

COMMENTS

RUNNING OUT OF BOUNDS: OVER- EXTENDING THE LABOR ANTITRUST EXEMPTION IN *CLARETT V. NATIONAL FOOTBALL LEAGUE*

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INTRODUCTION

The application of federal antitrust laws to agreements between employers and unions has been an area of seemingly endless tension, since the product of collective bargaining will invariably minimize competition.¹ With the development and rapid growth of labor unions in the early twentieth century, Congress and the courts soon noticed the inherent contradiction between the goals of labor law, which sought to encourage collective bargaining and employer-union negotiations, and those of antitrust law, which attempted to foster free competition.² The

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¹ See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996) ("As a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves . . . *any* . . . competition-restricting agreements . . ."); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975) (observing that application of antitrust laws would thwart the goals of federal labor laws); *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 959 (2d Cir. 1987) (noting that the interaction of antitrust laws and labor laws has long been controversial).

² See *Connell*, 421 U.S. at 622; *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 700–03 (1965) (Goldberg, J., concurring) (mentioning the Sherman Act's ambiguous effect on labor unions); Jonathan S. Shapiro, *Warming the Bench: The Nonstatutory Labor Exemption in the National Football League*, 61 *FORDHAM L. REV.* 1203, 1206 (1993) (noting that antitrust laws "would otherwise restrict, as a restraint of trade, the concerted activities that union members regularly practice during collective bargaining with employers"); Shawn Treadwell, Note, *An Examination of the Nonstatutory Labor Exemption from the*

plain language of the Sherman Act³ was so broad that remedial action was necessary to shield labor activities from antitrust scrutiny.⁴ Through several pieces of legislation, Congress formed the statutory antitrust exemption, ensuring that labor unions would not be considered conspiracies in restraint of trade, and further exempting activities such as boycotts and secondary picketing from antitrust laws.⁵ However, because these laws did not protect employer-union agreements from antitrust scrutiny, the Supreme Court chiseled a distinct and limited nonstatutory exemption, noting that “labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions.”⁶ Yet, some federal courts have been more tolerant than others, leaving the reach of the exemption unclear.⁷ Recently, in *Clarett v. National Football League*,⁸ the Second Circuit greatly expanded the nonstatutory exemption, protecting a National Football League (“NFL”) eligibility rule requiring that rookies be three seasons removed from their high

Antitrust Laws, in the Context of Professional Sports, 23 FORDHAM URB. L.J. 955, 957–58 (1996) (discussing “union concerns” that Sherman Act would subject labor to antitrust scrutiny).

³ 15 U.S.C. § 1 (2000) (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).

⁴ See *Allen Bradley Co. v. Local Union No. 3, Int’l Bhd. of Elec. Workers*, 325 U.S. 797, 801 (1945) (“Sharp controversy soon arose as to whether the [Sherman] Act applied to unions.”); Treadwell, *supra* note 2, at 957 (observing that “the vague command of the Sherman Act . . . left courts with great latitude in interpreting” the law).

⁵ See Clayton Act, 15 U.S.C. § 17 (2000) (declaring that “[t]he labor of a human being is not a commodity or article of commerce” and that labor organizations are not to be “construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws”); Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, 113 (2000) (shielding specified activities from antitrust laws); see also *Connell*, 421 U.S. at 621–22; Shapiro, *supra* note 2, at 1205–06 (observing that the Clayton Act and Norris-LaGuardia Act “statutorily exempt” labor activity from antitrust laws).

⁶ *Connell*, 421 U.S. at 622; see also *Brown*, 518 U.S. at 235–37 (holding that the nonstatutory exemption “recognizes that, to give effect to federal labor laws . . . some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions”); Robert A. McCormick & Matthew C. McKinnon, *Professional Football’s Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws*, 33 EMORY L.J. 375, 383–87 (1984) (referring to the nonstatutory exemption as an accommodation between labor law and antitrust law); Shapiro, *supra* note 2, at 1208 (describing how “[t]he exemption grants preeminence to labor laws, and . . . collective bargaining, over antitrust laws” under certain circumstances).

⁷ See *Clarett v. Nat’l Football League*, 369 F.3d 124, 131 (2d Cir. 2004) (“The Supreme Court has never delineated the precise boundaries of the exemption . . .”), *cert. denied*, 125 S. Ct. 1728 (2005).

⁸ *Id.*

school graduation, even though this provision was only incorporated by reference in the collective bargaining agreement between the NFL and the NFL Players' Association ("NFLPA").⁹

Maurice Clarett, the plaintiff challenging the NFL's eligibility rule, was a star running back for Ohio State University and former Big Ten Freshman of the Year.¹⁰ As the first Ohio State freshman in sixty years to open a season starting at running back, Clarett led the Buckeyes to an undefeated national championship season, scoring the winning touchdown in the 2003 Fiesta Bowl.¹¹ After being suspended from college football at the start of his sophomore year, Clarett sought entry into the 2004 NFL Draft but was denied because he graduated high school in December 2001, too late to satisfy the three-year eligibility rule.¹² While football pundits disagreed over Clarett's potential as a professional running back and his likely draft position, there was little doubt that he would be drafted at some point during the 2004 NFL Draft.¹³

The NFL, an unincorporated association of thirty-two member teams, began operations as the American Professional Football Association in 1920.¹⁴ Currently, it is not only North America's most financially successful professional football league,

⁹ See *id.* at 126–27, 142–43. It should also be noted that, unlike professional baseball, professional football enjoys no league-specific antitrust exemption. See *Radovich v. Nat'l Football League*, 352 U.S. 445, 447–48 (1957). Despite the subsequent creation of both the statutory and nonstatutory exemptions, Major League Baseball continues to enjoy its unique antitrust exemption granted in *Federal Baseball Club v. National League*, 259 U.S. 200, 208–09 (1922). Although called “more a panegyric to the virtues of baseball and its important role in American culture than an informed commentary on antitrust law,” the *Federal Baseball* antitrust exemption has continued to persist despite Major League Baseball's growth and labor strife. See CHARLES P. KORR, *THE END OF BASEBALL AS WE KNEW IT* 4 (2002); see also *Flood v. Kuhn*, 407 U.S. 258, 282–85 (1972) (expressing reluctance to overturn the policy after fifty years); *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953) (deferring to Congress as the proper source for any change in Baseball's antitrust status).

¹⁰ *Clarett*, 369 F.3d at 125–26.

