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Application of Antitrust Laws to Professional Sports' Eligibility and Draft Rules

Robert B. Terry

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COMMENT

APPLICATION OF ANTITRUST LAWS TO PROFESSIONAL SPORTS' ELIGIBILITY AND DRAFT RULES

I. *Introduction* 797
II. *The League Rules* 798
  A. *Eligibility Rule Restraints* 798
  B. *Draft Procedure Rule Restraints* 801
III. *The Antitrust Exemptions* 803
  A. *The Baseball Exemption* 803
  B. *The Labor Exemption* 806
    1. *Scope of the Labor Exemption* 807
    2. *Application of the Labor Exemption* 810
IV. *The Antitrust Issues* 813
  A. *Introduction* 813
  B. *The Eligibility Rules* 816
    1. *Group Boycotts versus Concerted Refusals to Deal* 816
    2. *Per Se Rule versus Rule of Reason* 817
    3. *Application of Rules* 821
  C. *The Draft Procedures* 823
V. *Conclusion* 827

I. INTRODUCTION

Few 18-year-old athletes are ready to compete as professionals in physical sports such as football. College coaching, playing experience, and physical development are needed to groom even the most gifted atheletes. At some point, however, these athletes are capable of playing professionally. This Comment will examine the plight of athletes who are ready, willing, and able to play professional baseball, basketball, and football, but who are prevented from doing so by rules adopted by the professional sports establishment.[1] Specifically, this Comment will examine the

1. While numerous sports are played professionally in the United States, this Comment will examine only the sports of baseball, basketball, and football. The legal implications discussed herein, however, are applicable to all professional sports. *See generally* United States v. International Boxing Club of New York, Inc., 348 U.S. 236 (1955) (boxing); Deesen v. Professional Golfers' Ass'n, 358 F.2d 165 (9th Cir. 1966), *cert. denied*, 385 U.S. 846 (1968) (golf); Drysdale v.

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eligibility and draft procedure rules of professional baseball, the National Basketball Association (NBA), and the National Football League (NFL), and analyze those rules in light of the exemptions allowed from and the prohibitions imposed by Section 1 of the Sherman Antitrust Act.[2]

II. THE LEAGUE RULES

The eligibility and draft rules of professional baseball, basketball, and football limit an athlete's ability to enter the league[3] and his freedom to negotiate and contract with the team of his choice. The eligibility rules bar certain athletes from entering the league and require those athletes who do enter the league to participate in a player draft[4] before contracting to play for a team.[5] The draft procedure rules grant exclusive negotiating and contracting rights to the selecting team. Thus, they restrict the athlete in two ways: he cannot choose where or with which team to play, and he cannot freely negotiate his salary because of the lack of competitive bidding for his services.[6]

A. *Eligibility Rule Restraints*

Each league has rules that govern the eligibility of an athlete to enter the league and to negotiate and contract by setting standards that athletes must meet before they are eligible to be drafted by a team.[7] Thus, an

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Florida Team Tennis, Inc., 410 F. Supp. 843 (W.D. Pa. 1976) (tennis); Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973) (golf); Heldman v. United States Lawn Tennis Ass'n, 354 F. Supp. 1241 (S.D.N.Y. 1973) (tennis); Nassau Sports v. Hampson, 355 F. Supp. 733 (D. Minn. 1972) (hockey); Nassau Sports v. Peters, 352 F. Supp. 870 (E.D.N.Y. 1972) (hockey); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972) (hockey); Boston Professional Hockey Ass'n v. Cheevers, 348 F. Supp. 261 (D. Mass.), *remanded*, 472 F.2d 127 (1st Cir. 1972) (hockey).

2. 15 U.S.C. § 1 (1976).

3. "League" and "leagues" shall be used to mean professional sports organizations that represent management and ownership interests.

4. The word "draft" shall refer to the system whereby the teams in the leagues select exclusive negotiating rights to eligible athletes. Once an athlete is drafted by a team, no other team may negotiate for his services without acquiring the exclusive right to negotiate with him from the team that drafted him. In professional baseball, the right to draft and negotiate may not be traded away or sold. In the National Basketball Association (NBA) and the National Football League (NFL), drafting and negotiating rights are negotiable. *See* notes 28 & 29 and accompanying text *infra*. *See generally* Goldstein, *Out of Bounds Under the Sherman Act? Player Restraints in Professional Team Sports*, 4 PEPPERDINE L. REV. 285, 287-88 (1977) (discussion of draft mechanisms).

5. *See* notes 7-17 and accompanying text *infra*.

6. *See* notes 18-32 and accompanying text *infra*.

7. The eligibility and draft procedure rules are contained in the Professional Baseball Rules (baseball), the Collective Bargaining Agreement Between

athlete who is capable of competing in professional sports cannot do so if he does not meet these standards, either because of age or college sports status. The professional baseball rules restrain athletes the least because they allow an athlete to become eligible for the draft in many ways. A high school student is eligible for the baseball draft if he drops out of school and remains out for one year after graduation. He is also eligible for the draft at any time after losing eligibility to participate in high school athletics due to age, completion of the maximum number of semesters of attendance set by the school, or completion of the maximum number of seasons in which he was eligible to participate in any major high school sport.[8] A athlete otherwise eligible under the high school rule loses eligibility if he becomes a member of the baseball team[9] of a major four-year college,[10] and he generally does not regain draft eligiblity until he completes his college eligibility or withdraws from college.[11]

The entry of athletes into professional basketball is not restrained significantly by the NBA eligibility rules. Any athlete may become eligible for the draft if his high school class has graduated and he renounces his intercollegiate basketball eligibility by written notice to the NBA at least forty-five days before the draft.[12] Although the NBA collective bargaining

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the National Basketball Association and the National Basketball Players Association (basketball) [hereinafter referred to as NBA Agreement], and the Constitution and By-Laws for the National Football League (football) [hereinafter referred to as NFL Constitution].

8. Professional Baseball Rules, Rule 3(h).

9. A college athlete is a member of his college baseball team in the following situations:

(a) if he is a freshman in a college that does not have an intercollegiate freshman baseball program, or if his college does have such a program and he is a member or a prospective member of the freshman squad;
(b) if he is a sophomore and is a member or a prospective member of the varsity baseball squad;
(c) if he is a junior and is a member or a prospective member of the varsity baseball squad; or
(d) if he is a senior and is a member or a prospective member of the varsity baseball squad.

Id. Rule 3(k).

10. The baseball rules define "college" as

> any university or other institution of higher education located in the continental United States, including but not limited to, all members of the National Collegiate Athletic Association, which confers degrees upon students following completion of sufficient credit hours to equal a four-year course, provided the college is represented by a baseball team which participates in intercollegiate competition.

Id. This definition encompasses most four-year institutions.

11. *Id.* Rule 3(k)(2).

12. NBA Agreement, *supra* note 7, art. XXII, § 1(a)(2)(f). This procedure commonly was known as the "hardship rule" because a player who wished to use

agreement does not mention other methods of becoming eligible, a high school graduate who does not renounce his intercollegiate basketball eligibility presumably will be eligible after he graduates from college or exhausts his college eligibility. Unlike baseball,[13] these rules do not allow an athlete to become eligible while he is still in high school. The restraint imposed on athletes by this difference is minimal, however, for an athlete rarely possesses the ability to compete in the NBA before he completes high school.

The NFL eligibility rules are the most restrictive because they generally assume that an athlete attended college. Generally, an athlete is not eligible either to play or to be selected in the draft unless he has exhausted his college football eligibility, five years have elapsed since he first attended or entered a junior college, college, or university, or he has graduated from a college or university before September 1 of the next NFL season.[14] If an athlete does not play college football, he will be eligible for the draft after four football seasons have elapsed since he entered college.[15] Under the NFL rules, therefore, an athlete usually will not become eligible to play professional football before age twenty-two. In some cases, several years have passed since the athlete was physically capable of competing on the professional level.[16] Thus, competition between athletes in the league and those who wish to enter the league is restrained substantially by the NFL eligibility rules.

An additional time restraint is imposed by all three sports. An otherwise eligible athlete cannot sign with a team until after he has participated

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this rule to become eligible for the NBA draft before graduating from college or completing his college eligibility was required to show some financial necessity. The rule has been amended, however, so that a showing of hardship is no longer required. Under this rule, an athlete now may become eligible for the NBA draft after his high school class has graduated by giving written notice, regardless of what he has done after high school. *Id.*

13. *See* note 8 and accompanying text *supra*.

14. NFL Constitution, *supra* note 7, art. XII, § 12.1(A).

15. *Id.*

16. The position of Herschel Walker, a running back for the University of Georgia Bulldogs football team, best illustrates the hardship that these requirements impose. During his freshman season, Walker gained over 1,500 yards rushing, which broke the previous record for a freshman, and led the Bulldogs to the national title, as determined by the Associated Press and United Press International polls. He placed third in the balloting for the Heisman Trophy, an award given annually to the year's best college football player. Although scouts for the league teams believe that Walker could have played professional football immediately after high school, SPORTS ILLUSTRATED, Nov. 3, 1980, at 63 (quoting Gil Brandt, vice president in charge of personnel development for the Dallas Cowboys professional football franchise), the NFL rules bar Walker's entry into the league and deny him the livelihood he now could earn.

in the first draft occurring after he becomes eligible.[17] While this delay usually is shorter than the restriction imposed by the eligibility requirements, it further delays an athlete's entry into professional sports.

