that the particular restraints at issue in *Brady* and *Anthony* should not be subject to scrutiny under antitrust law. This argument, however, has been consistently and explicitly rejected for two reasons. First, the Supreme Court has unequivocally held that antitrust law applies to restraints on competition in labor markets.<sup>286</sup> Second, and more specifically, every court that addressed the issue, including the Supreme Court, has concluded that the Sherman Act applies to restrictions on the labor market in professional sports.<sup>287</sup>

---

(noting NFL's argument that "product market effects are an essential predicate for applying the antitrust laws"); Robert H. Jerry & Donald E. Knebel, *Antitrust and Employer Restraints in Labor Markets*, 6 INDUS. REL. L.J. 173, 184 (1984) (contending that the Sherman Act was not intended to apply to restrictions in labor markets); Roberts, *supra* note 63, at 637 ("[T]he only purpose for unionized athletes bringing an antitrust suit against the league for alleged restraints on their unionized labor market is to enhance their collective bargaining leverage, not to further antitrust policy."); Weistart, *supra* note 36, at 122 (noting that player "restraints in the sports cases . . . are more purely within the labor law sphere").

The NFL has, however, conceded that "agreements among competing employers to impose salary or other restraints in labor markets may be subject to the Sherman Act when they are imposed outside of the collective bargaining process and without regard to the labor laws." *Powell*, 930 F.2d at 1300.

<sup>285</sup> See *Mackey v. NFL*, 543 F.2d 606, 616-17 (8th Cir. 1976).

<sup>286</sup> See *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 428 (1990) (holding that the Sherman Act prohibited a boycott by lawyers in a labor market for indigent counsel services); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940) (noting that the Sherman Act does "embrace to some extent and in some circumstances labor unions and their activities"); see also *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787 (1975) (stating that the "sale of services" is "specifically included" within section 1 of the Sherman Act); *Anderson v. Shipowners Ass'n*, 272 U.S. 359, 361 (1926) (applying the Sherman Act to prohibit a system of employment registration utilized by shipowners); *Ostrofe v. H.S. Crocker Co., Inc.*, 740 F.2d 739, 742-43 (9th Cir. 1984) (holding that antitrust law applies to a multiemployer agreement not to hire "whistleblowers"); *Hennessey v. NCAA*, 564 F.2d 1136, 1147-51 (5th Cir. 1977) (holding that antitrust law applies to a multi-college agreement to limit the employment of college coaches). More broadly, the Supreme Court has announced that the Sherman Act is "comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1947).

In fact, Congress enacted the "statutory labor exemption" *because* the courts had held that restraints in the labor market were in violation of the Sherman Act. See *supra* notes 27-29 and accompanying text.

<sup>287</sup> See *Haywood v. NBA*, 41 U.S. 1204, 1205 (1971); *Radovich v. NFL*, 352 U.S. 445, 447-48 (1957) (holding that antitrust law applies to the labor market in the NFL); *NBA v. Williams*, 45 F.3d 684, 687 (2d Cir. 1995) ("Absent justification under

Moreover, even if antitrust law did require proof of anticompetitive effect on the product market (which it does not), restraints in the labor market for professional sports clearly do have such an impact.<sup>288</sup> Unlike other industries, the allocation of employees (i.e., players) among the different teams has a direct impact on the quality of the product (i.e., the game). Courts have historically recognized that competitive balance — achieved by allocating players across teams in a way that gives each team a relatively equal chance of success on the field — is a procompetitive benefit that allows a sports league to compete effectively in the product market.<sup>289</sup> Leagues have a recognized interest in dividing the players among the teams in a manner that maximizes consumer appeal.<sup>290</sup> Therefore, it follows that

---

the Rule of Reason or some defense, employers who compete for labor may not agree among themselves to purchase that labor only on certain specified terms and conditions.”); *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1054 (D.C. Cir. 1995) (“We recognize, of course, that, as a general matter, the antitrust laws may apply to restraints on competition in non-unionized labor markets.”); *Mackey v. NFL*, 543 F.2d 606, 616-17 (8th Cir. 1976) (holding that restrictions on player movement are subject to scrutiny under antitrust law); *Powell v. NFL*, 930 F.2d 1293, 1297-98 (8th Cir. 1993); see also *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193, 1197 n.7 (6th Cir. 1979); *Bridgeman v. NBA*, 675 F.Supp. 960, 965 (D.N.J. 1987); *Smith v. Pro-Football, Inc.*, 420 F. Supp. 738, 742 (D.D.C. 1976), *aff’d in part, rev’d in part*, 593 F.2d 1173 (D.C. Cir. 1978); *Robertson v. NBA*, 389 F. Supp. 867, 886-89 (S.D.N.Y. 1975); *Weistart*, *supra* note 36, at 116.

With only one exception, each of these cases involved an antitrust suit brought by a player who contended that the restraints harmed competition in the labor market. See *Weistart*, *supra* note 36, at 110. These cases had no significant impact on the product market, but the courts recognized that anticompetitive effects in the labor market for professional sports were a legitimate concern of antitrust law.

In fact, Professor Harper has argued that in the context of professional sports league player restraints, “the goals of the antitrust and labor laws are not in tension; both are served by preventing labor market restraints that would depress wages below competitive levels.” See Harper, *supra* note 34, at 1693.

<sup>288</sup> See Ross, *supra* note 67, at 673-77 (discussing the anticompetitive effects of a various restraints in the labor market for professional sports).

<sup>289</sup> See, e.g., *United States v. NFL*, 116 F. Supp. 319, 324 (E.D. Pa. 1953) (recognizing the value of competitive balance in the NFL); see also Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1, 24 (1983) (noting that the “relative equality of playing ability is needed to sustain fan interest, which is necessary for the economic survival of the [NFL]”); Roberts, *supra* note 276, at 1011 (asserting that player restraints “both reduce labor costs and maintain a reasonable level of competitive balance among the members and thereby avoid lopsided, uninteresting games, both of which enhance consumer welfare”). See generally *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2214 (2010) (noting that sports league clubs depend upon some cooperation with each other for economic survival).

<sup>290</sup> See Ross, *supra* note 67, at 673-77 (discussing the anticompetitive effects of a

restraints that interfere with the efficient allocation of players and hamper competitive balance are anticompetitive and have the ability to harm the product and consumers.<sup>291</sup> In other words, the inefficient allocation of NFL players can produce anticompetitive effects in both the labor and product markets that must be scrutinized under the Sherman Act.<sup>292</sup>

---

various restraints in the labor market for professional sports); Stephen F. Ross, *Antitrust Options To Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 CASE W. RES. L. REV. 133, 152 (2001) [hereinafter Ross, *Antitrust Options*] (“For example, rules that limit the ability of veteran players to obtain competing bids for their services or to impose a payroll cap on individual teams make it more difficult for inferior teams to quickly improve. The rules not only directly harm fans of these lousy teams, but . . . fans in general.”).

<sup>291</sup> Professor Ross has noted that sports teams are capable of entering into agreements that have significant anticompetitive effect on consumers. Ross, *Antitrust Options*, *supra* note 290, at 137 (“Ordinary sports fans make up the greatest number of victims of anticompetitive practices by sports leagues. Many fans are precluded from attending high-caliber professional sporting contests in their local areas because of the artificial scarcity of teams; other fans have no choice but to endure inferior quality teams caused by local mismanagement; yet others . . . cannot obtain affordable opportunities to watch their favorite teams play.”); *see also* ROGER D. BLAIR & JEFFREY L. HARRISON, *MONOPSONY: ANTITRUST LAW AND ECONOMICS* 72-75 (1993) (explaining that restraints on player salaries can harm consumers “because the producers’ profits are reduced and their response may be to reduce future supply”); Harper, *supra* note 34, at 1655 n.12 (noting that “a reduction in salary levels at the least reduces the incentive for some young people to invest the human capital necessary to become a skilled professional and thereby subtracts from maximum potential consumer satisfaction”); Ross, *Antitrust Options*, *supra* note 290, at 135-37 (detailing the anticompetitive effects of league restraints); Stephen F. Ross & Robert B. Lucke, *Why Highly Paid Athletes Deserve More Antitrust Protection than Ordinary Unionized Workers*, 42 ANTITRUST BULL. 641, 649 (1997); Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463, 488 (1990) [hereinafter Ross, *Antitrust Analysis*] (recognizing that the “authors of the Sherman Act intended to protect consumers from exploitation by monopolistic producers”).