¹¹ See *id.* at 126; see also Josh Dubow, *Clarett Steps Up When Buckeyes Need Him Most*, Jan. 3, 2003, available at <http://ohiostatebuckeyes.collegesports.com/sports/m-footbl/spec-rel/010303aad.html>.

¹² *Clarett*, 369 F.3d at 126.

¹³ See Bob Glauber, *Clarett Sues NFL for Right to Enter Draft*, *NEWSDAY*, Sept. 24, 2003, at A60 (describing several NFL executives as saying that Clarett would “likely . . . be a first-round choice”).

¹⁴ *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 382–83 (S.D.N.Y. 2004), *rev'd*, 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005).

but also its most successful professional league in any sport.¹⁵ Accordingly, NFL players are extraordinarily well-compensated. In 2003, the average player earned \$1,258,800, and the average first round draft pick earned \$1,367,120.¹⁶ The NFL, through its representative, the NFL Management Council (“NFLMC”), and the NFLPA entered into their first collective bargaining agreement (“CBA”) in 1968 and executed the CBA in effect during the Clarett litigation in 1993.¹⁷ The CBA, together with the NFL Constitution and Bylaws, outline the relationship between the league and its players.¹⁸ Among the key provisions of the CBA is a salary cap used by the league to assign a fixed limit on the amount of money each team can pay to its players.¹⁹ Also “capped” is the amount each team can pay its rookies and incoming players, one of which Clarett sought to be.²⁰

The eligibility rule challenged by Clarett had been in existence in some form since 1925, when the NFL required all players to be at least four years removed from their high school graduations.²¹ The eligibility rule in effect at the time of the 1993 CBA appeared in the NFL Constitution and Bylaws and required that players seeking to be drafted complete all four years of their college eligibility.²² However, a “Special Eligibility” provision was available to players seeking entry into the draft who were only three NFL seasons removed from their high school

¹⁵ *Id.* at 383. The NFL has been estimated to have a league-wide value of nearly \$18 billion, while the next most valuable league, the National Basketball Association, is valued at less than \$9 billion. *Id.* at 383 n.6.

¹⁶ *Id.* at 383. At the start of the 2004 season, the average salary of a 2004 first round draft pick, which Clarett aspired to be, had increased to \$1,396,200. M.J. DUBERSTEIN, OMNIBUS: FINAL 2004 OFF-SEASON SALARY AVERAGES & SIGNING TRENDS 282 (2004), available at http://www.nflpa.org/pdfs/shared/2004_season_final_pre-season_salary_&_salary_trends_omnibus_september_2004.pdf

¹⁷ *Clarett*, 306 F. Supp. 2d at 384.

¹⁸ *Id.* See generally COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS ASSOCIATION 2002-2008 (2002) [hereinafter CBA], available at <http://www.nflpa.org/Media/main.asp?subPage=CBA+Complete> (containing the complete CBA) (last visited Sept. 25, 2005).

¹⁹ See generally CBA, *supra* note 18, art. XXIV (laying out detailed criteria for determining the league-wide salary, salary cap, and minimum team salary).

²⁰ See generally *id.* art. XVII (providing salary limits for the NFL’s “Entering Player Pool”).

²¹ *Clarett*, 306 F. Supp. 2d at 385. The rule originated in the aftermath of University of Illinois superstar Red Grange’s controversial decision to leave college to pursue a professional career in 1925. *Id.*

²² *Clarett v. Nat’l Football League*, 369 F.3d 124, 127 (2d Cir. 2004) (referencing NFL Constitution and Bylaws, art. XII), *cert. denied*, 125 S. Ct. 1728 (2005).

graduations.²³ These players were required to submit applications to the Commissioner of the NFL, who routinely granted them.²⁴ These eligibility rules were not specifically included in the 1993 Collective Bargaining Agreement, only finding their way into the CBA through a merger clause:

This Agreement represents the complete understanding of the parties on all subjects covered herein, and there will be no change in the terms and conditions of this Agreement without mutual consent [T]he NFLPA and the Management Council waive all rights to bargain with one another concerning any subject covered or not covered in this Agreement for the duration of this Agreement, including the provisions of the NFL Constitution and Bylaws; provided, however, that if any proposed change in the NFL Constitution and Bylaws during the term of this Agreement could significantly affect the terms and conditions of employment of NFL players, then the Management Council will give the NFLPA notice of and negotiate the proposed change in good faith.²⁵

In addition to this reference within the Agreement, the NFLMC and NFLPA executed a side letter acknowledging that the NFL Constitution and Bylaws were so referenced.²⁶ However, the only evidence presented that the eligibility rule in particular was ever the subject of collective bargaining during the 1993 negotiations was the testimony of NFL negotiator Peter Ruocco, who could not say how much time was spent on the provision or whether the NFLPA received anything in return.²⁷

Since the eligibility rule clearly precluded him from entering the draft, Clarett sued the NFL,²⁸ arguing that the rule was an unreasonable restraint of trade in violation of the antitrust laws.²⁹ The United States District Court for the Southern

²³ *Id.*

²⁴ *See id.* In fact, the NFL granted “Special Eligibility” in the 2004 NFL Draft to forty-one underclassmen who applied and met the league’s “three-year eligibility rule.” Press Release, Nat’l Football League, NFL Declares Special Draft Eligibility for 41 Players (Jan. 19, 2004), *available at* http://www.detroitlions.com/document_display.cfm?document_id=313922.

²⁵ CBA, *supra* note 18, art. III, § 1.

²⁶ *See Clarett*, 369 F.3d at 128.

²⁷ *Id.* Ruocco attested merely that the “eligibility rule itself was the subject of collective bargaining.” *Id.*

²⁸ *See* 15 U.S.C. § 15(a) (2000) (granting a cause of action to “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws”).

²⁹ *See supra* note 3.

