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MAURICE CLARETT V. NATIONAL FOOTBALL LEAGUE, INC.: A N ANALYSIS OF CLARETT'S CHALLENGE TO THE LEGALITY OF THE NFL'S DRAFT ELIGIBILITY RULE UNDER ANTITRUST LAW

I. INTRODUCTION

Is there a valid reason why Maurice Clarett, "[a]rguably the best [running back] in the country," was not eligible to enter the National Football League ("NFL") 2003 rookie draft after his freshman year in college? Maurice Clarett does not think so. In fact, he is challenging the NFL's draft eligibility rule that prohibits him from entering the draft. His lawyer, Alan C. Milstein, confidently stated, "[t]he rule] will fall when it gets challenged, because of antitrust laws . . . . There are no facts in dispute; it's just a matter of if the rule is lawful."

Each major professional sports league has established its own eligibility rules by setting standards each athlete must meet to qual-

4. See Clarett Complaint, supra note 1.
If professional football, an athlete is eligible to participate in the professional draft after he has been out of high school for at least three years. Several commentators agree that the NFL's draft eligibility rule violates the federal antitrust provisions. These commentators contend that the rule is an unreasonable restraint on competition for the services of college athletes, and is therefore illegal.

The NFL disagrees with the contention that the draft eligibility rule is an unreasonable restraint on competition and intends to defend against Clarett's allegations. NFL commissioner, Paul Tagliabue, stated, "the league will fight any underclassman who tries to overturn the rule." Some commentators and experienced players in the NFL stand by the rule and are certain the rule serves a valuable purpose. Warren Sapp, the star defensive tackle for the former Super Bowl Champion Tampa Bay Buccaneers, entered the draft after his third year in college and said the value of college goes beyond the field. Sapp also stated it is important that Clarett

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7. For a discussion of the NFL Constitution and By-Laws, see infra note 65 and accompanying text.

8. See Nick Cafardo, Clarett Sues NFL for Eligibility: Player Challenging Draft Eligibility Rule, BOSTON GLOBE, Sept. 24, 2003 [hereinafter Player Challenging Rule] (quoting Duke University legal expert and professor, Paul Haagen, as saying Clarett has strong case and NFL will probably have trouble keeping Clarett out of draft), available at http://www.boston.com/sports/football/articles/2003/09/24/clarett_sues_nfl_for_eligibility/. "Any attempt by competitors to restrain competition in the labor market is regarded by the courts with great suspicion." Id. He further states that, "unless the restraint falls under a limited number of narrow exceptions, it will be treated as a violation of the antitrust laws." Id.

9. See Filing Suit, supra note 3 (noting Clarett's suit states, "[t]he rule is a restraint of amateur athletes who were strangers to the collective bargaining process").


stay in school and receive an education. He advised Clarett to "[g]et a clue . . . the [draft eligibility] rules have been put in place to help him . . . [t]hey were set up for a specific reason."

The purpose of this Note is to determine whether the NFL's draft eligibility rule violates antitrust laws. Part II of this Note will examine the antitrust laws, including the two standards of review the court uses in analyzing alleged violations, and how these standards apply to professional sports. Part II will also investigate the application of labor laws, particularly the non-statutory labor exemption, and how it has been applied to professional sports in the past. In Part III of this Note, the NFL's draft eligibility rule will be analyzed under antitrust laws and the non-statutory labor exemption to determine the potential outcomes of Clarett's challenge to the rule. Arguments by the NFL, in support of the rule, and by Maurice Clarett, in opposition to the rule, will be raised, discussed, analyzed, and criticized throughout the analysis.

II. Background

A. The Antitrust Laws and Standards of Review

A discussion of the validity of the NFL's draft eligibility rules must first begin with an overview of modern antitrust laws. Congress instituted the Sherman Act in 1890 to provide a blanket restriction on the restraint of trade. In order for conduct to be deemed illegal under this Act: (1) the restraint must affect trade or commerce among several states, and (2) there must be an agreement that is sufficient to constitute a contract, combination, or conspiracy. As one court suggested, the plain text language of the

14. See id.
15. See id. (quoting Warren Sapp statements urging Clarett to stay in school).
16. For a discussion on the standards of review, see infra notes 25-40 and accompanying text.
17. For a discussion of the non-statutory labor exemption, see infra notes 52-58 and accompanying text.
18. For an application of the antitrust laws and the non-statutory labor exemption to the NFL's draft eligibility rule, including possible arguments and the potential outcomes of Clarett's challenge, see infra notes 70-220 and accompanying text.
19. See Sherman Act, 15 U.S.C. § 1 (2000). The applicable portion of the statute states, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Id.
20. See id.; see also Kabbes, supra note 7, at 1235 (noting § 1 implies every combination restraining trade illegal). See generally Antitrust: An Overview, LEGAL INFO. INST., at http://www.law.cornell.edu/topics/antitrust.html (last visited Mar. 30,
Sherman Act is problematic if it is given its literal meaning. The statute states that "every" contract that restrains trade is unlawful. Justice Brandeis acknowledged that restraint is "the essence of every contract[,]" and if the Sherman Act were read literally, it would "outlaw the entire body of private contract law." Justice Brandeis further noted that this body of law establishes enforceability of commercial agreements and enables a competitive economy to function effectively.

1. **Illegal Per Se Standard**

In response to these interpretations of the plain text of the Sherman Act, courts have construed the Sherman Act to apply only to contracts or combinations that amount to an unreasonable restraint on trade. Based on these limitations, the Supreme Court developed standards for proving the illegality of contracts or combinations under the Act. In the "illegal per se" standard, the Court declared certain types of business arrangements are so anti-competitive that they violate the antitrust laws, despite their justifications. The Court defines "illegal per se" practices as those that have a pernicious effect on competition and have no redeeming virtue.

2004) (providing brief overview of antitrust laws and links to additional sources about antitrust law).


22. See id.

23. See id.; see also Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). Justice Brandeis further noted, "the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." Id.

24. See Chi. Bd. of Trade, 246 U.S. at 238 (discussing Justice Brandeis's contentions that restraining contracts are needed for competitive, economic function).

25. See Standard Oil Co. v. United States, 221 U.S. 1, 1 (1911) (establishing Sherman Act should be construed reasonably; only contracts unreasonably restricting competitive conditions are prohibited). Standard Oil had controlled almost ninety percent of the nation's refining capacity and employed abnormal competitive business practices. See id. at 58-60. The company used tactics, such as business espionage, to intentionally force competitors out of business. See id.

26. For a discussion of the standards the Supreme Court used to determine illegality under the Act, see supra notes 25-40 and accompanying text.

27. See N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (defining illegal per se standard constructed by court); see also Int'l Salt Co. v. United States, 332 U.S. 392, 392 (1947) (finding tying arrangements were illegal per se); Fashion Originator's Guild v. Fed. Trade Comm'n, 312 U.S. 457, 468 (1941) (holding group boycotts were illegal per se); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 151 (1940) (declaring price fixing illegal per se); United States v. Addyston Pipe & Steel, 85 F. 271 (C.A. 6 1898), aff'd, 175 U.S. 211, 211-16 (1899) (establishing division markets as illegal per se).

These practices are presumed to be unreasonable restraints on trade and are deemed illegal without economic investigation into the industry involved in order to determine unreasonableness of a particular practice at issue.29 Whenever a court discusses per se violations, it invariably mentions group boycotts and concerted refusals to deal and has held that reasonableness is no defense to the illegality such conduct.30

The Court later ruled in *Silver v. New York Stock Exchange*31 that under certain circumstances an otherwise per se violation might be permitted.32 This analysis, known as the "Silver Exception," is a three-part test used to determine whether an exception to the illegal per se standard exists.33 The Silver Exception provides a narrow exception to per se illegality if the following three requirements are met: (1) the industry structure requires self-regulation; (2) the collective action is intended to (a) accomplish an end consistent with a policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary; and (3) the association provides procedural safeguards which ensure that the restraint is not arbitrary and which furnish a basis for judicial review.34 If the three-part Silver test is satisfied, it allows the court to overcome a finding of per se illegality and requires the court to

29. See id.
30. See id. See *Fashion Originator's Guild*, 312 U.S. at 468 (noting court's refusal to hear evidence offered for reasonableness); see also *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13 (1959) (reiterating Court's previous holding that group boycotts could not be justified by allegations of reasonableness). The Court held that even though action by businessmen did not result in a reduction of opportunities for customers to buy in a competitive market, it was a concerted refusal to deal and constituted a group boycott in violation of the Sherman Act. See id.; see also *Worthen Bank & Trust Co. v. Nat'l BankAmericard, Inc.*, 485 F.2d 119, 124 (8th Cir. 1973) (noting courts restrict per se illegal group boycotts to three categories); LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 230 (1977) (defining classic group boycott). The Fifth Circuit suggested that group boycotts could be classified into three categories: "(1) horizontal combinations among traders to exclude direct competitors from the market; or (2) vertical combinations to exclude competitors of some of the members of the combination; or (3) combinations designed to influence the trade practices of boycott victims rather than eliminate them as competitors." *Worthen Bank*, 485 F.2d at 124; see also *United States v. Trenton Potteries Co.*, 273 U.S. 392, 395-96 (1927) (noting court held reasonableness of agreed prices was immaterial under an indictment charging combination to fix prices and limit sales in restraint of interstate commerce).
32. See id.
33. See id. (describing three-part test set forth by court to determine whether exception to illegal per se standard existed).
34. See id.
perform another type of analysis, known as the Rule of Reason analysis.  

2. **Rule of Reason Analysis**

The Supreme Court developed a more flexible method of antitrust analysis that weighs the activity’s benefit to competition against its injury to competition. The Court held that application of this standard, known as the “Rule of Reason,” should be limited to an agreement’s effect on economic competition only. The Court came to this conclusion by reasoning that the goal of the inquiry “is to form a judgment about the competitive significance of the restraint [against trade]; it is not to decide whether a policy favoring competition is in the public interest or in the interest of members of an industry.” In applying the Rule of Reason, courts must analyze the alleged anti-competitive effect of a restraint against trade by taking into account several factors. These factors include the facts peculiar to the business, the history of the restraint, and the reasons for the impositions of the rule. With a basic overview of antitrust laws and the standards of review, this


36. *See* Chi. Bd. of Trade *v.* United States, 246 U.S. 231, 238 (1918) (holding lengthy inquiry into restraint was needed to determine whether restraint suppresses or destroys competition under Rule of Reason analysis).


38. *Prof’l Eng’rs*, 435 U.S. at 692.

39. *See* Chi. Bd. of Trade, 246 U.S. at 238 (asserting relevant factors for deciding anticompetitive effect under Rule of Reason analysis).