<sup>292</sup> *See* Ross & Lucke, *supra* note 291, at 648 (“Consumers do have an interest . . . in whether football players are allocated among clubs in an efficient manner designed to enhance the quality of the overall league product, or allocated in an inefficient manner that reduces the quality of the product.”). According to Professor Ross, “careful analysis suggests . . . that salary caps and unreasonable restrictions on free agency harm competitive balance by inhibiting clubs with bad teams from getting better.” Stephen F. Ross, *An “Antitrust Lever” Is the Consumer’s Protection Against Lost Seasons and Anti-Fan Restraints of Trade*, 10 ANTITRUST 35, 39 (1995); *see also* Brief of Amicus Curiae Sports Fans Coalition in Support of the Appellees at 7, *Brady v. NFL*, 644 F.3d 661 (8th Cir. 2011) 2011 WL 2129892, No. 11-1898 (arguing that “when, pursuant to federal labor policy, workers express a preference for markets over collective bargaining, the public interest requires that consumers be protected from trade-restraining conspiracies of the sort agreed to by NFL owners”).

These antitrust concerns are compounded by the fact that the NFL has monopsony power in the market for “purchasing” elite professional players and a monopoly in the

Although presented as an attempt to reconcile a conflict between antitrust and labor law, the Leagues' interpretation of the nonstatutory labor exemption is in essence little more than a repackaging of these four theories. The courts have consistently rejected these theories in the past and they should not be used here to manipulate the balance between antitrust and labor law.

The fifth argument implicit in *Brady* and *Anthony*, however, deserves serious consideration. This final argument is that section 1 of the Sherman Act does not provide a meaningful framework for determining the legality of restraints in professional sports. The contention is that the Rule of Reason is a flawed and unworkable test that can be abusive and burdensome.<sup>293</sup> The Leagues' complaints about the incoherence of the Rule of Reason are not wholly without merit; the Rule of Reason has devolved from an imperfect test to an incoherent one.<sup>294</sup>

The shortcomings of the Rule of Reason are not unique to analyzing restraints in professional sports. Rather, the Rule of Reason is an imperfect framework for scrutinizing restraints of trade in all industries. As a consequence, this is not a "sports law" issue; it is a

---

sale of elite professional football games. See *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1393 (9th Cir. 1984) (holding that the relevant product market is NFL football); *USFL v. NFL*, 644 F. Supp. 1040, 1056-57 (S.D.N.Y. 1986) (same); see also *Int'l Boxing Club of New York, Inc. v. United States*, 358 U.S. 242, 251 (1959) (holding that world championship bouts were in a separate product market from other professional boxing bouts); *Phila. World Hockey Club, Inc. v. Phila. Hockey Club*, 351 F. Supp. 462, 501 (E.D. Pa. 1972) (holding that the relevant product market was elite professional hockey); Ross, *Antitrust Options*, *supra* note 290, at 153 ("Sports are extraordinary, because (a) the monopolistic structure of the industry deprives fans of any meaningful alternative when their sport is disrupted and (b) the monopsonistic structure of the industry's labor market means that antitrust intervention to prevent unreasonable restraints of trade would actually prove effective in limiting disruptions.").

<sup>293</sup> See, e.g., Brief of Appellants at 46-47, *Brady v. NFL*, 644 F.3d 661 (8th Cir. 2011) (No. 0:11-cv-00639-SRN-JJG) (referring to the risk of "unpredictable antitrust exposure"); see also Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 *GEO. L.J.* 19, 20 (1989) ("Haphazard and inconsistent decisions applying Section 1 of the Sherman Act to league governance rules and practices . . . have left leagues confused and uncertain as to what they may lawfully do to produce and market their respective sports entertainment products.").

<sup>294</sup> See, e.g., Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 *GEO. MASON L. REV.* 827, 827 (2009) ("One of the most amorphous rules in antitrust is the Rule of Reason. One of the most important rules in antitrust is the Rule of Reason. One of the most misunderstood rules in antitrust is the Rule of Reason. Put together these three propositions and you have the making of real trouble.").

general antitrust issue. The solution, of course, is not to ignore antitrust law and immunize all restraints in all industries from antitrust claims.<sup>295</sup> The imperfections in section 1 analysis can be eliminated, or at least minimized, through the formulation of a more coherent, predictable, and workable Rule of Reason.

The final Part of this Article identifies the flaws of the current Rule of Reason approach and proposes a model for streamlining the test. This streamlined model will aid courts in applying the Rule of Reason and will clarify the issues raised in *Brady* and *Anthony*. The proposed model seeks to prevent the Leagues from using their complaints about antitrust law to manipulate the nonstatutory labor exemption and the balance between labor and antitrust law.

#### IV. EVOLUTION AND CONFUSION OF THE RULE OF REASON AND A PROPOSAL FOR A MORE WORKABLE APPROACH

The Rule of Reason is the primary test for determining the legality of restraints under Section 1 of the Sherman Act.<sup>296</sup> Since its creation in 1918, the Rule of Reason has been the subject of constant attack and ridicule.<sup>297</sup> Referred to as the “antitrust equivalent to . . . water torture,”<sup>298</sup> critics argue that the test is “hopelessly imprecise”<sup>299</sup> and presents no meaningful framework for analysis.<sup>300</sup> Yet, over the last

---

<sup>295</sup> Interestingly, there is no indication that the current version of this Rule of Reason will operate to the detriment of professional sports leagues and owners. To the contrary, a recent study has shown that defendants have prevailed on all but one of the 222 Rule of Reason cases decided between 1999 and 2009. Carrier, *supra* note 294, at 830.

<sup>296</sup> See *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885-86 (2007); *State Oil v. Khan*, 522 U.S. 3, 10 (1997).

<sup>297</sup> See, e.g., Richard Posner, *The Next Step in the Antitrust Treatment of Restriction Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 15 (1981) (commenting that the Rule of Reason is “[a] standard so poorly articulated and particularized, applied by tribunals so poorly equipped to understand and apply it”).

<sup>298</sup> *In re Detroit Auto Dealers Ass’n, v. FTC*, 955 F.2d 457, 475-76 (6th Cir. 1992) (quotation omitted).

<sup>299</sup> Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75, 86 (2010) (“More than any other area of civil law, antitrust is error-prone. Its primary statutes are confoundingly ambiguous. Its basic analytical methodology is hopelessly imprecise.”).

<sup>300</sup> See, e.g., Richard Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 15 (1981) (commenting that the Rule of Reason is “[a] standard so poorly articulated and particularized, applied by tribunals so poorly equipped to understand and apply it”); Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 562 (2009) (stating that Rule of Reason “represent[s] nothing more than a

few decades, the rule has managed to devolve and become exponentially more imprecise due to the introduction of the “less restrictive alternative analysis” as an independent and dispositive prong of the test.<sup>301</sup> The solution, of course, is not to abandon antitrust scrutiny of potentially illegal restraints. The solution is to fix the test. This Part identifies the flaws in the Rule of Reason and offers mechanisms for creating a more workable and coherent Rule of Reason analysis.

A. *The Supreme Court’s Formulation of the Rule of Reason and Its Short Comings*

The Rule of Reason is one of the most criticized and misunderstood tests in antitrust jurisprudence.<sup>302</sup> The Supreme Court first articulated the classic formulation of the rule, created to determine the legality of restraints under section 1 of the Sherman Act, in 1918 case, *Chicago Board of Trade v. United States*.<sup>303</sup> The Rule of Reason requires courts to identify and balance the procompetitive benefits and anticompetitive effects of the restraint at issue to determine the restraint’s net competitive effect.<sup>304</sup> The crucial question to be answered by the balancing test is whether the procompetitive benefits of the restraint in question outweigh its anticompetitive effects.<sup>305</sup> If the restraint is net procompetitive — if the market is better off with the restraint than without it — it is legal under the Sherman Act. A restraint is only illegal if its anticompetitive effects outweigh its procompetitive benefits.<sup>306</sup>

---

muddled set of platitudes with no meaningful standards”).

<sup>301</sup> See, e.g., *Carrier*, *supra* note 294, at 827 (“One of the most amorphous rules in antitrust is the Rule of Reason. One of the most important rules in antitrust is the Rule of Reason. One of the most misunderstood rules in antitrust is the Rule of Reason. Put together these three propositions and you have the making of real trouble.”).

<sup>302</sup> See, e.g., *id.* at 827 (describing the criticism of the Rule of Reason). For a more comprehensive discussion of the criticisms and shortcomings of the Rule of Reason, see generally Feldman, *supra* note 300.

<sup>303</sup> *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

<sup>304</sup> See *NCAA v. Bd. of Regents*, 468 U.S. 85, 104-05 (1984).

<sup>305</sup> See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885-86 (2007).

<sup>306</sup> In the context of cases involving restraints in the labor market for professional sports, including *Brady* and *NBPA*, the primary procompetitive benefit typically alleged by the Leagues is that the restraints achieve competitive balance. The primary anticompetitive effects alleged by the players are that the restraints restrict player salaries and player movement and can lead to inefficient allocation of players across the teams.