District of New York ruled for Clarett, finding that the nonstatutory exemption did not extend so far as to protect a provision that did not cover a mandatory subject of collective bargaining, that applied to parties outside of the bargaining unit, and that did not arise from bona fide arm's-length negotiations.³⁰

On appeal, the United States Court of Appeals for the Second Circuit reversed, holding only that the eligibility rule was shielded from antitrust scrutiny by the nonstatutory exemption.³¹ In reaching this conclusion, the court disagreed with the rule of law applied by the district court. The court noted that the district court's basis for ruling for Clarett was the application of the three-part test derived from the Eighth Circuit in *Mackey v. National Football League*.³² The Second Circuit had never adopted the test from *Mackey*, and in fact had consistently declined to apply it.³³

³⁰ See *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 392–97 (S.D.N.Y. 2004) (discussing the scope of the nonstatutory exemption and ultimately determining that the eligibility rule is not within the scope of the exemption), *rev'd*, 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005). District Judge Scheindlin adopted these three factors from the Eighth Circuit's decision in *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976). While Judge Scheindlin recognized that the Second Circuit had explicitly rejected the *Mackey* test in favor of a test "that balances the conflicting policies embodied in the labor and antitrust laws, with the policies inherent in labor law serving as the first point of reference," she applied the three *Mackey* factors anyway, citing *Mackey* throughout her discussion. See *Clarett*, 306 F. Supp. 2d at 390–97 ("In a more recent case, the Second Circuit acknowledged the test promulgated by the Eighth Circuit, but preferred to apply the simple formulation enunciated by the Supreme Court."). The district court held that the eligibility rule was not a mandatory subject of collective bargaining because it was related to job eligibility, and not "wages, hours, or conditions." *Id.* at 395. Further, the rule applied to those excluded from the bargaining unit because Clarett was not a traditional newcomer to an industry. Rather, he was "categorically denied eligibility for employment." *Id.* at 395–96. Lastly, the court held that the rule did not arise from bona fide arm's-length bargaining because instead of proving that it did, the NFL relied upon the waiver of the right to bargain over provisions in the NFL Constitution and Bylaws. *Id.* at 396–97. After holding that the eligibility rule was not subject to the nonstatutory exemption, the court held that Clarett had the required antitrust standing, and that the rule was an unreasonable restraint of trade. *Id.* at 382.

³¹ See *Clarett*, 369 F.3d at 125 n.1 ("Because we find that the eligibility rules are immune . . . under the non-statutory labor exemption, we do not express an opinion on . . . Claret[t]'s . . . antitrust injury . . . or that the eligibility rules constitute an unreasonable restraint of trade . . .").

³² 543 F.2d 606 (8th Cir. 1976); see also *supra* note 30 and accompanying text.

³³ See *Clarett*, 369 F.3d at 133 ("We . . . have never regarded the Eighth Circuit's test in *Mackey* as defining the appropriate limits of the non-statutory exemption."); see also *Local 210, Laborers' Int'l Union v. Labor Relations Div. Associated Gen. Contractors*, 844 F.2d 69, 80 n.2 (2d Cir. 1988) ("[W]e need not

Having rejected *Mackey* as not binding, the court relied on several of its prior decisions relating to labor disputes in professional sports as precedent for giving great deference to professional sports leagues. It noted that it “need only retrace the path laid down by these prior cases to reach the conclusion that Clarett’s antitrust claims must fail.”³⁴ After analyzing its holdings in *Caldwell v. American Basketball Ass’n*,³⁵ *National Basketball Ass’n v. Williams*,³⁶ and *Wood v. National Basketball Ass’n*,³⁷ as well the Supreme Court’s decision in *Brown v. Pro Football, Inc.*,³⁸ the court held that controlling case law bound it to rule for the NFL because subjecting any provision of a collective bargaining agreement to antitrust scrutiny would seriously threaten the very foundation supporting the collective bargaining process.³⁹

While applying this rule to the facts presented by Clarett and the NFL, the court focused its analysis on the same three factors of the *Mackey* test that it had earlier rejected. Without mentioning *Mackey* specifically, the court held that “eligibility rules are mandatory bargaining subjects,” because in the NFL’s unique salary system, every player has a significant effect on every other player’s employment status and salary.⁴⁰ Further,

adopt [*Mackey*].”).

³⁴ *Clarett*, 369 F.3d at 135.

³⁵ 66 F.3d 523, 529 (2d Cir. 1995) (holding that “circumstances under which an employer may discharge . . . an employee” are protected under the nonstatutory exemption).

³⁶ 45 F.3d 684, 692–93 (2d Cir. 1995) (applying the nonstatutory exemption to NBA salary cap and draft process although they were agreed to in a collective bargaining agreement that had expired).

³⁷ 809 F.2d 954, 959 (2d Cir. 1987) (holding that the nonstatutory exemption protected the NBA salary cap and draft from the antitrust laws).

³⁸ 518 U.S. 231, 234 (1996) (applying the nonstatutory exemption to an employer’s unilateral imposition of terms after the parties had reached impasse).

³⁹ *See Clarett*, 369 F.3d at 135–38.

Our analysis in each case was rooted in the observation that the relationships among the . . . sports leagues and their players were governed by collective bargaining agreements and thus were subject to the carefully structured regime established by federal labor laws. We reasoned that to permit antitrust suits against sports leagues on the ground that their concerted action imposed a restraint upon the labor market would seriously undermine many of the policies embodied by these labor laws.

Id. at 135.

⁴⁰ *See id.* at 139–40. The court initially analogized the league’s refusal to make players such as Clarett eligible to the NBA’s refusal to hire a discharged player in *Caldwell*, saying that if the latter constituted a mandatory subject of bargaining, the former must as well. *See id.*; *see also Caldwell*, 66 F.3d at 529. The court then turned

the court held that the NFLPA sufficiently represented Clarett's interests as a prospective employee so as to consider him a part of the bargaining unit.⁴¹ Lastly, the court concluded that the waiver in the CBA of the right to bargain over the NFL Constitution and Bylaws was enough to satisfy the requirement of good faith bargaining.⁴² As a result, the court reversed the judgment of the district court and vacated its order designating Clarett eligible to enter the 2004 NFL Draft.⁴³ After Clarett's unsuccessful appeal to the Supreme Court,⁴⁴ the 2004 NFL Draft took place without him on April 24–25.⁴⁵

This Comment disagrees with the *Clarett* court's decision to extend the nonstatutory exemption to the NFL eligibility rule. It argues that the Second Circuit misinterpreted distinguishable precedent as binding. Additionally, the court erred in both steps of its analysis—first by rejecting the test from *Mackey* while nevertheless applying its three factors, and then in misapplying those three factors to the facts presented.