40. *See* id. In the opinion, Justice Brandeis makes a frequently cited statement regarding the Rule of Reason:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

*Id.*
Note will now examine how courts have applied antitrust laws to professional sports.

B. Application of Antitrust Laws to Professional Sports

Various facets of professional sports benefit either from complete or partial immunity from potential antitrust actions, depending on the particular sport and activity in question. \(^{41}\) "While professional sports [other than baseball] remain subject to antitrust scrutiny, their conduct is often held to less rigorous standards than conventional industries." \(^{42}\)

1. Baseball and Antitrust

Since 1922, professional baseball has been granted a complete exemption from the application of antitrust laws. \(^{43}\) In Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, \(^{44}\) the Supreme Court held that the business of baseball involved principally intrastate activities, to which the antitrust laws did not apply. \(^{45}\) Although this broad view of the Commerce Clause is no longer valid, the Court reaffirmed that baseball remains exempt from potential liability in subsequent decisions. \(^{46}\) Currently, the

\(^{41}\) See Joseph P. Bauer, Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?, 60 Tenn. L. Rev. 263, 263-64 (1993) (discussing existence, extent of antitrust immunity varies among professional sports). Activities protected from antitrust laws include agreements for the broadcasting of sporting events, mergers of sports leagues, restraint of players' ability to choose freely the teams they will play for, and restrictions on geographic moves by sports franchises. See id.


\(^{43}\) See Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 209 (1922) (holding antitrust laws do not apply toward professional baseball because reach extends only toward interstate commerce). The Court denied the assertion that the National and American Leagues and their member clubs had conspired to monopolize the business of baseball. See id. at 200.

\(^{44}\) 259 U.S. 200 (1922).

\(^{45}\) See id. at 208-09 (reasoning business of professional baseball is purely state affair, despite fact competitions are arranged across state lines causing spectators to cross state lines, because not enough change in business's character). The traveling of fans is incidental, it is not the essential thing, and the exhibition, although made for money, is not commonly called trade or commerce. See id.

\(^{46}\) See Flood v. Kuhn, 407 U.S. 258, 283-84 (1972) (offering two principal reasons why baseball should remain immune under antitrust laws). The first reason is Congress's "positive inaction." Id. The second reason is, although baseball's exemption from the antitrust laws seems illogical, it was the product of a judicial creation and is entitled to stare decisis. See id. The court further stated, "[i]f there is any inconsistency or illogic in all this, it is an inconsistency or illogic of long standing that is to be remedied by the Congress and not by this Court." Id.; see also
business of professional baseball is protected from antitrust laws by both congressional positive inaction and the rule of *stare decisis*.47

2. *Other Professional Sports*

Unlike professional baseball, other professional sports are subject to scrutiny under the scope of the antitrust laws. The Supreme Court has expressly held that the antitrust laws apply to professional football,48 professional boxing,49 and other professional sports.50 Lower federal courts across the nation have applied antitrust laws to professional sports as well.51 Analyzing a particular player restraint under antitrust laws requires examining both the particular rule being challenged and the context of its use in the professional sport involved.

C. *The Labor Exemption*

The labor exemption attempts to reconcile the conflicting goals of the pro-competitive antitrust laws and the labor laws that promote the organization of employees into labor unions.52 Essen-

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47. See Radovich v. Nat'l Football League, 352 U.S. 445, 451 (1957) (discussing reasoning behind exempting baseball under *stare decisis*). The Court has justified its decision that the business of baseball is outside the scope of antitrust laws by concluding more harm would be done in overruling *Federal Baseball* than in upholding a ruling, which, at best, would be of dubious validity. See id.; see also *Flood*, 407 U.S. at 283 (explaining congressional positive inaction). The Court states that baseball should be immune because Congress was well aware of the situation and of the general change of case law, in regard to the Commerce Clause, and has yet to act. See id. Therefore, the congressional acquiescence of the rule allows the immunity to remain. See id.

48. See *Radovich*, 352 U.S. at 445 (holding football subject to antitrust laws).


50. See *Flood*, 407 U.S. at 282-83 ("Other professional sports operating interstate—football, boxing, basketball, and presumably, hockey and golf — are not so exempt.")


tially, the exemption protects issues important to labor laws.\textsuperscript{53} In 1914, the Clayton Act created a statutory labor exemption in response to the restraining effects of labor agreements on competition under the Sherman Act of 1890.\textsuperscript{54} This exemption was supported with the passage of several pieces of pro-labor legislation.\textsuperscript{55} In addition to this statutory exemption, the Supreme Court proffered general decisions regarding labor issues that laid the groundwork for non-statutory, judicial exemptions.\textsuperscript{56} These decisions indicated that the Court was concerned with product market restraints.\textsuperscript{57} Additionally, such decisions indicated the Court's general assumption that labor market restraints are immunized from antitrust scrutiny.\textsuperscript{58}

D. Labor Exemption in Professional Sports

The labor exemption has been successfully invoked in recent cases by sports leagues to halt antitrust attacks on player restraint

\textsuperscript{53} See Rosner, \textit{supra} note 52.


\textsuperscript{55} See Norris-LaGuardia Act, 29 U.S.C. § 101 (2000); see also National Labor Relations Act, 29 U.S.C. § 157 (1976) (describing labor law practices Congress granted). The purpose of the National Labor Relations Act is to promote collective bargaining and to protect certain union or concerted employee activities. See \textit{id}. This law provides three basic rights: (1) the right to self-organize, to form, join, or assist labor organizations; (2) the right to bargain collectively through representatives; and (3) the right to engage in activities for employees' aid or protection (use pressure tactics). See \textit{id}; see also Taft-Hartley Act, 29 U.S.C. § 151 (1976) (providing same three rights).

\textsuperscript{56} See Rosner, \textit{supra} note 52, at 547-48; see also Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622-23 (1975) (holding concerted agreements between unions and non-labor groups not within statutory labor exemption); Amalgamated Meat Cutters v. Jewel Tea, 381 U.S. 676, 690-91 (1965) (holding labor and management free to reach agreements relating to parties' immediate employment policies when restraint does not lessen competition amongst business competitors); United Mine Workers of Am. v. Pennington, 381 U.S. 657, 660-61 (1965) (holding labor policy did not protect union-employer agreement, that other parties, not parties to agreement, forced to meet); Allen Bradley Co. v. Union, 325 U.S. 797, 810 (1945) (holding statutory labor exemption did not have automatic immunity but rather protected union conduct undertaken by itself or with other labor groups, but not with non-labor groups).

\textsuperscript{57} See \textit{supra} note 56 and accompanying text.

\textsuperscript{58} See Local 357 v. NLRB, 365 U.S. 667 (1961) (permitting labor market restraints, such as hiring halls); see also Rosner, \textit{supra} note 52, at 549 (noting sports cases involving labor markets and non-economic competitors were arguably restraints immune from antitrust scrutiny).
rules.\(^{59}\) In Mackey v. National Football League,\(^ {50}\) the Eighth Circuit developed a test for determining when a restraint is properly incorporated into a collective bargaining agreement, thereby excluding league officials from following provisions within the Sherman Act.\(^ {61}\) The Mackey court held the labor exemption would be available to the employer only if each element of the judicially created three-prong test was satisfied.\(^ {62}\) In sum, the court's formulation provides a shorthand method for striking the balance between the importance of the subject matter to employee interests and its anti-competitive effects.\(^ {63}\) The Mackey three-prong test will be discussed in detail in Part III of this Note.\(^ {64}\) Before analyzing the NFL's draft eligibility rule under antitrust law, this Note will briefly review the rule itself and the controversy its challenge presents.

E. The NFL

The NFL's eligibility rule states that a player is not eligible for the NFL draft until three college playing seasons have elapsed since the player's high school graduation.\(^ {65}\) The NFL's draft eligibility rule has become a part of the collective bargaining agreement between NFL team owners and the players' union.\(^ {66}\) This rule is the


60. 543 F.2d 606 (8th Cir. 1976).

61. See id. at 606 (holding under Rule of Reason, challenged rule restrained players' free marketing ability and therefore did not fall under labor exemption).

62. For a discussion of the three-prong test presented in the Mackey case, see infra notes 181-85 and accompanying text.

63. See McCormick & McKinnon, supra note 59, at 392 (citing Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976)); see also McCourt v. Cal. Sports, Inc., 600 F.2d 1193 (6th Cir. 1979) (summing up essence of labor exemption test created by both decisions).

64. For a discussion of the Mackey test, see infra notes 181-85 and accompanying text.

65. See NFL CONST. & BY-LAWS art. XII, § 12.1; art. XIV, § 14.2 (1976). The NFL Constitution and Bylaws provide in art. XIV, § 14.2: "The only players eligible to be selected in any Selection Meeting shall be those players who fulfill the eligibility standards prescribed in Article XII, § 12.1 of the Constitution and Bylaws of the League." Id. Article XII § 12.1(A) provides, in pertinent part, "no person shall be eligible to play or selected as a player unless (1) all college eligibility of such a player has expired; or (2) at least five (5) years shall have elapsed since the player first entered or attended a recognized junior college, college, or university . . . ." Id.

current subject of controversy between the NFL and Clarett, a football player who, under the rule, has been declared ineligible to play professional football. In response to that declaration, Clarett filed suit against the NFL on September 23, 2003, claiming the draft rule violates the antitrust laws because it unreasonably restrains athletes from competing in their sport. Defending the rule, the NFL asserts that the rule promotes competition within the league, does not violate the antitrust laws, and serves other valuable purposes.

III. ANALYSIS

A. Antitrust Laws and the NFL Draft Eligibility Rule

Many football players are prevented from entering the professional ranks because they have been declared ineligible for the draft under the NFL’s draft eligibility rules. As a result of collective bargaining agreements, all team owners place this restraint on athletes. In the past, professional athletes in numerous sports have challenged these rules as being illegal under antitrust laws. Although widely criticized, the NFL’s draft eligibility rule has never

67. For a discussion of Maurice Clarett’s claim against the NFL, see supra note 5.

68. See Clarett Complaint, supra note 1; see also Clarett Files Suit, supra note 5. “The rule is a restraint of amateur athletes who were strangers to the collective bargaining process . . . [t]he purpose of the rule is to perpetuate a system whereby college football serves as an efficient and free farm system for the NFL by preventing potential players from selling their services to the NFL until they have completed three college seasons.” Id.

69. See Clarett Files Suit, supra note 5. “When NFL commissioner Paul Tagliabue was asked earlier this month if the league could win such a suit, he replied: ‘My feeling as commissioner is that we have a very strong case and that we’ll win it.’” Id.

