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AN END RUN AROUND ANTITRUST LAW: THE SECOND CIRCUIT'S BLANKET APPLICATION OF THE NON-STATUTORY LABOR EXEMPTION IN CLARETT V. NFL

Scott A. Freedman*

I. INTRODUCTION

In 2003, Maurice Clarett's promising football career at The Ohio State University was cut short for alleged violations of National Collegiate Athletic Association ("NCAA") regulations.¹ He then petitioned, unsuccessfully, to begin his professional football career in the National Football League ("NFL").² Although the United States Court of Appeals for the Second Circuit promptly upheld the NFL's decision to deny Clarett's petition to join the league,³ the court's analysis in reaching that decision merits consideration. While federal antitrust laws generally prevent the NFL, as an entity, from barring Clarett's entry to the league without sufficient pro-competitive justification, federal labor laws nonetheless shield the NFL's actions from that antitrust scrutiny so long as they are taken in the presence of good faith, arms-length collective bargaining.⁴

The Second Circuit's particular application of federal labor and antitrust laws requires an examination because its application of those laws disproportionately favors federal labor policies. In certain circumstances, federal labor policies counsel against subjecting an action to antitrust scrutiny,⁵

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2. Id. at 126.
3. Id. at 143.
5. Clarett, 369 F.3d at 130 (citing United States v. Hutcheson, 312 U.S. 219 (1941)). "It has long been recognized that in order to accommodate the col-
while in other circumstances, permitting antitrust scrutiny would not significantly interfere with respecting federal labor policy. As this comment will conclude, the Second Circuit's denial of Clarett's entry into the NFL is an unfortunate, but nonetheless typical, result of an approach that fails to afford proper weight to federal antitrust law and policy in balancing those interests against applicable federal labor law and policy.

Section II of this comment traces the development of the United States' labor and antitrust laws and their underlying economic and legal theories. It then traverses how a number of courts have applied those laws in the professional sports and other contexts. Using the case of Maurice Clarett as a guide, this comment reexamines the merits of the various approaches courts have applied in resolving questions that arise at the intersection of federal labor and antitrust laws. Section III identifies the potential problem created by applying the Second Circuit's approach to a case like Clarett v. National Football League ("Clarett"). Section IV analyzes and critiques the Second Circuit's opinion, showing how it deviates from Supreme Court and other appellate court precedent. Section V proposes an approach different from the Second Circuit's and similar to that used by the Eighth Circuit and the Supreme Court. Finally, section VI concludes that Clarett was incorrectly decided, and that, without correction, could set dangerous precedent allowing parties to collective bargaining relationships to escape the mandates of federal antitrust law.


7. See discussion infra Part II.A.
8. See discussion infra Part II.B-C.
9. See discussion infra Part II.D-E.
10. Clarett, 369 F.3d 124; see discussion infra Part III.
11. See discussion infra Part IV.
12. See discussion infra Part V.
13. See discussion infra Part VI.
II. BACKGROUND

In passing the Sherman Act and the Clayton Act, Congress designed the statutory structure for antitrust law. This structure, with subsequent amendments, remains largely intact. Despite the statutes’ longevity, courts struggled to apply federal antitrust laws in a manner consistent with federal labor policies. In response, Congress enacted the National Labor Relations Act ("NLRA") in 1935. The NLRA envisioned the formation of labor unions that would engage in meaningful collective bargaining with employers to formulate the details of the labor and employment contracts between them. After 1935, courts were left with the clear indication from Congress that it had intended to promote meaningful collective bargaining by exempting such efforts from the application of otherwise applicable antitrust laws. However, courts were left to determine on their own when and how to interpret the limitations of that exemption.

The Sherman Act prohibits "[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 ..." However, the courts have interpreted the Sherman Act to limit only those contracts or com-


17. The courts’ difficulties in applying federal antitrust laws came, at first, as a result of their apparent distaste for labor unions. Ray, supra note 14, at 10.


19. “Collective bargaining” includes, among other acts, the efforts between employers and designated employee representatives to discuss grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of work. 29 U.S.C. § 152(5).

20. The parties are obligated by the terms of the NLRA to collectively bargain in good faith. 29 U.S.C. §§ 158(a)(5), 158(b)(3).


bination that: 1) have a restraining effect on interstate trade or commerce; 2) represent unreasonable or arbitrary restraints; and, 3) are not exempt from the antitrust laws. Consequently, the Sherman Act does not limit with whom a private entity may choose to deal, nor does it guarantee that entirely free competition is always protected. Instead, the Sherman Act is a declaration of congressional intent that the right to conduct business is not unqualified.

A. Judicial Interpretations of the Sherman Act

For over one hundred years, the Supreme Court has struggled to identify exactly what limitations the Sherman Act imposes on the right to conduct business. In its earliest interpretations of the Sherman Act, the Court construed it "in the light of reason" to "prohibit only [those] contracts and combinations which amount to an unreasonable or undue restraint of trade in interstate commerce." The Court thus undertook to regulate industry, taking an active role rather than simply prohibiting those contracts or acts that the common law had deemed undue restraints on trade. In doing so, the Court looked at "new times and economic conditions" to determine which contracts or actions were unreasonable or were undue burdens on trade at the time. These considerations led the Court to adopt a balancing approach called the "rule of reason," in which it struck contracts or actions with unduly or unreasonably anticompetitive effects that outweighed their proffered justifications.

Standard Oil Company v. United States\textsuperscript{32} ("Standard Oil") illustrates both the "rule of reason" and the difficulty the Court has had in applying it.\textsuperscript{33} The United States brought suit against Standard Oil and other oil companies, asserting that the defendants had conspired to fix the price of crude and refined oil, and that those actions amounted to violations of federal antitrust laws.\textsuperscript{34} The Court interpreted section 1 of the Sherman Act\textsuperscript{35} as if it "contained the word 'unreasonable' or the word 'undue.'"\textsuperscript{36} In determining whether the defendants' practices were unreasonable or unduly anticompetitive, the Court considered both the common law and the new times and economic conditions.\textsuperscript{37} Although the Court's review of then-current economic norms as well as established common law principles provided a solid foundation for its "rule of reason" review, its ultimate decision in Standard Oil instead rested upon a simple judicial balancing between the proffered efficiency justifications and the restrictive capacity of the challenged actions.\textsuperscript{38} The problem with such an approach, as Justice Harlan noted in his dissent, is the "obvious danger" that the Court's balancing invites the oft-feared result of "judicial legislation."\textsuperscript{39}

\begin{itemize}
  \item \textsuperscript{32} Standard Oil Co., 221 U.S. at 1.
  \item \textsuperscript{33} See generally id. at 47 ("Both as to the law and as to the facts, the opposing contentions pressed in the argument are numerous, and in all their aspects are so irreconcilable that it is difficult to reduce them to some fundamental generalization, which, by being disposed of, would decide them all.").
  \item \textsuperscript{34} Id. at 32.
  \item \textsuperscript{35} Section 1 of the Sherman Act, by its language, prohibits "[e]very contract, combination... or conspiracy." Sherman Act, 15 U.S.C. § 1 (2000).
  \item \textsuperscript{36} Standard Oil Co., 221 U.S. at 99 (Harlan, J., dissenting). However, by its "rule of reason" approach, the Court applied section 1 only to prohibit those contracts, combinations, or conspiracies that it found to place unreasonable or undue burdens on trade. Id. at 87.
  \item \textsuperscript{37} Id. at 59-60. Among common law principles considered by the Court were the English views on the law of restraint of trade. Id. "New times and economic conditions," as used by the Court, required it to look at the current state of the market in order to evaluate whether a challenged action had, based on changes in the marketplace, become more or less anticompetitive. Id.
  \item \textsuperscript{38} Id. The Court found the defendants' actions to be so anticompetitive as to raise a presumption of their intention to restrain trade and monopolize the market for crude oil. Id. Because the defendants were unable to rebut this presumption, the Court refused to accept the defendants' justifications for their actions. Id. at 74-76.
  \item \textsuperscript{39} Id. at 100 (Harlan, J., dissenting). In his opinion, Justice Harlan feared that the Court had improperly adhered to existing precedents and had set a dangerous course in adopting a "rule of reason" approach. Id. at 104-05. The primary problem with such an approach is that it would likely lead to the Court
To prevent overtly subjective results and the usurping of congressional authority, some courts thereafter rejected the *Standard Oil* balancing approach in favor of a per se rule as a "judicial shortcut." In hopes of standardizing and simplifying the process of review, these courts attempted to identify a specific number of actions or contracts, such as group boycotts, that were considered to be so blatantly anticompetitive as to amount to per se violations of federal antitrust laws. But the per se approach also proved to be of limited utility, as courts frequently found reasons to accept defendants' justifications for their anticompetitive actions that were based on little more than the "policy of another statute." Under the per se approach, challenged acts were in fact readily upheld based solely on policy-driven arguments and a desire to promote judicial efficiency, whereas under a *Standard Oil* balancing approach, similar actions would likely have been conclusively "undue or unreasonable" restraints on trade by virtue of their obvious anticompetitive nature.

While there is some support that the per se approach is now a dead letter altogether, at least one scholar has con-

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41. Group boycotts, also known as refusals to deal, are concerted action(s) of an entity that have the effect of limiting access of certain individuals to that entity or the services it provides. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959).
42. See, e.g., Klor's, Inc., 359 U.S. 207 (finding group boycott as per se violation); Int'l Salt Co. v. United States, 332 U.S. 392 (1947); Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941); see also N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (listing per se violations as including: price fixing, division of markets, group boycotts and tying arrangements).
43. *Silver*, 373 U.S. at 348-49 (finding that the defendant acted in compliance with the policies underlying the Securities Exchange Act of 1934, namely to eliminate restraints on competition, and that in light of that was entitled to a greater degree of protection from the Sherman Act).
44. See, e.g., *id.* at 341. In *Silver*, the Court considered the competing policies underlying the Sherman Act and the Securities Exchange Act. *Id.* The Securities Exchange Act presented a unique problem to the Court because it allowed for self-regulation by securities exchanges, and therefore, at least in theory, also allowed for a degree of anticompetitive behavior that would otherwise violate the Sherman Act. *Id.* at 349.
45. See *N. Pac. Ry. Co.*, 356 U.S. at 5 (finding that in many cases, anticompetitive actions would likely fail either a "rule of reason" or a per se approach, but advocating the per se approach as being generally more efficient).
46. See generally NCAA v. Bd. of Regents, 468 U.S. 85, 100 (1984) (deciding it would be inappropriate to apply a per se rule to a case involving an industry in which horizontal restraints on competition are essential if the product is to
cluded that the reluctance of the courts to apply a per se approach in the antitrust context is simply part of a larger judicial trend away from such out-of-hand rejections.\(^\text{47}\) As it applies in the antitrust context, this judicial trend recognizes the growing number of business-related acts that may be justified as necessary and advantageous to competition and that, therefore, merit more substantive judicial review.\(^\text{48}\) The trend also recognizes the general sentiment of many commentators that per se treatment is simply inappropriate in the antitrust context.\(^\text{49}\)

Despite this sentiment, the labor context, concerted refusals to deal\(^\text{50}\) on the part of an employer have often been held to be per se violations of the Sherman Act.\(^\text{51}\) Refusals to deal not only affect the victims of the boycott individually, but also detract from the overall vigor of free competition within the relevant market.\(^\text{52}\) While refusals to deal have often been held to be per se violations,\(^\text{53}\) such holdings are not without exception and limitation.

In *Silver v. New York Stock Exchange* ("*Silver*"),\(^\text{54}\) the Court noted that refusals to deal that would otherwise constitute per se violations of the Sherman Act might be permissible when clearly supported by "justification[s] derived from the policy of another statute or otherwise."\(^\text{55}\) In *Silver*, a
group of securities traders complained that the New York Stock Exchange had violated the Sherman Act by limiting their access to certain services necessary for them to compete in the sale of over-the-counter securities. However, instead of holding the Exchange's actions to be per se violations of the Sherman Act as constituting an illegal group boycott, the Silver Court instead upheld the Exchange's actions by creating a new "rule of reason" exception to the per se rule of illegality generally applied to group boycotts.

To uphold a group boycott under the new "rule of reason" exception, the Court required four conditions to be satisfied: 1) a legislative mandate existed on the subject matter; 2) the challenged action was consistent with the policies underlying the legislative mandate; 3) the restriction created by the group boycott was no more extensive than necessary; and finally, 4) adequate safeguards (i.e., judicial review) existed to prevent arbitrary enforcement.

In applying the test, the Court first noted the presence and importance of the Securities Exchange Act, and, more specifically, the fact that its presence indicated a congressional intent to allow for self-regulation of the securities trading. The Court next found that the action challenged by the petitioners was consistent with the original policies underlying the reasons for Congress's granting over-the-counter security traders self-regulation. The Court then decided that the respondents' actions met the remaining two parts of its four-part inquiry: the actions were no more extensive than necessary, and the respondents provided adequate safeguards against arbitrary enforcement of the restrictions. After considering these four prongs, the Court determined that the Exchange's actions warranted a "rule of reason" exception to the per se rule of illegality otherwise applicable to refusals to

56. Id. at 347. Unlike listed securities, such as those listed on general trade exchanges like the NYSE and NASDAQ, there is no central trading place for securities that are traded over-the-counter. Id. at 348-49.

57. Id. at 347.

58. See id. at 341.

59. Id. at 351-52. "It was . . . the combination of the enormous growth in the power and impact of exchanges in our economy, and their inability and unwillingness to curb abuses which had increasingly grave implications because of this growth, that moved Congress to enact the Securities Exchange Act." Id. (internal citations omitted).

60. See Silver, 373 U.S. at 359-61.

61. See generally id. at 341.
Thus, despite attempts by other courts to avoid the problems of subjectivity and judicial legislation, the Silver Court's four-part "rule of reason" test re instituted a heightened judicial role in evaluating refusals to deal or group boycotts.