B. *Draft Procedure Rule Restraints*

An athlete who meets the eligibility requirements for entry into the league faces a second restraint on his ability to negotiate and contract with league teams. The rules of each sport establish draft procedures in which teams select the exclusive right to negotiate and contract with eligible athletes.[18] Thus, a drafted athlete is restricted because he may negotiate and sign only with the selecting team. If he does not choose to contract with that team, he cannot sign with or play for any other league team for a specified period of time.[19]

The NBA draft procedure is the least harsh because an athlete who does not sign with the selecting team may wait a year and be selected by another team in the next draft.[20] If an athlete does not sign with the team that selects him in the second draft or if he is not selected in a draft in which he is eligible, he becomes a free agent who is able to negotiate and contract with any team.[21]

The baseball draft procedure rules also allow an eligible athlete who does not sign with a selecting team to be selected by another team in the next draft.[22] Since baseball conducts two drafts each year,[23] an athlete is bound to the selecting team for only six months, compared with the one year under the NBA rules.[24] The baseball draft procedure rules are more restrictive then the NBA rules, however, because an athlete does not become a free agent after failing to sign with the team that selects him in the second baseball draft, as he does after the second NBA draft.[25] Instead, an eligible athlete becomes a free agent in professional baseball only

17. Professional Baseball Rules, Rule 4(b); NBA Agreement, *supra* note 7, art. XXII, § 1(a)(1) (by implication); NFL Constitution, *supra* note 7, art. XII, § 12.1(F).

18. Professional Baseball Rules, Rule 4(b); NBA Agreement, *supra* note 7, art. XXII, § 1(a)(2)(a); NFL Constitution, *supra* note 7, art. XII, § 12.1(G).

19. Professional Baseball Rules, Rule 4(b) (approximately six months); NBA Agreement, *supra* note 7, art. XXII, § 1(A)(2) (one year); NFL Constitution, *supra* note 7, art. XII (until waived by selecting team).

20. NBA Agreement, *supra* note 7, art. XXII, § 1(a)(2)(b).

21. *Id.* The procedural rules differ slightly for a player who becomes eligible for the draft by renouncing his intercollegiate eligibility in writing. If he later returns to play intercollegiate basketball, he will not become a free agent until after his third draft. *Id.* § 1(a)(2)(f).

22. Professional Baseball Rules, Rule 4(d)(1).

23. *Id.* Rule 4(d).

24. *See* note 20 and accompanying text *supra*.

25. *See* note 21 and accompanying text *supra*.

if he is not drafted in a subsequent draft.[26] As long as he is drafted, the selecting team retains the exclusive right to negotiate and contract with him until the next draft.[27] The baseball rules further restrict an athlete's freedom to negotiate and contract because, unlike the NBA[28] and the NFL,[29] they do not allow the selecting team to trade or sell the exclusive rights to an athlete's services to another league team. Thus, even athletes with leverage cannot force the selecting team to trade or sell those rights to a team for which the athlete would prefer to play.

The NFL draft procedure rules impose the greatest restraint because an athlete who does not sign with the selecting team may not participate in the following draft unless the selecting team releases its exclusive right to the athlete's services by notifying the league commissioner that it has cut or "waived" the athlete.[30] A waived athlete may negotiate with other teams; an athlete who is not waived is not subject to any future drafts and presumably is bound to the selecting team indefinitely. Under the NFL rules, the athlete is not able to escape the exclusive right of a selecting team by waiting until the next draft without signing a contract, as he can in the NBA or professional baseball. The decision on the athlete's future in the NFL is made entirely by the drafting team. Thus, the athlete's limited freedom to negotiate and contract is restricted even further.

In addition to the restriction the draft procedure rules impose on an athlete's ability to choose where and for which team he will play, the draft procedures of all three sports hinder the athlete's power to bargain over his salary. Since only one team can negotiate with an athlete, the teams do not bid against each other for the athlete's services. Thus, salaries are held below their open market value because of the elimination of competitive bidding.[31]

In varying degrees, therefore, the eligibility and draft procedure rules of professional baseball, basketball, and football restrain athletes from competing for jobs with league teams and restrain the athletes' freedom to negotiate and contract with those teams. A remedy for these restraints is needed. If one exists, it most likely will be found in the Sherman Antitrust Act.[32]

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26. Professional Baseball Rules, Rule 4(h)(2).

27. *Id.*

28. NBA Agreement, *supra* note 7, art. XXII, § 1(a)(3).

29. NFL Constitution, *supra* note 7, art. XII, § 12.1(G).

30. *Id.* art. XII.

31. The huge salaries garnered in the competitive bidding for baseball's veteran free agents illustrate the potential effect on salaries if competitive bidding is allowed. Between 1976 and 1980, 43 players signed contracts worth at least $1 million after participating in baseball's veteran free agent draft. SPORTS ILLUSTRATED, Apr. 20, 1981, at 49.

32. 15 U.S.C. §§ 1-7 (1976).

III. THE ANTITRUST EXEMPTIONS

The restraints these league rules impose often are challenged as conspiracies that restrain trade in violation of the Sherman Antitrust Act.[33] The antitrust laws do not apply to all types of commerce, however, and if one of several exemptions applies, that commerce is not subject to the antitrust laws.[34] The leagues argue that two exemptions apply to their rules: the baseball exemption[35] and the labor exemption.[36]

A. *The Baseball Exemption*

Because of an early decision and a subsequent strict application of the doctrine of stare decisis,[37] the antitrust laws are not applied to professional baseball. In *Flood v. Kuhn*,[38] the United States Supreme Court upheld prior decisions that professional baseball is exempt from the antitrust laws.[39] In the first of these decisions, *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,[40] the Court held that professional baseball was exempt from the antitrust laws because those who play in and arrange baseball games are not engaged in interstate commerce.[41] The determination was based on the finding that the business of baseball was to give "exhibitions . . . which are purely state affairs."[42] Thus, the jurisdictional prerequisite for imposition of Sherman

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33. *Id.*

34. *See generally* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST §§ 235-239 (1977). Statutes and judicial decisions exempt specific areas of commerce from the antitrust laws: regulated industries, *id.* § 239, governmental action and its solicitation, *id.* § 238, labor organizations, *id.* § 237, agricultural cooperatives and the fishing industry, *id.* § 236.

35. *See* pp. 803-06 *infra*. *See generally* Martin, *The Aftermath of* Flood v. Kuhn*: Professional Baseball's Exemption from Antitrust Regulation*, 3 W. ST. U.L. REV. 262, 263 (1976); Roberts & Powers, *Defining the Relationship Between Antitrust Law and Labor Law: Professional Sports and the Current Legal Battleground*, 19 WM. & MARY L. REV. 395, 397-400 (1978); Comment, *Nearly a Century in Reserve: Organized Baseball: Collective Bargaining and the Antitrust Exemption Enter the 80's*, 8 PEPPERDINE L. REV. 313, 316-24 (1981).

36. *See* pp. 806-13 *infra*. *See generally* Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1201-24 (1980); Roberts & Powers, *supra* note 35, at 417-67; Comment, *supra* note 35, at 341-50; Comment, *The Eighth Circuit Suggests a Labor Exemption from Antitrust Laws for Collectively Bargained Labor Agreements in Professional Sports*, 21 ST. LOUIS U.L.J. 565 (1977).

37. *See* note 50 and accompanying text *infra*.

38. 407 U.S. 258 (1972).

39. *Id.* at 283-84.

40. 259 U.S. 200 (1922).

41. *Id.* at 208-09.

42. *Id.* at 208.

Antitrust Act sanctions was not met; the conduct did not restrain trade or commerce "among the several States, or with foreign nations."[43]

When *Federal Baseball* was decided, interstate commerce was defined narrowly.[44] Subsequent decisions have broadened the definition of interstate commerce; thus, the reasoning of *Federal Baseball* is no longer valid.[45] This point was alluded to in *Toolson v. New York Yankees, Inc.*,[46] when the Supreme Court was asked to overrule *Federal Baseball* by applying the broader definition of interstate commerce, *i.e.*, any conduct that "affects" interstate commerce.[47] Although the Court declined to overrule *Federal Baseball* in *Toolson*,[48] the decision was not based on the narrow interstate commerce analysis found in *Federal Baseball*:

> Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. . . . We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. *Without re-examination of the underlying issues, the judgments below are affirmed on the authority of . . .* [*Federal Baseball*] so far as that decision determines that Congress

43. 15 U.S.C. § 1 (1976). *See generally* L. SULLIVAN, *supra* note 34, §§ 232-234.

44. In *Federal Baseball*, the Court refused to hold that intrastate conduct that affected interstate commerce was, itself, interstate in nature: "That which in its consummation is not commerce does not become commerce among the States because the transportation [across state lines] that we have mentioned takes place." 259 U.S. at 209. This is consistent with cases decided prior to 1937, which required a direct connection between the conduct and the stream of interstate commerce for the conduct to be subject to federal legislation under the commerce clause. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Stafford v. Wallace, 258 U.S. 495 (1922). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 134-63 (1978).