Part I of this Comment outlines the origins of the nonstatutory exemption and the theory underlying it. Part II asserts that the Second Circuit erred in treating its factually distinguishable prior cases as binding on its decision in *Clarett*. Part III maintains that the court's stated rejection of the Eighth Circuit's test from *Mackey* was meaningless, since the test it

to the "unusual economic imperatives of professional sports," highlighting its unique mix of capped salaries, fixed rosters, entry drafts and free agency. *Clarett*, 369 F.3d at 140. As a part of this intricate system, the elimination of the eligibility rules would undermine the basis for the collective bargaining agreement, making the eligibility rule so closely connected to wages and working conditions as to make it a mandatory subject of bargaining. *See id.*

⁴¹ *See Clarett*, 369 F.3d at 140–41 (stating that a union in a collective bargaining relationship is empowered to advantage certain groups of employees over others, which may include setting rules for employee eligibility).

⁴² *See id.* at 142–43 (holding that the waiver of any challenge to the NFL Constitution and Bylaws in the CBA "makes clear that the union and the NFL reached an agreement with respect to how the eligibility rules would be handled").

⁴³ *Id.* at 143.

⁴⁴ *Clarett v. Nat'l Football League*, No. 03A870, 2004 U.S. LEXIS 3231, at *1 (Apr. 22, 2004). Almost one year later, the Supreme Court refused to grant certiorari on the merits. *Clarett v. Nat'l Football League*, 125 S. Ct. 1728 (2005). Also in April 2005, the officially draft-eligible Clarett was selected surprisingly high in the third round of the 2005 NFL draft by the Denver Broncos, who subsequently released him before the 2005 NFL season began. Joe Drape, *Gamble on Clarett Reveals Perils of Potential*, N.Y. TIMES, Aug. 31, 2005, at D8.

⁴⁵ *See NFL.com*, 2004 NFL Draft, <http://www.nfl.com/draft/history/years/2004> (last visited Oct. 2, 2005).

applied in *Clarett* was virtually indistinguishable. Lastly, Part IV asserts that the court erred in its application of the three factors from *Mackey*.

I. ORIGINS OF THE EXEMPTION

Labor exemption from antitrust law stems from both congressional and judicial recognition of the need to ensure that organized labor is able to operate effectively without fear of antitrust liability.⁴⁶ As has been widely noted by both courts and commentators, many of the traditional actions of labor unions have anticompetitive effects.⁴⁷ Congress acted first in passing legislation that forms the basis for the statutory exemption, which insulates pickets, boycotts, and other activities that labor unions conduct on their own.⁴⁸ The statutory exemption did not, however, exempt “concerted action or agreements between unions and nonlabor parties.”⁴⁹ Regarding this area of potential union liability as contrary to the intent of Congress and as a gaping hole in the concentric circles of labor and antitrust law, the Supreme Court sought to extend the exemption, and thereby extend the protections afforded to unions.⁵⁰ Accordingly, the

⁴⁶ See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 235–37 (1996) (stating that labor organizations would be rendered powerless by imposing antitrust liability upon collective bargaining); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975) (“Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws.”); *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 711 (1965) (Goldberg, J., concurring) (arguing that the regulatory labor relations scheme enacted by Congress “would be virtually destroyed by the imposition of Sherman Act criminal and civil penalties upon employers and unions engaged in . . . collective bargaining”).

⁴⁷ See, e.g., *Brown*, 518 U.S. at 237; *McCormick & McKinnon*, *supra* note 6, at 385 (“Agreements between employers and unions . . . are frequently ‘combinations in restraint of trade’ within the literal language of the Sherman Act.”).

⁴⁸ See Clayton Act, 15 U.S.C. § 17 (2000) (“Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . .”); Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, 113 (2000) (insulating various labor dispute activities from antitrust liability); *United States v. Hutcheson*, 312 U.S. 219, 231 (1941) (“[W]hether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct.”); *supra* note 5 and accompanying text.

⁴⁹ *Connell*, 421 U.S. at 622–23; see also *Brown*, 518 U.S. at 253–54 (Stevens, J., dissenting).

⁵⁰ See *Brown*, 518 U.S. at 237 (explaining that the nonstatutory exemption is

nonstatutory exemption, which “has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions,”⁵¹ serves to insulate some union-employer agreements from antitrust scrutiny even though they restrain competition.⁵² Over a period of thirty years, the Supreme Court decided four relevant cases in which the Court attempted to define some of the boundaries and limits of the still amorphous antitrust exemption.⁵³

In the first case to focus on the exemption, *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*,⁵⁴ the Supreme Court refused to apply the exemption where a union negotiated a series of “closed-shop” agreements.⁵⁵ The electrical workers’ union obtained agreements from contractors and manufacturers to deal only with other contractors and manufacturers that employed its members.⁵⁶ After obtaining this monopoly, members saw their wages increase, their hours decline, and their opportunities for employment expand.⁵⁷ When determining the parties’ antitrust liability, the Court recognized the difficulty in choosing between federal antitrust laws and federal labor laws.⁵⁸ The Court declined to apply the exemption, holding that by conspiring with non-labor groups, the union lost the immunity that would have protected it had it acted to achieve this success on its own.⁵⁹

necessary to give federal labor laws their intended effect); *Connell*, 421 U.S. at 622 (“The Court has recognized, however, that a proper accommodation between the congressional policy favoring collective bargaining . . . and the congressional policy favoring free competition . . . requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions.”).

⁵¹ *Connell*, 421 U.S. at 622.

⁵² *See id.*

⁵³ *See Clarett v. Nat'l Football League*, 369 F.3d 124, 131 (2d Cir. 2004) (“The Supreme Court has never delineated the precise boundaries of the exemption . . .”), *cert. denied*, 125 S. Ct. 1728 (2005); McCormick & McKinnon, *supra* note 6, at 386 (stating that “the specific contours of the labor exemption remain uncertain”).

⁵⁴ 325 U.S. 797 (1945).

⁵⁵ *See id.* at 799, 809–10.

⁵⁶ *See id.* at 799.

⁵⁷ *See id.* at 800.

⁵⁸ *See id.* at 806 (“[W]e have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining.”).