70. See Filing Suit, supra note 3 (reporting Maurice Clarett not eligible for NFL draft).


been challenged until now, and is currently restraining athletes from entering the draft.\textsuperscript{73}"

The NFL might first contend that when Congress exempted professional baseball from antitrust laws, it also intended to exempt professional football.\textsuperscript{74} Unfortunately for the NFL, the Court in \textit{Radovich v. National Football League}\textsuperscript{75} explicitly limited the antitrust exemption to professional baseball under the rule of \textit{stare decisis}.\textsuperscript{76} \textit{Radovich} further held that Congress did not intend to immunize professional football from the scope of antitrust laws through congressional positive inaction.\textsuperscript{77} In response, the NFL might argue that with regard to antitrust laws, there is no distinguishing factor between the conduct of professional football and the conduct of professional baseball.\textsuperscript{78} The NFL might further argue that, in order

\textsuperscript{73} See Filing Suit, supra note 8 (noting previous, not current, NFL draft eligibility rules). Craig “Ironhead” Heyward petitioned to enter the draft in 1988 when the NFL mandated a four-year window from the date of the high school graduating class. See \textit{id}. He petitioned because he was a fourth-year junior and the NFL allowed him to enter the draft, where he was drafted in the first round. See \textit{id}. Barry Sanders became the first “true” junior to be granted an exception to the rule in 1989. See \textit{id}. Sanders did not ask the NFL to change its policy, but rather for “special permission” to be eligible, which the NFL granted. See \textit{id}. The NFL Commissioner, Paul Tagliabue, changed the NFL rule in 1990 to require passage of three college seasons after the player’s high school graduation for eligibility. See \textit{id}.\textsuperscript{74} See Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs, 259 U.S. 200, 208-09 (1922) (holding professional baseball specifically exempt from antitrust laws).\textsuperscript{75} 352 U.S. 445 (1957).\textsuperscript{76} See \textit{id}. at 451-52. (stating Court found Sherman Act applied to professional football). The Court further stated it would adhere to, but not extend, the baseball exemption as long as Congress continued to acquiesce. See \textit{id}. See generally John A. Gray & Stephen J.K. Walters, \textit{Is the NFL an Illegal Monopoly?}, 66 U. DET. L. REV. 5 (1988) (discussing NFL and antitrust laws).\textsuperscript{77} See \textit{Radovich} v. Nat’l Football League, 352 U.S. 445, 452 (1957) (finding Congress’ acquiescence regarding professional baseball exemption did not show intention to exempt professional football). The Court further held Congressional processes are more accommodating of this type of exemption, and the legislature, not the court, can exempt other professional sports. See \textit{id}; see also United States v. Int’l Boxing Club of N.Y., Inc., 348 U.S. 296, 243-44 (1955) (noting denial of four separate bills introduced to Congress regarding extending baseball rule to other sports and exempting organized professional sports from antitrust laws). The Court noted extensive hearings on the three House bills were conducted by the Subcommittee of Study of Monopoly Power of the Committee on the Judiciary and no hearings were held on the Senate bill. See \textit{id}. At the end of the House Subcommittee, Congress unanimously opposed the four bills under the reasoning that such a broad exemption could not be granted without substantially repealing the antitrust laws. \textit{id}.\textsuperscript{78} See \textit{Radovich}, 352 U.S. at 455 (Frankfurter, J., dissenting) (stating antitrust laws applicable to baseball should be equally applicable to professional football); see also Kabbes, supra note 7, at 1242 (noting Justices Frankfurter, Harlan, and Brennan’s dissent from the majority’s opinion in \textit{Radovich}, stating the doctrine of \textit{stare decisis} should control Court’s decision). The dissenters further noted football
to eliminate error or discrimination, the Court should include professional football under the umbrella of protection afforded to professional baseball and similarly exempt football from antitrust laws.\textsuperscript{79}

For the remainder of this analysis, this Note presumes professional football falls under the scope of antitrust laws. In most cases, the Court has held player restraint rules in professional sports are concerted refusals to deal or group boycotts.\textsuperscript{80} Undoubtedly, the draft eligibility rule is a restraint on competition for college athletes, but is it an unreasonable restraint on competition?\textsuperscript{81} In order to analyze the legality of the NFL's draft eligibility rule, it is necessary to review past Supreme Court cases dealing with concerted refusals to deal and group boycotts. In analyzing the legality of eligibility rules under the antitrust laws, courts have varied in their approaches.\textsuperscript{82} Because it is uncertain which approach a court would use in analyzing the NFL's rule, this discussion will first examine the rule under the illegal per se approach and then under the Rule of Reason.\textsuperscript{83}

and baseball are indistinguishable and Congress did not intend to place baseball in a class of its own. \textit{Id.; cf. Int'l Boxing}, 548 U.S. at 248-50 (Frankfurter, J., dissenting) (stating "[i]f the intrinsic applicability of the Sherman Law were the issue, no attempt would be made to differentiate" professional baseball from professional boxing). Justice Frankfurter argued the doctrine of \textit{stare decisis} was the "imprisonment of reason" and acts to disregard identical situations in other professional sports. \textit{Id.}

\textsuperscript{79} \textit{See Radovich}, 352 U.S. at 456 (Harlan, J., dissenting) (stating Court should leave changes for Congress rather than make untenable distinctions). Justice Harlan further noted that holding professional football subject to the antitrust laws makes baseball \textit{sui generis} in the eyes of the law. \textit{See id.}

\textsuperscript{80} \textit{See Kapp v. Nat'l Football League}, 586 F.2d 644, 648 (9th Cir. 1978) (holding professional football leagues' group boycott of quarterback for refusing to sign standard player contract was illegal); \textit{see also} Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1323 (D. Conn. 1977) (invalidating WHA league rule barring men under twenty years old from playing professional ice hockey); Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1066 (C.D. Cal. 1971) (holding NBA's draft eligibility rule illegal because rule constituted concerted refusal dealing or group boycott).

\textsuperscript{81} \textit{See Geoff Calkins, Claret Case Should Be Decided on Merit, Beaufort-Gazette.com, at http://www.beaufortgazette.com/24hour/sports/story/1007568p-7024639c.html} (Sept. 23, 2003) [hereinafter \textit{On Merit}] ("Even if the exemption doesn't apply, the rule is perfectly reasonable.").

\textsuperscript{82} \textit{See McCormick & McKinnon, supra} note 59, at 428-29 (stating courts uncertain as to which rule to apply to professional sports cases); \textit{see, e.g.}, Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc., 351 F. Supp. 462, 503-04 (E.D. Pa. 1972) (applying Rule of Reason approach to sports cases because industry's unique economic position); \textit{All-Pro}, 325 F. Supp. at 1066 (applying illegal per se approach to sports cases).

\textsuperscript{83} \textit{See McCormick & McKinnon, supra} note 59, at 428-29 (noting uncertainty regarding which standard court will apply despite modern trend of applying Rule of Reason).
1. The NFL’s Draft Eligibility Rule Under the Illegal Per Se Approach

In two significant cases addressing the legality of eligibility rules in professional sports, the court has applied the illegal per se approach.84 First, in Denver Rockets v. All Pro-Management,85 Spencer Haywood challenged the National Basketball Association’s (NBA) rule that prohibited a player from entering the draft until four years after high school graduation.86 The court found that the by-laws of the NBA constituted a “group boycott,” or a primary concerted refusal to deal, wherein actors at one level of trade pattern (NBA team members) refused to deal with actors at another level (those ineligible under the four year rule).87 The court refused to perform a reasonableness test because it determined that the NBA could not meet the three requirements of the Silver test.88 The court found the first prong’s self-regulation requirement was satisfied, as self-regulation is inherent in the nature of professional sports leagues.89 The court further held the second prong’s requirement — that the rules employ the less restrictive means — was not satisfied because the rules prohibited players who did not attend college from playing and were overly broad.90 Finally, the NBA did not satisfy the third prong of the test because there was no

84. See Linseman, 439 F. Supp. at 1315; All-Pro, 325 F. Supp. at 1049.
86. See id. at 1059 (noting Haywood filed suit enjoining NBA from enforcing four-year rule, claiming Sherman Act violation).
87. See All-Pro, 325 F. Supp. at 1056 (reasoning NBA bylaws provision prevents Haywood, qualified professional basketball player, from contracting with any NBA team). In light of the evidence, the court ruled that the provision was “an arbitrary and unreasonable restraint upon the rights of Haywood and other potential NBA players to contract to play for NBA teams until the happening of an event (i.e., passage of four years from potential player’s high school class graduation) fixed by the NBA without the consent or agreement of such potential player.” Id. See generally Klor’s, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) (defining group boycott as vertical combination to exclude competitors of some of members of combination); see e.g., Linseman, 439 F. Supp. at 1326 (holding rule prohibiting person under age 20 from playing with professional hockey league member probably per se unlawful boycott); Boris v. Unites States Football League, No. Cv. 83-4980 LEW (Kx), 1984 WL 894, at *1 (C.D. Cal. Feb. 28, 1984) (holding rule prohibiting member teams from selecting player unless his college eligibility expired or until it was at least five years after he entered college was per se illegal group boycott).
88. See All-Pro, 325 F. Supp. at 1064-66 (explaining and applying three-part Silver test to case); see also Klor’s, 359 U.S. at 213-14 (holding financial necessity not basis for exemption from antitrust laws with regard to group boycotts unless qualified under Silver).
89. See All-Pro, 325 F. Supp. at 1064-66.
90. Id. at 1066 (holding rules overly broad because prohibited signing of players incapable of attending college and players who did not desire to attend college).
procedural due process afforded to Haywood; he would never have the opportunity to present his case to the NBA.\textsuperscript{91} Based on these findings, the \textit{All-Pro} court held that the bylaws violated antitrust laws and were illegal per se.\textsuperscript{92}

In \textit{Linseman v. World Hockey Association},\textsuperscript{93} a nineteen-year-old Canadian hockey player challenged a World Hockey Association (WHA) regulation prohibiting persons under the age of twenty from playing professional hockey for any team in the WHA.\textsuperscript{94} Linseman claimed the rule was an unreasonable restraint of trade in violation of the Sherman Act.\textsuperscript{95} The court found that this was a classic case of an illegal per se concerted boycott.\textsuperscript{96} Additionally, the court refused to apply the Rule of Reason because the age restriction rule failed to meet any of the \textit{Silver} requirements.\textsuperscript{97}

In both \textit{All-Pro} and \textit{Linseman}, the court determined that, on its face, the contested draft rule was a concerted refusal to deal that restrained competition in the market for the services of college players.\textsuperscript{98} Unless the draft rule satisfies all three elements of the \textit{Silver} Exception, it is deemed illegal per se.\textsuperscript{99} With the backdrop of \textit{Linseman} and \textit{All-Pro}, the NFL draft eligibility rule may be analyzed to determine whether it satisfies the three elements of the \textit{Silver} exception.