B. The Application of Federal Antitrust Laws to the NFL

The NFL is a private entity that enjoys a monopoly on professional football in the United States. With the exception of a limited antitrust exemption allowing for the formation of the current league system, the actions of the NFL are otherwise subject to antitrust scrutiny. While Major League Baseball enjoys full immunity from antitrust review, four legislative attempts to extend comparable immunity to the actions of the NFL have been rebuffed. Despite the fact that the Court itself has previously found the rationale underlying baseball's complete antitrust immunity to be "extremely dubious," "inconsistent," and "illogical," it nonetheless recognized that more harm than good would result from removing the immunity.

The NFL's actions, although not entirely immune from antitrust scrutiny, may nonetheless be exempt from that scrutiny provided that certain conditions are met. Since 1968, the National Football League Players Association ("NFLPA") has represented NFL players in their collective bargaining efforts with the NFL's Management Council

63. Mid-South Grizzlies v. NFL, 720 F.2d 772, 783 (3d Cir. 1983).
64. Id. at 775 (citing 15 U.S.C. § 1291 (2000) (amended in 1966)). This section allowed the formation of the current single-league NFL system from two previously separate leagues, the NFL and the AFL, without imposing on the newly formed league the otherwise applicable provisions of federal antitrust law. See 15 U.S.C. § 1291.
66. Id. at 450 n.7 (citing H.R. 4229, 4230, 4231 and S. 1526, 82d Cong. (1951) as failed attempts to petition a congressionally enforced exemption to federal antitrust laws, similar in nature to what is provided to Major League Baseball).
68. See Flood, 407 U.S. at 282 (finding that considerations of stare decisis and the "unique characteristics and needs" of baseball led the Court to reach this conclusion).
The NFLPA is recognized by the National Labor Relations Board ("NLRB") as the exclusive bargaining representative of all NFL players. It acts on the players' behalf in negotiating the terms of the league's Collective Bargaining Agreement ("CBA") with NFL owners and other league officials of the NFLMC. To the extent that the NFLPA represents the players in bona-fide, arms-length collective bargaining efforts with the NFLMC, the agreed upon terms of the CBA are generally exempt from antitrust scrutiny by operation of the non-statutory labor exemption.

C. The Non-statutory Labor Exemption and Early Interpretations by the Supreme Court

The non-statutory labor exemption ("Exemption") is a judicial creation, derived from the Supreme Court's understanding of federal labor policy and, more specifically, from the Court's view that one of the central goals of that policy is to promote collective bargaining efforts. The exemption pre-

70. Clarett v. NFL, 369 F.3d 126-27 (2d Cir. 2004) (identifying the NFLPA as the NFL players' exclusive bargaining representative and the NFLMC as the bargaining unit representing the owners of the NFL's teams; generally, the NFL and the NFLMC are interchangeable); see also Complaint of Maurice Clarett, (No. 03-CV-7441), http://sskrplaw.com/nfl/clarettv nfl.pdf (last visited Oct. 2, 2004) (on file with the Santa Clara Law Review).


73. The NLRA requires that the parties to a collective bargaining relationship "collectively bargain in good faith." See National Labor Relations Act, 29 U.S.C. § 158(d). It defines good faith collective bargaining to mean "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." Id. (a)(5). The Eighth Circuit has interpreted the requirement of § 158(d) to require evidence that the parties have relatively equal bargaining power, that the terms of their agreement are agreed upon by each party, that the terms benefit both parties, and, finally, that, if a term is unilaterally imposed, that at least it was shown to be a focal point of bargaining efforts prior to that time. Mackey, 543 F.2d at 615.

74. Mackey, 543 F.2d at 614. "As a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other any of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable." Brown, 518 U.S. at 237.

75. Brown, 518 U.S. at 235-36. In enacting the labor statutes in the 1930s, Congress "hoped to prevent judicial use of antitrust law to resolve labor dis-
vents the success of an otherwise valid antitrust cause of action where its success would mean subjecting collective bargaining efforts to a court's antitrust scrutiny. In doing so, the exemption applies to any employment relationship characterized by collective bargaining and, therefore, furthers Congress's primary objective for federal labor policy. While the Court has succeeded in broadly defining the scope and purpose of the exemption generally, it has struggled to define both the specific terms and the approaches to its application.

1. The Intimately Related /Jewel Tea Approach

Amalgamated Meat Cutters v. Jewel Tea Co. ("Jewel Tea") involved a collective bargaining agreement between Chicago-area butchers and a trade association that represented Chicago's meat retailers. Jewel Tea, a retailer, objected to the association's acquiescence to the butchers' demand that meat counters in stores only operate from 9 a.m. until 6 p.m. each day. In finding the restriction exempt from antitrust scrutiny, the Court explicitly stated that its decision to apply the non-statutory labor exemption was "very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws." In reaching that conclusion, the Court fashioned the "intimately related" test, which provided that an agreement between parties to a collective bargaining relationship is exempt from the application of antitrust law if the agreement: 1) concerns a mandatory subject of collective bargaining; 2)

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77. See, e.g., Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987) (finding that Wood's antitrust claims must fail because "no one seriously contends that the antitrust laws may be used to subvert fundamental principles of our federal labor policy as set out in the National Labor Relations Act"). Id.

78. See Marks, supra note 16, at 730-31; see also Brown, 518 U.S. at 250.


80. Id. at 680.

81. Id. at 689 (citing United Mine Workers v. Pennington, 381 U.S. 657 (1965)).

82. Mandatory subjects of collective bargaining generally include wages, hours, working conditions, and other terms of employment. See 29 U.S.C. § 158(d) (2000).
is intimately related to that subject; and, 3) is the product of bona-fide, arms-length negotiating between the parties. Thus, the Jewel Tea test encourages collective bargaining by generally exempting those efforts from a court's antitrust scrutiny, but nonetheless provides that the exemption does not shield all collective bargaining efforts.

2. The Follow Naturally/Connell Construction Approach

Without explicitly overruling Jewel Tea, the Court in Connell Construction Co. v. Plumbers and Steamfitters Local 100 ("Connell Construction") adopted a distinct approach to the application of the non-statutory labor exemption. In Connell Construction, a Dallas-area union, Local 100, requested that Connell Construction sign an agreement that would require it to subcontract its work only to those outfits that were members of Local 100. When Connell Construction refused, Local 100 staged a picketing campaign. Although it ultimately signed the agreement under protest, Connell Construction filed suit alleging antitrust violations. Although the Court found the reduction of nonunion members' competition was a legal end to pursue, it noted that the non-statutory exemption from antitrust scrutiny was not warranted simply because Local 100's goal was legal.

Instead, Justice Powell concluded that the agreement was not exempt from antitrust scrutiny because it failed a three-part inquiry: it was negotiated outside the collective bargaining context; it amounted to a direct restraint on trade with substantial anticompetitive effects; and its effects did not follow naturally from the elimination of competition over

83. See supra note 74.
84. Jewel Tea, 381 U.S. at 689-90.
85. See generally Marks, supra note 16, at 737-38 (explaining the restrictions that different Justices proposed before they would apply the nonstatutory labor exemption in Jewel Tea, as well as those created by lower courts interpreting Jewel Tea).
87. Id. at 619-20.
88. Id. at 620.
89. Id. at 620-21.
90. Federal labor policy requires tolerance for a degree of reduced competition and, therefore, a degree of protection from antitrust laws. Connell Constr., 421 U.S. at 622. The nonstatutory labor exemption fills this dual role. Id.
wages and working conditions.\(^9\) The Court's approach, as articulated by Justice Powell's opinion, is now commonly referred to as the "follow naturally" test.\(^92\) More succinctly stated, the follow naturally test attempts to accommodate federal labor policy's need for a degree of reduced competition by prohibiting only those provisions whose anticompetitive effects would not follow naturally from allowing for that degree of reduced competition in negotiating wages, hours, and working conditions.\(^93\)

Whether applying Connell Construction's "follow naturally" test or Jewel Tea's "intimately related" approach, the clear requirement for a challenged provision to gain exemption from antitrust scrutiny is that the labor law policy favoring collective bargaining must first be respected.\(^94\)

**D. The Case of Maurice Clarett**

1. **Background and "The Rule"**

Maurice Clarett was a student-athlete at The Ohio State University ("OSU") who, because of certain NCAA violations not relevant to this comment, was suspended from the OSU football team.\(^95\) In anticipation of not being able to return to OSU, Clarett sought early eligibility for the NFL draft in April of 2004.\(^96\) However, NFL officials, including NFL Commissioner Paul Tagliabue, publicly announced that Clarett would not be admitted to the NFL's draft prior to his senior year at OSU.\(^97\) The league's decision is based upon a statement contained within the 2003 amended version of Article XII of the NFL's Bylaws ("the Rule"), which limits eligibility for the draft to players who have been graduates of high

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91. Id. at 625 (articulating the "follow naturally" test).
92. See Marks, supra note 16, at 740-42.
93. Connell Constr., 421 U.S. at 625.
94. See Marks, supra note 16, at 743. "From a practical standpoint, the tests should reach the same result." Id.
96. Clarett, 369 F.3d at 126.
97. Complaint of Clarett, supra note 70, at ¶ 25.
school for a predetermined length of time.\textsuperscript{98}

Historically, the league required that its entering players wait until at least four years after high school graduation to become draft eligible.\textsuperscript{99} However, in 1990, the requirement was relaxed to allow early entry by players for whom only three years had elapsed since high school graduation.\textsuperscript{100} The only additional requirement for early entry was to file an application with the NFL's commissioner, and there is every indication that those petitions were regularly granted.\textsuperscript{101}

In 1993, the NFLPA and the NFLMC entered into a new collective bargaining agreement that, despite its comprehensiveness on issues such as rookie drafting and rookie compensation,\textsuperscript{102} did not itself contain any version of the Rule.\textsuperscript{103}

Instead, the Rule is contained within Article XII of the NFL Bylaws.\textsuperscript{104} However, the NFLMC provided the NFLPA with a copy of its most recent Bylaws as amended in 1992, along with a letter ("the Letter") confirming that the Bylaw provisions were "presently existing" as "referenced in Article IV, Section 2, of the Collective Bargaining Agreement."\textsuperscript{105}

In 2003, the NFL amended Article XII of the Bylaws, which still contained the Rule, to include a generic statement that a player for whom \textit{four seasons} had not elapsed could apply for special eligibility.\textsuperscript{106} The NFL Bylaws, as amended in 2003, also refer to a 1990 memorandum from the league's commissioner issued "pursuant to his authority under the By-

\begin{itemize}
\item \textsuperscript{98} See Clarett, 369 F.3d at 127.
\item \textsuperscript{99} Id. at 126.
\item \textsuperscript{100} Id.
\item \textsuperscript{101} Id. at 127.
\item \textsuperscript{102} Id. Rookie drafting and rookie compensation, or the methods by which young players are granted admission to professional sports leagues, have been held to be mandatory subjects of collective bargaining and, therefore, have regularly been included directly in the collective bargaining agreements of those leagues. See, e.g., Brown, 518 U.S. 231; NBA v. Williams, 45 F.3d 684 (2d Cir. 1995).
\item \textsuperscript{103} Clarett, 369 F.3d at 128. Instead, the Rule was incorporated by reference into the Collective Bargaining Agreement via the reference to the NFL's Bylaws.
\item \textsuperscript{104} Id. at 127. Article XII of the NFL Bylaws, titled "Eligibility of Players," provides in relevant part that upon exception, players who had received "Special Eligibility" from the NFL Commissioner could enter the NFL's draft so long as at least three \textit{NFL seasons} had passed since the player graduated from high school. Id.
\item \textsuperscript{105} Id. at 128 (internal citations omitted).
\item \textsuperscript{106} Id.
\end{itemize}
laws to establish necessary policies and procedures." The 1990 memorandum provides that a player may also apply for special eligibility so long as "three full college seasons have elapsed since high school graduation."

2. Clarett's Position

Clarett argues that the Rule amounts to a group boycott, or refusal to deal, that is "an unreasonable restraint on trade in violation of Section 1 of the Sherman Act," and, further, that the non-statutory labor exemption does not shield the Rule from antitrust scrutiny. Clarett contends that, although the Rule was a part of the 1992 NFL Bylaws, it is not included in the current version of the NFL Bylaws as effective in 2003. Instead, Clarett asserts that the only part of the 2003 Bylaws that has any bearing on his NFL draft eligibility is contained in the NFL commissioner's memorandum allowing players to petition for special draft eligibility. Clarett's position is that the incorporation of the Rule either solely via the commissioner's 1990 memorandum, or by the notice to the players in the Letter, is insufficient to meet the "good-faith collective bargaining" requirement that would merit the protection of the non-statutory labor exemption.

Clarett further argues that application of the non-statutory labor exemption is inappropriate in his case because the Rule affects parties outside the collective bargaining relationship in question and does not concern a mandatory subject of collective bargaining. As such, Clarett maintains that the Rule is subject to the close antitrust scrutiny generally applicable to group boycotts and should fail that

107. Id.
108. Id. (internal citations omitted).
110. Reply Memorandum of Clarett at 6, Clarett v. NFL, 369 F.3d 124 (2d Cir. 2004) (No. 04-0943-cv) (citing NFL Bylaw 12.1(E)), http://www.sskrplaw.com/nfl/clarettreply.pdf (last visited Oct. 4, 2004) (on file with the Santa Clara Law Review). The rule states that "three NFL seasons must have elapsed since the player was graduated from high school" before a player may become eligible for the NFL draft. Id.
111. Id.
112. Clarett, 369 F.3d at 141-42.
113. See Clarett, 306 F. Supp. 2d at 391. This oft-cited test was fashioned by the Eighth Circuit in its decision in Mackey, 543 F.2d 606. See also discussion supra Part II.E.2.b.
114. See Klor's, Inc., 359 U.S. 207.
3. The NFL's Position

The NFL argues that the Rule is shielded from antitrust scrutiny by application of the non-statutory labor exemption. The NFL asserts that the eligibility rule itself was the subject of collective bargaining, that the players discussed the Rule with the NFLPA and agreed not to challenge it, and that the Rule also concerns a mandatory subject of collective bargaining.