45. The requirement that conduct be in the stream of interstate commerce was rejected in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36 (1936). The Court established a test for interstate commerce that is satisfied if local conduct affects commerce between the states. *Id.* at 37-39. Under this test, professional baseball constitutes interstate commerce. *See generally* United States v. International Boxing Club, 348 U.S. 236 (1955); United States v. Shubert, 348 U.S. 222 (1955); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); United States v. Darby, 312 U.S. 100 (1941).

46. 346 U.S. 356 (1953) (per curiam).

47. *Id.* at 356-57.

48. *Id.* at 357.

had no intention of including the business of baseball within the scope of the federal antitrust laws.[49]

The *Toolson* decision was purely an exercise of stare decisis: Congress knows of *Federal Baseball* and has not altered the statute expressly to include baseball.[50] The *Toolson* Court apparently interpreted this inactivity as tacit congressional approval of the result of *Federal Baseball.* Evidence that Congress has considered this issue buttresses the inference of congressional approval.[51]

Following *Toolson*, the Supreme Court considered arguments that the baseball exemption should be applied to professional football and basketball. In both instances, the Court refused to expand the exemption granted to professional baseball in *Federal Baseball.* In *Radovich v. National Football League*,[52] the Court held that the exemption for baseball did not apply to football and that the antitrust laws applied to professional football.[53] The Court made this statement:

> If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But . . . [*Federal Baseball*] held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication.[54]

In *Haywood v. National Basketball Association*,[55] the Court held that the baseball exemption did not apply to professional basketball.[56]

The baseball exemption again was challenged in *Flood v. Kuhn.*[57] The Court examined the history of the exception and adopted the approach provided in *Toolson: Federal Baseball* is wrong, but Congress, and not the Court, must correct it.[58] Three members of the Court dissented in *Flood.* Justice Douglas would have overruled *Federal Baseball* and *Toolson.*[59]

49. *Id.* (emphasis added).

50. United States v. Shubert, 348 U.S. at 229-30.

51. 346 U.S. at 357. The *Toolson* dissent noted that a report issued by the Subcommittee on Study of Monopoly Power of the House of Representatives Committee on the Judiciary concluded that baseball was "'[i]nherently . . . intercity, intersectional, and interstate.'" *Id.* at 358 (Burton, J., dissenting) (quoting H.R. REP. NO. 2002, 82d Cong., 2d Sess. 5 (1952)).

52. 352 U.S. 445 (1957).

53. *Id.* at 451-52.

54. *Id.* at 452.

55. 401 U.S. 1204 (1971) (Douglas, Cir. J.).

56. *Id.* at 1205 (Douglas, Cir. J.).

57. 407 U.S. 258 (1972).

58. *Id.* at 282-84.

59. *Id.* at 286-88 (Douglas, J., dissenting).

Justice Marshall would have removed the antitrust exemption only prospectively.[60] Justice Brennan concurred with Justice Douglas' dissent[61] and joined in Justice Marshall's dissent.[62] The dissenting Justices rejected the argument that the inactivity of Congress evidenced acquiesence to *Federal Baseball*.[63] That inactivity was attributed to the isolation of the baseball exemption; since the exemption does not apply to all major sports, Congress simply has not been concerned enough to act.[64]

In conclusion, *Radovich* and *Haywood* clearly state that professional football and basketball are not exempt from the antitrust laws under *Federal Baseball*. The application of that exemption to professional baseball, however, appears to be strongly entrenched by the decisions in *Toolson* and *Flood*. In addition, each future decision that fails to apply the baseball exemption to activities outside of baseball[65] invites Congress to reject expressly that exemption; each failure of Congress to act in response adds weight to the *Toolson* argument that Congress has acquiesced to that exemption. Considering the deference to legislative acquiesence stated in *Flood*, the Court will find it increasingly difficult to overrule the cases that exempted professional baseball from the antitrust laws.

B. *The Labor Exemption*

Although football and basketball are not exempt from the antitrust laws under the baseball exemption,[66] the NFL and NBA argue that their eligibility and draft rules should escape antitrust analysis under the statutory exemption from the antitrust laws that Congress has provided for labor unions.[67] To further the policy that supports the rights of workers to join together to bargain collectively, Congress has provided that labor organizations are not to be considered under the antitrust laws as combinations that restrain trade.[68] The advent of players' unions and associa-

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60. *Id.* at 293 (Marshall, J., dissenting).
61. *Id.* at 286 (Douglas, J., dissenting).
62. *Id.* at 288 (Marshall, J., dissenting).
63. *Id.* at 292 (Marshall, J., dissenting).
64. *Id.* (Marshall, J., dissenting).
65. *See, e.g.*, San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966 (C.D. Cal. 1974) (professional hockey subject to antitrust laws); Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973) (professional golf subject to antitrust laws).
66. *See* notes 52-56 and accompanying text *supra*.
67. 15 U.S.C. § 17 (1976).
68. Section 6 of the Clayton Act, 15 U.S.C. § 17 (1976), provides the following:

> The labor of human beings is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having

tions in the NBA and NFL raises the question of whether the eligibility and draft rules established in collective bargaining between the leagues and the players' union representatives are exempt from the antitrust laws under this congressional mandate.

1. Scope of the Labor Exemption

Section 6 of the Clayton Act provides that the antitrust laws do not "forbid the existence and operation of labor . . . organizations"[69] and labor organizations and their members shall not "be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."[70] Four decisions of the United States Supreme Court define the scope of this exemption. In *Allen Bradley Co. v. Local 3, IBEW*,[71] the Court stated that a labor organization that acts to aid a nonlabor group in conduct that restrains trade is not protected by the labor exemption and violates section 1 of the Sherman Antitrust Act.[72] The Court struck down a provision in a collective bargaining agreement which provided that contractors could purchase electrical equipment only from manufacturers whose employees also were represented by the union. In return, the manufacturers agreed to sell only to contractors whose employees were represented by the union.[73] Thus, both sets of employers effectively reduced competitive pressures from outside manufacturers and contractors.

In refusing to apply the labor exemption, the Court said, "We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation [by the union] is a violation of the Act."[74] The Court held that the labor exemption did not apply because "[C]ongress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services."[75] Thus, after *Allen Bradley*, the labor exemption no longer provided an absolute escape for unions from the antitrust laws.[76]

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capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Id. See articles cited note 36 *supra.*

69. 15 U.S.C. § 17 (1976).
70. *Id.*
71. 325 U.S. 797 (1945).
72. *Id.* at 810.
73. *Id.* at 798-800.
74. *Id.* at 811.
75. *Id.* at 808.
76. *See* Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 622-23 (1975).

The rule that *Allen Bradley* established for application of the statutory labor exemption was clear: the labor exemption protects conduct a union undertakes by itself or in concert with other labor groups, but it does not protect any conduct a union undertakes in concert with a nonlabor organization. Such an absolute rule, however, did not allow adequate consideration of the competing policies that underlie the labor and antitrust laws. Thus, in *UMW v. Pennington*[77] and *Amalgamated Meat Cutters v. Jewel Tea Co.*,[78] announced as companion cases in 1965, the Court found that the labor statutes implied the existence of a separate, nonstatutory labor exemption, to which the strict *Allen Bradley* rule did not apply.[79]

Pennington, a small coal producer alleged that the United Mine Workers conspired to allow the larger coal producers to increase mechanization in exchange for a higher wage structure for the employees. Smaller producers could not afford the higher wages because they could not afford the increased mechanization.[80] Thus, the agreement restrained trade because it forced the smaller coal producers out of business. In *Jewel Tea*, a multi-employer bargaining unit agreed to the following provision in the collective bargaining agreement: "Market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above."[81] An employer, Jewel Tea, who objected to this provision throughout the negotiations, signed only because the union threatened to strike. Jewel Tea then sued for violation of the Sherman Act, alleging that the provision was an attempt by its competitors to limit the advantages of increased mechanization possessed by Jewel Tea.[82] The company argued that a member of the union would not be employed during the restricted hours, and therefore, the union had no interest in the matter.[83]

Justice White wrote the key opinions in both cases.[84] In these opinions, Justice White applied a test that balanced federal labor policies against antitrust policies.[85] His stated concern was "harmonizing the Sherman Act with the national policy expressed in the National Labor Relations Act of promoting 'the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotia-

77. 381 U.S. 657 (1965) (plurality).
78. 381 U.S. 676 (1965).
79. *Id.* at 691.
80. 381 U.S. at 659-61.
81. 381 U.S. at 679-80.
82. *Id.* at 681-82.
83. *Id.* at 692.
84. Justice White wrote for a plurality of four in *Pennington*, and the majority in *Jewel Tea* was represented by the opinions of Justices White and Goldberg.
85. 381 U.S. at 691.

tion.'"[86] This balancing test first seeks to reconcile any policy conflict by finding that one policy or the other does not apply to the dispute. If reconciliation is impossible, the Court then weighs the force of the competing policies as they apply to the case and follows the policy that more strongly applies.[87]

Thus, in *Pennington*, Justice White reconciled away any policy conflict by finding that the labor policy did not protect a wage agreement between a union and employers that other employers would be forced to meet.[88] Since the labor policy did not apply, the Court followed the policy underlying the antitrust laws[89] and denied the union protection under the labor exemption.[90] Application of the same test led to a different result in *Jewel Tea*. The Court was unable to reconcile the policy conflict because both policies applied in that case. In balance, however, the labor policy outweighed the antitrust policy, and[91] therefore, the labor exemption from the antitrust laws protected the union agreement.[92] Important factors in the balance were findings that the provision was a mandatory subject of bargaining and that to be exempt, a provision must be produced by bona fide, arm's length bargaining actively pursued by the union to fulfill its labor goals.[93]

The rest of the Justices rejected the balancing test and its variable results and applied different tests that produced the same results in each decision. Justice Goldberg would have applied the labor exemption in both cases,[94] based on a finding that both agreements dealt with mandatory subjects of collective bargaining. Justice Goldberg reasoned that since unions and employers are under a legal duty to bargain about mandatory subjects of bargaining, the negotiation and agreement on all such subjects should fall within the exemption.[95] Justices Douglas, Black, and Clark would have denied application of the labor exemption.[96] In both cases, the union was acting in concert with a nonlabor group. These Justices felt that they were dealing with the statutory labor exemption provided by the Clayton Act to which the strict rule of *Allen Bradley* should apply.[97]

86. 381 U.S. at 665 (quoting Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964)).