\begin{itemize}
\item[a.] \textbf{Satisfying the First Element of the \textit{Silver} Exception}

The first element of the \textit{Silver} Exception mandates that the industry structure require self-regulation.\textsuperscript{100} In \textit{Kapp v. National Foot-

\textsuperscript{91} See id.
\textsuperscript{92} See id.
\textsuperscript{93} 439 F. Supp. 1315 (D.C. Conn. 1977).
\textsuperscript{94} See id. at 1317-18 (reviewing facts of case).
\textsuperscript{95} See id. (stating relevant facts).
\textsuperscript{96} See id. at 1320 (holding WHA practice was group boycott or concerted refusal to deal); see also Fashion Originator's Guild v. Fed. Trade Commn., 312 U.S. 457, 468 (1941) (demonstrating concerted refusal to deal has long been consistently classified as per se Sherman Act violation); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) (supporting conclusion that refusal to deal is per se violation).
\textsuperscript{97} See \textit{Linseman}, 439 F. Supp. at 1321-23 (finding case indistinguishable from \textit{All-Pro} and relying heavily upon that case during analysis). The court refused to apply Rule of Reason analysis to the age restriction rule after finding that the restriction met none of the \textit{Silver} Exception's three requirements. \textit{See id.}
\textsuperscript{98} See \textit{id.}; \textit{All-Pro}, 325 F. Supp. at 1064-66.
\textsuperscript{99} See generally McCormick & McKinnon, supra note 59, at 431 (analyzing labor exemption rule and \textit{Silver} Exception within professional sports).
\textsuperscript{100} See \textit{Silver v. N.Y. Stock Exch.}, 373 U.S. 341, 349 (1959) (discussing first \textit{Silver} Exception element).

ball League, the court noted both the U.S. Justice Department and Congress recognized that professional sports teams need joint agreements to assure continued viability. Professional football requires self-regulation because "the nature of the business requires rules that enable it to maintain competitive balance and to function with reasonable efficiency." 

Clarett, an undergraduate declared ineligible to enter the NFL draft, questioned the NFL’s requirement of self-regulation when he claimed the draft eligibility rule violated antitrust laws. Clarett may argue that the NFL’s collective action and self-regulation are not necessary for a determination of who should be permitted to play professional football. Clarett may argue that this determination should be left instead to each individual team.

b. Satisfying the Second Element of the Silver Exception

The second element of the Silver Exception requires that the collective action is (a) intended to accomplish an end consistent with the policy justifying regulation; (b) reasonably related to that goal; and (c) not more extensive than necessary. Essentially, this


102. See id. at 79-80 (noting need for professional teams to self-regulate is judicially recognized, despite lack of legislative mandate for self-regulation).

103. See McCormick & McKinnon, supra note 59, at 431-32 (arguing self-regulating professional football is justified because business’s nature). For example, a draft is necessary to ensure players are dispersed among teams and to ensure the wealthiest teams do not receive all of the best players. Id.

104. See Clarett Complaint, supra note 1 (claiming eligibility rule is per se Sherman Act violation).

105. See Lineman v. World Hockey Ass’n, 439 F. Supp. 1315, 1321 (D.C. Conn. 1977) (holding self-regulation in professional hockey not required and World Hockey Association failed first prong of Silver Exception); see also Wash. State Bowling Proprietors Ass’n, Inc. v. Pac. Lanes, Inc., 356 F.2d 371, 376 (9th Cir. 1966) (applying illegal per se standard to invalidate regulatory scheme of Bowling Proprietors Association of America (BPAA), while holding per se rule applied to non-commercial boycotts). BPAA eligibility rules required tournament bowlers to restrict their league and tournament bowling to member establishments, to prevent "sandbagging" or including substandard scores to a bowler’s average to gain a larger handicap. See id. The Ninth Circuit held these rules were illegal because their purpose did not justify the regulation. See id. But see Deesen v. Prof’l Golfers’ Ass’n of Am., 358 F.2d 165, 171 (9th Cir. 1966) (holding self-regulation required and restraint not unreasonable). The court approved the PGA’s rule permitting only those approved by the association to participate in PGA sponsored matches, essentially restraining athletes from competing. See id. at 172. The purpose of the rule was to ensure that the number of golfers competing in a given match would not exceed the number of daylight hours available. See id. The purpose of the PGA’s rule was to accomplish this goal, and the court therefore held the PGA's self-regulation was reasonable and justified. See id.

element requires the NFL’s draft eligibility rule further the goal of self-regulation.

Much like the NBA’s contentions in *All-Pro*, the NFL will likely argue that its draft rule is necessary to guarantee each prospective professional football player is given the opportunity to obtain a college degree prior to commencing his professional career. Even though the policy underlying this argument is commendable, the court in *All-Pro* held it is not in a position to decide whether “this consideration should override the objective of fostering economic competition which is embodied in antitrust laws.” The *All-Pro* court stated that Congress, rather than the courts, should make this decision. Clarett might further argue that even if the rule does serve some relevant goal, it is more broad than necessary because it applies to all players, including those who do not wish to attend, or are unable to attend, college.

The NFL might also argue that the rule is necessary because it allows young players to mature physically, mentally, and emotionally before entering the NFL. Professional football is inherently

107. See, e.g., Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1057 (C.D. Cal. 1971) (noting NBA’s argument supporting draft eligibility rule and noting professional sports careers are temporary); see also Pat Kirwan, *Clarett Should Stay True to School*, NFL.COM, at http://www.nfl.com/news/story/6630186 (Sept. 10, 2003) (stating NFL players who completed college educations were ready move on to new challenges). “But the players who thought football would last forever or the big money would hold them over for the rest of their lives, usually found out it did not.” *Id.*


109. *See id.*

110. *See Clarett Complaint, supra* note 1 (stating draft eligibility rule advances no legitimate purpose and is harmful to competition because it excludes players notwithstanding their ability to perform, market, and compete for available positions in league); *cf.* Int’l Salt Co. v. United States, 332 U.S. 399, 397-98 (1936) (holding summary judgment violating antitrust laws was proper where less restrictive means could have been employed).

111. *See Len Pasquarelli, NRR — NFL’s Demands too Great for Prepsters*, at http://lists.rollanet.org/pipermail/rampage/Week-of-Mon-20010528/005688.html (May 30, 2001) [hereinafter *Prepsters*] (noting several opinions stating NFL has higher physical demands than other sports). The article quotes the Buffalo Bills team president and general manager, Tom Donahoe, stating “[a] high school kid trying to play in the NFL would absolutely get killed . . . [i]t’s simply unthinkable.” *Id.* Indianapolis Colts coach, Jim Mora, added, “[m]aybe somewhere out there is a high school kid who can do it. But in all the years I’ve been doing this, I’ve never seen one.” *Id.* Officials were surveyed by SportLine.com and spoke of the obvious differences between the demands of professional basketball and professional football. *See id.* The consensus was that the “daily grind of body-to-body contact, with perhaps thousands of high-speed collisions over the course of a typical NFL season, made it unlikely a high school player could realistically expect to succeed.” *Id.*

Eric Swann, former league defensive tackle, is one of the few players in recent times to enter the NFL without college experience. *See Prepsters, supra* note 111. Swann played semi-professional football and entered the draft at age 21. *See id.*
violent, and participation in the sport can cause devastating injuries.\(^\text{112}\) Thus, the NFL may argue that protecting the safety of potential players is an adequate justification for its self-regulating rule.\(^\text{113}\)

In response to these contentions, Clarett may argue that the NFL’s rule is overly broad because it eliminates prospective athletes with the ability to participate professionally in the sport.\(^\text{114}\) Clarett may also argue that the rule is too extensive because the athletic abilities vary radically among young players and determinations are therefore too subjective.\(^\text{115}\) Additionally, it may be possible to argue that the rule is overly broad because it can deny athletes who are physically, emotionally, and mentally ready to enter the NFL the opportunity to play.\(^\text{116}\)

Finally, the NFL might argue that collegiate athletics provides an efficient and inexpensive way of training young professional football players, and that without college athletics, there would be

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Swann was the number-one pick of the Arizona Cardinals in 1991 and said he had felt that the two or three years made a dramatic difference. See id. He was quoted as saying, "[y]ou hear about how a talented guy is the so-called 'man playing among boys,' but if the NFL let high school players in right out of graduation, it would be exactly the opposite. It's a big difference, both physically and from a maturity standpoint, between 18 and 21 years old." Id. Professional football player Herschel Walker was quoted saying, "[y]our body just isn't ready for it and neither is your mind . . . . It's a battle every day. A high school player wouldn't get very far." Id.

112. See McCormick & McKinnon, supra note 59, at 434 n.262 (noting seriousness of violence problem can be best analyzed through injury statistics). For example:

From 1969-1974[, ...] NFL players suffered an estimated 5,110 injuries. A follow-up study of serious sports injuries reported that serious football injuries in 1974 increased 25 percent over the previous season. During that year, a survey of NFL team trainers revealed that injuries increased to an estimated record 1,638. That is, 12 injuries for every 10 players.


113. See Neeld v. Nat'l Hockey League, 594 F.2d 1297, 1300 (9th Cir. 1979) (holding rule's purpose was promoting safety, with no anticompetitive intentions).

114. See McCormick & McKinnon, supra note 59, at 434 (stating draft rule aimed at protecting young players was consistent with policy justifying self-regulation). In the rule's present form, it is overly broad because it bars all players without regard to their physical prowess. Id. If there is a concern for a player's safety, each candidate should undergo an extensive physical examination prior to his eligibility for the draft. See id. at 435.

115. Compare Teammates, supra note 2, with Not Ready, supra note 2 (comparing two views of Clarett's readiness for NFL and noting subjective and contradicting views).