Even if the Rule does not merit protection from antitrust scrutiny by the non-statutory labor exemption, the NFL contends that the Rule can still pass antitrust muster. The parties agree that a per se rule of illegality is no longer viable in the sports context and that the "rule of reason" analysis is appropriate. To this end, the league offers three justifications in support of its draft eligibility policy: 1) to protect younger and/or less experienced players from injury; 2) to protect the NFL clubs from the costs and potential liability associated with those injuries; and 3) to prevent younger players from utilizing unhealthy methods to achieve NFL-level physiques.
Clarett has placed at issue whether or not the non-statutory labor exemption applies to shield the Rule from antitrust scrutiny. If it does, Clarett's claim must fail. If it does not, the Rule is subject to antitrust scrutiny, and the NFL's justifications for it become relevant. The Second Circuit Court of Appeals has recently resolved these issues in the NFL's favor. However, in light of Supreme Court and Eighth Circuit case law, there is substantial reason to be concerned about the potential impact of the court's ruling.

E. Prior Treatment of the Issues in Clarett's Case

1. The Sherman Act and Professional Sports

Athletes have often cited the Sherman Act as a basis for claiming that the actions of a particular professional sports league restrain their capacity to pursue athletic careers. In particular, athletes have often challenged restraints on entry into a particular league as group boycotts or refusals to deal. The cases of Spencer Haywood, Herbert Deesen, and Kenneth Linseman are perhaps the most factually similar to that of Maurice Clarett and provide apt illustrations of judicial approaches to the application of the Sherman Act in the context of entry to professional sports leagues.

a. Spencer Haywood and the National Basketball Association

In 1969, Spencer Haywood signed a contract to play for the Denver Rockets of the American Basketball Association.
Following a contract dispute with the Rockets, Haywood signed a contract with the Seattle Supersonics of the National Basketball Association ("NBA") and attempted to play for the Supersonics during the 1970-1971 season.\textsuperscript{135} Shortly thereafter, the NBA's commissioner declared Haywood ineligible pursuant to the league's "Four-Year Rule," which stated that a player was not eligible to compete in the league until four years had elapsed from the time of that player's high school graduation.\textsuperscript{136} Haywood challenged the rule as constituting a group boycott in violation of the Sherman Act.\textsuperscript{137}

Absent a collective bargaining relationship between the NBA players and owners, the case was decided entirely under an antitrust analysis, where the court determined that the Four-Year Rule merited a "rule of reason" exception similar to that in \textit{Silver}.\textsuperscript{138} After first deciding that section 1 of the Sherman Act was applicable because of the rule's significant effect on trade and because the rule constituted a "contract, combination . . . or conspiracy,"\textsuperscript{139} the district court relied on the test articulated in \textit{Standard Oil}\textsuperscript{40} and the exception cre-

\begin{itemize}
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Id. at 1059. The Four-Year Rule as stated in the NBA bylaws reads: \textit{High School Graduate, etc.} A person who has not completed high school or who has completed high school but has not entered college, shall not be eligible to be drafted or to be a Player until four years after he has been graduated or four years after his original high school class has been graduated, as the case may be, nor may the future services of any such person be negotiated or contracted for, or otherwise reserved. Similarly, a person who has entered college but is no longer enrolled, shall not be eligible to be drafted or to be a Player until the time when he would have first become eligible had he remained enrolled in college. Any negotiations or agreements with any such person during such period shall be null and void and shall confer no rights whatsoever; nor shall a Member violating the provisions of this paragraph be permitted to acquire the rights to the services of such person at any time thereafter.
\item \textsuperscript{137} Id. at 1060.
\item \textsuperscript{138} See id. at 1064-66 (detailing the Court's analysis and the rationale underlying its adoption of the "rule of reason" exception to the per se rule of illegality generally applicable to group boycotts).
\item \textsuperscript{139} Sherman Act, 15 U.S.C. § 1 (2000).
\item \textsuperscript{140} \textit{Standard Oil Co.}, 221 U.S. 1. The \textit{Standard Oil} approach balances the justifications for a challenged provision against its anticompetitive effect, strik-
Although the court’s decision did not ultimately rest on applying either Silver’s exception or Standard Oils test, its analysis of the NBA’s group boycott or refusal to deal did nonetheless rely on some of the elements contained therein. For that reason, the district court’s analysis provides insight into, and is helpful in evaluating, the Second Circuit’s decision in Clarett.

In applying the policy-driven analysis of Silver to the challenged NBA bylaw, the court reviewed and rejected the NBA’s three justifications for maintaining the bylaw. The court rejected the league’s argument of financial necessity for the rule based on the Supreme Court’s ruling in Klor’s, Inc. v. Broadway-Hale Stores, Inc. (“Klor’s”). The court then discarded the assertion that the league’s stated desire to ensure education for all NBA players on the grounds that such policies should be decided by Congress. Finally, the court rejected the league’s implicit argument that it was entitled to a free system for player development.

Although the court explicitly recognized that the subjective balancing approach in Standard Oil was unworkable, its analysis (purportedly under the narrow “rule of reason” exception of Silver) nonetheless included a discussion of undue and unreasonable burdens typical of Standard Oil balancing. The court managed to avoid a “difficult and lengthy” and “very subjective” inquiry into the actual neces-

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141. Silver, 373 U.S. 341. The Silver exception to the per se rule of illegality generally applied to refusals to deal, or group boycotts, and uphold such provisions provided compliance with four criteria: 1) there is a statute or other legislative mandate concerning the subject matter of the challenged act/provision; 2) the act/provision is in conformance with the policy underlying that mandate; 3) the act/provision is no more extensive than necessary; and, 4) there are adequate safeguards to prevent the arbitrary enforcement of the provision. See id. at 363-64.


143. Id. (relying on Klor’s, Inc., 359 U.S. 207); see also discussion infra Part II.E.1.b.

144. Denver Rockets, 325 F. Supp. at 1066.

145. Id. Haywood argued, and the court seemed to implicitly accept, that the NBA used high school and collegiate basketball leagues as a free means to develop and scout its potential players prior to their eligibility for the NBA draft. Id.

146. Id. at 1063; see also supra note 140.

147. See discussion supra p. 159.

148. Id.
sity of the NBA's justifications for the rule, which, as a refusal to deal/group boycott, was found to be a per se violation of the Sherman Act as in *Klor's.* In basing its decision on the Four-Year Rule's blanket application to all potential players without a mechanism allowing players to petition for special consideration, the court also implicitly revived the fourth prong of the *Silver* approach. In effect, the court incorporated aspects of both the *Silver* and the *Standard Oil* approaches into its decision, and also recognized the general rule that refusals to deal violate the Sherman Act.

**b. Kenneth Linseman and the National Hockey League**

Kenneth Linseman was a nineteen-year-old hockey player who, while competing for the Kingston Canadians in a junior Canadian hockey league, was drafted by the Birmingham Bulls of the professional World Hockey Association ("WHA"). Subsequently, the president of the WHA informed him that he was ineligible to play in the league pursuant to WHA Operating Regulation section 17.2(a) (the "twenty-year-old rule"), limiting players eligible for the league's draft to those over the age of twenty.

In granting an injunction preventing the twenty-year-old rule's enforcement, the district court noted the history of such group boycotts as being found per se illegal. The court highlighted the difficulties of applying the *Standard Oil* "rule of reason" to group boycotts, which had led to the adoption of that per se approach in the first place. After weighing its

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149. *Klor's, Inc.*, 359 U.S. 207 (stating general rule that refusals to deal/group boycotts amount to per se violations of the Sherman Act).
150. Id. at 1066.
151. *Silver*, 373 U.S. at 348-49. The fourth prong of the *Silver* exception looks for adequate safeguards against the arbitrary enforcement of the challenged provision.
153. Id. at 1318 n.3. The "twenty-year-old rule" provided that "[e]ach Member Club shall make its selections from among the players who attain their twentieth (20th) birthdays between January 1st, next preceding the conduct of the draft, and December 31st, next following the conduct of the draft both dates included." *Id.* (internal citation omitted).
154. *Id.* at 1320 (citing N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1957)). *See also* Fashion Originators' Guild v. *FTC*, 312 U.S. 457 (1941); *Klor's, Inc.*, 359 U.S. 207.
155. *Linseman*, 439 F. Supp. at 1320. The court noted that applying the *Standard Oil* "rule of reason" approach led the courts to undertake subjective
options, the court found the league’s twenty-year-old rule to be per se illegal and not deserving of the *Silver* exception to the per se treatment.  

The distinguishing feature of the *Linseman* court’s *Silver* analysis is its focus on the WHA’s justifications for the challenged rule under *Silver’s* second prong. The WHA argued that if the rule was struck down, a flood of young players would leave the junior leagues for the bigger money in the WHA, and that, as a result, the junior hockey leagues would not survive for lack of sufficiently talented young players. However, the court responded by stating, “the Sherman Act does not permit a failing enterprise to be buoyed up with an illegal agreement to restrain trade.” Furthermore, the WHA argued that if younger players did not spend time playing in the junior leagues, the WHA would consequently lose its free “training ground” for prospective players. As to the league’s second justification, the court noted that even if a free “training ground” were necessary to the league’s survival, it did not create a “need for concerted action as to which specific players will be employed.”

Linseman argued that his current salary with the Kingston team was only $75 per week, or $21,600 over six years, and that his contract with Birmingham guaranteed him at minimum a total of $500,000 over six seasons. Further, the $500,000 amount excluded additional compensation, the amount of which “would be impossible to determine if he were presently denied the opportunity to test his skills against those of other professionals.” The district court accepted Linseman’s arguments, noting the career span of a professional athlete is relatively short in duration, and found the WHA’s justifications for its rule did not support depriving

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factual inquiries and reach policy-driven decisions that often encroached on the legislative function. *Id.*

156. *Id.* at 1321-23.

157. See discussion *supra* Part II.A. The second prong of the *Silver* analysis generally looks at the underlying policy reasons justifying an entity’s refusal to deal. *Id.*


159. *Id.*

160. *Id.*

161. *Id.* at 1321.

162. *Id.* at 1318.

163. *Id.* at 1319.
Linseman of even one year of his career.\textsuperscript{164}

In reaching a conclusion similar to that in the case of Spencer Haywood,\textsuperscript{165} the court held that the determination of which players should be eligible for the WHA, under a free market system, “ought to be left up to each individual team.”\textsuperscript{166}

c. Herbert Deesen and the Professional Golfer’s Association

Herbert Deesen was declared ineligible to play in the Professional Golfers’ Association (“PGA”) tournaments after several subpar performances in 1958.\textsuperscript{167} Although the PGA maintained a virtual monopoly over professional golf tournaments in the United States,\textsuperscript{168} the district court relied on Supreme Court precedent\textsuperscript{169} to find that the league’s actions with respect to Deesen amounted to a reasonable restraint of trade.\textsuperscript{170} The PGA excluded Deesen as a means of increasing competition within the league and only did so after he had been given an opportunity to petition for reinstatement by playing a number of “test” rounds.\textsuperscript{171} Because the PGA’s actions were driven by the league’s need to limit the number of tournament-eligible players to those who could compete in a single day, subject to review by a PGA player board, they tended to promote competition and therefore did not contravene the policies of the Sherman Act.\textsuperscript{172}

Linseman subsequently affirmed Deesen’s holding in finding the WHA’s actions distinguishable from the PGA’s.\textsuperscript{173}

\textsuperscript{164} See Linseman, 439 F. Supp. at 1319 (noting that the loss of even one year of the career of a professional athlete amounted to an irreparable injury).
\textsuperscript{165} Denver Rockets, 325 F. Supp. 1049.
\textsuperscript{166} Linseman, 439 F. Supp. at 1321.
\textsuperscript{167} Deesen, 358 F.2d at 168.
\textsuperscript{168} Id. at 171 n.7. The court recognized this, although noted at the time that the PGA did not sponsor five or six of the major professional golf tournaments in the United States in a given year. Id.
\textsuperscript{169} Id. at 170 (citing Bd. of Trade of Chicago v. United States, 246 U.S. 231 (1918)).
\textsuperscript{170} Id. at 170-71. Relying on the Supreme Court’s opinion in Board of Trade of Chicago v. United States, the district court noted, “[t]he true test of legality is whether the restraint imposed is such as merely regulates and thereby perhaps [sic] promotes competition or whether it is such as may suppress or even destroy competition.” Id. at 170 (citing Bd. of Trade of Chicago, 246 U.S. at 238).
\textsuperscript{171} Id. at 168.
\textsuperscript{172} Id. at 171-72.
\textsuperscript{173} Linseman, 439 F. Supp. at 1323.
The *Linseman* court noted the WHA's rule was clearly inferior to the PGA's on the basis that the WHA's rule was completely arbitrary, that it suppressed competition, and that it was governed by a blanket application rather than by any sort of skill assessment. The *Deesen* decision is also significant because it recognizes that a skill-based, as opposed to a blanket age-based, restraint is both a viable and workable means for limiting a player's eligibility to participate in professional sports and does not contravene the provisions of the Sherman Act.