87. L. SULLIVAN, *supra* note 34, § 237, at 729.

88. 381 U.S. at 666-67.

89. *Id.* at 668.

90. *Id.* at 669.

91. 381 U.S. at 690-91.

92. *Id.* at 690.

93. *Id.* at 689-90. *See generally* United States v. Hutcheson, 312 U.S. 219 (1941) (statutory exemption does not protect activity that would be illegal under antitrust laws if done by employer acting alone).

94. 381 U.S. at 697, 735.

95. *Id.* at 735.

96. 381 U.S. at 736; 381 U.S. at 672.

97. 381 U.S. at 738; 381 U.S. at 675.

After *Pennington* and *Jewel Tea*, therefore, parties considering litigation faced the uncertain application of a broad balancing test when courts determined if the nonstatutory labor exemption applied. Some of the uncertainty was removed by the Supreme Court in *Connell Co. v. Plumbers & Steamfitters Local 100*.[98] In *Connell*, the Court held that the statutory labor exemptions do not apply to concerted action or agreements between unions and nonlabor parties,[99] and that the nonstatutory labor exemption implied from the labor policies does not protect all regulated conduct, but only conduct that is authorized or approved by the labor laws.[100] In conclusion, these four cases present three questions in the sports league rules context: (1) which labor exemption, if any, applies, (2) who can claim that exemption, and (3) what test determines if the claimed exemption applies to the league rules?

2. Application of the Labor Exemption

The statutory labor exemption provided by the Clayton Act[101] cannot be claimed by the NFL and the NBA because the league rules did not result solely from union conduct as required by *Allen Bradley*.[102] Thus, the leagues can only argue that the nonstatutory labor exemption recognized in *Pennington* and *Jewel Tea* exempts their rules from the antitrust laws.

The second issue is whether the leagues can claim the nonstatutory labor exemption. Usually, the labor union claims this exemption in defense to a charge of anticompetitive conduct. This is logical because the purpose of this exemption is to protect agreements that are won by the union through the collective bargaining process, which labor policies strongly support. In the league rules context, however, the professional sports leagues would be arguing for application of the nonstatutory exemption against their employees. It is doubtful, therefore, that the courts would find strong support in the labor policies for applying the nonstatutory labor exemption to defeat the goals of employees.

Even if the leagues can claim the nonstatutory labor exemption, it is unlikely that they will succeed in maintaining that claim under the test for application of that exemption stated in *Mackey v. National Football League*.[103] In *Mackey*, the NFL claimed that the so-called Rozelle Rule was exempt from the antitrust laws. Mackey, an NFL veteran, challenged the NFL rule that allowed the commissioner to decide the compensation to be paid by a team that signs a veteran free agent from another team.[104]

98. 421 U.S. 616 (1975).
99. *Id.* at 622.
100. *Id.* at 622-23.
101. 15 U.S.C. § 17 (1976).
102. *See* notes 71-76 and accompanying text *supra*.
103. 543 F.2d 606 (8th Cir. 1976).
104. *Id.* at 610-11.

The United States Court of Appeals for the Eighth Circuit determined that the *Jewel Tea-Pennington* authority states three prerequisites for applying the nonstatutory labor exemption to exempt conduct that restrains trade from the antitrust laws. First, the restraint primarily may affect only the parties to the collective bargaining relationship. Second, the restraint must be over a mandatory subject of bargaining. Third, it must be the product of bona fide arm's length bargaining.[105]

The leagues cannot meet the requirements of the *Mackey* test because the league rules govern the employment circumstances of outsiders to the agreement. Thus, the restraints imposed by the league rules do not primarily affect only the parties to the agreement, and the first prerequisite is not fulfilled. In addition, there is also some question about whether the second part of the test is met. Unions legitimately may bargain for provisions that affect third parties to the agreement. The principles for determining when those provisions are mandatory subjects of collective bargaining are found in three United States Supreme Court cases.[106] Those cases, however, do not deal specifically with the labor exemption question and, therefore, do not directly determine whether the league rules meet the second requirement of the *Mackey* test. They do indicate, however, the issues that are crucial to that determination.

In *Fibreboard Paper Products Corp. v. NLRB*,[107] the employer unilaterally decided to contract out to a third party work that had been done previously by union employees.[108] The question was whether such contracting out was a mandatory subject of bargaining so that the employer would be forbidden from taking action without first negotiating the matter with the union.[109] The United States Supreme Court held that the issue concerned a term or condition of employment and was, therefore, a mandatory subject of bargaining.[110] The Court based its decision on a finding that the issue was vitally important to the union and employer and, therefore, the federal labor policy favoring negotiation in labor relations applied.[111]

The situation in *Local 24, International Brotherhood of Teamsters v. Oliver*[112] is more analogous to the league rules situation. Oliver, an independent trucker and an outsider to the challenged agreement, sued the

105. *Id.* at 614.

106. Chemical Workers Local No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964); Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959). *See* notes 107-24 and accompanying text *infra*.

107. 379 U.S. 203 (1964).

108. *Id.* at 206.

109. *Id.* at 204-05.

110. *Id.* at 215.

111. *Id.* at 211.

112. 358 U.S. 283 (1959).

union for violation of state antitrust laws. He alleged that a provision of the collective bargaining agreement amounted to price fixing because it controlled the amount of money that an employer must pay him as an independent contractor.[113] The regularly employed truck drivers were represented by the union. The employer could hire extra truck drivers as independent contractors.[114] The collective bargaining agreement with the union dictated what expenses of operation incurred by the independent truck drivers must be borne by the employer.[115] It also required that the employer pay the independent drivers the same wages as similarly situated union drivers. This provision kept the independent drivers, in effect, from undercutting the price of labor by understating the costs of operating their vehicles.[116] The issue the Court faced was whether federal labor policy pre-empted the state antitrust remedy. The Court found that the state law was pre-empted.[117] Because the provision was labeled as one that controlled wages, not prices, it was held to be a mandatory subject of bargaining.[118]

The Court at least partially revealed the extent to which it applied the reasoning of these cases to third parties in *Chemical Workers Local No. 1 v. Pittsburgh Plate Glass Co.*[119] The employer determined that its health plan for retired workers was rendered useless by Medicare.[120] The Supreme Court upheld the unilateral change of health care plan by the employer because the plan was not a mandatory subject of bargaining and the retired workers were not "employees" as defined by the National Labor Relations Act.[121] The Court noted that *Fibreboard* and *Oliver* provided the controlling principles[122] and stated that "the question is not whether the third-party concern is antagonistic to or compatible with the interests of bargaining-unit employees, but whether it vitally affects the 'terms and conditions' of their employment."[123] The Court held that the changes in the retirees' benefits did not "vitally affect" the active employees.[124]

When these preceding cases are applied to the league rules situation, it seems that the second requirement of the *Mackey* test is not met. The draft and eligibility rules apply only to outsiders to the collective bargaining agreements[125] and do not vitally affect the terms and conditions of players

113. *Id.* at 292-93.
114. *Id.* at 298-304 (appendix to Court's opinion).
115. *Id.* at 300.
116. *Id.* at 287-94.
117. *Id.* at 295-97.
118. *Id.* at 295.
119. 404 U.S. 157 (1971).
120. *Id.* at 161.
121. *Id.* at 165-68.
122. *Id.* at 179.
123. *Id.*
124. *Id.* at 179-82.
125. *See* notes 105 & 106 and accompanying text *supra*.

in the leagues. In addition, this interpretation of *Fibreboard, Oliver*, and *Chemical Workers* destroys any argument for applying the approach advocated by Justice Goldberg in *Pennington* and *Jewel Tea*.[126] That approach looked solely to the nature of the subject of negotiation. If the agreement dealt with a mandatory subject of collective bargaining, it was protected by the labor exemption; otherwise, the labor exemption did not apply.[127] This is the same as the second requirement of the *Mackey* test.[128] Since the leagues apparently cannot establish that the rules are mandatory subjects of collective bargaining,[129] the claim for application of the labor exemption is destroyed under the second requirement of the *Mackey* test and under Justice Goldberg's approach.