116. See College Ball Picks, supra note 2 (reporting Clarett's statistics and honors). But see Not Ready, supra note 2 (stating opinion that Clarett was not physically, emotionally, or mentally ready for NFL).
no organized system to pool talented prospects.\textsuperscript{117} Thus, the NFL's eligibility rule promotes the efficient operation of the NFL by strengthening the sport at the college level so that the NFL does not have to invest as many resources in developing players at the professional level.\textsuperscript{118} Such an argument may justify the rule as financially necessary for the league to continue.\textsuperscript{119} Further, there is a compelling need for the NFL to maintain good relationships with colleges because college athletics remain the best resource for discovering talented players.\textsuperscript{120} These relationships would be disrupted if the NFL were allowed to draft top players who still had years of college eligibility left.\textsuperscript{121}

In response, Clarett might argue that if the NFL needs a training ground to develop its players, "the principle of the free market system dictates that it bear the cost of that need by establishing its own farm system."\textsuperscript{122} Clarett may reference past decisions that have rejected similar arguments and have instead held "the anti-trust laws do not admit any exceptions due to economic necessity."\textsuperscript{123}

In order to satisfy the second requirement of the Silver Exception, the NFL would have to demonstrate that the purpose of its draft eligibility rule is to balance competition among NFL teams by ensuring a steady flow of talented collegiate players.\textsuperscript{124} Thus, the

\begin{itemize}
\item \textsuperscript{117} See Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1066 (D.C. Cal. 1971) (holding NBA's rule justified because argument allows for college athletics to be replaced by farm teams).
\item \textsuperscript{118} But see Ned Barnett, Clarett Should Be Allowed Early Entry Trip to the NFL, NEWSOBSERVER.COM, at http://newsobserver.com/front/digest/story/2892409p-2664558c.html (Sept. 24, 2003) (claiming rule has nothing do with preserving college amateurism or any other virtue). Barnett claims the rule is based on the deal between colleges and NFL, under which colleges "develop the best players for [the NFL] for free and [in return the NFL will] make sure they have no option but to play for you for free for at least three years.").
\item \textsuperscript{120} See McCormick & McKinnon, supra note 59, at 432-33 (stating practicability is real reason for rule because college players are primary talent source and necessary for leagues to maintain good relations).
\item \textsuperscript{121} See id. at 434.
\item \textsuperscript{123} United States v. Gen. Motors Corp., 384 U.S. 127, 146 (1966) ("Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins . . . .").
\item \textsuperscript{124} See Silver v. N.Y. Stock Exch., 373 U.S. 341, 349 (1959) (describing first Silver Exception element).
\end{itemize}
NFL would have to prove the rule is reasonably related to the goal, that it ensures competitive balance of the league, and is no more extensive than necessary.\(^{125}\) It is unlikely the NFL will be able to prove that restricting athletes from entering the draft early would significantly hinder the NFL's ability to spread competition evenly among teams.\(^{126}\)

c. Satisfying the Third Element of the Silver Exception

The third and final element of the Silver Exception requires the Association provide procedural safeguards assuring that restraints against trade are not arbitrary and furnish a basis for judicial review.\(^{127}\) The NFL's Constitution and Bylaws do not provide any provision that would satisfy this requirement.\(^{128}\) The All-Pro court struck down the NBA's draft eligibility rule because "there [was] no provision [in the bylaws of the NBA] for even the most rudimentary hearing before the . . . [draft eligibility rule] . . . [was] applied to exclude an individual player."\(^{129}\) Here, due to the lack of a provision, the court should conclude the NFL rule falls outside of the Silver Exception and is subject to the illegal per se rule normally applicable to group boycotts.

In order to satisfy this element, the NFL would have to provide procedural safeguards that focus on the need for notice and hearing.\(^{130}\) These safeguards would both act as a check against illegitimate self-regulation and provide antitrust courts with a record from which they could determine whether the self-regulation was justified.\(^{131}\) The NFL's present draft eligibility rule acts as a blanket restriction as to age without any consideration of talent.\(^{132}\) The NFL should include procedural safeguards that exclude players

\(^{125}\) See id. at 357-67 (discussing second and third elements of Silver Exception that NFL must establish to gain application of Rule of Reason approach).

\(^{126}\) See McCormick & McKinnon, supra note 59, at 433 (noting argument draft rule necessary to balance competition seems unreasonable when looking at amount of professional football teams and minimal number of qualified athletes who can compete professionally before their college eligibility over).

\(^{127}\) See Silver, 373 U.S. 341, 361-67 (discussing third element of exception).

\(^{128}\) For a discussion of the NFL Bylaws, see supra note 65.


\(^{130}\) Cf. Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1322 (D.C. Conn. 1977) (comparing professional football's procedural safeguard requirements to professional hockey). The Linseman court held the draft eligibility rule in professional hockey did not contain procedural safeguards and therefore did not satisfy the Silver test. See id.

\(^{131}\) See id.

only after their skill has been assessed. After analyzing the NFL’s draft eligibility rule under the illegal per se standard, it is now appropriate to examine how the rule would fare if the court were to adopt the Rule of Reason approach.

2. The NFL’s Draft Eligibility Rule Under the Rule of Reason Approach

It has been suggested that All-Pro would control any suit brought against the NFL because the NFL’s eligibility rule is similar to the NBA rule invalidated by the All-Pro court. The All-Pro court only considered the economic effect the rule had on the athlete, such as loss of salary. In applying the illegal per se approach, the All-Pro court failed to consider other justifications of the rule that would have been considered had it applied Rule of Reason analysis. It can be argued that the court erred in adopting the illegal per se standard because it did not consider the rule’s other justifications, and therefore, it erred in finding the rule reduced competition in the league. Thus, in applying Rule of Reason analysis, the Clarett court should consider the NFL’s need to

133. See Deesen v. Prof’l Golfers’ Ass’n of Am., 358 F.2d 165, 170 (9th Cir. 1966) (holding procedural safeguards established by Professional Golf Association (PGA) valid). The PGA’s rule excluded players only after their skill had been assessed and was therefore valid. See id. The exclusion of a golfer from professional golf matches based on a number of test rounds and an evaluation from a panel of judges is valid. See id.

134. See Kabbes, supra note 7, at 1248-49 (discussing application of illegal per se standard to NFL cases was not dispositive, and suggesting All-Pro case differs from suits against NFL eligibility rule). Another problem with applying All-Pro’s analysis to football rules is that in All-Pro, Haywood was already playing in the NBA and had already proven his ability when the rule was challenged. See id. at 1249. Any challenge to the NFL rule would be from a college undergraduate with little assurance that he would be able to succeed in the NFL, and therefore, standing may be lacking. See id.

135. See Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1061 (C.D. Cal. 1971) (noting court applied illegal per se standard and only considered whether rule would harm athletes economically if they were declared ineligible).

136. See Kabbes, supra note 7, at 1249 (suggesting court was correct in finding that athlete ineligible for draft suffers financially because he cannot receive salary in college and that Rule of Reason should have been applied to include consideration of other justifications for rule).

137. See id. (noting other factors, such as ability to succeed in league, should have been considered). Statistics approximate only one percent of college seniors playing football or basketball succeed in league. See id.; see also Collegiate Student Protection Act of 1983: Hearing on S. 610 Before Comm. on the Judiciary, 98th Cong., 1st Sess. 94 (1983) [hereinafter Hearings] (reporting prepared statement by John L. Toner, President of NCAA). In stating other purposes of the rule, Toner noted that the NFL enacted the eligibility rule at the insistence of colleges and universities. See id. Toner further stated that without the rule, recruiting a college athlete would be difficult for professional teams. See id.
cooperate with college athletics as a factor demonstrating it’s intent to increase competition rather than restrain it.\textsuperscript{138} Under the Rule of Reason approach, numerous lower court decisions have upheld various types of self-regulatory schemes that have the effect of a group boycott.\textsuperscript{139} In \textit{Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.},\textsuperscript{140} the Court held that the illegal per se rule was not applicable without a showing that the challenged activity was manifestly anti-competitive.\textsuperscript{141} In theory, both the Rule of Reason approach and the illegal per se approach should reach the same conclusion regarding the legality of the questioned activity.\textsuperscript{142} Because, however, in reality the application of these two standards can result in very different outcomes, the court’s determination of which rule to apply is critically important.\textsuperscript{143}

\begin{itemize}
  \item \textsuperscript{138} See \textit{Hearings}, supra note 137 (noting Toner’s advice during Senate Hearings).
  \item \textsuperscript{139} See Smith v. Pro-Football, Inc., 593 F.2d 1173, 1183 (D.C. Cir. 1978) (applying Rule of Reason to professional football restraints); see also Mackey v. Nat’l Football League, 543 F.2d 606, 620 (8th Cir. 1976) (applying Rule of Reason to professional football restraints). See generally Deesen v. Prof’l Golfer’s Ass’n, 358 F.2d 165 (9th Cir. 1966) (applying Rule of Reason to professional golf restraints); see also McCormick & McKinnon, \textit{supra} note 59, at 422-23 (discussing modern trend of applying Rule of Reason to self-regulatory schemes having effect of boycott). In order to establish guidelines as to when the Rule of Reason and illegal per se approaches should be applied, Professor Sullivan suggests that only classic boycotts should be per se violations, whereas other forms of concerted actions should be analyzed under the Rule of Reason. See \textit{id}. at 423. Sullivan defines a classic boycott as that occurring when a group of competitors take a concerted action aimed at directly depriving their competitors of some essential trade relationship, in order to protect themselves from non-group members. See \textit{id}. Because the purpose is clearly anticompetitive, there is no need to perform a lengthy factual analysis, and this is a per se violation. See \textit{id}. The approach proposed by Professor Sullivan suggests that the purpose and the effect of a restraint should be analyzed, and, if the purpose is anticompetitive, it should be deemed illegal. See \textit{id}. If the purpose is not to restrain competition, but its effect is anticompetitive, it should be analyzed under the Rule of Reason. See \textit{id}. (quoting LAWRENCE SULLIVAN, \textit{HANDBOOK OF THE LAW OF ANTITRUST} 14 (1977)).
  \item 140. 472 U.S. 284 (1985).
  \item 141. See \textit{id}. (holding unless plaintiff demonstrates defendant possesses market power or exclusive access to an element necessary for effective competition, courts should apply Rule of Reason analysis); see also Molinas v. Nat’l Basketball Ass’n, 190 F. Supp. 241, 243-44 (S.D.N.Y. 1961) (holding group boycott reasonable and necessary for survival of league because every association needs reasonable governing rules, and therefore such restraints do not necessarily violate Sherman Act).
  \item 142. See Rosner, \textit{supra} note 52, at 545 (noting disparity in results between application of illegal per se and Rule of Reason standards).
  \item 143. See \textit{id}. at 546.
\end{itemize}
In introducing the more flexible Rule of Reason approach, the Court differentiated between vertical and horizontal restraints. Vertical restraints stimulate inter-brand competition and are subject to the Rule of Reason analysis. Horizontal restraints have no purpose other than stifling competition and constitute illegal per se violations of the Sherman Act.

In evaluating eligibility rules in professional sports, it can be argued the Rule of Reason should be applied. Several factors must be considered in analyzing the alleged anti-competitive effect of a restraint: (1) the facts peculiar to the business, (2) the history of the restraint, and (3) the reason for its imposition. These three factors should be considered in a Rule of Reason analysis in order to determine whether the rule has the “net effect” of substantially impeding competition.

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144. See id. at 545 (citing Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-50 (1977) as noting differences between restraints).

145. See Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51-54 (1977) (reflecting view vertical restrictions cannot be completely prohibited because have too great potential for promoting inter-brand competition). The Court stated, “a more complete prohibition might severely hamper smaller enterprises resorting to reasonable methods of meeting the competition of giants and of merchandising through independent dealers.” Id.