Since its inception, the Rule of Reason has been subject to intense criticism. Commentators argue that it provides no meaningful standards for judges and juries and leads to expensive, unpredictable, and lengthy litigation.<sup>307</sup> As then-Professor Easterbrook contended, the test “puts too many things in issue . . . . Of course, judges cannot do what such open-ended formulas require. When everything is relevant, nothing is dispositive.”<sup>308</sup> Other critics similarly contend that the balancing test is fatally flawed because judges and juries are unable to identify or measure with any precision the competitive impacts of a challenged restraint.<sup>309</sup> Even if a judge is able to identify the procompetitive benefits and anticompetitive effects, the Rule of Reason gives no real guidance as to how these measures should be balanced and weighed.<sup>310</sup> As Justice Scalia explains, balancing

---

<sup>307</sup> Feldman, *supra* note 300, at 600.

<sup>308</sup> Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 153, 155 (1984); *see also*, Maxwell M. Blecher, *The “New Antitrust” as Seen by a Plaintiff’s Lawyer*, 54 ANTITRUST L.J. 43, 45 (1985) (“The increased focus on case facts under the Rule of Reason will . . . increase the uncertainty involved in litigation, and this uncertainty will increase the number of cases litigated because parties are unsure of what the outcome of a particular case will be.”).

<sup>309</sup> *See, e.g.*, *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 771 (1999) (recognizing, by contrasting the majority’s view with that of the dissent, that judges could reasonably reach differing conclusions when determining competitive effects, which indicates the difficulty of making this determination precisely and accurately); Easterbrook, *supra* note 308, at 153 (noting that it is “fantastic to suppose” that judges can balance economic effects with any precision because even economists would likely reach different end results); *id.* at 145 (“For many practices, even the most careful economists can say no more than that there are possible gains, possible losses . . . . Often the best anyone can do is offer a menu of possibilities, some pro- and some anti-competitive.”). In fact, most of the “balancing” cases in the Rule of Reason analysis do not involve any real balancing at all. *See* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1322-23 (1999) (hypothesizing that judges wait for defendants to prove the necessity of the restraint); *cf.* *Sproles v. Binford*, 286 U.S. 374, 388 (1932) (“To make scientific precision a criterion of constitutional power would be to subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.”).

<sup>310</sup> *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 916 (2007) (Breyer, J., dissenting) (“How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily.*”); Harvey J. Goldschmid, *Horizontal Restraints in Antitrust: Current Treatment and Future Needs*, 75 CALIF. L. REV. 925, 926 (1987) (concluding that the Rule of Reason is “simply unworkable”). The 1913 Report of the Senate Interstate Commerce Committee illustrates the early criticism leveled at the Rule of Reason:

It is inconceivable that in a country governed by a written Constitution and statute law the courts can be permitted to test each restraint of trade by the

incommensurate values, such as competitive effects, is the equivalent of “judging whether a particular line is longer than a particular rock is heavy.”<sup>311</sup> If courts are incapable of identifying and balancing competitive effects with precision, the argument goes, how can they determine the net competitive impact of a restraint?<sup>312</sup>

*B. The Addition of the Less Restrictive Alternative as an Independent Prong of the Rule of Reason*

Despite the steady criticism of the test, the Supreme Court has never veered from the original formulation of the Rule of Reason.

---

economic standard which the individual members of the court may happen to approve . . . . In the end nine justices of the Supreme Court will be asked to say whether the restraint of trade brought about through this combination is a due or an undue restraint, and the answer which each justice makes to that question will depend upon his individual opinion as an economist or sociologist, the conclusion of the court being in substance an act of legislation passed by the judicial branch of the Government to fit a particular case.

S. REP. NO. 62-1326, at 10-11 (1913), *reprinted in* 49 CONG. REC. 4126, 4129 (1913).

<sup>311</sup> *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring). Much of this criticism, however, is overstated. Courts are rarely required to perform a real or precise balancing test when applying the Rule of Reason. Instead, in nearly every case, the competitive effects of the challenged conduct are overwhelmingly net procompetitive or anticompetitive. See Feldman, *supra* note 300, at 576. The Second Circuit’s decision in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), is illustrative of the typical Rule of Reason case. In *Visa*, the court invalidated the restraint at issue under the Rule of Reason after identifying a number of anticompetitive effects and noting that there was “no evidence” of countervailing procompetitive benefits. *Id.* at 243. In fact, a comprehensive study of Rule of Reason cases has shown that the overwhelming majority of Rule of Reason cases are disposed of because one party puts forth no evidence of valid anticompetitive or procompetitive effects at all. See Carrier, *supra* note 309, at 1322.

<sup>312</sup> See, e.g., *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 440-41 (1978) (holding that “the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct”); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609 (1972) (noting that “courts are of limited utility in examining difficult economic problems”); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 n.11 (D.C. Cir. 1986) (“Weighing [competitive] effects in any direct sense will usually be beyond judicial capabilities.”). Carrier, *supra* note 309, at 1349 (“Like it or not, balancing is with us. And as long as we do not expect mathematical precision — which, in any event, is impossible — balancing is not necessarily a bad thing.”); Robert Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 33 (1978) (“[T]here is no reliable way in which a balance of this sort can be made.”). For a thorough discussion on the problems associated with this “new Rule of Reason,” see generally Feldman, *supra* note 300.

Nevertheless, each federal circuit, ostensibly to simplify the test, has changed the test by adopting its own version of a “less restrictive alternative” inquiry<sup>313</sup> as an independent and dispositive prong of the Rule of Reason.<sup>314</sup> This less restrictive alternative inquiry originated as the test for determining the legality of restraints of trade in English common law,<sup>315</sup> but the Supreme Court discarded it after the passage of the Sherman Act, only to return as part of a new formulation of the Rule of Reason.<sup>316</sup>

Under this “Modern Rule of Reason,” a permissible restraint must achieve a net procompetitive impact. Thus, what would have been legal under the original Supreme Court standard would be illegal if that impact could have been attained by a less restrictive alternative under the Modern Rule of Reason standard.<sup>317</sup> As the United States Court of Appeals for the Second Circuit explained:

[e]stablishing a violation of the rule of reason involves three steps. First, the plaintiff bears the initial burden of showing that the challenged action has had an *actual* adverse effect on

---

<sup>313</sup> Though more commonly associated with constitutional law, the means-oriented less restrictive alternative inquiry originated in common law restraint of trade cases and was the first Rule of Reason test in antitrust law. The classic formulation of the early test is contained in then-Judge Taft’s much-lauded decision in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282-84 (6th Cir. 1898), *aff’d*, 175 U.S. 211 (1899). See Dennis A. Yao & Thomas N. Dahdouh, *Information Problems in Merger Decision Making and Their Impact on Development of an Efficiencies Defense*, 62 ANTITRUST L.J. 23, 37 (1993) (discussing the importation of the inquiry from antitrust law to constitutional law). While the inquiry was embraced by the Supreme Court in constitutional law jurisprudence, particularly during the civil rights movement, the Supreme Court refused to adopt its use in Rule of Reason cases, opting instead for the balancing test in *Chicago Board of Trade*. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907-08 (2007) (overturning the per se rule against vertical price restraints in favor of a Rule of Reason approach because there are occasions when such restraints will have a procompetitive effect).

<sup>314</sup> See, e.g., *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997) (holding that the plaintiff can overcome a showing that the restraint has a net procompetitive effect by identifying an alternative means of achieving the same effect); see also Feldman, *supra* note 300, at 562.

<sup>315</sup> The initial version of the less restrictive alternative was discussed in *Mitchel v. Reynolds*, 24 Eng. Rep. 347, 348 (K.B. 1711).

<sup>316</sup> The analysis of less restrictive alternatives serves a significant role in constitutional law, but constitutional law borrowed the analysis from antitrust and restraint of trade jurisprudence. See Yao & Dahdouh, *supra* note 306, at 37 (discussing the importation of the inquiry from antitrust law to constitutional law).

<sup>317</sup> See, e.g., *Clorox*, 117 F.3d at 56 (outlining the three part analysis framework as the proper way to determine if Lysol trademark agreements produced anticompetitive effects and harmed the public).

competition as a whole on the relevant market. Then, if the plaintiff succeeds, the burden shifts to the defendant to establish the pro-competitive redeeming virtues of the action. Should the defendant carry this burden [of proving that the restraint is net procompetitive], the plaintiff must then show that the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition.<sup>318</sup>

Although courts added the less restrictive alternative inquiry to simplify and clarify the Rule of Reason test, the combination of the balancing test from the original Rule of Reason with a dispositive less restrictive alternative analysis has only served to increase the confusion.<sup>319</sup> The resulting Modern Rule of Reason test is flawed from both a theoretical and practical perspective.