Although the cases of *Denver Rockets*, *Linseman*, and *Deesen* do not address restraints on trade in an industry where a collective bargaining relationship exists, they do provide a clear indication that the Sherman Act mandates that a restraint on entry into a professional sports league should promote competition in that league or else it will risk per se illegality as a group boycott or refusal to deal. The next section will discuss the impact the collective bargaining relationship has on similar restraints on trade, and how the Second Circuit's strong adherence to federal labor laws has guided it to conclude that the mandates of the Sherman Act are secondary to those of federal labor laws.

2. The Non-Statutory Labor Exemption and Professional Sports

Over the past thirty years, there have been a number of disputes between professional sports players and owners that arise at the intersection between federal labor and antitrust laws. Although many of these cases involved antitrust issues similar to those discussed above in Section A, they were instead decided by applying federal labor laws.

In an industry where a collective bargaining relationship

174. *Id.*
175. *See Deesen*, 358 F.2d at 168-69.
176. *Id.* at 171-72. Relying heavily on the Supreme Court's test articulated in *Board of Trade of Chicago v. United States*, the district court found that the PGA had adopted reasonable measures to promote competition that did not amount to either a violation of Sherman Act section 1 or 2. *Id.* at 170-72 (citing *Bd. of Trade of Chicago*, 246 U.S. at 238).
177. *See Brown*, 518 U.S. 231; *Mackey*, 543 F.2d 606; *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989); *Caldwell*, 66 F.3d 523; *Williams*, 45 F.3d 684; *Wood*, 809 F.2d 954.
178. *See Brown*, 518 U.S. 231; *Mackey*, 543 F.2d 606; *Powell*, 930 F.2d 1293; *Caldwell*, 66 F.3d 523; *Williams*, 45 F.3d 684; *Wood*, 809 F.2d 954.
is established, federal labor laws generally govern that relationship, and the Sherman Act applies only in limited circumstances. Effectively, only if a questioned practice or rule fails to qualify for the protection of the non-statutory labor exemption, is it then subject to antitrust scrutiny. As the Supreme Court most recently stated in deciding Brown v. Pro Football, Inc. ("Brown"), the application of implicit (non-statutory) antitrust exemptions is "not intended to insulate from antitrust review every joint imposition of terms by employers." This section will discuss the application of the non-statutory labor exemption in the context of professional sports and, more specifically, the distinct approaches of the Second and Eighth Circuits and how those unique approaches impacted the Court's later application of the exemption in Brown.

a. The Second Circuit's Approach: Leon Wood, Joe Caldwell, and Charles Williams Take the Court Against the NBA and ABA

The Second Circuit's decisions in Wood v. NBA, Caldwell v. American Basketball Ass'n, and NBA v. Williams demonstrate its application of the non-statutory labor exemption in cases alleging improper restraints on trade within a labor market characterized by a collective bargaining relationship and a multi-employer collective bargaining unit. These decisions are marked by a strong adherence to federal labor laws and policy and are predictive of the likelihood

180. Id.
181. See id.
182. Id. at 250 (emphasis added). The Court noted that "an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process." Id.
183. Wood, 809 F.2d 954.
185. Williams, 45 F.3d 684.
186. Clarett, 369 F.3d at 134. The court declined to follow the approach of the Eighth Circuit partly because it found the Eighth's Circuit's approach to be inconsistent with its own decisions. Id. at 133-34. The Second Circuit followed its own prior decisions as precedent because it found that they comport with the Supreme Court's approach and result. Id. at 138.
187. Wood, 809 F.2d at 963 ("Wood's claim is beyond peradventure one that implicates the labor market and subverts federal labor policy."); Caldwell, 66 F.3d at 530 ("Unlike the claim in Wood, Caldwell's claim regarding his dis-
that the Second Circuit will apply the non-statutory labor exemption to claims relating to a labor market characterized by collective bargaining in order to protect the labor policy of favoring such efforts.

1. Leon Wood v. NBA

After being drafted into the NBA by the Philadelphia 76ers, Leon Wood filed suit contesting a number of provisions contained in the league's collective bargaining agreement.\textsuperscript{188} Citing Sherman Act section 1 violations,\textsuperscript{189} Wood alleged that several provisions were tantamount to a NBA conspiracy to curb his pursuit of a NBA career.\textsuperscript{190} Specifically, the contested provisions granted the 76ers exclusive rights to Wood,\textsuperscript{191} required the 76ers to limit his salary,\textsuperscript{192} and further granted the 76ers a right of first refusal upon expiration of its exclusive rights to Wood.\textsuperscript{193}

The district court upheld the challenged rules as exempt from antitrust scrutiny via application of the \textit{Mackey v. NFL}\textsuperscript{194} approach.\textsuperscript{195} The Second Circuit, fearful of reaching a charge is not directly inconsistent with substantive federal labor law. Nevertheless, allowing Caldwell to proceed with his action would subvert fundamental principles of our federal labor policy as set out in the National Labor Relations Act.” (internal citations omitted); see Williams, 45 F.3d at 694.

188. \textit{Wood}, 809 F.2d at 956.
189. Sherman Act, 15 U.S.C. § 1 (2000). Section 1 of the Sherman Act provides in relevant part that, “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.” \textit{Id}.
190. \textit{Wood}, 809 F.2d at 958.
191. \textit{Id} at 957. The operation of the NBA's draft system, or the system by which young players entering the league are generally selected, included a provision that upon drafting a player, a team would have exclusive rights within the league to sign him to a contract for up to one year. \textit{Id}.
192. \textit{Id}. The NBA also adopted a salary cap, or a maximum amount of money that any given team could spend (total) in a given year to pay all of its players. \textit{Id}. Because the 76ers had reached its salary cap level at the time Wood was drafted, they were only able to offer him a nominal contract for his first year of play. \textit{Id} at 958.
193. \textit{Id}. Once the one-year period of exclusive rights to a player's contract had expired, the drafting team was given an opportunity to match any offer made to the drafted player by another team at that time. \textit{Id} at 957.
194. \textit{Mackey}, 543 F.2d 606. The \textit{Mackey} approach, discussed \textit{infra} Part II.E.2.b, looks at three factors to decide if the non-statutory labor exemption applies: which parties are primarily impacted by the challenged provision; whether the provision concerns a mandatory subject of collective bargaining; and whether there is evidence that good faith collective bargaining occurred on the subject/provision. \textit{Id} at 614.
decision that would allow Wood to subvert federal labor policy,196 reached the same conclusion based on the ongoing collective bargaining relationship between the owners and the NBA players.197

2. Joe Caldwell v. American Basketball Association

Joe Caldwell signed a five-year contract to play for the Carolina Cougars of the American Basketball Association in 1970.198 However, as a result of allegations that Caldwell had violated league rules, he was terminated by the Cougars and never played professional basketball again.199 Caldwell filed suit, asserting that the National Basketball Association blacklisted him in violation of section 1 of the Sherman Act, and, also, that the league improperly monopolized the market for professional basketball in the United States in violation of section 2 of the Sherman Act.200

The district court found that Caldwell's physical limitations as a thirty-three-year-old with multiple injuries were the actual cause of the end of his basketball career, and that as a result he had failed to state a claim under the Sherman

195. Wood, 809 F.2d at 958 (citing Wood v. NBA, 602 F. Supp. 525 (S.D.N.Y. 1984)). Although there is no explicit reference to the Mackey approach, the district court's ruling clearly encompasses each of the Mackey factors. See discussion infra Part II.E.2.b.
196. Wood, 809 F.2d at 963. The court did not even reach an antitrust analysis because of its fear of contradicting federal labor policy (to promote collective bargaining efforts) as set out in the National Labor Relations Act. Id. at 959. The court stated "(t)his is not collective bargaining as intended by Congress. Indeed, it is not bargaining at all." Id. at 963.
197. Id. at 961-62.
198. Caldwell, 66 F.3d at 525.
199. Id. at 525-26. Allegedly, as a member of the Cougars, Caldwell aided a teammate in planning an incident whereby the teammate "jumped the team"—a negotiation tactic forbidden by the league. Id. Although the teammate returned to the team soon thereafter, the team suspended Caldwell pursuant to certain terms in his individual contract, because they believed that he had been involved in planning the incident. Id. (internal citations omitted).
200. Id. at 526. The American Basketball Association merged into, and became a part of, the National Basketball Association after the 1975-1976 season. Id. Further, although Caldwell's case was filed in early 1975, due to his bankruptcy proceedings, his case was not heard by the district court until 1993. Id.
In upholding the district court’s decision, the Second Circuit relied again on the federal labor policy to promote collective bargaining, and found the NBA’s refusal to hire Caldwell to be in good faith and immune from antitrust scrutiny based on the collective bargaining relationship between NBA players and owners. 204

3. NBA v. Charles Williams

At the end of the 1994 NBA season, the collective bargaining agreement between the players and owners expired. 205 Charles Williams and other NBA players contested the same three provisions of the NBA’s collective bargaining agreement as Leon Wood. The difference in Williams’s case is that the players waited until the expiration of the effective bargaining agreement. 206 Therefore, while there was still an ongoing collective bargaining relationship, there was no collective bargaining agreement in effect. 207

The NBA owners refused to take out the challenged provisions. They claimed that the 1994 collective bargaining agreement simply maintained the status quo, the players’ refusal to agree to the questioned terms was not in good faith, and the provisions were necessary for them to maintain a strong bargaining position relative to the players association. 208

The district court upheld the owners’ unilateral implementation of the terms into the 1994 collective bargaining agreement. 209 Purporting to apply the Eighth Circuit’s approach from Powell v. NFL, 210 the district court found the owners’ acts immune from antitrust scrutiny based on the

203. Caldwell, 66 F.3d at 526.

204. Id. at 530. The court reached its decision based on its reading of the NLRA to provide that actions taken by the league in the context of collective bargaining relationship, with the collective bargaining representative of the league’s players, were to be insulated from antitrust review. Id.

205. Williams, 45 F.3d at 686.

206. Id.

207. Id.

208. See id. at 687-89.

209. Id. at 686.

210. Powell v. NFL, 930 F.2d 1293, 1304 (8th Cir. 1989). The “Powell approach” dictates that so long as a collective bargaining relationship exists, antitrust immunity protects actions of either party to that relationship even if the bargaining over a particular term goes to impasse and no actual agreement is reached. Id.
collective bargaining *relationship* existing with the players.\(^{211}\)

The Second Circuit, relying instead on the Supreme Court decisions in *NLRB v. Truck Drivers Local Union No. 449*\(^{212}\) and *Bonanno Linen Service, Inc. v. NLRB*,\(^{213}\) reached essentially the same conclusion.\(^{214}\) The court ultimately found that the actions of the NBA owners, likely otherwise *per se* violations of the Sherman Act,\(^{215}\) deserved immunity from antitrust scrutiny because of a "longstanding if unspoken assumption that multiemployer collective bargaining was not subject to the antitrust laws . . . ."\(^{216}\)

Together, *Wood, Caldwell,* and *Williams* demonstrate the Second Circuit's reluctance, based on its adherence to federal labor policy to promote collective bargaining, to consider a plaintiff's antitrust claims so long as those claims arise in a labor market characterized by collective bargaining.

\(b.\) The Eighth Circuit's Approach: Mackey v. NFL

In 1963, in the interest of promoting competition within the league, the NFL unilaterally implemented the Rozelle Rule.\(^{217}\) The Rozelle Rule provided that upon the termination of a player's contract, he would become a free agent capable of contracting with any league team.\(^{218}\) However, the Rozelle Rule further provided that the NFL commissioner had discretion to grant the player's former club the right to one or more players from his new team.\(^{219}\)

On behalf of himself and other NFL players, John Mackey filed suit claiming that the NFL's actions amounted to an illegal restraint that denied him the right to freely contract for his services.\(^{220}\) Although the Rozelle Rule was ultimately struck down as a violation of the Sherman Act,\(^{221}\) the court first considered the potential application of the non-

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211. *Williams,* 45 F.3d at 686.
214. *Williams,* 45 F.3d at 692-93.
215. *Id.* at 692.
216. *Id.* at 693.
217. *Mackey,* 543 F.2d at 610-11.
218. *Id.*
219. *Id.* at 611. The league's commissioner was given this discretion based on the league's concern that the Rozelle Rule could otherwise lead to drastic alterations in the competitive balance between league teams. *Id.*
220. *Id.* at 609.
221. *Id.* at 623.
statutory labor exemption. In 1963, the NFL first included the Rozelle Rule as an amendment to the NFL Constitution and Bylaws. In 1968, at the first meeting of the newly formed NFLPA and NFLMC, the two groups argued from the outset as to the terms of the Rozelle Rule. However, at the termination of the parties’ 1968 discussions, the Rozelle Rule was incorporated by reference into the 1968 Collective Bargaining Agreement along with the remainder of the NFL’s Constitution and Bylaws.

At the 1970 collective bargaining negotiations between the parties, the NFLPA again expressed the players’ discontent with the Rozelle Rule. The NFLPA complained that the Rozelle Rule prevented certain players from signing contracts, but due to more pressing issues, the NFLPA could not afford the time to sufficiently fight to exclude the Rozelle Rule. However, the 1970 CBA did not incorporate the NFL Constitution or Bylaws by reference. Instead, as the NFL later claimed, “it was their understanding” that the Rozelle Rule remained in effect. The only manner in which the Rozelle Rule remained in effect (in writing) was via the Standard Player Contract signed by all players, which incorporated the terms of NFL’s Constitution and Bylaws by reference.