146. See id. at 49-50 (holding vertical restraints should be evaluated under Rule of Reason); cf. Smith v. Pro-Football, 593 F.2d 1173, 1187 (D.C. Cir. 1978) (applying Rule of Reason to NFL draft eligibility rule). The court did not characterize the draft as an illegal per se violation because it differed from a classic group boycott in two respects: (1) NFL clubs are not economic competitors in that they operate as a joint venture; and (2) NFL clubs do not combine to exclude competitors or potential competitors from their level of the market. Id. at 1178. The court further noted the per se doctrine should not apply “to concerted refusals that are not designed to drive out competitors but to achieve some other goal.” Id. at 1180.

147. See Smith, 593 F.2d at 1181 (holding illegal per se rule was judicial short-cut and should be applied only after considerable experience with particular type of restraint). The Smith court noted the limited experience courts have had with draft rules as restraints. See id. Further, courts often know too little of the economics and businesses from which these rules issue to declare them illegal without a proper analysis. See id. at 1182.


149. See Cont'l T. V., 433 U.S. at 49 (citing Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)). Under the Rule of Reason, “the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” Id. In determining whether a particular commercial practice should be prohibited per se, “[t]he probability that anticompetitive consequences will result from [the] practice and the severity of those consequences must be balanced against its pro-competitive consequences.” Id.
a. Considering Facts Peculiar to the Business

First, it is important to consider the facts peculiar to the NFL. In professional football, it is essential the teams work together to attain a high level of quality because spectator interest will be maintained only if teams are "competitively balanced." Unlike most businesses subject to antitrust laws, NFL teams are not interested in driving out competition; football teams understand that no one team can survive if the NFL fails. Therefore, rules such as the draft eligibility rule are essential for ensuring a steady flow of talent and balancing competition among teams. The NFL could argue that the draft eligibility rule's restraint on players is reasonable because it protects the league's viability by balancing competition.

150. See Smith, 593 F.2d at 1186 (MacKinnon, J., dissenting) (distinguishing nature of professional sports from different businesses for several reasons). Judge MacKinnon notes several important reasons:

(1) professional sports involve economic cooperation instead of competition; (2) the NFL comprises a natural monopoly; (3) a player draft is simply "natural" for team sports, as all major sports have drafts; (4) the draft has succeeded in producing a higher level of competition and has produced a quality product by reducing the ability of certain teams to dominate the league. Therefore, the draft's pro-competitive effects can be found to outweigh its anti-competitive effects, and should withstand the Rule of Reason scrutiny.

Id. at 1191-1222.

151. See id. at 1179 (noting NFL clubs combined in implementing draft not economic competitors, but rather, operate joint venture for producing entertainment product football games and telecasts); see also Mackey v. Nat'l Football League, 543 F.2d 606, 619 (8th Cir. 1976) (noting "joint venture" characteristics of NFL); Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 332 (1978) ("Agreements to refuse to deal are essential to the effectiveness and sometimes to the existence of many wholly beneficial economic activities. All league sports . . . rest entirely upon the right to boycott.").

152. See Smith, 593 F.2d at 1179 (noting because of joint venture characteristics of NFL, no teams within joint venture can survive without other); see also N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1253 (2d Cir. 1982) ("[E]conomic success of each franchise is dependant on the quality of sports competition throughout the league and the economic strength and stability of other league members.").

153. See Smith, 593 F.2d at 1181 (noting some form of player selection system may serve to regulate and thereby promote competition in what would otherwise be a chaotic bidding market for service of college players). "[E]vidence showed that the draft was designed to preserve, and that it made some contribution to preserving, playing-field equality among NFL-teams with various attendant benefits." Id.; cf. Note, The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws, 81 HARV. L. REV. 418, 419-21 (1967) (supporting NFL's argument draft balances competition even in professional baseball). Professional baseball adopted a draft in 1965, after many years of exclusive reliance on its "farm system," because the farm system was leading to a competitive imbalance. Id.
The NFL could also assert that professional football is a business and the draft itself differs from classic group boycotts because "[t]he NFL clubs have not combined to exclude competitors or potential competitors from their level of the market."\(^{154}\) Clarett is not seeking to compete with the NFL clubs, and their refusal to deal with him has resulted in no substantial impediment to competition.\(^{155}\) Thus, the draft rules are not designed to insulate the NFL from competition resulting in a monopoly, but rather to "improve the entertainment product by enhancing its team's competitive equality."\(^{156}\)

In *Smith v. Pro Football, Inc.*,\(^{157}\) the court stated that evidence on whether the draft was essential to competitive balance was at best equivocal and there was no correlation between the NFL draft and the survival of the league had been shown to exist.\(^{158}\) Clarett may argue that the impact of the player draft does not serve to equalize competition in the NFL.\(^{159}\) Clarett may further argue that the career of a professional athlete is far more limited than that of a person engaged in most other occupations, thus the loss of one year of playing time is irreparably harmful.\(^{160}\) Clarett may suffer irreparable financial and emotional damage as a consequence of the draft.
eligibility rule.\textsuperscript{161} Clarett might demand an injunction to the rule because there is no adequate monetary compensation for the damage he will suffer from being unable to participate in the NFL draft.\textsuperscript{162}

b. Considering the History of the Restraint

An analysis of the NFL eligibility rule under the Rule of Reason requires a review of the history of the NFL draft rule’s restraint.\textsuperscript{163} The NFL might contend that the draft rule, enacted at the inception of the NFL, has succeeded in achieving its purposes.\textsuperscript{164} The draft was a device intended to allocate player talent evenly and prevent wealthy owners from cornering the market.\textsuperscript{165} At the time, the player draft arguably had some importance in preserving a competitive balance to ensure spectator interest.\textsuperscript{166} Aside from balancing competition, the rules were also adopted in response to the demands of colleges and universities.\textsuperscript{167} The draft eligibility rule enables colleges to retain quality players until their eligibility has ended, and, in return, professional teams have access to college

professional league, athletes may achieve the status of “superstar,” which would bring them both financial and emotional rewards. \textit{See id.}

\textsuperscript{161} Cf. Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1057 (C.D. Cal. 1971) (comparing Haywood’s claim against NBA to Clarett’s claim against NFL). The court stated:

[Haywood] will suffer irreparable injury in that a substantial part of his playing career will have been dissipated, his physical condition, skills and coordination will deteriorate from lack of high-level competition, his public acceptance as a super star will diminish to the detriment of his career, his self-esteem and his pride will have been injured and a great injury will have been perpetrated on him.

\textit{Id.; see also Linseman, 439 F. Supp. at 1319} (holding hockey player would suffer injury by not playing in league).

\textsuperscript{162} See Clarett Complaint, \textit{supra} note 1; \textit{see also} Bowman v. Nat’l Football League, 402 F. Supp. 754, 756 (D. Minn. 1975) (finding potential player’s inability to play in NFL would cause irreparable injury and granting preliminary injunctive relief).

\textsuperscript{163} For a discussion on the Rule of Reason, see \textit{supra} notes 36-40 and accompanying text.

\textsuperscript{164} See Kabbes, \textit{supra} note 7, at 1250.

\textsuperscript{165} See Smith, 593 F.2d at 1185.

\textsuperscript{166} \textit{See id. at} 1179 (noting along with television’s advent came need for better and more evenly spread competition and noting draft was enacted to preserve competitive balance for this purpose).

\textsuperscript{167} See Kabbes, \textit{supra} note 7, at 1250 (citing Boris v. Unites States Football League, No. Cv. 83-4980 LEW (Kx), 1984 WL 894, at *1 (C.D. Cal. Feb. 28, 1984) as stating NFL and USFL adopted rules responding to demands of colleges and universities); \textit{see also} Hearings, \textit{supra} note 137 (noting NFL commissioner’s statements support finding that NFL enacted and follows eligibility rule at insistence of colleges).
programs for the purpose of scouting college athletes.\textsuperscript{168} The NFL is not attempting to restrain competition through the adoption of its rule, but rather it seeks to increase competition while maintaining a good rapport with colleges and universities.\textsuperscript{169}

c. Considering the Reasons Underlying the Restraint

The Rule of Reason approach also requires an examination of the reasons underlying the draft eligibility rule in determining the rule's legality.\textsuperscript{170} The NFL may attempt to justify the draft rule by asserting it has a legitimate business purpose of promoting "competitive balance."\textsuperscript{171} The player draft rule acts to heighten athletic competition and to improve the entertainment product offered to the public; it is therefore "pro-competitive."\textsuperscript{172}

If the Clarett court follows the Smith holding, the NFL's competitive balance argument will not be upheld. The court in Smith declared that the alleged pro-competitive effect of the NFL draft rule did not increase competition in the economic sense.\textsuperscript{173} Using the Rule of Reason balancing test, the draft's anti-competitive evils must be balanced against its pro-competitive virtues. The rule will only be upheld if the latter outweighs the former.\textsuperscript{174} It is uncontested the NFL draft's pro-competitive effects are economically nonexistent.\textsuperscript{175} The Court's holding in \textit{National Society of Professional En-

\textsuperscript{168} See Kabbes, \textit{supra} note 7, at 1250 (citing Boris v. Unites States Football League, No. Cv. 85-4980 LEW (Kx), 1984 WL 894, at *1 (C.D. Cal. Feb. 28, 1984) as noting recruiting college athletes could be difficult for professional teams without college coach's approval).

\textsuperscript{169} See \textit{id.} (USFL's actions within Boris case evidences benefits derived by college programs from eligibility rules); see also \textit{Hearings}, \textit{supra} note 137 (stating until College Football Association knew USFL's position on signing college athletes and disregarding eligibility rule, full cooperation with USFL would be "difficult for CFA members"). The College Football Association is a voluntary organization of 60 universities who sponsor football at major NCAA Division I level universities. See \textit{id.}

\textsuperscript{170} For a discussion of the Rule of Reason, see \textit{supra} notes 36-40 and accompanying text.

\textsuperscript{171} See, e.g., \textit{Smith}, 593 F.2d at 1186 (noting NFL argued same principle).

\textsuperscript{172} See \textit{id.} (noting draft allegedly exerts pro-competitive effect on playing field).

\textsuperscript{173} See \textit{id.} (reasoning that draft was pro-competitive in different sense from being anti-competitive). Although the draft is allegedly pro-competitive on the playing field, it is anti-competitive in the market. See \textit{id.} The draft "does not increase competition in the economic sense of encouraging others to enter the market and to offer the product at lower cost." \textit{Id.} "In strict economic terms, the draft's demonstrated pro-competitive effects are nil." \textit{Id.}

\textsuperscript{174} See \textit{id.} (discussing principle behind Rule of Reason analysis).