From a theoretical perspective, the Modern Rule of Reason is problematic because it does not answer the basic question raised by section 1 of the Sherman Act — whether a restraint is net pro- or anticompetitive. *Chicago Board of Trade* and every subsequent Supreme Court decision makes clear that antitrust law requires a determination of the net competitive effect by comparing the state of competition before (or without) the restraint versus after (or with) the restraint.<sup>320</sup> By using the less restrictive alternative as an additional dispositive prong of the test, the Modern Rule of Reason changes the fundamental purpose of the section 1 analysis and divorces itself from the mission of *Chicago Board of Trade*. The modern test would compare the state of competition after (or with) the restraint with the state of competition with alternative restraints. This inquiry may tell

---

<sup>318</sup> *Id.* (quotations omitted) (citations omitted); see also, Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 GEO. L.J. 1605, 1621-22 (1986) (“A Rule of Reason analysis means balancing anticompetitive effects against efficiencies and other business justifications, and then examining whether comparable efficiencies could have been achieved in a less restrictive way.”).

<sup>319</sup> See Feldman, *supra* note 300, at 586-610. See also Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75, 89 (2010) (“The vagueness of the antitrust statutes might not matter so much if courts and agencies could call upon an analytical methodology that would eliminate or significantly reduce the possibility of error inherent in the statutory text. But no such methodology exists. Indeed, in many ways the ‘rule of reason’ . . . compounds the problem of error.”).

<sup>320</sup> See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 103-04 (1984) (explaining that the Court’s inquiry is whether the challenged restraint enhances competition); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978) (explaining that the Rule of Reason inquiry focuses directly on a challenged restraint’s impact on competition).

us if the challenged restraint is more or less efficient than its alternatives, but it does not measure the net effect of the restraint. Therefore, such an inquiry avoids the fundamental question raised in *Chicago Board of Trade*.

A restraint that is not as effective as available alternatives may be direct evidence of a bad business decision, but it is not evidence of net anticompetitive effect. As Judge Bork explained, the Rule of Reason was never intended to require courts to “calibrate degrees of reasonable necessity. That would make the lawfulness of conduct turn upon judgments of efficiency. There is no reason in logic why the question of degree should be important.”<sup>321</sup>

The role of antitrust law is not to fix imperfections, but rather to ensure a satisfactory level of market performance.<sup>322</sup> The less restrictive alternative, however, provides an invitation for plaintiffs to challenge every firm’s business decision. Once a court makes a determination of the net competitive effect of a restraint, the role of antitrust law is complete.<sup>323</sup> If the restraint is net anticompetitive, it is illegal.<sup>324</sup> If it is net procompetitive, it is legal and nothing more than a business decision made by a firm or group of firms. Interference by a court after a restraint is determined to be net procompetitive is no different and no less inappropriate than judicial regulation of any other business decision.<sup>325</sup>

---

<sup>321</sup> *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227-28 (D.C. Cir. 1986).

<sup>322</sup> As one economist has noted:

The antitrust laws and antitrust enforcement institutions are not designed or well suited to identify and ‘fix’ all market imperfections that lead markets to depart from textbook models of perfect competition. Neither the state of economic science, nor the capabilities of public and private policy enforcement institutions, would make it feasible or desirable for antitrust policy to seek to identify a wide range of market imperfections, and associated firm behavior and market structures, and then to evaluate each case to determine whether some way can be found to improve economic efficiency by changing the structure of the market or constraining firm behavior.

Paul L. Joskow, *Transaction Cost Economics, Antitrust Rules, and Remedies*, 18 J.L. ECON. & ORG. 95, 98 (2002).

<sup>323</sup> See Feldman, *supra* note 300, at 572.

<sup>324</sup> *Id.*

<sup>325</sup> See, e.g., *Dr. Miles Med. Co. v. John D. Parke & Sons Co.*, 220 U.S. 373, 411 (1911), *overruled by* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007) (“I think that at least it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear.”) (Holmes, J., dissenting); *Rothery Storage*, 792 F.2d at

Use of the less restrictive alternative inquiry changes the role of section 1 from an *ex ante* deterrent of anticompetitive behavior to an *ex post*, ad hoc regulator and micromanager of procompetitive business decisions.<sup>326</sup> Putting aside the fact that courts are not equipped to second-guess business judgments, the inquiry fundamentally changes the Rule of Reason and allows courts to strike down agreements if they are not “procompetitive enough.”<sup>327</sup> This change is inconsistent with the basic theory underlying section 1 of the Sherman Act.

The Modern Rule of Reason is also problematic from a practical perspective. The test seems to ask courts to do what the original test was criticized for asking courts to do before. That is, while critics attacked the original Rule of Reason for requiring courts to perform a balancing test, the Modern Rule of Reason appears to require judges to perform multiple balancing tests.<sup>328</sup> After all, in theory, to determine if

---

229 n.11 (“Once it is clear that restraints can only be intended to enhance efficiency rather than to restrict output, the degree of restraint is a matter of business rather than legal judgment.”); *Foster v. Md. State Sav. & Loan Ass’n*, 590 F.2d 928, 935 (D.C. Cir. 1978) (holding that defendant’s failure to use allegedly less restrictive alternatives was a “legitimate exercise of business judgment that is outside the scope of the antitrust laws”). As Professor Bork explained:

For a court to strike down, for example, a vertical market division on the theory that the manufacturer had made a mistake as to the most efficient mode of distribution would be equivalent to judicial supervision of any other normal business judgment. The court might as well second-guess management’s judgment on assembly line planning, inventory policy, product design or any of the other decisions that affect efficiency. Whatever else it is, the Sherman Act is not a device for imposing upon the entire economy, or any aspect of the economy’s behavior, a judicial form of public utility regulation.

Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 *YALE L.J.* 373, 404 (1965). Or, as Milton Handler wrote:

But what about the business man? Why should he be required to experiment with less restrictive (and possibly less effective and less practical) alternatives on pain of incurring severe antitrust liability? Why should he be second-guessed by economic theoreticians because he has elected to cope with his distribution problems in a business-like manner, selecting the arrangements

ROBERT BORK, *THE ANTITRUST PARADOX* 279 (1978)

<sup>326</sup> Cf. BORK, *supra* note 325, at 26 (observing that permitting a reasonable price defense in price fixing cases would put courts in the impossible position of “allowing cartels but policing their prices and behavior”).

<sup>327</sup> See Feldman, *supra* note 300, at 593-94.

<sup>328</sup> See *id.* at 572-74.

an alternative is “less restrictive,” a court must identify the procompetitive benefits and anticompetitive effects of the challenged restraint before determining if any alternatives would have achieved the same procompetitive benefits in a less restrictive manner.<sup>329</sup> To do this, courts must identify the procompetitive benefits and anticompetitive effects of a variety of hypothetical alternative restraints and balance them against the benefits and effects of the actual challenged restraint.<sup>330</sup> If courts struggle to engage in a single balancing test, one wonders how effective they will be at simultaneously engaging in multiple balancing acts.

The test is further complicated because there is confusion among (and even within) the circuits regarding the requisite level of “restrictiveness,” which varies from “least restrictive” to “reasonably necessary.”<sup>331</sup> The D.C. Circuit and the Fourth Circuit employ the most extreme version of the test, placing the burden on a defendant to show that the restraint employed was the least restrictive alternative, regardless of the net effects of the restraint.<sup>332</sup> The Second Circuit has been inconsistent, using both the “least restrictive” and “reasonably necessary” standard.<sup>333</sup> The Third and Eleventh Circuits place the

---

<sup>329</sup> See *id.* at 600-02.

<sup>330</sup> *Id.* at 601-04.

<sup>331</sup> *Id.* at 582-86.

<sup>332</sup> See *Kreuzer v. Am. Acad. of Periodontology*, 735 F.2d 1479, 1494-95 (D.C. Cir. 1984); see also *Smith v. Pro-Football, Inc.*, 593 F.2d 1173, 1187-88 (D.C. Cir. 1979) (concluding that the draft offered by the defendant was not the least restrictive restraint on trade). The Fourth Circuit applies a similar test. See *Cont'l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 510-11, 517 (4th Cir. 2002) (remanding to the district court with instructions to more carefully scrutinize the presumption in favor of procompetitive justifications); *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1041-42 (4th Cir. 1987) (affirming lower court's denial of MBNA's motions for a directed verdict and judgment because MBNA failed to establish that its replacement parts tie-in was the least restrictive method of avoiding groundless warranty claims).

<sup>333</sup> The Second Circuit and Fourth Circuits employ a similar test. See *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997) (explaining that the plaintiff must first show that the challenged action had an actual adverse effect on competition as a whole. Then, the burden then shifts to the defendant to show that the action has pro-competitive benefit. If the defendant succeeds, the burden shifts back to the plaintiff to show that the same pro-competitive benefit could have been achieved through less restrictive means); *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995) (explaining that the burden shifts back to the plaintiff if the defendant can show that the contested action has pro-competitive benefits). The Second Circuit has been inconsistent in its approach. In an earlier case, the Second Circuit “agree[d] with the Third Circuit that a better charge would be to require that ‘the restraints . . . not exceed the limits reasonably necessary to meet the competitive problems’ ” and suggested that the inquiry was not a dispositive factor in the analysis.

burden on a plaintiff to show that the restraint was not “fairly necessary”<sup>334</sup> or “not reasonably necessary”<sup>335</sup> to accomplish the procompetitive benefits.<sup>336</sup> The Sixth, Eighth, and Ninth Circuits all place a more demanding burden on a plaintiff, requiring it to show that any legitimate goals can be achieved by a defendant in a “substantially less restrictive manner.”<sup>337</sup> Scholarly commentary is no less muddled.<sup>338</sup> And, because the Supreme Court has never adopted the Modern Rule of Reason, it has provided no guidance to lower courts for executing the test.