⁵⁹ *See id.* at 809 (“So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted But when the unions participated with a combination of business

Moreover, the Court framed the initial scope of the nonstatutory exemption as one limited to activity conducted by the union itself, indicating that the legality of union activity depended on “whether the union acts alone or in combination with business groups.”⁶⁰

Two decades later, the Supreme Court again dealt with the nonstatutory exemption, deciding two landmark cases on the same day—declining to apply the exemption in *United Mine Workers v. Pennington*,⁶¹ and applying the exemption in *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*⁶² In *Pennington*, a mine workers’ union agreed with larger coal mines to demand higher wages from smaller coal mines.⁶³ The Court injected a new factor into its analysis, identifying wages as a mandatory subject of collective bargaining under the National Labor Relations Act.⁶⁴ However, the Court declined to issue a blanket exemption for all agreements resulting from negotiations over mandatory bargaining subjects.⁶⁵ Instead, the Court noted that whether antitrust liability will attach to such agreements depends on the “form and content of the agreement.”⁶⁶ Accordingly, the exemption normally enjoyed by the union is forfeited when it agrees with one set of employers to seek certain standards “outside the bargaining unit.”⁶⁷

In contrast, in *Jewel Tea*, a meatpackers’ union and several meat dealers agreed to shorten the length of the employees’ workdays, fearing the threat posed by nighttime sales of pre-packaged meat by unskilled laborers.⁶⁸ The Court applied the

men . . . a situation was created not included within the exemptions . . .”).

⁶⁰ See *id.* at 810; Milton Handler, *Reforming the Antitrust Laws*, 82 COLUM. L. REV. 1287, 1341 (1982) (“In *Allen Bradley*, the Court clarified the limits of the evolving labor exemption, explaining that the exemption does not shelter a union that participates in a conspiracy among employers to fix prices or to monopolize a market.”).

⁶¹ 381 U.S. 657, 669 (1965).

⁶² 381 U.S. 676, 688 (1965).

⁶³ See *Pennington*, 381 U.S. at 660.

⁶⁴ See *id.* at 665–66. The National Labor Relations Act defines collective bargaining as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . .” 29 U.S.C. § 158(d) (2000).

⁶⁵ See *Pennington*, 381 U.S. at 664–65.

⁶⁶ See *id.*

⁶⁷ See *id.* at 668.

⁶⁸ See *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381

nonstatutory exemption, though the justices disagreed as to the scope of the exemption.⁶⁹ Justice White, writing for three justices in the opinion designated as that of the Court, again focused on the fact that hours are mandatory subjects of bargaining, stating that “this fact weighs heavily in favor of antitrust exemption for agreements on these subjects.”⁷⁰ However, it was not conclusive, and the Court’s analysis considered other factors. In a passage that the Second Circuit would later adopt as its own standard for the exemption,⁷¹ the Court held:

[T]he issue in this case is whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions’ successful attempt to obtain that provision through bona fide, arm’s-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.⁷²

Concluding that the agreement covered a mandatory subject of collective bargaining, and that the union earned it through negotiations with multiple employers, the Court exempted the provision from antitrust scrutiny.⁷³

Justice Goldberg also wrote an opinion on behalf of three justices, dissenting in *Pennington* and concurring in *Jewel Tea*, arguing that such a balancing test was unnecessary because all

U.S. 676, 680–81 (1965).

⁶⁹ See *id.* at 679, 688. Justice White wrote the Court’s opinion on behalf of himself, Chief Justice Warren, and Justice Brennan. *Id.* at 679. Justice Goldberg authored a concurrence on behalf of himself and Justices Harlan and Stewart. *Id.* at 697 (Goldberg, J., concurring). Justice Douglas penned a dissent joined by Justices Black and Clark. *Id.* at 735 (Douglas, J., dissenting).

⁷⁰ See *id.* at 689.

⁷¹ See *Berman Enter. v. Local 333, United Marine Div.*, 644 F.2d 930, 935 n.8 (2d Cir. 1981) (referring to the passage as “a classic formulation of the standard for determining applicability of the labor exemption”); see also *Home Box Office, Inc. v. Directors Guild*, 531 F. Supp. 578, 590 (S.D.N.Y. 1982), *aff’d*, 708 F.2d 95 (2d Cir. 1983).

⁷² *Jewel Tea*, 381 U.S. at 689–90.

⁷³

Weighing the respective interests involved, we think the national labor policy . . . places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work. An agreement on these subjects between the union and the employers in a bargaining unit is not illegal . . . nor is the union’s unilateral demand for the same contract of other employers

Id. at 691.

agreements covering mandatory subjects of collective bargaining should be entitled to the nonstatutory exemption.⁷⁴ Expanding the exemption in this fashion, he argued, was the only way to “effectuate [the] congressional intent” of obligating parties to bargain over the specified mandatory subjects.⁷⁵

In 1975, the Supreme Court spoke again on the scope of the nonstatutory exemption, declining to apply it in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*.⁷⁶ In *Connell*, a plumbers’ union obtained, through picketing, an agreement with a contractor to subcontract only to firms that employed union members.⁷⁷ The Court noted that the union-contractor agreement was not a collective bargaining agreement.⁷⁸ The Court also distinguished between agreements that follow from negotiations over mandatory bargaining subjects and those that do not, holding that the anticompetitive effects of the union’s control over subcontract work were “unrelated to the union’s legitimate goals of organizing workers and standardizing working conditions.”⁷⁹

Though these four cases do not set firm boundaries for the application of the nonstatutory exemption, they do establish several basic principles. In *Jewel Tea*, the Court clearly distinguished between mandatory and non-mandatory subjects of collective bargaining by deferring to the union where the anticompetitive effects of the agreement were related to the length of the working day, a mandatory bargaining subject.⁸⁰

⁷⁴ See *id.* at 710 (Goldberg, J., concurring).

⁷⁵ *Id.* (asserting that “in order to effectuate congressional intent, collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws”).

⁷⁶ 421 U.S. 616, 625 (1975).

⁷⁷ See *id.* at 618–19.

⁷⁸ See *id.* at 619–20 (observing that, as expressed in the agreement, Local 100 did not wish to act as a collective bargaining representative for Connell’s employees).

⁷⁹ See *id.* at 624. The Court also noted that this restraint on business does “not follow naturally from the elimination of competition over wages and working conditions,” and, accordingly, “federal policy favoring collective bargaining . . . can offer no shelter for the union’s . . . action against Connell or its campaign to exclude nonunion firms from the subcontracting market.” *Id.* at 625–26.

⁸⁰ Compare *Jewel Tea*, 381 U.S. at 691 (“We think that the [hours provision is] well within the realm of ‘wages, hours, and other terms and conditions of employment’ about which employers and unions must bargain.”), with *Connell*, 421 U.S. at 625 (“This kind of direct restraint on the business market has substantial anticompetitive effects . . . that would not follow naturally from the elimination of competition over wages and working conditions.”).