\textsuperscript{175} See \textit{Smith}, 593 F.2d at 1186.
gineers v. United States suggests that businessmen "could not justify their restrictive conduct on the basis of some noneconomic benefit." Under this reasoning, the NFL’s competitive balance justification likely would not be upheld.

B. Labor Exemption and the NFL Draft Eligibility Rule

This Note now turns to a consideration of whether the labor exemption applies to the NFL’s draft eligibility rule, removing it from the scope of antitrust laws. A judicially created labor exemption has been developed to accommodate inherent conflicts between national labor and antitrust policies. The exemption essentially protects labor-management agreements from antitrust laws. The NFL claims that the draft eligibility rule is incorporated as part of the collective bargaining contract between the NFL owners and the players’ union. Thus, an argument may be made that the NFL’s rule is protected by national policies that protect union activities and, ultimately, immunize the NFL draft rule from antitrust scrutiny.

Past decisions applying the non-statutory labor exemption to sports industry practices are good indicators of the likelihood that the NFL draft eligibility rule will qualify for exemption. In Mackey v. National Football League, the court devised a three-part test to determine whether it was appropriate to apply the non-statutory la-

177. See id. at 692 (limiting scope of inquiry under Rule of Reason to means necessary “to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of the industry.”).
179. See generally Boudin, supra note 178.
180. But see Clarett Complaint, supra note 1 (stating CBA does not expressly contain rule).
181. See McCormick & McKinnon, supra note 59, at 382 (discussing possibility labor exemption will exclude NFL draft rule from antitrust laws); see also NFL Collective Bargaining Agreement, 10-211 ENT. INDUSTRY CONT. FORM 211-2, art. I, § 2 (Mar. 1, 1977) (describing collective bargaining agreement between NFL and NFLPA). The relevant section of the agreement states: "Any provisions of the . . . N.F.L. Constitution and Bylaws . . . which are not superseded by this Agreement, will remain in full force and effect for the continued duration of this Agreement and, where applicable, all players, clubs, the N.F.L.P.A., and the N.F.L., and the Management Council will be bound thereby." Id.
182. 543 F.2d 606 (8th Cir. 1976).

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broad exemption. The three requirements are: (1) the restrictions must affect only the parties to the collective bargaining agreement, (2) the assailed practice must concern a mandatory subject of bargaining, and (3) the restriction must be a product of bona fide arm's-length bargaining. The NFL's draft eligibility rule must satisfy each of the three prongs of the Mackey test in order to avoid an antitrust violation under the exemption.

1. **First Prong of the Mackey Test**

Under the first prong of the labor exemption test, the court must examine whether the draft eligibility rule, as a contract between the players' union and the NFL, effectively restrains players who were not parties to agreement. Those agreements that restrain players who are not parties to the collective bargaining do not fall within the labor exemption unless the impact is outweighed by some vitally important union purpose. Clarett argues that the draft is illegal because it affects players outside of the collective bargaining unit and that past court decisions have held these agreements do not qualify under the labor exemption.

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183. See id. at 613-14 (noting court employed three-part test in determining whether non-statutory labor exemption applied to Rozelle Rule presupposing violation of antitrust laws).

184. See id. (discussing three requirements); see also McCourt v. Cal. Sports, Inc., 600 F.2d 1193 (6th Cir. 1979) (altering third prong of test). The Sixth Circuit slightly altered the Mackey test. See id. at 1290. In order to satisfy the third prong, management in that case simply had to show that the union fully participated in the negotiations leading up to the collective bargaining agreements. See id. at 1201.


186. See generally United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965) (holding one group of employers may not conspire to eliminate competitors from industry and union is liable with employers if it is party to conspiracy. The Pennington Court also held that the policy considerations underlying antitrust law is set against employer-union agreements seeking to prescribe labor standards outside of the bargaining unit. See id.; see also Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975) (holding arrangement effectively precluded non-union subcontractors from competing for jobs constituted restraint on strangers to relationship and labor exemption was not available); Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797 (1945) (holding no exemption existed when unions participated with businessmen who had power to eliminate all competition among themselves and prevent all competition with others, even if purpose was to increase union member wages and employment opportunities).

187. See Clarett Complaint, supra note 1 (claiming rule is restraint on amateur athletes who are strangers to collective bargaining process between NFL and NFLPA and asserting restraint does not advance any important union goal); see also McCormick & McKinnon, supra note 59, at 597 (noting arguments supporting view that NFL rule should not be granted immunity under labor exemption). The Note states:
Collective agreements, however, often affect employees outside of the bargaining union.\textsuperscript{188} The NFL may argue that due to the nature of professional football as a business and of professional football teams as employers, there must be contractual arrangements tailored to those unusual commercial contexts.\textsuperscript{189} One of the fundamental principles of the labor policy is the NFL players' union can legally eliminate competition among its players through a governmentally supervised majority vote by selecting an exclusive bargaining representative, the players' union.\textsuperscript{190} The federal labor policy thus enables the players' union to seek the best deal for the majority of the existing players through collective, rather than individual, bargaining power.\textsuperscript{191} Once the union has been selected, individual players such as Clarett are not permitted to negotiate directly with teams without the union's consent.\textsuperscript{192}

The NFL draft eligibility rule, though it may preserve and prolong employment for current unit members, has, as its direct effect, the restraint of amateur athletes who as yet are strangers to the bargaining relationship and does not significantly advance any important union goal. Restraining college undergraduates from competing for a position on an NFL team is in fact the direct object of the agreement between the NFL and the NFLPA. Like the small mine operators in Pennington, the non-New York City manufacturers in Allen Bradley, and the non-union subcontractors in Connell, these amateurs — still strangers to the bargaining relationship — are the direct (and only) object of the restraint. Immunity, therefore, cannot be claimed.

\textit{Id.}

\textsuperscript{188} See, e.g., Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 210-17 (1964) (noting seniority clauses prevent outsiders from bidding on particular jobs, while other provisions may regulate allocation of work that favors senior workers).

\textsuperscript{189} See Wood v Nat'l Basketball Ass'n, 809 F.2d 954, 959 (2d Cir. 1987) (noting college draft needed for business's unique nature).

\textsuperscript{190} See National Labor Relations Act, 29 U.S.C. \textsection 159(a) (2000). Section 159(a) of the National Labor Relations Act explicitly provides that "[r]epresentatives . . . 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." \textit{Id.}; cf. \textit{Wood}, 809 F.2d at 959 (holding NBA's collective agreement was illegal because it prevented plaintiff from achieving his full-market value and noting that such prevention is at odds with federal labor policy).

\textsuperscript{191} See \textsection 159(a).

\textsuperscript{192} See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) (holding labor policy extinguishes individual employee's power to order his own relations with employer and creates power vested in chosen representative to act in interests of all employees). "National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions." \textit{Id.}; see also Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 202 (1944) ("Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents.").
Clarett’s complaint asserts that the collective bargaining agreement is illegal because it prohibits him from being a party to the collective bargaining that restrains him. Collective agreements routinely set standards for all players, and Congress granted the players’ union the task of setting these standards, which prohibit players from individually bargaining with NFL teams. With regard to the standards set by the union, the Supreme Court has observed, “[t]he complete satisfaction of all who are represented is hardly to be expected.” To allow Clarett to individually bargain with NFL teams, despite evidence pointing to his ability to compete at the professional level, would be contrary to explicit federal labor policy.

2. Second Prong of the Mackey Test

The second prong of the Mackey test requires that the draft eligibility rule be a mandatory subject of bargaining within the meaning of the National Labor Relations Act (NLRA) in order to receive antitrust immunity. The NLRA requires employers (NFL teams) to bargain collectively regarding “wages, hours, and other terms and conditions of employment” with the representative of the employees (the players’ union).

193. See Clarett Complaint, supra note 1 (claiming draft eligibility rule’s direct effect is restraint of amateur athletes who were strangers to bargaining process between NFL and NFLPA).


195. Cf. Wood v. Nat’l Basketball Ass’n, 809 F.2d 954, 960 (2d Cir. 1987) (supporting proposition that individual bargaining is not allowed and interpreting NLRA as Congress granting authority to union to balance employee interests).

196. See Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953) (noting differences inevitably arise in manner and degree of terms of any negotiated agreement that affect individual employees and classes of employees).

197. See National Labor Relations Act, 29 U.S.C. § 159(a) (2000) (establishing employee representative as exclusive representative for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment); see also Wood, 809 F.2d at 960 (noting if plaintiff’s theory that he should be able to individually bargain with NBA is permitted, then any dissatisfied employee could insist on individual bargaining, contrary to explicit labor policy).


199. See National Labor Relations Act, 29 U.S.C. § 158(d) (2000). The statute defines “bargain collectively” as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .” Id. at § 158(a)(5). Section 158(a)(5) provides that it is an
Clarett may argue that the NFL's draft eligibility rule is not a mandatory subject of bargaining for two reasons. First, amateur athletes like Clarett are not employees to whom the employer's obligation flows. Second, the subject matter itself, employment eligibility, is not within the definition of the terms and conditions of employment set out in the NLRA.

a. Amateur Athletes as "Employees" Under the NLRA

Clarett may argue that a narrow interpretation of "employee" should apply and that college undergraduates are not "employees" within the meaning of the NLRA. Clarett might use the holding in Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., which held that a union only represents employees in an appropriate bargaining unit. Furthermore, the NLRA rule limits this appropriate unit to employees who share a "community interest," thereby excluding people outside that community whose interests would be submerged in an over-inclusive grouping. Clarett

unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a)." Id. See McCormick & McKinnon, supra note 59, at 401 (discussing why draft eligibility rule is not mandatory bargaining subject).

201. See Clarett Complaint, supra note 1 (claiming rule does not concern wages, hours, or other terms and conditions of employment and is thus not mandatory subject of bargaining within meaning of NLRA).

203. See Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 165 (1971) (addressing term "employee"). The Court determined that the definition of "employee" should not be stretched beyond its plain meaning, which included those who worked for another, by looking at the legislative history of the Taft-Harley Act. Id. at 166; see also McCormick & McKinnon, supra note 59, at 404 (stating because college undergraduates could neither be included in bargaining unit with active players nor vote for selection of bargaining representative, duty to bargain on their terms and conditions of employment does not attach).

204. See id. at 172 (declaring retirees are not "employees" within meaning of collective bargaining).

205. See ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW 379 (1976) (listing factors considered in determining whether community interest exists). To determine whether a "community of interest" exists among groups of employees, the Board examines the following factors: (1) similarity in the scale and manner of determining earnings; (2) similarity in employment benefits, hours of work and other terms and conditions of employment; (3) similarity in kind of work performed; (4) similarity in the qualifications, skills and training of the employees; (5) frequency of contact or interchange among employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (9) relationship to the administrative organization of the employer; (10) history of collective bargaining; (11) desires of the affected employees; (12) extent of union organization.
could argue that with regard to the eligibility rule that bars his entry into professional football, his interest is in opposition to the interests of active players. 206 Under this reasoning, because Clarett's interests are not represented, he would not be included in the bargaining unit with active players and would therefore not be considered an "employee" within the meaning of the NLRA.