In 1974, the NFLPA vehemently contested the Rule at the parties’ collective bargaining meetings, and bargaining

222. See id. at 613-18.
223. Mackey, 543 F.2d at 610.
224. Id. at 612. At that time, the players sought to modify the Rozelle Rule but, due to other pressing issues and lack of bargaining power at the negotiations, were not able to modify or exclude it. Id.
225. Id. at 613.
226. Id.
227. Id.
228. Id. at 613. The court’s opinion does not indicate why the 1970 Collective Bargaining Agreement did not incorporate the NFL’s Constitution or Bylaws. Id.
229. Mackey, 543 F.2d at 613. At the trial court level, bargaining representatives for both sides indicated it was their understanding that the Rozelle Rule remained in effect during the term of the 1970 collective bargaining agreement. Id.
230. The terms of the 1970 Collective Bargaining Agreement included a provision that required each player to sign a “Standard Player Contract,” which governed player-owner relations and provided that the player agreed to be bound by the NFL’s Bylaws and Constitution. Id. at 613.
231. Id.
reached an impasse over that exact subject. The Eighth Circuit, in deciding whether to apply the non-statutory labor exemption to protect the Rozelle Rule from antitrust scrutiny, noted "the availability of the non-statutory exemption for a particular agreement turns upon whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case." The court then proceeded to review a lengthy list of cases facing similar questions and fashioned a three-part test as a result.

In attempting to "strike a balance" between the competing purposes and interests of labor and antitrust principles, the Eighth Circuit synthesized a test that would apply the non-statutory labor exemption only if: 1) the challenged provision primarily affected parties to the collective bargaining relationship; 2) the provision concerned a mandatory subject of collective bargaining; and, 3) the provision was the product of bona-fide arms-length collective bargaining. Relying heavily on Supreme Court precedent, the Eighth Circuit recognized that the NLRA envisioned that labor law principles should preempt the application of antitrust law and principles where collective bargaining is present. However, it

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232. "Impasse" has been defined by the National Labor Relations Board as being "only a temporary 'deadlock' or 'hiatus' in negotiations which in almost all cases is eventually broken, either through a change of mind or the application of economic force." Bonanno Linen Serv., Inc. v. Teamsters Local 25, Int'l Bhd. of Teamsters, 243 N.L.R.B. 1093, 1093-94 (1979).

233. Id.

234. Id. (citing Connell Constr., 421 U.S. 616; Jewel Tea, 381 U.S. 676; United Mine Workers v. Pennington, 381 U.S. 657 (1965)). Although recognizing the case before it was clearly factually dissimilar, the Eighth Circuit followed the Supreme Court's approach to resolving the question. Id. (citing Connell Constr., 421 U.S. 616).

235. Mackey, 543 F.2d at 614.


237. Mackey, 543 F.2d at 614. "Bona-fide arms-length collective bargaining" is not statutorily defined, but, as the Mackey court interpreted it, a court would be required to examine several factors: whether there was relative bargaining power of the parties; whether the terms at issue were unilaterally imposed; whether the terms at issue benefit both sides; and, whether or not the terms at issue were ever a "focal point" of the negotiations. Id. at 615.

238. Id. at 614 n.12 (quoting Flood v. Kuhn, 407 U.S. 258, 294 (1972) (Marshall, J., dissenting)). The court noted the ability, in a collective bargaining relationship, of the parties to restrain trade to a greater extent than would be allowable in the absence of such a relationship. Id. See also Connell Constr., 421 U.S. at 622 (stating that federal labor law's "goals" could "never" be
also recognized that "benefits to organized labor cannot be utilized as a cat's-paw to pull employer's chestnuts out of the antitrust fires." In other words, the Eighth Circuit concluded that the protection afforded by the non-statutory labor exemption in a collective bargaining relationship is not unqualified.

Applying its test, the Eighth Circuit decided the terms of the Rozelle Rule primarily concerned only parties to the collective bargaining relationship. The court also found that the Rozelle Rule concerned a mandatory subject of collective bargaining because it had the practical effect of reducing player mobility and depressing player salaries. Nonetheless, the court held the Rozelle Rule did not merit the protection of the non-statutory labor exemption because it did not represent the product of bona-fide arms-length negotiating. The court focused on the facts that the Rule was unilaterally promulgated by the league in 1963, that it continued to apply after 1963 with only the NFLPA's passive acceptance, and that it ultimately benefitted NFL owners to the detriment of NFL players. The court also recognized the insufficiency of the evidence offered by the NFL's owners as to the collective bargaining that had occurred on the Rozelle Rule.

Having reached the conclusion that the Rozelle Rule did not merit the protection of the non-statutory labor exemption, the court then proceeded to evaluate the Rozelle Rule under a "rule of reason" approach and ultimately invalidated the Rozelle Rule.

achieved if ordinary anti-competitive effects of collective bargaining were held to violate the antitrust laws); Jewel Tea, 381 U.S. at 711 (finding that national labor law scheme would be "virtually destroyed" by the routine imposition of antitrust penalties upon parties engaged in collective bargaining).

239. Mackey, 543 F.2d at 614 n.12 (internal citations omitted).
240. Id. at 615.
241. Id. The court, relying on section 8(d) of the National Labor Relations Act, defined mandatory subjects of collective bargaining as anything affecting "wages, hours and other terms or conditions of employment." Id. (citing 29 U.S.C. § 158(d) (2000)).
242. Id. The court found that the determination of whether a particular subject was a mandatory one in a collective bargaining relationship was to be assessed with respect to its practical effect and not simply its form. Id. (citing § 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d); Federation of Musicians v. Carroll, 391 U.S. 99 (1968)).
243. Id. at 615-16.
244. Id.
245. Mackey, 543 F.2d at 616.
zelle Rule as a violation of section 1 of the Sherman Act.\textsuperscript{246}

Although factually similar and based on identical statutory frameworks, the above cases before the Second and Eighth Circuits were decided in conflicting manners. While the Second Circuit applied the non-statutory labor exemption nearly per se if a collective bargaining relationship was present, the Eighth Circuit recognized that there are circumstances in which the presence of a collective bargaining relationship alone does not merit the protection of the non-statutory labor exemption. Incorporating aspects of each approach, the Supreme Court recently decided the case of \textit{Brown v. Pro Football, Inc.}\textsuperscript{247}

c. \textit{The Supreme Court's Approach: Brown v. Pro Football, Inc.}

When the collective bargaining agreement between the NFL's players and owners expired in 1987, the two sides began to negotiate a new one.\textsuperscript{248} During the negotiations, the NFL presented to the players "Resolution G-2" ("G-2"), a proposition that would have allowed each NFL team a developmental squad for practice purposes.\textsuperscript{249} Over the next three months, the players and owners were not able to agree to the terms of G-2, and negotiations reached impasse.\textsuperscript{250} Consequently, the NFL owners unilaterally implemented G-2, and Antony Brown and other developmental squad players filed suit alleging violations of section 1 of the Sherman Act.\textsuperscript{251} In upholding the NFL's decision, the Supreme Court held that the non-statutory labor exemption protects what otherwise would have amounted to an illegal restraint of trade in violation of section 1 of the Sherman Act.\textsuperscript{252}

In reaching its decision, the Court made a number of notable distinctions. First, the Court declined to accept the con-

\begin{itemize}
  \item \textsuperscript{246} \textit{Id.} at 620-22.
  \item \textsuperscript{247} \textit{Brown}, 518 U.S. 231.
  \item \textsuperscript{248} \textit{Id.} at 234.
  \item \textsuperscript{249} \textit{Id.} Developmental squads were to be comprised of rookie, or first-year players, and players assigned to those squads would primarily be used by the team in practice situations.
  \item \textsuperscript{250} \textit{Id.} at 235. The league sought to cap developmental squad player salaries at $1,000 per week and to otherwise limit the benefits available to those players. \textit{Id.}
  \item \textsuperscript{251} \textit{Id.}
  \item \textsuperscript{252} \textit{Id.} at 235.
\end{itemize}
clusion of the Court of Appeals for the District of Columbia that federal labor laws were intended to waive *any* potential antitrust liability related to the imposition of restraints on trade where the challenged restraints were imposed in a labor market characterized by collective bargaining.\(^{253}\) Thereby declining to apply the non-statutory labor exemption simply because a collective bargaining relationship existed,\(^{254}\) the Court instead indicated that the exemption should be properly applied only where certain additional conditions had been met.\(^{255}\)

In fact, the test applied by the Court in *Brown* closely paralleled the test described in *Mackey*, and it relied on similar Supreme Court precedent in doing so.\(^{256}\) Within the realm of industrial conflict, the Court stated that the non-statutory labor exemption should prevent a court from replacing the considered will of the parties with its own decision as to what constitutes a "reasonable" practice.\(^{257}\) Applying *Mackey*, the Court upheld G-2 in finding that it affected only parties to the collective bargaining relationship, that it concerned a mandatory subject of collective bargaining,\(^{258}\) and that it was the result of bona-fide, arms-length, albeit unsuccessful, collective bargaining.\(^{259}\)

Finally, after discussing why the NFL owners' unilateral implementation of G-2 merited the protection afforded by the non-statutory labor exemption, the Court cautioned that its

\(^{253}\) *Brown*, 518 U.S. at 235. Citing the 2-1 split below on this issue, the Court explicitly stated that it did *not* accept that the non-statutory labor exemption's protection swept as broadly as the lower court had concluded. *Id.*

\(^{254}\) The Supreme Court implicitly rejected an approach similar to the Second Circuit's approach, as seen in *Wood, Campbell, and Williams*, of finding that the presence of a collective bargaining relationship alone merits exempting the actions of parties to that relationship from antitrust scrutiny. *See* discussion *supra* Part II.E.2.a.

\(^{255}\) Also by implication, the Court stated its approval of an approach similar to that applied by the Eighth Circuit in *Mackey*. *See* discussion *supra* Part II.E.2.b. The Eighth Circuit's approach is that, in addition to a valid collective bargaining relationship, exempting the efforts of the parties to that relationship from antitrust scrutiny also requires the additional conditions that the challenged provision primarily affect only those parties, that it concern a mandatory subject of collective bargaining, and that the parties had bargained in good faith over its terms. *Id.*

\(^{256}\) *Brown*, 518 U.S. at 236.

\(^{257}\) *Id.* at 237.

\(^{258}\) The mandatory subject of collective bargaining was wages. *Id.* at 250.

\(^{259}\) *Id.*
holding was "not intended to insulate from antitrust review every joint imposition of terms by employers." In closing, the Court reiterated the inappropriateness of a per se approach to the application of the non-statutory labor exemption in a labor market characterized by a collective bargaining relationship.

F. Clarett's Day in Court: The Recent Opinions

1. The District Court: Another Touchdown for Clarett

Maurice Clarett filed suit against the NFL in September 2003, alleging that the league's decision to deny him early access to its draft amounted to a group boycott or refusal to deal in violation of section 1 of the Sherman Act.

The district court's opinion relied heavily on the Eighth Circuit's Mackey approach, and found that the Rule was not exempted from antitrust scrutiny by the non-statutory labor exemption because it did not concern a mandatory subject of collective bargaining, it affected only complete strangers to the collective bargaining relationship, and it was not the product of arms-length negotiating between the NFLPA and the NFLMC.

The court then invalidated the Rule under a "quick look" antitrust analysis, finding the Rule so "blatantly anticompetitive" that nothing more was necessary to determine that the Rule violated antitrust laws. "Indeed, one can scarcely

260. Id. The Court further stated that "an agreement... could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process." Id.

261. See generally id. (stating that it is unnecessary to determine where a rule permitting antitrust intervention needs to be drawn).

262. See Clarett, 369 F.3d at 129; see also Complaint of Clarett, supra note 70.

263. See discussion supra Part II.E.2.b.

264. The "Rule" prevents from competing in the NFL any player who has not completed three college seasons or for whom three college seasons have not elapsed since his high school graduation date. Complaint of Clarett, supra note 70 at ¶ 14.

265. The district court found that the Rule did not concern a mandatory subject because it affected job eligibility and not the terms of actual employment such as wages, hours, or employee benefits. Clarett, 306 F. Supp. 2d at 393.

266. Id. at 393-97.

267. Id. at 407-08. The "quick look" approach, as developed by the Supreme Court, is appropriately applied where the anticompetitive effects of a challenged provision can be easily ascertained even by the observation of a casual observer.
think of a more blatantly anticompetitive policy than one that excludes certain competitors from the market altogether.\textsuperscript{268}

The court rejected the NFL's concern for potential injuries caused by the presence in the league of younger, underdeveloped players, and noted that the league's concerns could be better addressed with less restrictive and equally effective means.\textsuperscript{269}

The district court then issued an order allowing Clarett access to the 2004 NFL draft.\textsuperscript{270} The NFL quickly moved for a stay of that order and concurrently filed an appeal of the district court's judgment.\textsuperscript{271}

2. The Second Circuit: Clarett's Touchdown is Reversed

No sooner had Clarett gained access to the NFL's 2004 draft than the Second Circuit Court of Appeals denied that access in May 2004.\textsuperscript{272} In doing so, the court held that the non-statutory labor exemption shielded the Rule from antitrust scrutiny.\textsuperscript{273} After reaching this conclusion, the court turned to its familiar approach: application of the non-statutory labor exemption.\textsuperscript{274}

Refusing to apply the \textit{Mackey} test as the Supreme Court had done in \textit{Brown},\textsuperscript{275} the court instead relied on its own precedent in \textit{Caldwell}, \textit{Wood}, and \textit{Williams}.\textsuperscript{276} In doing so, the court applied its virtual per se approach and used the non-statutory labor exemption to trump the application of the Sherman Act in a relationship characterized by collective bargaining.\textsuperscript{277}

The court articulated that denying Clarett access to the

\textit{Id.} at 408 (citing Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999)).
268. \textit{Id.}
269. \textit{Clarett}, 369 F.3d at 129.
270. \textit{Id.}
271. \textit{Id.} at 143.
273. \textit{Id.} at 143.
274. \textit{Id.} at 134-35.
275. \textit{See Clarett}, 369 F.3d at 133-34 (stating "we... have never regarded the Eighth Circuit's test in \textit{Mackey} as defining the appropriate limits of the non-statutory exemption," and rejecting the application of the frequently cited Supreme Court decisions in cases like Clarett's).
276. \textit{Id.} at 134-38.
277. \textit{Id.} at 143 (citing \textit{Wood}, 809 F.2d at 961).
draft was mandated by the policies underlying federal labor laws.278 The court indicated that upholding the Rule would ensure meaningful collective bargaining,279 would safeguard the compromises reached by the parties,280 and would give sufficient effect to the Supreme Court's decision in Brown.281 The remainder of this comment will discuss the Second Circuit's opinion in Clarett as well as the potential implications of adherence to that opinion in the future.