---

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 303 (2d Cir. 1979) (quoting *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975) (emphasis omitted)). However, the Second Circuit later held that the defendant had “to come forward with proof that any legitimate purposes could not be achieved through less restrictive means.” *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1261 (2d Cir. 1982).

<sup>334</sup> *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1248 (3d Cir. 1975).

<sup>335</sup> *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1065 (11th Cir. 2005); see also *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1213 (11th Cir. 2002) (“Rule of Reason analysis requires the plaintiff to prove (1) an anticompetitive effect of the defendant’s conduct on the relevant market, and (2) that the conduct has no procompetitive benefit or justification.”).

<sup>336</sup> The Third and Eleventh Circuits assert that their tests do not require proof that the restraint was the “least restrictive alternative.” *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1065 (11th Cir. 2005); *Am. Motor Inns*, 521 F.2d at 1248.

<sup>337</sup> *Care Heating & Cooling, Inc. v. Am. Standard, Inc.*, 427 F.3d 1008, 1012 (6th Cir. 2005) (quoting *Nat’l Hockey League Players’ Ass’n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003)); *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996); *Flegel v. Christian Hosps. Ne.-Nw.*, 4 F.3d 682, 688 (8th Cir. 1993) (quoting *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991)); *Barry v. Blue Cross of Cal.*, 805 F.2d 866, 873-74 (9th Cir. 1986) (ruling in favor of Blue Cross in part because the plaintiffs did not sufficiently demonstrate the existence of a viable alternative). Similarly, the Federal Trade Commission and the Department of Justice only consider procompetitive benefits that could not have been achieved “by practical, significantly less restrictive means.” FED. TRADE COMM’N & U.S. DEPARTMENT OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.36(b), at 24.

<sup>338</sup> See, e.g., Lazaroff, *supra* note 72, at 204-06 (announcing two different standards for analyzing professional sports league restraints under the Rule of Reason). Compare Harrison, *supra* note 63, at 583 n.63 (stating that antitrust law requires that the “methods chosen would have to be the least restrictive means of achieving the procompetitive ends”), with BORK, *supra* note 326, at 279 (stating that the relevant standard is if the means employed is “no broader than necessary for that purpose”), Roberts, *supra* note 276, at 1010-11 (arguing that restraints of trade in professional sports are legal as long as they “reasonably relate” to a lawful purpose, regardless of the existence of less restrictive alternatives), Ross, *Antitrust Analysis*, *supra* note 291, at 489 (stating that the relevant standard is if the means employed were “reasonably necessary” and if there are “obvious less restrictive alternative[s]”).

Given the divergent standards, there is a lack of clarity for courts — and litigants — as to what actually constitutes a “less restrictive alternative,” or how a court should go about identifying these possible alternatives.<sup>339</sup> “Is an alternative ‘less restrictive’ only if it achieves the same level of procompetitive benefits as the challenged restraint but with a lesser anticompetitive impact? If so, how much of a lesser impact is required? Or is an alternative ‘less restrictive’ if it achieves greater procompetitive benefits with the same level of anticompetitive impact? If so, how much of a greater impact is required? Or is an alternative ‘less restrictive,’ regardless of the precise procompetitive benefits and anticompetitive effects, as long as its net procompetitive benefits are greater? Or, as scholars have suggested, is an alternative ‘less restrictive’ if it achieves ‘nearly’ the same procompetitive benefits with a lesser anticompetitive impact?”<sup>340</sup>

The Supreme Court neither adopted or cited the Modern Rule of Reason nor given any guidance to lower courts on how to execute it. Litigants are left with an opaque, standardless moving target instead of a coherent, consistent test. With the creation of this Modern Rule of Reason, the cure may have been worse than the disease, as each of the federal circuits is essentially applying its own uniquely confused, ad hoc version of the Rule of Reason.<sup>341</sup>

The NFL and the NBA, as well as all other potential antitrust defendants have a legitimate claim that the Rule of Reason has morphed into an incomprehensible morass. The solution, however, is not to ignore antitrust law. Rather, the solution is to find ways to

---

<sup>339</sup> Some commentators have given guidance with respect to a mechanism or process for identifying less restrictive alternatives. See, e.g., Ross, *Antitrust Analysis*, *supra* note 291, at 478 (“To prevail in an antitrust challenge, the plaintiff should have the burden of showing that, were the contract at issue to be held illegal, the league or its members would probably enter into an alternative contract (or contracts) that would result in” higher output). This commentary is often conflicting, and offers no guidance as to incorporating both the balancing and less-restrictive-alternative prongs into a single test.

<sup>340</sup> Feldman, *supra* note 300, at 604 (internal citations omitted); see also Ross, *Antitrust Analysis*, *supra* note 291, at 491 (noting the objection to the less restrictive alternative inquiry because “in many cases, the alternative does not fully accomplish the defendant’s legitimate goals”). There is also confusion regarding which party has the burden of proving the presence or absence of the less restrictive alternative. See Feldman, *supra* note 300, at 583.

<sup>341</sup> For example, some courts have *only* employed the less restrictive alternative analysis while ignoring the balancing aspect of the Rule of Reason. This version of the test is simply inconsistent with the purpose of the Rule of Reason and ignores nearly a century of Supreme Court precedent. See Carrier, *supra* note 294, at 834 (discussing the variations across circuits in the formulation of the Rule of Reason); Feldman, *supra* note 300, at 604-05.

modify the Rule of Reason and create a more coherent, predictable, and workable analysis. The next subpart takes an initial step in that direction by looking for mechanisms for streamlining the Rule of Reason.

### C. *Towards a New Rule of Reason Standard*

Despite the faults in the Rule of Reason, there are mechanisms that can be used to create a more workable analysis. This subpart proposes three such mechanisms. First, courts should utilize market power as a heuristic. Second, the less restrictive alternative analysis should be used as an aid to courts in balancing the competitive effects of challenged restraints. Third, courts can look to proportionality analysis for guidance in navigating the Rule of Reason.

#### 1. Market Power Filter as a Heuristic

Section 1 analysis can be streamlined by instituting a strict market power filter as a threshold issue for plaintiffs. Market power is defined as the ability to raise prices without sacrificing so many sales that the increase becomes unprofitable.<sup>342</sup> Market power is gauged by identifying a product's substitutes and potential substitutes, which dictates a firm or group of firms' ability to raise price above competitive levels.<sup>343</sup> If a firm or group of firms, without market power, raises the price of its products, consumers will simply purchase a substitute product at a lower price.

With a market power filter, a plaintiff would have the initial burden of proving that a defendant has market power in a relevant market. If the plaintiff fails to meet this burden, the case would be dismissed. Implementation of a rigid market power filter is not a drastic solution. The Supreme Court has implicitly concluded in several cases that proof of market power is a threshold issue in Rule of Reason cases.<sup>344</sup>

---

<sup>342</sup> Easterbrook, *supra* note 308, at 159-61.

<sup>343</sup> *Id.* at 160.

<sup>344</sup> See *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (explaining that the Rule of Reason is "an inquiry into market power and market structure designed to assess the combination's actual effect"); *NCAA v. Bd. of Regents*, 468 U.S. 85, 109 (1984); see also Andrew I. Gavil, *Copperweld 2000: The Vanishing Gap Between Sections 1 and 2 of the Sherman Act*, 68 ANTITRUST L.J. 87, 98 (2000) (noting that *NCAA* and *Indiana Federation* "implicitly assume that market power is a prerequisite to the proof of a rule of reason offense"). The Supreme Court has also implemented an explicit market power filter in tying cases. See, e.g., *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 305 (1949); Easterbrook, *supra* note 308, at 159-61.

---

---

Although it is not quite universal, most courts have already adopted a de facto (if not de jure) market power requirement.<sup>345</sup>

A market power threshold is a powerful filter. It prevents a plaintiff from pursuing a case where a defendant cannot achieve anticompetitive effects due to an inability to raise prices (or lower salaries) without sacrificing demand (or supply).<sup>346</sup> Thus, a strict market power filter helps ferret out cases in which there is an insignificant (or no) risk of net anticompetitive behavior, and potential risk that procompetitive behavior will be condemned or discouraged.<sup>347</sup> As such, only restraints that present a real possibility of anticompetitive behavior will be subject to Rule of Reason scrutiny.