Thus, the league rules should not be protected by the labor exemption to the antitrust laws. Under *Mackey*, they would clearly not be exempt because neither the first nor the second requirement of that test is met. Even under Justice Goldberg's approach, which relies solely on whether the agreement deals with a mandatory subject of collective bargaining, they should not be found to be exempt.

IV. THE ANTITRUST ISSUES

A. *Introduction*

As discussed in Part III of this Comment,[130] professional football and basketball are not exempt from the antitrust laws under the baseball exemption[131] and arguably should not be exempt under the labor exemption.[132] In the future, Congress may expressly remove the exemption professional baseball enjoys under *Federal Baseball*.[133] Thus, section 1 of the Sherman Antitrust Act may apply to the eligibility and draft rules of all three sports.[134]

Section 1 provides, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."[135] A two

126. *See generally* Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 25-27 (1971).

127. *See* notes 94-95 and accompanying text *supra*.

128. *See* note 105 and accompanying text *supra*.

129. *See* notes 106-24 and accompanying text *supra*.

130. *See* pp. 803-13 *supra*.

131. *See* notes 52-56 and accompanying text *supra*.

132. *See* notes 101-29 and accompanying text *supra*.

133. This congressional response is invited by every judicial decision that refuses to overrule the outdated logic of *Federal Baseball* because of the congressional acquiesence implied from legislative inactivity under *Toolson* and the doctrine of stare decisis. *See* notes 48-51 and accompanying text *supra*.

134. 15 U.S.C. § 1 (1976). *See generally* Roberts & Powers, *supra* note 35.

135. 15 U.S.C. § 1 (1976). The Sherman Act was enacted in 1890. At first, the Supreme Court interpreted this statute literally and held that § 1 condemned

category approach has developed to determine whether certain conduct violates section 1.[136] Conduct that directly restrains competition is illegal per se.[137] Conduct in this category, such as price fixing,[138] market division,[139] tying arrangements,[140] and group boycotts,[141] is illegal

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every restraint of trade. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 340-41 (1897). It soon became apparent, however, that a literal reading would be impractical. In 1898, the Court retreated from *Trans-Missouri* and ruled that Congress intended to distinguish between restraints that are direct and immediate and those that are indirect and remote. United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898). Otherwise, in the Court's words, " 'there would scarcely be an agreement . . . among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.' " *Id.* at 568 (quoting Hopkins v. United States, 171 U.S. 578, 600 (1898)).

136. *See* L. SULLIVAN, *supra* note 34, § 63, at 166.

137. *Id.* § 64, at 169. Under the per se rule, conduct that directly restrains competition is subject to a conclusive presumption of illegality under § 1. Standard Oil Co. v. United States, 221 U.S. 1, 65 (1911). Proof that the condemned conduct occurred, by itself, establishes illegality. No anticompetitive effect or purpose need be proven, and the conduct cannot be defended by assertions of reasonableness or a lack of anticompetitive effect or purpose. *See generally* L. SULLIVAN, *supra* note 34, § 67.

Although four specific types of conduct have been labeled illegal per se, other types of conduct can be brought under this test as well. Professor Sullivan states that, as applied today, the per se rule is applied to conduct if two elements are established:

> first, that the practice if effective is likely in the great generality of cases to cause substantial injury to competition, and second, that an inquiry into whether the practice will in this instance be injurious to competition would be complex, time consuming, costly and, in the end, uncertain. When both of these propositions . . . accurately characterize a particular trade practice, the principle of judicial efficiency warrants that the practice be banned out of hand.

Id. § 70, at 193.

138. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). *See* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 (1951); United States v. Trenton Potteries Co., 273 U.S. 392, 396-402 (1927); United States v. Addyston Pipe & Steel Co., 85 F. 271, 293 (6th Cir. 1898), *aff'd*, 175 U.S. 271 (1899) (applying common law).

139. United States v. Topco Assocs., Inc., 405 U.S. 596 (1972); United States v. Sealy, Inc., 388 U.S. 350 (1967); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

140. International Salt Co. v. United States, 332 U.S. 392 (1947). *See* Northern Pac. R.R. v. United States, 356 U.S. 1, 5-9 (1958).

141. Silver v. New York Stock Exch., 373 U.S. 341 (1963); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).

regardless of its reasonableness, motive, or effect.[142] Other contracts, combinations, or conspiracies that restrain trade are analyzed under the rule of reason for section 1.[143]

Thus, the first step in analyzing a contract, combination, or conspiracy under section 1 is to determine if the conduct restrains trade. If it does, the next step is to inquire whether the conduct is one of the four types that are per se violations of section 1, or whether the validity of the conduct should be determined under the rule of reason. The eligibility and draft rules of the professional sports leagues will be analyzed in this framework.

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142. *See* note 137 *supra*.

143. L. SULLIVAN, *supra* note 34, § 64, at 169-70. Professor Sullivan states that the following is the traditional rule of reason: "[W]here an arrangement does not obviously stifle competition, but may adversely affect it, analysis of the arrangement must be pursued to gauge its purpose and effect." *Id.* Thus, proof of conduct that is not illegal per se does not carry a conclusive presumption of illegality. Instead, that conduct may be justified as being reasonable, even though it restrains trade, if it is in the public interest or if it, in fact, has no anticompetitive purpose. *Id.* § 65, at 172-74.

Current application of the rule of reason entails four issues: identifying the practice involved, determining the purpose of the restraints, identifying the likely effects of the practice, and determining whether, on the whole, the restriction imposed substantially impeded competition. *Id.* § 68, at 187-88.

In National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978), the society sought to defend its ban on competitive bidding by engineers under rule of reason analysis by asserting that competition in the profession was not in the public interest because it would force engineers to produce inferior work to meet those bids. *Id.* at 687. Thus, the society argued that the restraint on competition was reasonable because competition itself was unreasonable in this profession. The Court rejected this defense:

> [T]he purpose of the [rule of reason] analysis is to form a judgment about the *competitive significance* of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

Id. at 692 (emphasis added). Thus, modern rule of reason analysis looks only at the impact the restraint has on competitive conditions, *id.* at 690, by comparing the restraint's short-term anticompetitive effect with its long-term procompetitive effect. If the net effect of the restraint promotes competition, the restraint is reasonable.

Although a court will look only at the net economic effect of a restraint in rule of reason analysis after *Professional Engineers*, that analysis is used more often under Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979) ["*BMI*"]. In *BMI*, the Court held that restraints with which a court had not had "considerable experience" should be analyzed under the rule of reason and should not be held illegal per se, even if the restraint appears to fall in an illegal per se category. *Id.* at 8-10.

B. *The Eligibility Rules*

As discussed in Part II of this Comment,[144] the eligibililty rules imposed by the leagues prohibit certain athletes from playing for league teams. Arguably, these rules restrain trade in violation of section 1 of the Sherman Antitrust Act because the effect of that prohibition is to lessen competition: the number of athletes eligible to compete with entering and present players for jobs is reduced. In antitrust terminology, this type of arrangement is known as a "group boycott"[145] because the teams in the league, as a group, refuse to purchase the services of athletes who do not meet the eligibility rules imposed by the league. A group boycott also is sometimes called a "concerted refusal to deal"[146] because the team owners, as a group, refuse to deal with ineligible athletes for their services. These terms are not interchangeable,[147] however, because the tests used to determine if each type of conduct violates section 1 may differ.

Conduct characterized as a group boycott is illegal per se;[148] proof that the conduct occurred establishes, by itself, a violation of section 1. There is confusion, however, over whether conduct characterized as a concerted refusal to deal is to be analyzed under the per se rule or the rule of reason.[149] This confusion exists because the term "group boycott" is applied to several types of activity that arguably should be analyzed differently. Thus, conduct that constitutes a group boycott must be distinguished from that which only constitutes a concerted refusal to deal,[150] and the tests for a violation of section 1 that apply to each type of conduct must be identified.

1. Group Boycotts versus Concerted Refusals to Deal

A group boycott is aimed at direct competitors of the group and is initiated for an anticompetitive purpose; a concerted refusal to deal may be

144. *See* pp. 798-802 *supra*.

145. "A group boycott is group action to coerce third parties to conform to the pattern of conduct desired by the group or to secure their [the third parties] removal from competition." Jones Knitting Corp. v. Morgan, 244 F. Supp. 235, 238 (E.D. Pa. 1965), *rev'd on other grounds*, 361 F.2d 451 (3d Cir. 1966). Thus, the league coerces athletes into conforming to their eligibility requirements by denying entry into the league until those requirements are met. Until eligible, those athletes are barred from competing with athletes in the league for jobs.

146. L. SULLIVAN, *supra* note 34, § 83, at 229. *See* Arzee Supply Corp. v. Rubberoid Co., 222 F. Supp. 237, 242 (D. Conn. 1963).

147. All group boycotts are not concerted refusals to deal; all concerted refusals to deal are not in the illegal per se category of group boycotts. *See* L. SULLIVAN, *supra* note 34, § 83, at 231-32. *See also* notes 151-55 and accompanying text *infra*.