The Court also looked to the effects of the agreement, refusing to apply the exemption where parties excluded from bargaining were significantly affected.⁸¹ Lastly, by mentioning “bona fide, arm’s-length bargaining,”⁸² the Court appeared to put into words what may have been obvious—that collective bargaining agreements will be exempted from liability only when they are truly the products of collective bargaining.⁸³

II. SECOND GUESSING THE SECOND CIRCUIT

After reviewing the historical background for the nonstatutory exemption established by the Supreme Court,⁸⁴ the *Clarett* court distinguished between the facts presented in those four cases and those presented by *Clarett*, noting that the former were cases initiated by businesses suing their competitors for restraining the product market, while the latter featured a prospective employee complaining of a restraint on the labor market.⁸⁵ In this scenario, the Second Circuit held that its decisions in *Caldwell v. American Basketball Ass’n*,⁸⁶ *National Basketball Ass’n v. Williams*,⁸⁷ and *Wood v. National Basketball Ass’n*,⁸⁸ as well as the Supreme Court’s decision in *Brown v. Pro Football, Inc.*,⁸⁹ precluded it from ruling for *Clarett*.⁹⁰

This Comment maintains that in reaching this conclusion, the Second Circuit significantly misinterpreted key aspects of these decisions and overlooked critical factual differences in concluding that *Clarett*’s complaint was indistinguishable from those of the unsuccessful plaintiffs in *Caldwell*, *Williams*, *Wood*, and *Brown*.

⁸¹ See *Connell*, 421 U.S. at 626 (observing that the union sought to exclude nonunion parties from the market); *United Mine Workers v. Pennington*, 381 U.S. 657, 665 (1965) (holding that “a union forfeits its exemption . . . when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units”).

⁸² *Jewel Tea*, 381 U.S. at 690.

⁸³ See *id.* at 689–90; *Mackey v. Nat’l Football League*, 543 F.2d 606, 614 (8th Cir. 1976).

⁸⁴ See *Clarett v. Nat’l Football League*, 369 F.3d 124, 130–33 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005).

⁸⁵ *Id.* at 134.

⁸⁶ 66 F.3d 523 (2d Cir. 1995).

⁸⁷ 45 F.3d 684 (2d Cir. 1995).

⁸⁸ 809 F.2d 954 (2d Cir. 1987).

⁸⁹ 518 U.S. 231 (1996).

⁹⁰ *Clarett*, 369 F.3d at 135 (“We need only retrace the path laid down by these prior cases to reach the conclusion that *Clarett*’s antitrust claims must fail.”).

In *Wood*, a first round NBA draft selection sued the NBA, alleging that the NBA's draft and team salary cap provisions contained in the NBA's collective bargaining agreement were illegal.⁹¹ The court applied the nonstatutory exemption, holding that to allow *Wood* to undo important provisions of a collective bargaining agreement would "subvert fundamental principles of our federal labor policy."⁹² Moreover, the court held that both the draft and salary cap were mandatory subjects of bargaining,⁹³ that they were the results of actual collective bargaining, and, therefore, that striking down either provision would untangle the "unique bundle of compromises" that comprised the agreement.⁹⁴

In holding that its decision in *Wood* was controlling over the case presented by *Clarett*, the Second Circuit ignored several significant factual distinctions. *Wood* was actually drafted in the 1984 NBA Draft and then sued the league, arguing that the very agreement that allowed him to enter the league prevented him from choosing his employer and negotiating his salary without a cap.⁹⁵ Both the draft and salary cap were provisions on which the entire NBA agreement was based.⁹⁶ In contrast, *Clarett*, who was ineligible for the NFL Draft, challenged a rule that served as a complete bar to entry, not as a limitation on negotiating with a specific employer or for a higher salary.⁹⁷ This difference illuminates two significant distinctions between the antitrust challenges of *Wood* and *Clarett*. In *Wood*, both provisions were mandatory subjects of bargaining, while the NFL eligibility rule was not. The NBA's salary cap had a significant and direct effect on the wages of all NBA players. In fact, it served as an absolute limit on the amount of money each employer could pay its

⁹¹ See *Wood*, 809 F.2d at 956–57.

⁹² See *id.* at 959; see also *Clarett*, 369 F.3d at 134–36 (discussing the court's application of the nonstatutory exemption in *Wood*).

⁹³ *Wood*, 809 F.2d at 962 ("We also agree with the district court that all of the . . . matters are mandatory subjects of bargaining . . .").

⁹⁴ See *id.* at 961.

⁹⁵ See *id.* at 958. *Wood*, who was drafted by the Philadelphia 76ers, sought an injunction compelling the other NBA teams to cease their refusals to deal with him. *Id.*

⁹⁶ See *id.* at 957 (summarizing and discussing the relevant provisions of the agreement).

⁹⁷ *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 395 (S.D.N.Y. 2004) (stating that the eligibility rule "precludes players from entering the labor market altogether"), *rev'd*, 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005).

employees.⁹⁸ Likewise, the draft process affects the players' working conditions by ceding control over their place of employment and their employer to the league and its teams.⁹⁹ Clarett was not challenging the NFL draft process, but rather one of its rules determining which players are eligible to be selected.¹⁰⁰ It is unlikely that anyone, whether an established NFL veteran or an older potential draft selection, would see his salary affected at all by expanding the pool of potential draft picks, particularly given the NFL's insistence that younger football players are "less mature physically and psychologically," and that their inclusion in the NFL would lead to "adverse consequences."¹⁰¹ Further, the challenged provisions in *Wood* were the products of bona fide collective bargaining. The agreement between the league and the union was reached in the hours leading up to a union-imposed strike deadline, and the salary cap and draft process were critical ingredients in a system that also featured a salary floor and guaranteed revenue sharing "unique in professional sports."¹⁰² In stark contrast, the NFL's eligibility rule predated collective bargaining in professional football by more than forty years, and was not even contained anywhere in the NFL's collective bargaining agreement.¹⁰³ These key differences were overlooked by the Second Circuit and were clearly significant enough to distinguish Clarett's complaint from *Wood*'s.

Eight years later in *Caldwell*, the Second Circuit again applied the nonstatutory exemption to a provision in a collective bargaining agreement dictating when an employer could discharge an employee.¹⁰⁴ After Joe Caldwell played professional basketball for five seasons, he was unable to find employment and sued, alleging that he was being blacklisted in retaliation for

⁹⁸ See *Wood*, 809 F.2d at 957.

⁹⁹ See *id.*

¹⁰⁰ See *Clarett*, 306 F. Supp. 2d at 382.