On the other hand, the NFL may argue that the NLRA explicitly defines "employee" in a way that includes workers outside of the bargaining unit. 207 The NFL could also argue that because courts have ruled that job applicants are "employees" within the meaning of the Act, prospective NFL players should similarly be considered employees for this purpose. 208 Furthermore, if Clarett's claim were to succeed, the federal labor policy would collapse because commonplace arrangements would be subject to similar challenges unless the judge constructed an exception for professional athletes. 209

b. Employment Eligibility as Mandatory Subject of Bargaining Under the NLRA

Clarett may further argue that the draft eligibility rule is not a mandatory subject of bargaining under the NLRA and therefore fails the second prong of the judge-made labor exemption test. 210 The NLRA does not list the subjects that fall within the statutory requirement, despite the fact that the subjects within the requirement settle an aspect of the employee-employer relationship. 211

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206. See Jay Glazer, Game-Day Notebook: Ball Gets Rolling on Clarett Challenge, SPORTSLINE.COM, at http://cbs.sportsline.com/nfl/story/6639875 (Sept. 14, 2003) ("There had been talk of him transferring . . . but Clarett now appears like the only place he wants to play next year is the NFL.").

207. See National Labor Relations Act, 29 U.S.C. § 152(3) (2000). The definition provides, in pertinent part: "[t]he term employee shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise." Id.

208. See Time-O-Matic, Inc. v. NLRB, 264 F.2d 96, 99 (7th Cir. 1959) (holding job applicants were employees under 29 U.S.C. § 152(3)); John Hancock Mut. Life Ins. Co. v. NLRB, 191 F.2d 483, 485 (D.C. Cir. 1951) (holding term "employee" included applicants as well as existing employees).

209. See Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 961 (2d Cir. 1987) (noting if antitrust claim succeeded and employees were allowed to individually bargain, employers would have no assurance they could enter into collective agreements without exposing themselves to action for treble damages).

210. See Clarett Complaint, supra note 1 (asserting draft eligibility rule is not mandatory collective bargaining subject); see also McCormick & McKinnon, supra note 59, at 405 (claiming draft eligibility restraint not mandatory bargaining subject).

211. See Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 ("In general terms, the limitation [in
cases where an exception to this rule has been made, the exception has been based on a finding that the subject affects parties outside the relationship and the issue "vitaly" affects the employment terms and conditions of the employee. In this case, the "draft eligibility rule enacts an artificial obstacle to employment for amateur athletes that incidentally benefits marginal players whose place on team rosters would be threatened by the rule's abolition," and does not "vitaly" affect the terms and conditions of employment. Clarett may argue that because the rule places an unreasonable restraint on prospective players outside the collective bargaining unit without "vitaly" affecting active players represented by the union, it fails the second prong of the Mackey test and should not be immunized from the antitrust laws.

In response to this argument, the NFL may argue that the draft eligibility rule is a mandatory subject of bargaining under the NLRA because it is intimately related to "wages, hours, and other terms and conditions of employment." In fact, it is because of this intimate relationship that such matters are so controversial and are the focus of bargaining in professional sports.

3. Third Prong of the Mackey Test

Finally, the third prong requires that there must be bona fide arm's-length bargaining. Essentially, it must be shown that the

§ 8(d) includes only issues that settle an aspect of the relationship between the employer and employees."). The court noted, "normally matters involving individuals outside the employment relationship do not fall within [the bargaining subject matter] category ...." Id. at 178.

212. See, e.g., Local 24 v. Oliver, 358 U.S. 283 (1959) (noting inadequate rental fee was potentially destructive to employees' job security and holding rental fee term was both integral to establishment of stable wage structure for employees and mandatory subject of bargaining); see also Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 209-15 (1964) (holding subcontracting provision was mandatory bargaining subject and deeming third party matter intimately relating to employee job security was critical factor).

213. See McCormick & McKinnon, supra note 59, at 407 (concluding draft eligibility rule cannot qualify as exception based on past cases).


215. See id. (noting court reasoned NBA draft eligibility rules were mandatory bargaining subjects).

216. See McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1200 (6th Cir. 1979) (altering test's third prong requiring restraint rule within collective bargaining agreement to be product of vigorous collective bargaining); see, e.g., Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc., 351 F. Supp. 462, 498-500 (E.D. Pa. 1972) (noting court gave careful attention to extent of actual bargaining, matter was inserted and "discussed," yet court ultimately refused concluding collective bargaining product existed). The court held in this case that immunity failed for want of "serious, intensive, arm's-length collective bargaining." Id. at 499; see also
players' union considered the draft eligibility rule and approved of the restraint. This requirement is difficult to determine because of the thin line that distinguishes bargaining from discussion and therefore should be applied only in narrowly circumscribed situations.217 The National Labor Relations Board has barred "surface bargaining" in the past because the only NLRA mandate is that parties bargain in good faith.218 Because the unions of professional sports have matured, and because of the uncertain nature of this requirement, courts will often presume that if a matter appears in a collective bargaining agreement, it is the product of arm's-length bargaining.219 Based on this presumption, the courts will most likely conclude that the subject was the product of actual bargaining. Although Clarett argues that the rule is not an express part of the existing collective bargaining agreement, it is not the product of bona fide arm's-length negotiations, and therefore it should not be afforded antitrust immunity under the labor exemption.220

IV. CONCLUSION

In Maurice Clarett v. National Football League,221 the illegal per se standard is inappropriate because of the unique characteristics of professional football. Therefore, the court should apply Rule of Reason analysis in evaluating the NFL's draft eligibility rule. Under the Rule of Reason, the draft rule's economic benefit to competition will be weighed against its economic injury to competition.

The draft eligibility rule should be deemed an unreasonable restraint on trade because it acts to suppress competition and be-

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217. See McCormick & McKinnon, supra note 59, at 414 (noting actual bargaining requirement is "fraught with danger").

218. See, e.g., NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir. 1953) (holding bad faith bargaining will not receive immunity under labor exemption). The court found that the employer bargained in bad faith based on his conduct in a lengthy series of unsuccessful bargaining conferences. See id. at 134-35. The court found that the employer's conduct demonstrated that he merely went through the motions of negotiations as an elaborate pretense and with no desire to reach agreement. See id.

219. See Weistart, Judicial Review of Labor Agreements: Lessons from the Sports Industry, 44 LaW & CONTEMP. PROBS. 109 (1981), at 128-29 (citation omitted) ("If parties to the disputed agreement have a long-standing and well-established bargaining relationship . . . it is difficult to imagine justification for questioning the effectiveness of either side's consent to a particular term in a particular negotiation.").

220. See generally Clarett Complaint, supra note 1.

221. See id.
cause it serves no valuable economic purpose. Although the rule is an unreasonable restraint, the labor exemption immunizes the draft eligibility rule from antitrust laws. In applying the labor exemption, the court should find that the rule affects only parties to the agreement, that the practice concerns a mandatory subject of bargaining, and that the agreement is the product of bona fide arm's-length agreement. In balancing the interests of both the NFL and amateur players, the court should consider the goals and values of each side with sensitivity.222

The court's ruling has the potential to impact professional sports and athletes in a variety of ways.223 If the court finds that the draft eligibility rule violates antitrust law and is an illegal restraint on trade, professional football and college athletics may undergo a series of changes.224 The NFL may experience an unprecedented influx of prospective young athletes, which in turn may force it to develop a "farm system" to pool and develop talented players.225 College football programs may be unable to retain top players to compete, and the overall quality of competition at the collegiate level may suffer.226 Elimination of the rule will likely lead to a clearer distinction between professionalism in the NFL and amateurism in college athletics.227

222. See Bauer, supra note 41, at 294 (noting professional sports involve necessary on-field and off-field competition and attempts to constrain latter form of competition requires sensitivity).

223. See Dennis Dodd, Early Exits Will Lead to One-and-Done Recruiting Nightmares, SPORTSLINE.COM, Oct. 13, 2003, at http://www.cbs.sportsline.com/collegefootball/story/6687522 (predicting that if draft eligibility rule is eliminated, college football will become minor league football franchise, recruiting limitations may change, and costs would change).

224. See On Merit, supra note 81 (stating commentator's opinion "football still works in college and pros"). The commentator further argues that the elimination of draft eligibility rules in basketball and baseball has ruined those sports. See id. The commentator applauds the NFL's draft eligibility rule, stating "[y]ou can still name the starting quarterback for most big college teams. You can get attached to a guy." Id.

225. See Player Challenging Rule, supra note 7 (stating NFL has been avoiding costs of developmental league, but if draft rule is eliminated, NFL would receive influx young players, creating need for new minor league).

226. See Perspectives, supra note 61 (stating college football depends on emerging superstars' participation to generate money for programs). The system has been structurally based on one major assumption — that schools will develop top players before they attempt to play professionally. See id. "This assumption has led to big business — the Big Ten entered into a $50.1 million television contract last year, for example." Id. If the rule is declared invalid, college football will enter an era of business uncertainty that may affect the allocation of funds in years to come. See id.

227. See McCormick & McKinnon, supra note 59, at 440.
In response to an invalidation of the draft eligibility rule, the NFL may seek legislative intervention to halt the influx of younger players. As Judge Furgeson suggested in All-Pro, Congress could possibly grant an antitrust exemption to draft eligibility rules. Congressional action, however, is unlikely because the issue does not carry enough political importance to warrant the action.

In the most recent decision in the Clarett case, a United States district court held that the NFL draft eligibility rule violated antitrust laws and declared Clarett eligible for the 2004 draft. The NFL intends to appeal the decision to the Court of Appeals for the Second Circuit. Final decision on the case is pending.

Shauna Itri

228. See Rosner, supra note 52, at 572.
229. See Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1066 (C.D. Cal. 1971); see also Rosner supra note 52, at 572 (noting Senator Arlen Specter introduced Bill 610 in United States Senate to extend antitrust exemption to professional sports leagues for draft eligibility rules that restricted underclassmen eligibility). Bill 610 died, however, after extensive hearings. See id.
230. See Rosner, supra note 52, at 572.
232. See Associated Press, Judge Denies NFL’s Request in Clarett Case, NFL.com, Feb. 11, 2004, at http://www.nfl.com/news/story/7081207 (noting NFL’s statement regarding ruling and plans for appealing). “We continue to believe that last week’s ruling is legally erroneous and not in the best interests of the NFL, college football, or professional and college players. We are a long way from a final decision.” Id.