The market power filter, however, may only have limited utility in player restraint cases involving the NFL because there is little dispute that the NFL has market power in the labor market for elite professional football players.<sup>348</sup> That is, there is currently no league that can offer professional football players the same salaries and benefits that they can earn in the NFL. Without competition, the NFL has the ability to lower salaries without losing their supply of elite professional football players.

Unlike the NFL, a market power filter may play a role in the NBA because the labor market for elite professional basketball players continues to expand overseas.<sup>349</sup> At some point in the relatively near future, it is possible that other basketball leagues will present real substitutes for elite professional basketball players. If elite professional basketball players have the opportunity to play basketball in leagues

---

But, the Supreme Court recently suggested that market power is merely a factor to consider in the Rule of Reason analysis and not a threshold issues. *See* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885-86 (2007) (noting that “market power is a . . . significant consideration” in the Rule of Reason analysis).

<sup>345</sup> As the Tenth Circuit has held, “[p]roof of market power, then, for many courts is a critical first step, or ‘screen,’ or ‘filter,’ which is often dispositive of the case.” *SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 36 F.3d 958, 965-66 (10th Cir. 1994); *see also* *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666-67 (7th Cir. 1987) (“A threshold inquiry in any Rule of Reason case is whether the defendant had market power, that is, the power to raise prices significantly above the competitive level without losing all of one’s business.” (internal quotations omitted)).

<sup>346</sup> *See* Easterbrook, *supra* note 308, at 159-61.

<sup>347</sup> *See* *SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 36 F.3d 958, 965-66 (10th Cir. 1994).

<sup>348</sup> *See* Jocelyn Sum, *Clarett v. National Football League*, 20 BERKELEY TECH. L.J. 807, 824 (2005).

<sup>349</sup> *See* Henry Abbott, *For Players, a Potentially Lucrative Lockout*, ESPN.COM (Aug. 15, 2011, 1:00 PM) [http://espn.go.com/blog/truehoop/post/\\_id/31477/for-players-a-potentially-lucrative-lockout](http://espn.go.com/blog/truehoop/post/_id/31477/for-players-a-potentially-lucrative-lockout).

other than the NBA (and earn similar salaries), the NBA will lose the ability to lower salaries without sacrificing their supply of players.

Granted, market power can be difficult to prove.<sup>350</sup> But, if used as a threshold filter, it can at least focus the analysis and terminate some cases prior to the expansive Rule of Reason.<sup>351</sup> Also, depending on the complexity of a particular market and the possible range of substitutes, a market power analysis can be relatively simple, or at least much simpler than a full-blown Rule of Reason analysis.<sup>352</sup> At a minimum, it can serve as a heuristic by narrowing the issue and allowing parties to present empirical evidence supporting a particular market determination.

## 2. Use of the Less Restrictive Alternative Inquiry to Help Determine Competitive Effects

The second approach is to return to the Supreme Court's original (and unchanged) formulation of the Rule of Reason in *Chicago Board of Trade* and eliminate the use of the less restrictive alternative inquiry as a dispositive prong of the test. Rather than invalidating a restraint if a court finds that there is a less restrictive alternative available to a defendant, courts can use the less restrictive alternative inquiry as a factor to help determine the competitive effects of the challenged restraint under the Rule of Reason.<sup>353</sup> Under this approach, a court will determine if an obviously less restrictive alternative exists to the

---

<sup>350</sup> See, e.g., *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 598 (1st Cir. 1993) ("There is no subject in antitrust law more confusing than market definition.").

<sup>351</sup> Despite the Seventh Circuit's pronouncement that market power is an indispensable part of every Rule of Reason case, the district court in the Bulls litigation deemed market power irrelevant. *Chi. Prof'l. Sports Ltd. Pshp. v. NBA*, 95 F.3d 593, 601 (7th Cir. 1996).

Plaintiffs may use evidence of market share as a substitute for market power, though defendants can rebut this evidence by showing that, despite high market share, elasticity of supply or demand remains high and prevents the defendant from raising prices without losing demand. As an alternative to proving market power or high market share, a plaintiff may also provide direct evidence of anticompetitive effect. After all, if proof of actual anticompetitive effects is presented, there is no need to prove that the defendants had the ability to achieve such effects. For a comprehensive discussion of the use of market share and proof of anticompetitive effects as substitutes for proof of market power, see Easterbrook, *supra* note 308, at 159-61, and Gavil, *supra* note 344, at 93-94.

<sup>352</sup> See Evans, Padilla & Ahlborn, *supra* note 68, at 333 (noting that the market power determination is "not empirically demanding. They entail investigations into market structure in which economists routinely engage").

<sup>353</sup> See Feldman, *supra* note 300, at 624.

restraint utilized by a defendant.<sup>354</sup> Proof that a restraint is clearly overly restrictive (i.e., that a less restrictive alternative exists) allows for the presumption that the restraint was not intended to achieve its purported procompetitive benefits.<sup>355</sup> After all, if the achievement of the procompetitive benefit were the true purpose of the restraint, why not employ a less restrictive alternative?<sup>356</sup> If a league fails to use the most efficient methods to achieve its procompetitive goals, one can presume that it did not intend to achieve those goals.<sup>357</sup> Rather, the procompetitive goals merely serve as pretext to cover the true anticompetitive purpose of the restraint.

Courts can utilize the intent of the restraint to help determine its competitive effects.<sup>358</sup> As the Supreme Court has explained, “knowledge of intent may help the court to interpret facts and to predict consequences.”<sup>359</sup> Proof of intent can serve an important function in determining whether a restraint is net procompetitive or anticompetitive where the economic impact of the restraint is otherwise difficult to identify.<sup>360</sup> In such cases, proof of a less restrictive alternative can serve as a “tiebreaker.”<sup>361</sup> Clear evidence that an obviously less restrictive alternative was available would allow for a strong inference of anticompetitive intent and would have a

---

<sup>354</sup> Although lower courts have adopted the less restrictive alternative inquiry as a distinct and dispositive prong of the Rule of Reason, the Supreme Court has only included it as one factor to consider in analyzing a restraint’s competitive effects. See *id.* at 562-63.

<sup>355</sup> *Id.* at 624. This analysis, of course, has also been used in the constitutional law context, where the presence of obviously less restrictive alternatives was used to show that the purported legitimate goals of a rule or regulation were merely pretext. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 342-43, 353-54 (1972).

<sup>356</sup> See, e.g., BORK, *supra* note 338, at 38 (concluding that courts can infer anticompetitive intent from overly restrictive practices and asking, “[i]f efficiency would have produced comparable results, why resort to such [overly restrictive] practices?”); Feldman, *supra* note 300, at 624-28 (discussing the use of evidence of less restrictive alternatives as proof of intent).

<sup>357</sup> See Feldman, *supra* note 300, at 624-25.

<sup>358</sup> See, e.g., *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* 472 U.S. 585, 602-03 (1985) (explaining that anticompetitive intent can be probative of competitive effect).

<sup>359</sup> *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918); see also, e.g., *K.M.B Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 130 (2d Cir. 1995) (noting that intent can “help courts interpret the effects’ of the defendants’ actions” (citing *State of N.Y. by Abrams v. Anheuser-Busch, Inc.*, 811 F. Supp. 848, 874 (E.D.N.Y. 1993))).

<sup>360</sup> Cf. Feldman, *supra* note 300, at 631 (“Proof of less restrictive alternatives can also be used to support or confirm the evidence of actual economic effects.”).

<sup>361</sup> *Id.*

potentially significant role in determining net competitive effects. Evidence of the presence of a slightly less restrictive alternative, however, would be given little weight and play little role in determining competitive effects.<sup>362</sup>

This approach is consistent with the Supreme Court's limited use of the less restrictive alternative in antitrust litigation. For example, in *NCAA v. Board of Regents*, the NCAA implemented a restriction on the number of times each school's football games could be televised.<sup>363</sup> The NCAA claimed that the television limitation was procompetitive because, *inter alia*, it preserved the "academic tradition" that distinguished college football from the NFL.<sup>364</sup> The Supreme Court recognized this as a legitimate procompetitive benefit, but found that the NCAA had less restrictive alternatives to preserve its "academic tradition" than the television restrictions it had employed.<sup>365</sup> The Court made clear that the presence of these alternatives proved that the procompetitive justifications for the restriction were merely pretext, and that the NCAA's real intent was to reduce output and raise prices.<sup>366</sup> The intent of the plan shed light on its competitive effects and allowed the Court to conclude that the NCAA's plan was net anticompetitive.<sup>367</sup>

A brief examination of a hypothetical antitrust challenge brought against the NFL player entry draft illustrates the utility of this role for the less restrictive alternative inquiry in cases involving player restraints in professional sports. Assume that in 2021,<sup>368</sup> there is no collective bargaining agreement between the players and the owners,<sup>369</sup> and the NFL owners agree to a sixteen-round draft for allocating the rights to negotiate with football players eligible for entry into the NFL. In that draft, the team with the worst record during the previous season gets to select the first player; the team with the second-worst record gets to make the second selection, and so on, until all thirty-two teams have made a selection in the first round.<sup>370</sup> The process then

---

<sup>362</sup> Feldman, *supra* note 254, at 914.