¹⁰¹ Memorandum of the National Football League (1) in Opposition to Plaintiff's Motion for Summary Judgment and (2) in Support of the NFL's Cross-Motion for Summary Judgment at 4, *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004) (No. 03-CV-7441(SAS)).

¹⁰² See *Wood*, 809 F.2d at 957; see also *infra* notes 180–92 and accompanying text (discussing the mandatory subjects of bargaining unique to professional sports and their relationship to the eligibility rule at issue in *Clarett*).

¹⁰³ See *Clarett*, 306 F. Supp. 2d at 396; *infra* Part IV.C.

¹⁰⁴ See generally *Caldwell v. Am. Basketball Ass'n*, 66 F.3d 523 (2d Cir. 1995).

his activity in the players' union.¹⁰⁵ The court ruled for the ABA and applied the exemption because "the circumstances under which an employer may discharge or refuse to hire an employee" are considered a mandatory subject of bargaining.¹⁰⁶

The *Clarett* court treated the *Caldwell* decision as almost exactly on point, equating the teams' refusal to hire Caldwell with the NFL's refusal to hire Clarett.¹⁰⁷ However, the *Caldwell* court considered "refusal to hire" as being the same thing as dismissal, thereby designating the National Labor Relations Board as having proper jurisdiction over similar cases in order to avoid "every employee who is discharged [from bringing] an antitrust action similar to Caldwell's."¹⁰⁸ The league's refusal to hire a dismissed but formerly employed worker is very different from the NFL's refusal to make Clarett eligible for its draft. The rule in *Caldwell* was a mandatory subject of bargaining because it was critical in determining the terms of how players were to be employed, even though in this particular instance it served to insulate Caldwell's dismissal from antitrust scrutiny.¹⁰⁹ However, the NFL's eligibility was not a mandatory bargaining subject because it did not cover the wages, hours, and working conditions of employees, but instead served to prevent some prospective players from obtaining the possibility of employment.¹¹⁰

The last two cases cited as controlling in *Clarett* involved whether the nonstatutory exemption covered provisions imposed by professional sports leagues after collective bargaining agreements expired.¹¹¹ In *Williams*, the NBA sought a

¹⁰⁵ See *id.* at 525–26. At the time, the American Basketball Association was involved in merger negotiations with the National Basketball Association, and Caldwell asserted that he was prevented from playing in the ABA because, as a former activist president of the ABA players' union, he might imperil the merger negotiations. *Id.* at 526.

¹⁰⁶ *Id.* at 529.

¹⁰⁷ See *Clarett v. Nat'l Football League*, 369 F.3d 124, 139–40 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005).

¹⁰⁸ See *Caldwell*, 66 F.3d at 530. In addition, the court referred to "Caldwell's claim regarding his discharge." *Id.*

¹⁰⁹ See *id.* at 530–31.

¹¹⁰ See *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 395 (S.D.N.Y. 2004), *rev'd*, 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005); *infra* Part IV.B.

¹¹¹ See generally *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (determining that the non-statutory labor exemption applied to the NFL's unilateral imposition of a salary cap for developmental players after negotiations with the union had become

declaratory judgment that its continued imposition of the draft system, salary cap, and right of first refusal for free agents was legal even though they were embodied in a collective bargaining agreement that had expired.¹¹² The Second Circuit applied the exemption because the players' claims threatened the legitimacy of multi-employer bargaining—a longstanding and commonplace means of bargaining—and conduct during negotiations for a collective bargaining agreement is an issue better suited for the National Labor Relations Board than the courts.¹¹³

The following year, the Supreme Court decided a nearly identical case in a nearly identical fashion, applying the nonstatutory exemption to insulate the NFL's unilateral imposition of a cap on the salaries of practice squad players after its negotiations with those players had reached impasse.¹¹⁴ The Court held that the nonstatutory exemption was not so narrow as to protect only existing collective bargaining agreements and that the exemption protected even post-impasse negotiations of an expired agreement.¹¹⁵ Writing for the eight-justice majority, Justice Breyer cautioned that the Court's decision was not a complete *carte blanche* for employers to impose whatever terms they wanted whenever they wanted to: “[o]ur holding is not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process”¹¹⁶ Moreover, the Court

deadlocked); *Nat'l Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995) (holding that the NBA's conduct fell within the non-statutory exemption though the challenged policies were unilaterally implemented by the league after negotiations with the player's union on these subjects had reached impasse).

¹¹² See *Williams*, 45 F.3d at 686. The right of first refusal enabled a team to match any offer made to one of its restricted free agent players by another team. *Id.*

¹¹³ See *id.* at 693. The court also rejected the union's challenge to multi-employer bargaining as a whole, calling it an important counterweight to the potentially expansive powers of unions. *Id.* at 688–93.

¹¹⁴ See *Brown*, 518 U.S. at 234.

¹¹⁵ See *id.* at 243–47 (“One cannot mean the principle literally—that the exemption applies only to understandings embodied in a collective-bargaining agreement—for the collective-bargaining process may take place before the making of any agreement or after an agreement has expired.”).

¹¹⁶ *Id.* at 250. The lone dissenting justice was Justice Stevens, who argued that “it would be most ironic to extend an exemption crafted to protect collective action by employees to protect employers acting jointly to deny employees the opportunity to negotiate their salaries individually in a competitive market.” *Id.* at 255 (Stevens, J., dissenting).

seemed to reiterate the three factors from its *Jewel Tea* holding, which were later adopted as the test in *Mackey*, by writing that the provision “was directly related to[] the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship.”¹¹⁷

It is difficult to see how the decisions in *Williams* and *Brown* are at all factually relevant to the argument presented by Clarett. Both cases focused on antitrust challenges related not to the “what” of collective bargaining, but rather to the “when.” The salary caps challenged in *Williams* and *Brown* were nearly identical to the salary cap exempted from antitrust scrutiny in *Wood*.¹¹⁸ The basis of the unions’ challenges was that the exemption expired at the same time as the collective bargaining agreement.¹¹⁹ In both cases, the courts disagreed and applied the exemption to the collective bargaining process, rather than merely the existing collective bargaining agreement.¹²⁰ There is nothing in either opinion that would suggest that this chronological extension of the exemption post-expiration would affect a determination of whether to apply the exemption to a provision in an existing collective bargaining agreement, such as the one between the NFL and the NFLPA.