148. *See* cases cited note 141 *supra*.

149. L. SULLIVAN, *supra* note 34, § 83, at 229-30. *See* notes 156-85 and accompanying text *infra*.

150. *See generally* L. SULLIVAN, *supra* note 34, § 83, at 229-30.

aimed at competitors or noncompetitors and may be initiated for the purpose of affecting competition or for a valid purpose unrelated to competition.[151]

In a classic group boycott, the boycotting group seeks to cripple a competitor.[152] When a group of manufacturers agree not to buy from any supplier who sells to certain other manufacturers, they are engaging in a group boycott of the other manufacturers.[153] Included in this kind of group boycott is a concerted refusal to deal: members of the boycotting group refuse to deal with any supplier who deals with the target manufacturer. A group boycott can occur without a refusal to deal, however. Manufacturers can induce the suppliers not to sell to another manufacturer by convincing them that the other manufacturer is a poor credit risk.[154] While the conspiring manufacturers do not refuse to deal with the target, they cause a boycott of the isolated manufacturer.

In addition, refusals to deal and group boycotts can also be distinguished by their purpose and effect. In both of the previous examples involving group boycotts, the target of the conspiracy was a direct competitor. Such tactics aimed at a direct competitor will always have some anticompetitive effect. In contrast are situations when the target of the conduct is not a direct competitor. For example, a group of manufacturers may be concerned about the unsavory tactics used by some retailers of their produce. Fearing that this conduct will reflect badly on their industry, they agree not to deal with any retailers who employ such tactics.[155] Their purpose clearly is not anticompetitive and their refusal to deal is not an illegal group boycott. The manufacturers merely are using their power to clean up the industry. These distinctions are important when conduct is characterized to determine the test that should be applied to the conduct under section 1 analysis.

2. Per Se Rule versus Rule of Reason

Beginning with the 1941 decision in *Fashion Originators' Guild of America, Inc. v. FTC*,[156] the United States Supreme Court continually has

151. *See* notes 152-55 and accompanying text *infra*.

152. *See generally* L. SULLIVAN, *supra* note 34, § 83. *Compare* Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941) (classic group boycott against direct competitor); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914) (same); McCann v. New York Stock Exch., 107 F.2d 908 (2d Cir. 1939) (same); AMA v. United States, 130 F.2d 233 (D.C. Cir. 1942) (same), *aff'd*, 317 U.S. 519 (1943) *with* United States v. First Nat'l Pictures, 282 U.S. 44 (1930) (concerted refusal to deal with other levels); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930) (same); Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925) (same).

153. L. SULLIVAN, *supra* note 34, § 83, at 230.

154. *Id.* at 230-31.

155. *See generally id.* at 231-32.

156. 312 U.S. 457 (1941).

held, both implicitly and explicitly, that group boycotts are illegal per se.[157] In each case, the group boycott was directed at a direct competitor of the defendants. Thus, when the target competes on the same level as the boycotting group, the courts will find that the conduct constitutes a group boycott and is illegal per se.

It is not clear, however, what test the Supreme Court will apply to conduct where the target is not a direct competitor. In two cases decided in 1930, the Supreme Court examined boycott arrangements aimed at noncompetitors. In *United States v. First National Pictures Inc.*,[158] film distributors agreed to use a standard form contract that required exhibitors to provide security against default. They further agreed that they would not deal with exhibitors who refused to do so.[159] *Paramount Famous Lasky Corp. v. United States*[160] involved a similar agreement between film distributors which required that exhibitors agree to arbitrate disputes with the distributors.[161] In neither case did the Court label the arrangements as group boycotts or find that the conduct was illegal per se. The Court applied the rule of reason and found that the arrangements were anticompetitive and that they violated the Sherman Act.[162] These cases, however, were decided before the Court fully articulated the per se doctrine and applied it to group boycotts.[163] Thus, it is not certain that the cases would still be analyzed under the rule of reason today.

Arguably, the per se approach applied to group boycotts should not apply in these situations. Professor Lawrence Sullivan, author of the leading treatise on antitrust law,[164] argues that arrangements which set nonprice terms of trade with entities on another level of competition should not be illegal per se because they are not as consistently adverse to competition as group boycotts, which are aimed at direct competitors. Under the rule of reason, he argues, arrangements against competitors on other levels that obviously are anticompetitive, such as the ones found in *Lasky* and *First National Pictures*, automatically will be found to violate the Act, while arrangements that have some merit and may not be anticompetitive can be scrutinized more closely.[165]

Professor Sullivan's approach was adopted by the United States Court of Appeals for the Ninth Circuit in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*,[166] where the court analyzed under the rule

157. *Id.* at 466-68 (implied application of per se rule).
158. 282 U.S. 44 (1930).
159. *Id.* at 49-51.
160. 282 U.S. 30 (1930).
161. *Id.* at 37-38.
162. 282 U.S. at 54-55; 282 U.S. at 43-44.
163. *See* cases cited note 141 *supra*.
164. L. SULLIVAN, *supra* note 34.
165. *Id.* § 90, at 256-57.
166. 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

of reason an agreement between two distillers to break away from the present distributor and together offer their merchandise to a new distributor. The court held that this was not a group boycott subject to the per se rule because it was not designed to eliminate a competitor from the market by cutting off its suppliers or customers.[167] In a case more similar to the league rules situation, *Molinas v. National Basketball Association*,[168] the United States District Court for the Southern District of New York held that the NBA had not violated the Sherman Act by banning from league play a player who admitted to gambling on league games. The conduct, which was not aimed at a competitor of the league, was found to be reasonable under the rule of reason.[169]

The argument advanced by Professor Sullivan and supported by the *Seagram* and *Molinas* decisions bolsters the argument that the eligibility rules of the professional sports leagues are not aimed at direct competitors of the leagues but at the ineligible athletes who do not compete with the league. Thus, the eligibility rules arguably should be analyzed under the rule of reason because they do not constitute a classic group boycott, which is illegal per se.

The argument for rule of reason analysis under section 1 of the Sherman Antitrust Act did not succeed, however, in the one direct attack on the eligibility rules of the professional sports leagues. Spencer Haywood had been an All-American at the University of Detroit before joining the Denver Rockets of the American Basketball Association, the rival league of the NBA.[170] In 1971, he attacked the NBA rule which required that a player be out of high school for at least four years before he could enter the league, contending that those rules constituted a group boycott that violated section 1 of the Sherman Antitrust Act.[171] In *Denver Rockets v. All-Pro Management, Inc.*,[172] the United States District Court for the Central District of California allowed an injunction against enforcement of the league's rule, which allowed Haywood to play for the Rockets, to stand.[173] The court found that the rule constituted a classic group boycott[174] and, thus, was illegal per se.[175]

In *Denver Rockets*, the NBA argued that a narrow exception to application of the per se rule to group boycotts should apply.[176] The exception

167. 416 F.2d at 78-79.
168. 190 F. Supp. 241 (S.D.N.Y. 1961).
169. *Id.* at 244-45.
170. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1052, 1060 (C.D. Cal. 1971).
171. *Id.* at 1060-61.
172. 325 F. Supp. 1049 (C.D. Cal. 1971).
173. *Id.* at 1067.
174. *Id.* at 1061.
175. *Id.* at 1063-64.
176. *Id.* at 1064-66.

the NBA claimed was articulated by the United States Supreme Court in *Silver v. New York Stock Exchange.*[177] The defendant-brokers in *Silver* claimed it would be inappropriate to find that they violated the Sherman Act because the boycott of Silver, another broker, was a self-enforcement mechanism required by the Securities Exchange Act of 1934.[178] The Supreme Court stated, "The fundamental issue confronting us is whether the Securities Exchange Act has created a duty of Exchange self-regulation so pervasive as to constitute an implied repealer of our antitrust laws, thereby exempting the exchange from liability in this and similar cases."[179] The Court examined the history and role of exchange self-regulation and found that, in certain situations, the self-regulation requirement would justify what otherwise might be a violation of the antitrust laws.[180]

To qualify for this exception to per se treatment, a defendant must establish the following elements: a legislative mandate for self-regulation "or otherwise," that the collective action is intended to accomplish an end that is within the policy of self-regulation, and that the means used to accomplish the self-regulation were not overbroad.[181] If these requirements are met, the conduct is analyzed under the rule of reason instead of being illegal per se.[182]

In *Denver Rockets*, the court found that the NBA failed to establish the requirements of the *Silver* exception from per se analysis because the NBA eligibility rules were overbroad.[183] It is also improbable that the other leagues could meet even the first requirement of the *Silver* exception. There is no legislative mandate for the eligibility rules. Thus, the leagues would have to show that those rules were "otherwise" mandated. The *Silver* Court extensively discussed the important public policies supporting self-enforcement under the Securities Exchange Act.[184] Therefore, courts are likely to require a strong public policy mandate to satisfy the *Silver* Court's "or otherwise" language; it is unlikely that the leagues can show such a mandate for their eligibility rules.