III. THE POTENTIAL PROBLEMS CREATED BY CLARETT v. NFL

The NFL has a recognized monopoly over professional football in the United States.282 While antitrust law views monopoly as a "necessary evil," federal labor law envisions collective bargaining as an indispensable means of limiting that evil.283 Striking the appropriate balance between labor and antitrust is not a new task for the courts.284 In attempting to do so, courts are often forced to reach towards the outer boundaries of the judicial role, accompanied by a corresponding degree of apprehension to neither engage in legislative nor labor board functions.285

But even greater harm may come in allowing a collective bargaining entity to overstep its boundaries by taking advantage of the protections afforded it when it acts within the confines of a collective bargaining relationship.286 While federal

278. Id. at 143 ("Allowing Clarett to proceed with his antitrust suit would subvert 'principles that have been familiar to, and accepted by, the nation's workers for all of the NLRA's [sixty years] in every industry except professional sports.'") (citing Caldwell, 66 F.3d at 530). Id.
279. Id. at 131 (citing Brown, 518 U.S. at 237).
280. Id. at 143. In citing Wood, the court stated that labor law protection extended as far as necessary "to safeguard the 'unique bundle of compromises' reached by the NFL and the players union." Id. (quoting Wood, 809 F.2d at 961).
281. See Clarett, 369 F.3d at 137-38.
282. Mid-South Grizzlies v. NFL, 720 F.2d 772, 775 (3d Cir. 1983).
283. Marks, supra note 16, at 700.
286. In order to promote collective bargaining, the non-statutory labor exemption allows for parties to a collective bargaining relationship to engage in behavior that would otherwise amount to violations of antitrust laws. See, e.g., Jewel Tea, 381 U.S. 676. But applying the non-statutory labor exemption
labor policy offers a significant protection to agreements made within a collective bargaining relationship, the courts have struggled with defining the point at which such protection must yield to the mandates of antitrust policies. The Second Circuit's apparent conclusion is that the non-statutory labor exemption protects agreements from antitrust scrutiny so long as a collective bargaining relationship exists. By contrast, the Eighth Circuit imposes additional requirements before federal labor policy demands such protection. While the Supreme Court has not clearly resolved the issue, this comment will analyze the precedent of the three courts and conclude that the Eighth Circuit's approach gives appropriate faith and credit to both federal labor and antitrust policies.

IV. ANALYSIS

To give proper respect to federal labor law and policy, the protection of the non-statutory labor exemption must extend as far as is necessary to "safeguard the 'unique bundle of compromises' reached by the NFL and the players union" in their collective bargaining efforts. But, it is also true that only "certain concerted activity among and between labor and employers must be held to be beyond the reach of the antitrust laws." To reconcile these two conflicting statements, situations must exist where the non-statutory labor exemption does not preempt antitrust scrutiny. While the Supreme Court has not decided such a case in the context of professional sports, its opinion in Brown provides ample support for the proposition that the non-statutory labor exemption

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where there is limited, or no, indication that the party or parties are collectively bargaining in good faith, there is a risk that antitrust violations will go unpunished. Id.

288. See discussion supra Part II.E.2.a-c.
289. See discussion supra Part II.E.2.a.
290. See discussion supra Part II.E.2.b.
292. Clarett v. NFL, 369 F.3d 124, 143 (2d Cir. 2004) (citing Wood v. NBA, 809 F.2d 954, 961 (2d Cir. 1987)).
293. Id. at 130 (citing United States v. Hutcheson, 312 U.S. 219 (1941); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940)) (emphasis added).
294. See Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976). The Court did reach antitrust scrutiny after finding that nothing about the non-statutory labor exemption prevented it from doing so.
should not be applied to all situations involving a collective bargaining relationship.\footnote{295}

At the conclusion of Justice Breyer's opinion in \textit{Brown}, an opinion joined by seven of his fellow Supreme Court justices,\footnote{296} he explicitly recognized that in particular circumstances, permitting antitrust intervention in a case involving a collective bargaining relationship would be appropriate.\footnote{297} However, wary of trampling into either the authority of the NLRB or Congress, Justice Breyer ended his opinion without specifying exactly what those circumstances might be.\footnote{298}

\textbf{A. The Economic Theories Underlying Broad Statutory Mandates Must Be Properly Considered Before Applying the Non-Statutory Labor Exemption}

Justice Stevens entered into exactly that discussion in a dissent in \textit{Brown} that was joined by no other justice.\footnote{299} While the dissent of a single justice may carry little weight, it does offer an argument to consider in deciding cases like Maurice Clarett's. In drawing an analogy to Justice Holmes's famous dissent in \textit{Lochner v. New York},\footnote{300} Justice Stevens argued that it is "equally important . . . to be faithful to the economic theory underlying broad statutory mandates . . . ."\footnote{301} The economic theory underlying federal antitrust laws is that by discouraging concerted action, such as collective bargaining, optimal price levels can be achieved.\footnote{302} The economic theory underlying federal labor policy is that the use of concerted action, in the form of collective bargaining, will lead to protecting optimal wage levels.\footnote{303} Taken to their logical extremes, the economic theories underlying federal antitrust and labor laws are in direct conflict as to whether or not con-

\footnotesize{\textsuperscript{295} Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996). \textsuperscript{296} Id. at 232. \textsuperscript{297} Id. at 250. \textsuperscript{298} Id. \textsuperscript{299} Id. at 252 (Stevens, J., dissenting). \textsuperscript{300} Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Justice Stevens recalls Justice Holmes's classic argument that disagreement with the economic theory embodied in a particular piece of legislation should not be a factor in the Court's decision as to whether that particular legislation is constitutional. \textit{Brown}, 518 U.S. at 252 (Stevens, J., dissenting). \textsuperscript{301} Brown, 518 U.S. at 252 (Stevens, J., dissenting). \textsuperscript{302} Id. \textsuperscript{303} Id. at 253.}
certed action is a desirable means to achieving a valid end.

The non-statutory labor exemption was created to resolve this conflict and, as Justice Stevens points out in quoting *Connell Construction*, “requires that some union-employer agreements be accorded a limited non-statutory exemption from antitrust sanctions.” If the protection of the non-statutory labor exemption does apply only in some instances, and is intended to be a “limited” exemption, it seems more appropriate to find a particular agreement or provision to be unlawful unless it is exempt, rather than exempt unless it is unlawful. In placing the burden on the party claiming the exemption’s protection to show that it is merited because it should be a limited exception, proper respect is given to both the theories underlying federal labor and antitrust laws by allowing for concerted action only where it is clearly shown that such action is warranted.

1. The Eighth Circuit and the Supreme Court Take Justice Stevens’s Words to Heart

At issue in *Brown* was the unilateral implementation by the NFL of Resolution G-2, a proposal dealing with the creation of a new developmental squad system for the league. In accepting the league’s unilateral implementation of Resolution G-2, the Court relied on two distinct tests, both of which demonstrate its concern to be “faithful to the economic theory underlying broad statutory mandates.”

The elements of the first test require that the terms of the challenged provision be “reasonably comprehended within the employer’s preimpasse proposals.” This requirement is typically satisfied where the resulting rule embodies the last proposal rejected by the objecting party. The first test then requires that the collective bargaining be free of any unfair

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304. Id. at 254 (emphasis added) (citing Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975)).
306. See *Mackey*, 543 F.2d at 616 (placing the burden of proving that good-faith collective bargaining had occurred on the proponent of the argument that it had, in fact, occurred).
307. See *Brown*, 518 U.S. at 231; see also discussion supra Part II.E.2.c.
309. Id. (Stevens, J., dissenting).
310. Id.
labor practice and amounts to a requirement that both parties discussed the challenged provision in good faith.

Drawing from Supreme Court and NLRB precedent, the above test recognizes that to qualify for the limited non-statutory exemption from antitrust scrutiny, a challenged provision must be the product of good faith and documented collective bargaining efforts. As Justice Stevens cautioned in his dissent in Brown, the test also requires that the economic theory on which the non-statutory labor exemption is based first be respected before antitrust scrutiny is preempted. Only upon satisfaction of that condition does the test allow that integral parts of the collective bargaining process proceed unfettered by the constraints of antitrust scrutiny.

The cases of Mackey v. NFL and Brown v. Pro Football, Inc. are apt examples of how this test respects both antitrust and labor law policies, and how it provides labor relations sufficient breathing room from antitrust scrutiny.

In Mackey, on the one hand, the NFL unilaterally implemented the Rozelle Rule after the players' continued acquiescence. On the other hand, in Brown, the NFL unilaterally implemented Resolution G-2 after the parties had unsuccessfully bargained over the exact terms for G-2 for two months. The Eighth Circuit struck the Rozelle Rule in Mackey, while the Supreme Court upheld Resolution G-2 in Brown. The clear distinction between the two cases is the extent of documented, arms-length, good-faith collective bargaining between the parties.

In Clarett v. NFL, the Second Circuit was unfazed by the
parties' "fail[ure] to wrangle over the eligibility rules at the bargaining table." Consequently, in Clarett's case, it ignored the most basic reason for applying the non-statutory labor exemption: the promotion of meaningful collective bargaining.

The second test the Court utilized in Brown closely mirrors the three-pronged "intimately related" approach of Jewel Tea and also incorporates the first test's concern for meaningful collective bargaining. Directly incorporating the first test into its Jewel Tea-like second one, the Court required sufficient evidence that Resolution G-2 was implemented only after good-faith collective bargaining on the subject. The Court was further satisfied of the merits of applying the non-statutory labor exemption after finding that Resolution G-2 concerned only parties to that bargaining, but also that Resolution G-2 involved a subject the parties were required to negotiate collectively.

The Court ultimately upheld the NFL's unilateral implementation of Resolution G-2 in Brown, and its approach to the matter is predictive as to how the Court may decide a case similar to Maurice Clarett's. Specifically, to properly defer to the economic theories underlying federal labor and antitrust laws, the Court's approach views the non-statutory labor exemption as a limited protection that must be earned.

2. The Second Circuit's "Per Se Approach" to the Application of the Non-Statutory Labor Exemption

The Second Circuit's opinions in Wood, Caldwell, and Williams demonstrate how its approach deviates from the

321. Clarett, 369 F.3d at 142.
322. Brown, 518 U.S. at 237 (relying on its opinions in Connell Construction and Jewel Tea in support of this conclusion).
323. See discussion supra Part II.C.1.a. The intimately related test examines if the challenged provision concerns a mandatory subject of collective bargaining, if the challenged provision is intimately related to that mandatory subject, and, finally, if the challenged provision is the product of bona-fide arms-length negotiations. Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 689-90 (1965).
325. Id.
326. Id.
327. See discussion supra Part II.E.2.a.1-3.
view that the non-statutory labor exemption is a limited protection that must be earned, and instead presumes its application so long as a collective bargaining relationship exists. In *Caldwell*, the Second Circuit's opinion revives its fear from *Wood* of "subvert[ing] fundamental principles of our federal labor policy," a fear that guided it to rule that Joe Caldwell had failed to state a claim for relief simply because an "application of antitrust principles to a collective bargaining relationship would disrupt collective bargaining as we know it." But the Second Circuit's conclusion cannot be reconciled with Justice Breyer's statement in *Brown* that, in certain circumstances, applying antitrust principles would not interfere with the collective bargaining process. In light of the Supreme Court's opinion in *Brown*, and its implicit revival of its earlier approach from *Jewel Tea*, it appears that the Second Circuit's approach is incorrect.

Unfortunately for Maurice Clarett, the Second Circuit applied the very same per se approach in deciding his case. However, an application of the Supreme Court's approach from *Brown* will demonstrate how Maurice Clarett's case could quite easily have been decided in a different manner. In such a manner, proper respect is given to both the economic theories underlying federal labor and antitrust laws, as well as to the need to apply the non-statutory labor exemption as a limited immunity from antitrust scrutiny.

3. Synthesizing a Limited Role for Application of the Non-Statutory Labor Exemption

As discussed above, the Supreme Court's approach from *Brown* draws heavily from the "intimately related" and "follow naturally" tests from *Jewel Tea* and *Connell Construction*, respectively. The Court's approach also mirrors the

328. *Caldwell* v. Am. Basketball Ass'n, 66 F.3d 523, 530 (2d Cir. 1995) (quoting *Wood* v. NBA, 809 F.2d 954, 959 (2d Cir. 1987)).
329. *Caldwell*, 66 F.3d at 530 (quoting *NBA* v. Williams, 45 F.3d 684, 693 (2d Cir. 1995)).
331. *See id.* at 237.
332. *Clarett*, 369 F.3d at 135. The Second Circuit stated that its analyses in *Caldwell*, *Williams*, and *Wood* were guided by its fear that applying antitrust suits in sports leagues with collective bargaining relationships "would seriously undermine many of the policies embodied by . . . labor laws." *Id.*
334. *See generally* discussion *supra* Part II.C.1.a-b; the follow naturally test
Eighth Circuit's opinion in *Mackey.* This approach also finds support in the approaches of the Sixth and Ninth Circuits. Regardless of which court's approach is used, the essence of the approach is that a number of conditions must be met before the non-statutory labor exemption applies. These cases do not blindly apply the exemption in all circumstances simply because a collective bargaining relationship is present. To do so is to forget Justice Stevens's concern regarding proper respect for the economic theories underlying broad statutory mandates. In essence, the non-statutory labor exemption is a limited exemption that should only be granted where its proponent can demonstrate that doing so would be in furtherance of the policies underlying its application in the first place.