<sup>363</sup> *NCAA v. Bd. of Regents*, 468 U.S. 85, 94 (1984).

<sup>364</sup> *Id.* at 101-02.

<sup>365</sup> *See id.* at 102-07.

<sup>366</sup> *See id.* at 119.

<sup>367</sup> *See id.* at 113.

<sup>368</sup> The current collective bargaining agreement between the NFL and NFLPA expires in 2021. *See* Nate Davis, *NFL Players Announce New 10-Year Labor Agreement*, USA TODAY, July 25, 2011, <http://content.usatoday.com/communities/thehuddle/post/2011/07/reports-nfl-players-agree-to-new-collective-bargaining-agreement/1>.

<sup>369</sup> Assume that the draft is not protected by the nonstatutory labor exemption.

<sup>370</sup> *See Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1175 (D.C. Cir. 1978).

repeats for sixteen rounds, with the last place team making the first selection and the first place team making the last selection in each round.<sup>371</sup> The teams are then given the exclusive right to negotiate a contract with any player they have selected in that draft.<sup>372</sup>

Then, assume the New Orleans Saints draft a running back in the twelfth round. The running back, however, refuses to sign a contract with the Saints because he believes he will not get any playing time because the Saints already have several quality running backs on their team. Instead, the running back brings a claim under section 1 of the Sherman Act against the Saints, the NFL, and the thirty-one other teams alleging that the draft restricts competition in the market for player services.<sup>373</sup>

At trial, assume that the running back is able to allege a number of anticompetitive effects—the draft restricts competition among teams for player services, lowers player salaries, restricts player movement, and results in an inefficient allocation of players.<sup>374</sup> The NFL alleges a number of procompetitive benefits—the draft promotes competitive balance, increases the quality of the product, and provides financial stability for the teams.<sup>375</sup> There is no simple way to balance these effects. As Justice Scalia might put it, there is no formula to tell us if the running back's rock is heavier than the NFL's line is long.<sup>376</sup>

The less restrictive alternative inquiry can, however, be of significant assistance. The running back will be able to show that a twelve-round draft is obviously overly restrictive. Evenly distributing the ninety-six best players (across three rounds) entering the draft in a given year might contribute to competitive balance, but it is hard to conceive of the necessity of evenly distributing the 320th through 384th best players.<sup>377</sup> Thus, a shorter draft such as a three-round draft is an obviously less restrictive alternative. Proof of this significantly less restrictive alternative could be used to infer anticompetitive intent and serve as a “tiebreaker” to permit a court to determine that the draft was net anticompetitive.<sup>378</sup>

---

<sup>371</sup> *Id.*

<sup>372</sup> *Id.* at 1176. For a similar example, see Feldman, *supra* note 254, at 907.

<sup>373</sup> This is essentially the lawsuit that was brought in *Smith*, 593 F.2d at 1175-78.

<sup>374</sup> See *id.* at 1174-75.

<sup>375</sup> See *id.* at 1175-76.

<sup>376</sup> *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

<sup>377</sup> Ninety-six total players would be drafted in the first three rounds of the draft. A total of 320 players would be drafted in 10 rounds, and a total of 384 players would be drafted in 12 rounds.

<sup>378</sup> See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1185 (D.C. Cir. 1978). Many

This limited use of the less restrictive alternative is consistent with the underlying rationale of the Sherman Act and the original balancing test in the Rule of Reason. By removing the less restrictive alternative as an independent and dispositive prong, the test maintains its focus on the search for net competitive effects, prevents courts from using section 1 of the Sherman Act to second-guess the business judgment of defendants, and simplifies the Rule of Reason analysis.

### 3. Seeking Guidance from Proportionality Analysis

To simplify the analysis under section 1 of the Sherman Act, courts should revert back to the original Rule of Reason and solely use the less restrictive alternative as an aid in balancing the competitive effects of restraints. If, however, the Modern Rule of Reason and its use of the less restrictive alternative as a dispositive prong endure, courts must be given guidance for executing the test. That guidance should come, in part, from a study of “proportionality analysis,” the framework of constitutional analysis used by virtually every country in the world.<sup>379</sup>

---

commentators have argued that the less restrictive alternative inquiry should replace the Rule of Reason’s balancing test. *See, e.g.,* Ross, *Antitrust Analysis*, *supra* note 291, at 489-97 (discussing the merits of the less restrictive alternative inquiry). The inquiry, however, should not serve as a replacement for the balancing test because it can be more difficult to perform than the balancing test and because it does not, by itself, gauge the competitive effects of the restraint. *See* Feldman, *supra* note 300, at 570-85.

<sup>379</sup> DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 159-60 (2004); *see also*, Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on “Proportionality,” Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 606-07 (1999) (discussing Canadian use of proportionality analysis via *Oakes* test). The analysis originated in Canada and Germany. *See* Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT’L J. CONST. L. 468, 468-69, 476-78 (2009). The United States has not embraced proportionality as a form of constitutional analysis, though its use has appeared in a number of cases. *See, e.g.,* *Solem v. Helm*, 463 U.S. 277, 286-88 (1983) (noting that “[t]he constitutional principle of proportionality has been recognized explicitly in this Court for almost a century”). Controversy still reigns over the use of proportionality analysis in analyzing the Eighth Amendment’s prohibition of “cruel and unusual punishment.” *See id.* at 288; Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: ‘Proportionality’ Relative to What?*, 89 MINN. L. REV. 571, 575 (2005) (noting that the “fundamental concept” of the Eighth Amendment is “excessive, not ‘proportional’”).

More direct lessons can also be learned from the use of proportionality analysis in judging the legality of player restraints under EU competition law. *See, e.g.,* Katarina Pijetlovic, *Another Classic of EU Sports Jurisprudence: Legal implications of Olympique Lyonnais SASP v. Olivier Bernard and Newcastle UFC (C-325/08)*, 35 EUR.L. REV. 857, 860-68 (2010).

This is not a drastic proposal, as proportionality analysis employs the same basic framework as the Modern Rule of Reason. Like the Modern Rule of Reason, proportionality analysis has two stages.<sup>380</sup> The first stage, known as “necessity,” is a less restrictive alternative inquiry that ensures that the benefits of the regulation could not have been achieved through a less restrictive alternative.<sup>381</sup> It encompasses a notion of “efficiency or Pareto-optimality: there can be no alternative policy which improves the level of rights-enjoyment without imposing extra costs on the level of goal-realisation.”<sup>382</sup> The second stage, known as “*stricto sensu*,” is a traditional form of balancing, where courts weigh and balance competing values and objectives against each other.<sup>383</sup> The balancing test in *stricto sensu* requires “that costs to one principle must be adequately off-set by gains to the other . . . . [T]he intensity of interference with one principle must be proportional to the extent of satisfaction of another.”<sup>384</sup>

Nor is this a normative proposal — it merely recognizes that federal circuit courts in the U.S. are rudderless in navigating a test that the rest of the world uses as its core adjudicatory framework.<sup>385</sup> Although couched in terms of constitutional rights and legislative prerogatives instead of anticompetitive effects and procompetitive benefits, proportionality analysis and the Modern Rule of Reason seek answers to the same questions.

The commonalities between the two tests are obvious, but the utility of this universally applied proportionality analysis to U.S. antitrust law is unexplored. This is, therefore, a novel proposal. Despite the fact that judiciaries throughout the world “rely almost entirely on the principal of proportionality” to determine if a regulation is permissible, courts

---

<sup>380</sup> The test has been articulated many different ways, but the distillation of the tests results in the same two prongs. For example, the Constitutional Court of South Africa explains that “limitations on constitutional rights can pass constitutional muster only if the Court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in this limitation, taking into account the availability of less restrictive means to achieve this purpose.” *Christian Education South Africa v. Minister of Education* 2000 (4) SA 757 (CC) at 777 B-C (S. Afr.).

<sup>381</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103, 139-40.

<sup>382</sup> See Julian Rivers, *Proportionality and Discretion in International and European Law*, in *TRANSNATIONAL CONSTITUTIONALISM* 115 (2007).

<sup>383</sup> See, e.g., Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law: In Comparative Perspective*, 42 *TEXAS INT’L L.J.* 371 (2007).

<sup>384</sup> Rivers, *supra* note 382 at 115.