In summary, the eligibility rules would be illegal per se if those rules constitute group boycotts, if courts follow *Denver Rockets* in applying the per se rule to that conduct, and the leagues fail to meet the *Silver* exception requirements. The rules may be analyzed under the rule of reason if the conduct does not constitute a classic group boycott or other illegal per se activity, if the courts adopt Professor Sullivan's argument, as supported by

177. 373 U.S. 341 (1963). *See generally* L. SULLIVAN, *supra* note 34, § 88.
178. 373 U.S. at 346-47.
179. *Id.* at 347.
180. *Id.* at 361.
181. *Id.* at 361-67. *See* 325 F. Supp. at 1064-65.
182. *See* L. SULLIVAN, *supra* note 34, § 88, 247-48.
183. 325 F. Supp. at 1066.
184. 373 U.S. at 349-57.

Seagram and *Molinas*,[185] for analyzing the group boycott of noncompetitors under the rule of reason, or if the *Silver* exception is established. The following section will analyze the league eligibility rules under these alternative rules.

3. Application of Rules

Application of the per se test results in automatic violation of section 1 of the Sherman Antitrust Act.[186] If the eligibility rules are group boycotts, they are illegal per se; the leagues can present no justifications in defense of those rules. If the rule of reason is applied, however, the rules will be found to violate section 1 only if they are undue restraints on competition.[187] Thus, the leagues would have an opportunity to justify the eligibility rules and show that the rules were reasonable.

First, the leagues could argue that the eligibility rules are justified because they keep professional sports from interfering with the players' education.[188] This argument has merit with respect to the professional baseball rule and the NBA rule because they are based primarily on the player's departure from high school. Compulsory attendance requirements evidence the strong state policy favoring high school education. For example, Missouri generally requires that people attend school until age sixteen.[189] The NBA rules, however, require that the person finish high school, at which time the student is usually eighteen years of age. Thus, it could even be argued that the rule, as supported by this justification, is overbroad. The same justification does not exist for the NFL rules because the public policy in favor of attending college is not as compelling. In fact, many people lack the intellectual or financial ability to attend college. The NFL rule offers no exception for these people and likely is overbroad for that reason, even if the justification were accepted. In addition, the NFL does not require that a player actually graduate, just that he wait for a certain period of time before becoming eligible. In *Denver Rockets*,[190] the court found that the education justification was commendable but outweighed by the public policy supporting economic competition. The court also said that if the balance should be shifted, Congress should do so.[191]

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185. *See* notes 164-69 and accompanying text *supra*.

186. *See* note 137 *supra*.

187. Standard Oil Co. v. United States, 221 U.S. 1, 59-60 (1911) (§ 1 outlaws any "contract or combination by which an undue restraint of interstate or foreign commerce was brought about"). *See* note 143 *supra*. *See generally* L. SULLIVAN, *supra* note 34, § 65, at 173.

188. 325 F. Supp. at 1066.

189. RSMo § 167.031 (1978). Exceptions are granted for mental or physical incapacitation and legal employment between the ages of 14 and 16, if the employment is found to be desirable. *Id.*

190. 325 F. Supp. at 1049.

191. *Id.* at 1066.

A second possible justification, also raised in *Denver Rockets*,[192] is that the eligibility rules were financially necessary to the league. The merits of that claim can be examined by example. Shortly after the *Denver Rockets* decision, the NBA adopted the "hardship rule," which allowed early entry into the draft if special financial needs were shown. This later was amended so that any player who was out of high school could choose to become eligible for the draft.[193] Essentially, the new rule permits anyone who so wishes to be treated as college graduates were under the old rule. The teams are not required to draft such a player or sign him if they do not wish. In *Denver Rockets*, the court countered this argument by observing that the Supreme Court had disavowed it with respect to group boycott cases in *Klor's v. Broadway-Hale Stores*.[194]

A more persuasive justification for the rules was suggested by counsel for Haywood in the *Denver Rockets* case. As the NBA rule existed then and the NFL rule exists today, colleges serve as farm systems for the professional franchises. Professional baseball incurs the expense of developing their players prior to competition on the major league level;[195] the NFL and the NBA do not. Haywood suggested that by prohibiting teams from raiding the college teams for their top talent, the rules keep college athletic programs healthy so they will continue to serve as an ideal training ground for future professional athletes.[196] As seen from the NBA rule change, however, players out of high school may be given the freedom to choose to become eligible for the draft instead of playing college basketball without causing college athletic programs to disintegrate.

For these reasons, it appears that the NFL eligibility rules, which generally require an athlete to have attended college for four years, cannot be justified as being reasonable. Their unreasonableness becomes apparent when their effect is compared with the effect of the professional baseball and NBA eligibility rules, which generally allow athletes to play in the league after high school. Practically, the baseball and NBA eligibility rules have little effect on athletes because it is rare that a high school athlete has the ability and maturity to compete professionally in those sports. On the other hand, the NFL rules stand as a roadblock between outstanding college athletes[197] and the money they could make in profes-

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192. *Id.*

193. *See* note 12 and accompanying text *supra*.

194. 359 U.S. 207 (1959).

195. In professional baseball, each major league team sponsors a series of minor league teams that develop and train athletes for major league play. Unlike football and basketball, in which signed athletes play for the major league team from the beginning, most professional baseball players start their careers playing for a minor league team sponsored by the major league team with which they signed. *See generally* Shapiro, *Monopsony Means Never Having to Say You're Sorry—A Look at Baseball's Minor Leagues*, 4 J. CONTEMP. L. 191 (1978).

196. 325 F. Supp. at 1066.

197. *See* note 16 *supra*.

sional football. The professional baseball and NBA rules illustrate that, at a minimum, the NFL eligibility rules are overbroad because they provide no exception for the talented college players who might prefer professional football to a college education. For these reasons, the NFL eligibility rules probably would be held to violate the antitrust laws, even under the rule of reason. The professional baseball and NBA eligibility rules are legally suspect, but in fact only minimally restrain entry. The NFL eligibility rules, however, work a significant hardship on many players. The NFL rules cannot be justified as being reasonable and probably would be found to violate section 1 of the Sherman Antitrust Act under either per se or rule of reason analysis.

C. *The Draft Procedures*

The framework used to analyze the eligibility rules must also be used to analyze the league rules on draft procedures: does the conduct restrain trade, and if so, does the per se rule or rule of reason apply?[198] As discussed in Part II of this Comment,[199] the procedures for conducting the league drafts restrain prospective players in two ways. They limit the player's ability to select the team for which he will play, and they reduce his bargaining power by allowing him to negotiate with only one team.[200] Arguably, therefore, the conduct restrains trade. The character of the conduct determines which rule will be used to analyze the conduct under section 1.

Application of the per se rule to the draft rules can be argued on three grounds. First, the draft rules arguably constitute group boycotts because the nondrafting teams refuse to bargain with the player, and the drafting team will deal with the player only in accordance with the league rules. This argument was adopted in *Smith v. Pro-Football*[201] and *Robertson v. National Basketball Association*,[202] where United States district courts held that the NFL and the NBA draft procedures, respectively, constituted group boycotts[203] and were illegal per se under section 1 of the Sherman Antitrust Act.[204] This analysis is questionable for the same

198. *See* notes 135-43 and accompanying text *supra*.
199. *See* pp. 798-802 *supra*.
200. *See* notes 18-32 and accompanying text *supra*.
201. 420 F. Supp. 738 (D.D.C. 1976).
202. 389 F. Supp. 867 (S.D.N.Y. 1975).
203. 420 F. Supp. at 744-45; 389 F. Supp. at 893. The *Smith* court based its finding that the NFL draft constituted a group boycott on the following analysis:

> The essence of the draft is straightforward: the owners of the teams have agreed among themselves that the right to negotiate with top quality graduating college athletes will be allocated to one team, and that no other team will deal with that person. This outright, undisguised refusal to deal constitutes a group boycott in its classic and most pernicious form.

420 F. Supp. at 744-45.
204. 420 F. Supp. at 744; 389 F. Supp. at 891-93.

reasons that make analysis of the eligibility rules under the per se rule questionable: the target of the boycott is on a different level of competition than the league teams.[205] Nevertheless, the professional sports cases indicate that if the per se rule is to be applied at all, it will be because the draft procedure rules constitute a group boycott under this argument.[206] Second, the court in *Robertson* also noted that the draft procedure rules could be considered to be price fixing[207] because the price of a player's services is driven down when the number of teams bidding for those services is limited. Such tampering with the price mechanism of a product places the conduct in a category that is illegal per se.[208]

The third argument for analyzing the draft procedures under the per se rule is that the procedures are horizontal market divisions[209] because they divide the player market and eliminate competition between the teams for the players who are allocated by the draft.[210] This argument for per se analysis is the most compelling. The draft procedures are analogous to customer, product, and territorial allocations, which have been condemned under the per se rule.[211] The restraints on competition for players' services are pernicious in the same way and for the same reasons that caused horizontal market divisions to be classified as illegal per se. That is, they eliminate competition for the players between entities that would otherwise compete for the individual players. Although this was mentioned as a basis for per se treatment in *Robertson*,[212] it was not relied on by the court.

Notwithstanding the arguments in favor of per se analysis, there is authority and justification for using the rule of reason. When confronted with a unique or novel business arrangement, the Supreme Court has warned against hasty application of the per se rule. In *White Motor Co. v. United States*,[213] the Court analyzed customer and territorial restrictions between a manufacturer and its distributors. In rejecting the per se approach, the Court distinguished the arrangement from the market divisions the courts usually encounter.[214] Therefore, the per se approach

205. *See* notes 156-70 and accompanying text *supra*.