In attempting to give proper respect to the economic theories underlying both labor and antitrust laws, the Supreme Court in *Jewel Tea* examined whether a challenged agreement was "intimately related" to a mandatory subject of collective bargaining. It further analyzed whether the parties *primarily* affected by the challenged agreement were the same as those negotiating its terms. Finally, the Court as-

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335. *See generally* discussion *supra* Part II.E.2.b.
337. *See, e.g.,* *Mackey,* 543 F.2d at 614.
340. *Mackey,* 543 F.2d at 614. The Eighth Circuit only will apply the non-statutory labor exemption, thereby allowing the labor policy favoring collective bargaining pre-eminence over the antitrust laws, upon a showing: that the only parties affected by a challenged provision are the parties to a collective bargaining relationship; that the challenged provision concerns a mandatory subject of collective bargaining; and that the challenged provision is the product of bona fide, arms-length collective bargaining. *Id.*
341. *Jewel Tea,* 381 U.S. at 689-90. The Court looked to see if the challenged provision was "intimately related" to a mandatory subject of collective bargaining because, upon satisfaction of that condition, the Court would then be assured that the national labor policy underlying the application of the non-statutory labor exemption was properly respected. *Id.*
342. *Id.* The Court held similar concerns that the parties to the challenged
certained that actual, good-faith bargaining had occurred.\textsuperscript{343} Only upon satisfaction of all three conditions would the Court apply the non-statutory labor exemption.

In \textit{Connell Construction}, the Supreme Court applied the non-statutory labor exemption only after it was convinced that three distinct conditions had been met.\textsuperscript{344} The \textit{Connell Construction} Court looked for good-faith collective bargaining.\textsuperscript{345} It also examined whether the challenged provision amounted to a direct restraint with "substantial anticompetitive effects."\textsuperscript{346} Finally, the challenged provision could only cause effects that would "follow naturally" from the elimination of competition over wages and other working conditions.\textsuperscript{347}

These two approaches, though dissimilar, exemplify the Court's sentiment that the non-statutory labor exemption applies only in limited circumstances. The approaches further demonstrate that, like the first test from \textit{Brown} discussed above,\textsuperscript{348} the focus in applying the non-statutory labor exemption is on the specific nature and effect of the collective bargaining efforts and not simply on the presence of a collective bargaining relationship generally. The Court looks at the parties affected, the extent and nature of negotiation on the subject, and the anticompetitive nature of the provision in general.\textsuperscript{349} Although named the non-statutory \textit{labor} exemption, there is a clear respect for the economic theories underlying federal antitrust law in each of the \textit{Jewel Tea} and \textit{Connell Construction} approaches. The \textit{Jewel Tea} approach looks at the provision's impact on trade, whereas the \textit{Connell Construction} approach considers the anticompetitive nature of the challenged provision as one of its elements.\textsuperscript{350} This re-

\textsuperscript{343} Id.
\textsuperscript{344} Id.
\textsuperscript{346} Id.
\textsuperscript{347} Id.
\textsuperscript{348} Brown, 518 U.S. at 238-39.
\textsuperscript{349} See id.
\textsuperscript{350} See Connell Constr., 421 U.S. at 625; Jewel Tea, 381 U.S. at 690 n.5.
spect demonstrates not only the Court's concern for those underlying economic theories, but also that the proper application of the non-statutory labor exemption is to resolve the natural conflict between labor and antitrust law and not to allow one to blindly preempt the other.

The Eighth Circuit's approach, as applied in Mackey,351 is a clear example of the adequacy of the Jewel Tea and Connell Construction tests in resolving the question of when to apply the non-statutory labor exemption in the context of professional sports. Mackey also exemplifies the use of the non-statutory labor exemption as a limited protection from antitrust scrutiny, applied only when "the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case."352 In striking down the NFL's unilateral implementation of the Rozelle Rule,353 the Eighth Circuit utilized a three-pronged test resonant of the Supreme Court's opinions in Jewel Tea and Connell Construction.354

Although prongs one and two of the test were satisfied for the Rozelle Rule, the Eighth Circuit refused to apply the non-statutory labor exemption because the Rozelle Rule's implementation failed the test's third prong: the parties did not negotiate at arm's length and in good faith over the Rozelle Rule prior to its implementation.355 Recognizing the limited application of the non-statutory labor exemption, the Eighth Circuit refused to apply the exemption solely on the ground that the Rozelle Rule remained part of the NFL's rules because of the players' acquiescence, rather than because of the parties' substantive negotiating.356 In reaching this conclusion, the Eighth Circuit clearly indicated that the non-statutory labor exemption must be applied only when federal labor policy truly deserves preeminence over antitrust policy.357

Both of these considerations, while relevant in labor discussions, are essential in antitrust analysis.

351. Mackey, 543 F.2d at 613.
352. Id. at 613 (citing Connell Constr., 421 U.S. at 622; Jewel Tea, 381 U.S. at 689-90; United Mine Workers v. Pennington, 381 U.S. 657 (1965)).
353. Mackey, 543 F.2d at 616.
354. Id. at 614.
355. Id. at 615-16.
356. Id. at 616.
357. Id. at 613.
The Supreme Court in *Brown* incorporated elements of *Jewel Tea*, *Connell Construction*, and *Mackey* into its decision. It looked to see which parties were primarily affected by the challenged provision, as instructed by *Jewel Tea*.\(^{358}\) It inquired into the anticompetitive nature of the provision, as mandated by *Connell Construction*.\(^{359}\) And finally, it only applied the non-statutory labor exemption upon a showing of sufficient collective bargaining efforts between the parties, as instructed by *Mackey*.\(^{360}\) The Court’s incorporation of these tests is clearly intentional, as the reasons for doing so are explicitly described in the opinion,\(^{361}\) and provides support for the conclusion that the application of the non-statutory labor exemption should be limited.

2. Why the Second Circuit’s Approach Does Not Comport with the Proper Application of the Non-Statutory Labor Exemption—The Supreme Court’s Brown Approach Compared

It ignores the Court’s indications entirely to hold, as the Second Circuit did in *Clarett*, that the Eighth Circuit’s opinion in *Mackey* does not define the “appropriate limits of the non-statutory [labor] exemption”\(^{362}\) or that the *Jewel Tea / Connell Construction* line of precedent does not “dictate the appropriate boundaries of the nonstatutory exemption for cases . . . [involving] . . . a labor market organized around a collective bargaining relationship.”\(^{363}\) If the Court were faced with the facts of Maurice Clarett’s case then, its analysis would likely have mirrored its analysis in those earlier cases as it did in *Brown*. An application of the *Brown* approach to the facts of Clarett’s case shows the merits of doing so and also illustrates the implications of failing to do so.

Even if the Rule does concern a mandatory subject of collective bargaining, it appears likely that the NFL’s Rule

\(^{358}\) *Brown*, 518 U.S. at 250 (stating that the parties affected by G-2’s implementation were the same employer and employee involved in the collective bargaining relationship).

\(^{359}\) *Id.*

\(^{360}\) *Id.* at 234-35 (noting that the parties negotiated over the terms of G-2, specifically, from April-June 1989).

\(^{361}\) *Id.* at 250.

\(^{362}\) *Clarett*, 369 F.3d at 133.

\(^{363}\) *Id.* at 134.
would have failed at least two of the other prongs necessary to gain the protection of the non-statutory labor exemption. Applying the remaining two prongs of Mackey to Clarett's case, the parties primarily affected by the Rule's application are arguably Maurice Clarett and the last player selected in this year's NFL draft. If Clarett had been selected, only one other potential NFL draftee would have lost his opportunity to be drafted due to the limited number of available draft slots. Certainly the NFL could argue that the Rule affects its owners' ability to draft certain players, and the current NFL players could argue that one player would be displaced from the league for every Clarett drafted. But these effects are secondary to the primary effect of the Rule, which is only Maurice Clarett and the one player whose draft slot he takes. As Jewel Tea instructs, the relevant inquiry focuses on what is primarily affected by the challenged provision.

The Rule also fails Brown's and Mackey's requirement of a showing that good-faith, arms-length collective bargaining occurred. This requirement of Brown and Mackey is actually a statutory requirement of the NLRA. The NLRA's requirement that the parties bargain collectively in good faith has been interpreted to require a court to look at the parties' relative bargaining power, whether the terms are or were unilaterally imposed, whether the terms benefit both sides, and whether it was ever a "focal point" of the negotiations. Based on the evidence that was before the court in Clarett's case, there is nothing that would suggest this NLRA requirement was met.

Initially, the Rule was not even part of the otherwise "comprehensive" Collective Bargaining Agreement between the NFLPA and NFLMC. Instead, it was incorporated into that agreement by the NFL Constitution and Bylaws in

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364. The two remaining prongs of Mackey inquire into: 1) which parties are primarily affected by the challenged provision and 2) whether or not the parties have engaged in good faith, arms-length collective bargaining specifically on the subject matter of the challenged provision.
365. Even where only one prong of the test is not met, a court may properly refuse to apply the non-statutory labor exemption. Mackey, 543 F.2d at 615-16.
366. Electronic mail from Michael McCann, Law Professor and Co-counsel for Maurice Clarett, to Author (July 14, 2004) (on file with author).
367. Jewel Tea, 381 U.S. at 690 n.5.
369. Mackey, 543 F.2d at 615.
370. Clarett, 369 F.3d at 127.
At that time, the Rule's incorporation into the Agreement resulted solely from the NFLPA's signature on a May 6, 1993 letter "confirm[ing] that the attached documents are the presently existing provisions of the Constitution and Bylaws of the NFL referenced in Article IV, Section 2, of the Collective Bargaining Agreement."372 The only other evidence presented to the district court to show the extent of collective bargaining over the Rule was the declaration of Peter Ruocco.373 Peter Ruocco, senior vice president of Labor Relations at the NFLMC, stated that "during the course of collective bargaining that led to the [collective bargaining agreement], the [challenged] eligibility rule itself was the subject of collective bargaining."374 It is noteworthy that the district court found this evidence to be insufficient,375 and it can hardly be called an abuse of discretion for the district court to find that such self-serving statements offered by the NFLMC in support of its own Rule376 are not sufficient to show good faith collective bargaining.

Further, the Rule was amended in 2003 to incorporate a 1990 memorandum written and implemented solely by the NFL's commissioner three years before the current Collective Bargaining Agreement took effect.377 There was no evidence that this amendment was ever discussed by either party. Although the substance of the amendment was minimal, its unilateral implementation by the NFL furthers the argument against protecting it from antitrust scrutiny.

Despite this paltry showing of collective bargaining on the Rule, the Second Circuit determined that the non-statutory labor exemption applied to shield the Rule from antitrust scrutiny.

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371. Id.
372. Id. at 128 (quoting the letter from NFL to the NFLPA (May 6, 1996)).
373. Id.
374. Id. (quoting Declaration of Peter Ruocco at 8, Clarett v. NFL, 306 F. Supp. 2d 379 (S.D.N.Y. 2004)).
375. Clarett, 306 F. Supp. 2d at 396. While Clarett failed to submit any evidence to show the Rule was not a subject of good faith collective bargaining, the "only proof submitted by the NFL strongly suggests that the Rule was never the subject of collective bargaining between the League and the union, and did not arise from the collective bargaining process." Id.
376. The district court itself noted this in a footnote, stating that "[t]he NFL makes much of a side letter dated May 6, 1993. This letter adds nothing to the record. The letter is from the general counsel of the NFLPA to the attorney for the NFLMC." Id. at 396 n.110.
377. Id. at 396.
Despite noting the players' "acquiescence" to the eligibility rules and the failure of the parties to "wangle over the eligibility rules at the bargaining table," the Second Circuit was satisfied that sufficient bargaining had occurred.\(^{379}\)

Refusing to accept the application of Mackey, Jewel Tea, or Connell Construction,\(^ {380}\) the Second Circuit instead relied on its conclusions in Wood, Caldwell, and Williams\(^ {381}\) that the presence of a collective bargaining relationship alone dictates that only federal labor law will govern.\(^ {382}\) In so doing, the court failed to give proper faith and credit to the line of the Court's precedent exemplified by Jewel Tea and Connell Construction, which the Court later applied in Brown. The court also ignored the general rule, as exemplified by a number of Supreme Court cases, that the non-statutory labor exemption is designed to be limited in scope and is only to be applied where the underlying policies of labor and antitrust laws are properly respected.\(^ {383}\) Finally, it ignored Justice Breyer's explicit statement in Brown that certain situations exist where permitting antitrust intervention would not significantly interfere with the collective bargaining process.\(^ {384}\) The clear implication of ignoring these holdings is exactly what Justice Stevens feared the Court had done in Brown: "conflict with the basic purpose of both the antitrust laws and the national labor policy" by failing to be "faithful to the economic theory underlying" those statutory mandates.\(^ {385}\)

Instead of blindly applying the non-statutory labor exemption in any case involving a collective bargaining relationship, the economic theories of antitrust law dictate consideration of the anticompetitive effects of the challenged provision.\(^ {386}\) This is not to say that an agreement between an
employer and employee in a collective bargaining relationship cannot have anticompetitive effects, for federal labor laws protect such agreements every day. However, where it is not evident that the employer-employee agreement in question resulted from bona-fide, arms-length negotiating between those parties, the Supreme Court has determined that there is room for the application of federal antitrust laws. This is particularly relevant for cases like Clarett's, which involve refusals to deal or group boycotts that have a history of per se illegality for being blatantly anticompetitive. In those cases, where the non-statutory labor exemption does not apply, the analysis focuses on the anticompetitive effect of the challenged provision.