<sup>385</sup> Proportionality analysis has also been described as “a universal criterion of constitutionality.” Beatty, *supra* note 379, at 162.

in the United States have never discussed, much less cited, the analysis in the context of antitrust law.<sup>386</sup>

Proportionality analysis will not eliminate all of the practical problems inevitably presented by combining a balancing test with a less restrictive alternative inquiry.<sup>387</sup> But, lessons can be learned from studying how the analysis is used, how it has developed, and why its use is so prevalent. This Article does not attempt to answer all of those questions. Rather, it suggests that the Modern Rule of Reason can be given shape and form by understanding how judiciaries throughout the world have used similarly difficult standards to adjudge the legality of restraints on, *inter alia*, liberty, human rights, and trade. As Professor Frase has noted, the difficulties of the two-pronged test in proportionality analysis “have not prevented the Supreme Court, lower courts, and foreign courts from employing many ends proportionality principles which require rough balancing of qualitatively different costs and benefits such as the costs and benefits of forced medication of inmates or of additional procedural safeguards.”<sup>388</sup>

One reason offered for the nearly universal adoption of the proportionality analysis is that it furthers a “culture of justification.”<sup>389</sup> Put simply, it asks rule-makers to justify their actions. As Professors Moshe Cohen-Eliya and Iddo Porat explain, “The global move toward proportionality is therefore a global move toward justification; it responds to a widespread and basic intuition: we want government to justify all of its actions.”<sup>390</sup>

Another primary reason why use of proportionality analysis is favored by judicial systems throughout world is that it allows for guided flexibility.<sup>391</sup> It provides a structured framework of analysis,

---

<sup>386</sup> *Id.*

<sup>387</sup> It also does not eliminate the inconsistency with the underlying rationale of the Sherman Act. *See supra* Part V.B.

<sup>388</sup> Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment ‘Proportionality’ Relative to What?*, 89 MINN. L. REV. 571, 593, 594 (2005).

<sup>389</sup> *See* Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. ON HUM. RTS. 31, 32 (1994). According to Mureinik, the post-Apartheid constitution in South Africa must be a “bridge away from a culture of authority . . . It must lead to a culture of justification — a culture in which every exercise of power is expected to be justified . . . The new order must be a community built on persuasion, not coercion.”

<sup>390</sup> Moshe Cohen-Eliya & Ido Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMP. L. 463, 475 (2011).

<sup>391</sup> *See, e.g.*, PAUL CRAIG, *EU ADMINISTRATIVE LAW* 657 (2006) (“It becomes apparent that the way the proportionality principle is applied by the Court of Justice covers a spectrum ranging from a very deferential approach, to quite a rigorous and

but it also embeds a sliding scale that permits courts to exercise a level of discretion, or “margin of appreciation,”<sup>392</sup> depending on the interests implicated by the regulation in question. As Professor Beatty explains, “As a general principle, proportionality [analysis] tells governments and their officials that they have to have stronger and more compelling reasons for decisions that inflict heavy burdens and disadvantages on people than when the infringements of rights and liberties are not as serious or painful.”<sup>393</sup>

The discretion afforded courts in the sliding scale can help give shape to the amorphous less restrictive alternative inquiry stage of the Modern Rule of Reason. In proportionality analysis, much like in U.S. constitutional law, the requisite “restrictiveness” of the regulation in question varies depending on the significance of the interest implicated.<sup>394</sup> Thus, interference with a “fundamental right” is subject to the most exacting, or strict, scrutiny, while interference with other rights faces a less demanding standard.<sup>395</sup> The sliding scale of deference, therefore, permits a more nuanced, context-sensitive

---

searching examination of the justification for a measure which has been challenged.” (citing Gráinne De Búrca, *The Principle of Proportionality and its Application in EC Law*, 13 Yearbook of Eur. L. 105, 111 (1993)); Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789, 831 (2007) (noting that “the degree of deference” under proportionality analysis “depends on the general level of scrutiny that . . . applies to the right in question).

<sup>392</sup> Andenas & Zleptnig, *supra* note 383, at 378.

<sup>393</sup> Beatty, *supra* note 379, at 163-64. As the Constitutional Court of South African explained, “the more serious the impact of the measure in the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure . . .” Gardbaum, *supra* note 397, at 841.

<sup>394</sup> U.S. Constitutional law, however, does not explicitly incorporate a balancing test. Rather, it only uses varying forms of the less restrictive alternative inquiry. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (discussing the less restrictive alternative inquiry); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783-84 (2007) (noting that strict scrutiny requires an “inquiry into less restrictive alternatives”).

<sup>395</sup> In U.S. constitutional law, such rights include speech, religion, association, etc. *See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783 (2007) (“It is well established that when a governmental policy is subjected to strict scrutiny, the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling governmental interests.” (internal quotation and citation omitted)); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (“The term ‘narrowly tailored,’ so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used.”).

analysis, and does not mandate a single “correct” answer.<sup>396</sup> The flexibility of the test dictates that — depending on the intensity of review the interests implicated necessitate — courts, and defendants, have a choice of proportional, legally permissible alternatives.<sup>397</sup>

If these principles are incorporated into the Modern Rule of Reason, the flexibility can reduce the risk of courts second-guessing business judgments in cases where the anticompetitive effects implicated are slight or the procompetitive benefits are large. Restraints that appear to implicate greater anticompetitive effects (or lesser procompetitive benefits), like rules that infringe on more fundamental rights, warrant more searching scrutiny and less deference. Restraints that appear to implicate greater procompetitive benefits (or lesser anticompetitive effects) merit a less searching and more deferential approach. Granted, there may be some disagreement regarding the characterization of the anticompetitive or procompetitive effects the restraint may implicate. This model, however, can at least serve as a starting point for creating a more coherent analysis.

This model would be particularly helpful in analyzing restraints in the sports industry. It would allow courts to recognize the interdependent nature of professional sports leagues and the efficiencies typically associated with team and league cooperation. This recognition will not entitle the leagues to immunity under antitrust law, but it will allow courts to give greater deference to league decisions that require cooperation among the teams and fall on the “obviously procompetitive” side of the scale. For example, assume the NFL owners implement a rule that any player found to have bet on an NFL game — the cardinal sin in sports<sup>398</sup> — will be suspended for life. The rule is put in place, according to the owners, to maintain the integrity of the league and to protect the quality of the NFL product. There are obviously numerous less restrictive alternatives, including any non-lifetime suspension. But, under the sliding scale approach, a court will take into account the obviously procompetitive and legitimate nature of the restraint (and limited anticompetitive effect) and permit it unless “manifestly inappropriate.”<sup>399</sup>

By contrast, assume an NFL rule that prohibits a player from signing or even negotiating with a new team without his old team’s consent,

---

<sup>396</sup> See Rivers, *supra* note 382, at 118.

<sup>397</sup> *Id.* at 114.

<sup>398</sup> See MICHAEL COZZILLO, MARK LEVINSTEIN, MICHAEL DIMINO & GABE FELDMAN, *SPORTS LAW: CASES AND MATERIALS* 611-15 (2d ed. 2007).

<sup>399</sup> See *Molinas v. NBA*, 190 F. Supp. 241, 343-44 (S.D.N.Y. 1961) (holding that suspension from NBA for betting on NBA games did not violate Rule of Reason).

even after the contract with his old team has expired. In other words, consider a rule operates as a perpetual restraint on the players' ability to move to a new team.<sup>400</sup> According to the owners, the rule is implemented to maintain competitive balance among the teams and protect the quality of the NFL product. Obviously, there are numerous less restrictive alternatives for achieving competitive balance, including a more limited restriction on the player's ability to leave for a new team (i.e., a five-year restriction instead of a perpetual one). Given the obviously anticompetitive effect of the rule (a perpetual restraint on the player) and its dubious procompetitive benefits, it would be prohibited under antitrust law because it is not the "least onerous" option available to the league for achieving competitive balance.

The proposed model is not intended as a comprehensive solution to the flaws of the Rule of Reason. The modest goal of this proposal is to introduce proportionality analysis as an untapped resource for guiding American courts through the murky waters of the Modern Rule of Reason. Inevitable problems will remain when asking courts to perform a balancing test and a less restrictive alternative inquiry in antitrust law, but lessons can be learned from the nearly universal application of these factors in proportionality analysis.

#### CONCLUSION

This Article highlighted the flawed premise underlying the League's argument for the expansion of the nonstatutory labor exemption to immunize agreements made in the absence of a union. The premise that antitrust law should not apply to professional sports leagues disregards the balance between antitrust and labor law and is yet another attempt by the Leagues to avoid scrutiny under the oft-maligned Rule of Reason. The Rule of Reason is a flawed test, but its flaws do not warrant elevating labor law over antitrust law in the absence of conflicting statutory regimes. Rather, the Rule of Reason should be modified and streamlined to provide a more coherent and predictable form of analysis.

---

<sup>400</sup> Such a rule is, of course, not merely hypothetical. The "perpetual restraint" in Major League Baseball's reserve system was the object of Curt Flood's infamous antitrust challenge in the *Flood v. Kuhn* case. *Flood v. Kuhn*, 407 U.S. 258, 282-86 (1972).