206. *See, e.g.*, 420 F. Supp. at 744; 389 F. Supp. at 891-93; 325 F. Supp. at 1056.

207. 389 F. Supp. at 893. Price fixing is defined as any arrangement, the purpose or effect of which is to raise, depress, fix, peg, or stabilize prices and is illegal per se. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

208. *See* notes 135-42 and accompanying text *supra*.

209. *See* note 139 and accompanying text *supra*.

210. *See* 389 F. Supp. at 893.

211. *See* Burke v. Ford, 389 U.S. 320, 321-22 (1967); United States v. Sealy, Inc., 388 U.S. 350, 352-55 (1967).

212. 389 F. Supp. at 893.

213. 372 U.S. 253 (1963). *See* Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 8-10 (1979); United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08 (1972).

214. 372 U.S. at 263.

should not be applied mechanically when the courts consider arrangements with which they are not familiar.

The leagues can argue that the courts are not familiar with the unique structure of the draft procedures and the relationship between league teams, so that per se analysis of the draft procedure rules is precluded by *White Motor*. First, the teams in the leagues are not competitors in the traditional business sense of the word. They share their television revenue and jointly conduct the business of offering sports entertainment.[215] Additionally, the strength of any one team depends on the strength of the league itself. No team will benefit from the demise of a competing team because the product offered to the public is the competition of the teams with each other.[216] If courts apply *White* and analyze the draft procedure rules under the rule of reason, the leagues must justify those rules as being reasonable.[217]

In *Kapp v. National Football League*,[218] the entire reserve system of the NFL was challenged. The United States District Court for the Northern District of California acknowledged the unique nature of professional sports and, thus, applied the rule of reason.[219] The same approach was taken by the United States Court of Appeals for the Eighth Circuit in *Mackey v. National Football League*.[220] It faced a similar question involving the NFL reserve system.

In the rule of reason analysis, only one major justification is presented to show that the draft procedure rules are reasonable. The leagues argue that the viability of professional sports depends on offering the public competition between evenly matched teams. Without the draft, they argue, quality players would flock to the teams in the glamour cities of New York, Los Angeles, and Chicago, and to the teams with wealthy owners. Thus, a few very powerful teams would dominate league play, undermining competition and spectator interest, and the business of professional sports would be destroyed.[221]

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215. *See* Mackey v. National Football League, 543 F.2d 606, 620-21 (8th Cir. 1976); Kapp v. National Football League, 390 F. Supp. 73, 79-80 (N.D. Cal. 1974); United States v. National Football League, 116 F. Supp. 319, 323-25 (E.D. Pa. 1953).

216. *See* cases cited note 215 *supra*.

217. *See* note 143 *supra*.

218. 390 F. Supp. 73 (N.D. Cal. 1974).

219. *Id.* at 81-82.

220. 543 F.2d 606, 619 (8th Cir. 1976).

221. *Id.* at 621; 390 F. Supp. at 81. The leagues could argue, therefore, that the net competitive effect of the draft procedure rules is procompetitive. Thus, the restraints imposed by those rules would be reasonable under the rule of reason analysis of National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978). *See* note 143 *supra*. It is doubtful, however, that the leagues could successfully argue that the net competitive effect of the draft procedure rules is procompetitive. *See* notes 222-34 and accompanying text *infra*.

Even if the maintenance of spectator interest through competitive balance is a legitimate justification for the draft procedure rules,[222] the leagues must show that the draft procedure actually promotes competitive balance and that less restrictive means are not available. In *Smith v. Pro-Football*,[223] the court found a very low correlation between the player draft and the level of competition in the NFL.[224] Noting that nine of the NFL's 26 teams had dominated the league standings over the last three years, the court concluded that the draft did not effectively promote competitive balance.[225] Since the draft provides the less competitive teams with the earlier selections in the draft, however, it is logical that it would benefit competitive balance more than a perfectly equal distribution of incoming talent.[226] Conversely, a system that allows the players total freedom to select for whom they play arguably would provide better competitive balance because players would be attracted to the less competitive teams where their chances of making the team and playing earlier in their careers were greater. Because the abilities of the teams in recognizing talent are uncertain, this argument should be considered.

If the league's justification for the draft procedures is accepted, however, it must be determined if a less restrictive means of achieving the same goal exists. If the procedures are more restrictive than necessary to achieve competitive balance, they are unreasonable and thus violate section 1 of the Sherman Antitrust Act.[227] This is where the draft procedure face their most formidable challenge. In *Smith*, the evidence indicated that the scouts of professional football teams can identify five to ten top-flight prospects per year and thirty to fifty other players certain to make the teams that draft them.[228] Since the ability of the draft to distribute talent is only as good as the ability of the scouting process to identify that talent,[229] the court concluded that a draft that distributes more than the fifty-five to seventy players that the scouts can identify as certain to make the team drafting them is not justified.[230] Under this logic, according to the court, an NFL draft of more than two rounds, with each team receiving one selection per round, is not justified. The NFL draft then consisted of seventeen rounds, and for that reason, the *Smith* court found it unduly

222. This justification was accepted in theory in both *Mackey* and *Kapp*. The court in Smith v. Pro-Football, 420 F. Supp. 738, 745-46 (D.D.C. 1976), *modified*, 593 F.2d 1173 (D.C. Cir. 1978), while applying the per se rule, discussed the justification in dictum.

223. 420 F. Supp. 738 (D.D.C. 1976).

224. *Id.* at 746.

225. *Id.*

226. *Id.* at 746-47.

227. *See* note 143 *supra*.

228. 420 F. Supp. at 746.

229. *Id.* at 747.

230. *Id.*

restrictive.[231] The *Smith* court suggested two revisions besides shortening the draft that would help ease the restrictions. The court suggested that a player could be drafted by more than one team and then the number of players one team could sign could be limited.[232] This would give the player some choice of where to play and increase his bargaining power.

The draft procedures also could be improved if a time period was set after which an unsigned player could negotiate with any team. This was suggested by the court in *Kapp*, which stated, "[T]he draft rule . . . is also patently unreasonable insofar as it permits [a] virtually *perpetual* boycott of a draft prospect even when the drafting club refuses or fails within a reasonable time to reach a contract with the player."[233] The court in *Mackey* also found that the NFL draft procedure was more restrictive than needed to achieve competitive balance.[234] This was because the draft involved more players than possibly could affect competitive balance.

The draft procedure used by the NBA is less restrictive than the one used by the NFL because it permits an unsigned player to be drafted by another team in a later draft. It too, however, could be characterized as overbroad because more players are drafted than the scouting systems can evaluate. To the extent that players of uncertain talent and talent that only marginally would affect competitive balance are drafted, the NBA rules exceed the justification offered by the league.

In conclusion, even if maintenance of competitive balance is a reasonable justification for the draft procedures, the procedures professional sports leagues employ are more restrictive than necessary. If challenged, they could not be justified under the rule of reason because they are overbroad, and therefore would be found to violate section 1 of the Sherman Antitrust Act. For this reason, they should be modified greatly, if not abolished altogether. Prospective players should have the same leeway to determine who to work for that most workers enjoy. Not only would this more closely conform to the usual expectations in the economic system, it is mandated by the Sherman Act.

V. CONCLUSION

Those who control professional sports have always conducted their player personnel policies with an air of impunity, treating players as chattels to be drafted, traded, and sold at will. Admittedly, some players now can gain their freedom through free agent procedures in all three sports, which allow teams to bid competitively for the services of veteran players and allow the players to choose for which team they will play. This has

231. *Id.*
232. *Id.*
233. 390 F. Supp. at 82.
234. 543 F.2d at 622.

altered the salary structure of the sports completely, yet competitive balance and spectator interest have not been damaged. It is time that the free market concepts, evidenced by these free agent procedures, be extended to the incoming players. It is apparent now that the catastrophe that owners in all three sports predicted would result from competitive bargaining in the free agent process will not occur, and that these fears should no longer preclude all players from benefitting from the open competition mandated by the policies underlying the Sherman Antitrust Act.

It may be easier to appreciate the nature of these restraints by considering the reaction if the largest corporations in the country conducted a draft of the top Master in Business Administration graduates. If such a graduate had but one employer to negotiate with and no choice of where he would live and work, the sense of outrage would be clear. Why should one react differently to the plight of professional athletes? The league restrictions were characterized vividly by Judge Frank of the United States Court of Appeals for the Second Circuit who, in discussing the professional baseball rules in 1949, said:

> As one court, perhaps a bit exaggeratedly, has put it, "While the services of these baseball players are ostensibly secured by voluntary contracts a study of the system as . . . practiced under the plan of the National Agreement, reveals the involuntary character of the servitude which is imposed upon players by the strength of the combination controlling the labor of practically all of the players in the country. . . ." [I]f the players be regarded as quasi-peons, it is of no moment that they are well paid; only the totalitarian-minded will believe that high pay excuses virtual slavery.[235]

ROBERT B. TERRY

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235. Gardella v. Chandler, 172 F.2d 402, 410 (2d Cir. 1949) (footnote omitted).