C. The Rule Fails Antitrust Scrutiny

The guidelines of the Supreme Court's opinions in Standard Oil and Silver are instructive in examining the anticompetitive nature of the Rule. Without the protection of the non-statutory labor exemption, the analysis of the Rule focuses solely on the potential antitrust violation. The lower court decisions in Linseman, Deesen, and Denver Rockets further demonstrate how a restriction similar to the NFL's Rule should be handled by a court in this situation.

The four-part Silver test for an exception to the rule of per se illegality generally applied to refusals to deal requires

anticompetitive effects of a challenged provision).
388. Id. at 250; see Mackey, 543 F.2d at 615-16.
390. See Clarett, 369 F.3d at 130 n.11.
391. See discussion supra Part II.E.1.a-c. In Linseman, the court held that the determination of which players should be eligible for the World Hockey Association ("WHA"), under a free market system, ought to be left up to each individual team. Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1321 (D. Conn. 1977); see discussion supra Part II.E.1.b. In Deesen, the court held that the PGA's exclusion of Deesen from PGA tour competition due to poor performance was a reasonable restraint of trade because procedural safeguards such as an internal appeals process were in place and the PGA's goal was to increase competition within the league. Deesen v. PGA, 358 F.2d 165, 168-71 (9th Cir. 1966); see discussion supra Part II.E.1.c. In Denver Rockets, the court rejected the league's justifications for maintaining the four-year rule. Denver Rockets v. All-Pro Mgmt, Inc., 325 F. Supp. 1049 (1971), 1066-68. The league's purported justifications were that the rule was a financial necessity and fulfilled a desire for athletes to finish their college education, as well as an implicit justification that it was entitled to a free system for player development. Id.; see discussion supra Part II.E.1.a.
that an employer's refusal to deal with a particular employee must meet a number of conditions to survive antitrust scrutiny. The Silver test inquires whether the particular provision concerns a subject of legislative mandate, whether it is consistent with the policies underlying that mandate, whether it was more extensive than necessary, and, finally, whether safeguards existed to prevent arbitrary application of the provision.

Although the Silver approach was fashioned to address a non-sports-related conflict, its teachings are on point in a number of professional sports cases. In Deesen, for example, the Ninth Circuit found that the PGA's rules survived antitrust scrutiny because they promoted competition and provided safeguards that allowed a player to petition for special consideration. In contrast, in Linseman a Connecticut district court failed to protect the WHA's "twenty-year-old rule" from antitrust scrutiny because the rule was designed primarily to foster the league's own financial interests. Similarly, in Denver Rockets a California district court struck down the NBA's "four-year rule," finding that the league's justifications for the rule, while honorable, were inadequate in a system that provided no means for a player like Spencer Haywood to petition for special draft consideration.

Although decided in situations where league and player relations were not governed by a collective bargaining relationship, these cases demonstrate appropriate guidelines for deciding a case like Clarett's. Although a collective bargaining relationship does exist between NFL players and owners, in the case of the Rule the protection of the non-statutory labor exemption is not warranted. In such a situation, there is little distinction between a typical refusal to deal case like Silver and the more factually similar cases of Deesen, Linseman, and Denver Rockets. Without the protection of the non-statutory labor exemption to the Rule, the analysis should parallel those cases.

1. The Rule Fails to Qualify for the Silver Exception and

392. See discussion supra Part II.A.
393. See discussion supra Part II.A.
394. See discussion supra Part II.E.1.c.
395. See discussion supra Part II.E.1.b.
396. See discussion supra Part II.E.1.a.
Therefore Should Be Considered an Illegal Refusal to Deal or Group Boycott

Applying the Silver exception to Clarett's case, it is evident that the NFL's Rule fails to qualify for its protection. In making this determination, it is important to first consider the NFL's proffered justifications for the Rule. The NFL claimed that the Rule served to: prevent a higher number of injuries to younger players, prevent member clubs from bearing the cost of such injuries, and prevent younger players from enhancing their physical conditions by unhealthy means.

Prong three of the Silver analysis inquires into whether the Rule is no more extensive than necessary to achieve the NFL's lofty goals. Prong four of the Silver analysis ensures that, in any event, there are adequate safeguards to allow a particular player to petition for special consideration. As to the NFL's first justification, to prevent injuries to younger players, there is no guarantee that the Rule in fact protects that goal. Maurice Clarett is six feet tall and weighs approximately 230 pounds. Three recent Hall of Fame—caliber NFL running backs, which Clarett aspires to be, were smaller and lighter than Clarett. Further, as the district court noted, restrictions based solely on height or weight are poor proxies for "NFL-readiness." The district court also took notice of the fact that the NFL and its owners already had an opportunity to evaluate younger players' "NFL-readiness" via a number of physical and mental examinations given to all entering players. As Silver instructs, the chal-

397. Prongs one and two, not relevant to this portion of the discussion, are: whether or not the subject matter of the challenged provision is a subject of legislative mandate; and whether or not the challenged provision is consistent with the policies underlying that mandate. Silver v. NYSE, 373 U.S. 341 (1963).
398. Clarett, 369 F.3d at 129.
399. See discussion supra Part II.A.
400. See discussion supra Part II.A.
402. Id.
403. Id. at 410.
404. Id. at 410 n.195. Potential draft picks are subjected to extensive physical, medical, and psychological testing. Id. "Each of the players that attend the NFL's annual draft combines—where prospective draftees are evaluated by the teams—are subjected to a battery of physical examinations, psychological profiles, and interviews." Vic Carucci, Combine Still Critical to Evaluating Talent
lenged provision should be no more extensive than necessary to achieve the proponent’s stated end. Where it is clear that the NFL’s concern for the physical and mental preparedness of entering players is already addressed elsewhere, there is little reason to uphold an additional restriction that only serves to decrease competition in the league.

The NFL’s second justification for the Rule, to limit the cost of injuries to smaller, less mature players, is similarly faulty and could be addressed by less extensive means. There is no guarantee that younger players are smaller or are any less prepared to compete in the NFL. Furthermore, the NFL’s concern over hiring players who are not physically capable of competing in the league is addressed elsewhere. Finally, as Linseman instructs, the NFL’s desire to limit its costs is not a valid reason to uphold an otherwise anticompetitive justification.

The NFL’s third justification for the Rule, to prevent younger players from utilizing unhealthy performance-enhancing methods, can be dismissed with similar ease. Although laudable, the justification is unrelated to promoting competition. In fact, it has more to do with a general concern for the welfare of the younger players. Presumably, the testing methods described above would address the NFL’s concern in a far less anticompetitive fashion. However commendable this desire may be, as the district court noted in Denver Rockets, neither the courts nor the NFL are in a position to say that “this consideration should override the objective of fostering economic competition which is embodied in the antitrust laws. If such a determination is to be made, it must be made by Congress and not the courts.”

Having dispensed with the NFL’s proffered justifications for the Rule as being anticompetitive and without support, it

405. See discussion supra Part II.A.
406. Clarett, 306 F. Supp. 2d at 410 n.195; see also supra note 404. Generally, all entering players participate in pre-draft camps where the teams are able to view the players and assess their “NFL-readiness.” Clarett, 306 F. Supp. 2d at 410 n.195. Based on that system, a player who is not “NFL-ready” would have a significantly reduced chance of ever being drafted and an even smaller chance of ever participating in a real game. Id.
408. See supra note 404.
is also worth noting that the NFL provides no means by which a player like Maurice Clarett could petition for special consideration under prong four of the Silver exception. The Supreme Court in Silver noted the importance of providing such an avenue, and the PGA’s example in Deesen demonstrates how such a review could operate in the realm of professional sports. Since potential draftees undergo a series of performance-related tests prior to being drafted, there is a built-in opportunity for such a petition or review process to occur. If an otherwise eligible draftee is ultimately not drafted by an NFL team because of Maurice Clarett’s stronger performance during one of those tests, it would only serve to promote competition in the league and thereby address the primary concern of federal antitrust laws.

The Second Circuit’s opinion in Clarett v. NFL deviates from the Supreme Court’s approach in Brown, and rejects the applicability of the Court’s opinions in Jewel Tea and Connell Construction or the Eighth Circuit’s opinion in Mackey. In doing so, the Second Circuit applied the non-statutory labor exemption nearly “per se” simply because the parties were engaged in an ongoing collective bargaining relationship. But this application ignores the very purpose of the non-statutory labor exemption in allowing for “a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets [by requiring] that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions.” It also precludes the applicability of federal antitrust laws in a case where, in all likelihood, those laws should have been applied.

V. PROPOSAL

Although grounded in the facts of Clarett, this proposal could theoretically be applied to any case involving the intersection of federal labor and antitrust laws. National labor policy favors free and meaningful collective bargaining. To

411. See discussion supra Part II.E.1.c.
412. See Carucci, supra note 404.
413. Brown, 518 U.S. at 254 (emphasis supplied).
promote that policy, the courts have developed a non-statutory labor exemption, allowing certain labor practices to be exempted from antitrust scrutiny. The courts have struggled to determine the boundaries of the exemption, and more specifically, when its application is not warranted. This comment has considered the approach of both the Second and Eighth Circuits, as well as that of the Supreme Court, in making such determinations.

While the Supreme Court has never faced a case quite like Maurice Clarett's, there is considerable support in other decisions of the Court to predict how it might decide such a case. There is also ample support in the Court's decisions for the proposition that certain circumstances exist where, despite the presence of an ongoing collective bargaining relationship, the application of the non-statutory labor exemption is not warranted.

A. In Applying the Non-Statutory Labor Exemption, a Court Should Only Do So Where the Underlying Economic Theories Behind it are Clearly Respected

This proposal calls for the Court, and all other courts, to consider the concern of Justice Stevens in his dissent in Brown v. Pro Football, Inc. Where a law finds its source in a particular economic or other theory, that theory should be respected to the fullest extent possible. Federal labor relationships have been given a degree of protection from the courts' scrutiny by the operation of the non-statutory labor exemption. But the scope of the exemption is properly limited. The limits on the exemption need not be exactly defined, but they can be broadly interpreted so as to respect the reasons for the exemption in the first place.

B. Before Applying the Non-Statutory Labor Exemption in a

415. Id.
416. See discussion supra Part II.E.2.
417. Id.
418. Id.
419. Brown, 518 U.S. at 250.
420. Id.
421. Id. at 237 (citing Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975); Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 711 (1965)).
422. See, e.g., Brown, 518 U.S. at 238.
Particular Case, a Court Should First Undertake a Factual Inquiry Sufficient to Determine the Nature and Extent of Collective Bargaining Efforts on the Subject Matter of the Challenged Provision

The non-statutory labor exemption promotes the operation of meaningful arms-length collective bargaining efforts by affording the fruits of such efforts a limited protection from otherwise applicable antitrust laws. But where such bargaining efforts do not occur, or where the proponent of a challenged provision can only offer limited proof of such bargaining, the presumption must lean in favor of not applying the exemption. Where meaningful collective bargaining has occurred, no problem exists. Where meaningful collective bargaining may have occurred, the burden should be on the party claiming its occurrence to prove it. To allow otherwise is to blindly permit the operation of a limited protection at the expense of jeopardizing the effect of federal antitrust law. This is not, and should never be, the proper application of the non-statutory labor exemption.

Courts should take note of the proof of collective bargaining efforts presented to them before deciding to apply the non-statutory labor exemption. When sufficient proof to show that such efforts have occurred is lacking, courts are in their right to apply federal antitrust laws and a "rule of reason" analysis. This is not judicial legislation, nor is it the usurping of National Labor Relations Board or congressional functions; it simply represents the courts' efforts to "be faithful to the economic theory underlying broad statutory mandates."

VI. CONCLUSION

The 2004 NFL draft has come and gone, and Maurice Clarett was forced to watch it from the sidelines. With his professional football career on hiatus for the immediate future, Clarett is left to consider other pursuits.
Looking beyond *Clarett v. NFL*, the implications of the Second Circuit's analysis in that case are disheartening. The opinion ignores a long line of Supreme Court precedent, including *Jewel Tea* and *Connell Construction*, on the application of the non-statutory labor exemption that the Court itself applied in *Brown v. Pro Football, Inc.* The opinion further rejects the Eighth Circuit's approach in *Mackey v. NFL*, an approach at least implicitly recognized by the Court in *Brown*. In doing so, the Second Circuit instead strongly adheres to its own line of precedent, comprised of cases such as *Caldwell v. ABA*, *NBA v. Williams*, and *Wood v. NBA*. However, the danger of adhering to this line of precedent is that it allows for the blanket application of the non-statutory labor exemption in any case where a collective bargaining relationship is present, without properly considering some of the factors that may counsel against application.

This comment has explored a number of instances where the blanket application of the non-statutory labor exemption is improper. This comment has further explored how in such cases lower court antitrust decisions like *Deesen v. PGA*, *Linseman v. WHA*, and *Denver Rockets v. All-Pro Management, Inc.* become relevant and offer sufficient guidance of how such cases should be decided. These lower court decisions, as interpretations of the Supreme Court's analysis in *Silver v. NYSE* and *Standard Oil Co. v. United States*, focus entirely on general antitrust concerns.

But the analysis in a case like *Clarett v. NFL* only reaches antitrust questions after it has been determined that the non-statutory labor exemption does not apply. This comment has explored the question of when antitrust analysis becomes relevant in a case like *Clarett v. NFL*, and concludes that, in reaching the antitrust analysis in such a case, proper respect has been given to both the economic theories underlying federal labor and antitrust laws.


428. See discussion supra Part IV.
429. See discussion supra Part IV.
430. See discussion supra Part II.E.2.a.
431. See, e.g., discussion supra Part II.E.2.b.
432. See discussion supra Part II.E.1.
433. See discussion supra Part II.E.1.