The Second Circuit in *Clarett* held that “the path laid down by these prior cases” led to the conclusion that “Clarett’s antitrust claims must fail.”¹²¹ Yet after examining the four cases, it is clear that the court must have taken a detour along the way. *Wood* and *Caldwell* both involved antitrust challenges to provisions detailing the terms of how drafted players are employed or discharged, both mandatory bargaining subjects and both collectively bargained.¹²² *Williams* and *Brown* differed only

¹¹⁷ *Id.* at 250.

¹¹⁸ Compare *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954, 957 (2d Cir. 1987) (defining the salary cap as a provision that established a maximum amount for aggregate team salaries), with *Brown*, 518 U.S. at 235 (stating that the NFL imposed a \$1,000 per player weekly salary rate), and *Nat’l Basketball Ass’n v. Williams*, 45 F.3d 684, 686 (2d Cir. 1995) (defining the salary cap system as subjecting the total salary paid by each team to its players to a maximum).

¹¹⁹ See *Brown*, 518 U.S. at 235; *Williams*, 45 F.3d at 686.

¹²⁰ See *Brown*, 518 U.S. at 235; *Williams*, 45 F.3d at 693.

¹²¹ *Clarett v. Nat’l Football League*, 369 F.3d 124, 135 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005).

¹²² See *Caldwell v. Am. Basketball Ass’n*, 66 F.3d 523 (2d Cir. 1995); *Wood*, 809 F.2d 954.

to the extent that they extended the exemption to the same terms contained in expired agreements or made during negotiations.¹²³ None of these cases involved a rule limiting employee eligibility, and none of the challenged provisions featured the tenuous relationship to the collective bargaining relationship of the NFL eligibility rule. Rather than guiding the court to apply the nonstatutory exemption in *Clarett*, these four cases only reinforced the rule that the exemption applies solely to agreements over mandatory bargaining subjects that were actually bargained.

III. MACKEY BY ANY OTHER NAME

In 1976, the Eighth Circuit, in *Mackey v. National Football League*,¹²⁴ declined to apply the nonstatutory exemption to the "Rozelle Rule" for free agent compensation embodied in the collective bargaining agreement between the NFL and the NFLPA.¹²⁵ In reaching this conclusion, the *Mackey* court established a three-factor test for determining the applicability of the nonstatutory exemption, culling from Supreme Court jurisprudence that the exemption should only be applied where the restraint: (1) primarily affects parties to the collective bargaining relationship; (2) covers a mandatory subject of bargaining; and (3) is the product of bona fide arm's-length bargaining.¹²⁶ Each of these three factors is specifically

¹²³ See *Brown*, 518 U.S. 231; *Williams*, 45 F.3d 684.

¹²⁴ 543 F.2d 606 (8th Cir. 1976).

¹²⁵ See *id.* at 623. The "Rozelle Rule" mandated that where one NFL team lost the services of a player whose contract had expired, the player's new team had to send the player's former team compensation, and that when the teams could not agree on compensation, the Commissioner of the NFL could select the players or draft choices that would serve as compensation. See *id.* at 609 n.1.

¹²⁶ *Id.* at 614.

We find the proper accommodation to be: First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. . . . Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. . . . Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.

Id.

mentioned in Justice White's decision in *Jewel Tea*.¹²⁷ The *Mackey* court held that the "Rozelle Rule" primarily affected parties to the bargaining relationship, and was a mandatory subject of bargaining, but that the rule was not the product of bona fide arm's-length bargaining.¹²⁸

In the twenty-nine years since *Mackey*, it has been adopted by both courts and commentators alike as the proper standard for the nonstatutory exemption.¹²⁹ One notable exception has been the Second Circuit, which, in *Clarett*, reiterated its refusal to accept *Mackey* as identifying the "appropriate limits of the non-statutory exemption."¹³⁰ The *Clarett* court criticized the district court for its application of the *Mackey* test.¹³¹ However, while the district court did rely on the three *Mackey* factors, it acknowledged that the Second Circuit's standard was "the simple formulation enunciated by the Supreme Court in [*Jewel Tea*]."¹³² Although the Second Circuit has consistently refused to apply the Eighth Circuit's test from *Mackey*, it has yet to adopt a test that is at all distinguishable.

In 1981, the Second Circuit addressed the nonstatutory exemption issue in *Berman Enterprises v. Local 133, United Marine Division*.¹³³ The court focused on *Jewel Tea* and decided the nonstatutory exemption issue by looking at whether the disputed collective bargaining provision affected nonparties and whether it was a mandatory subject of collective bargaining.¹³⁴ Both factors are elements of the *Mackey* test, while the third

¹²⁷ See *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689–90 (1965); *supra* notes 68–75 and accompanying text.

¹²⁸ See *Mackey*, 543 F.2d at 615–16.

¹²⁹ See *Cont'l Mar. of S.F., Inc. v. Pac. Coast Metal Trades Dist. Council*, 817 F.2d 1391, 1393 (9th Cir. 1987); *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193, 1197–98 (6th Cir. 1979); Thomas Lombardi, *Can't We Play Too? The Legality of Excluding Preparatory Players from the NBA*, 5 VAND. J. ENT. L. & PRAC. 32, 38 (2002); McCormick & McKinnon, *supra* note 6, at 391; Robert D. Koch, Comment, *4th and Goal: Maurice Clarett Tackles the NFL Eligibility Rule*, 24 LOY. L.A. ENT. L. REV. 291, 297 (2004).

¹³⁰ See *Clarett v. Nat'l Football League*, 369 F.3d 124, 133 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005); see also *Local 210, Laborers' Int'l Union v. Labor Relations Div. Associated Gen. Contractors*, 844 F.2d 69, 80 n.2 (2d Cir. 1988) ("Although we believe that the agreement . . . could satisfy [*Mackey*], we need not adopt this particular analysis.").

¹³¹ See *Clarett*, 369 F.3d at 133.

¹³² *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 392 (S.D.N.Y. 2004), *rev'd*, 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005).

¹³³ 644 F.2d 930, 935 (2d Cir. 1981).

¹³⁴ See *id.*

Mackey factor—bona fide bargaining—was addressed in the court's recitation of the facts.¹³⁵ As a result, without mentioning *Mackey*, and while adopting *Jewel Tea* as the proper standard for applying the exemption, the Second Circuit essentially applied *Mackey*.

In 1983, the Second Circuit again looked to *Jewel Tea* for the appropriate contours of the nonstatutory exemption. In *Home Box Office, Inc. v. Directors Guild*,¹³⁶ the court expressly affirmed the discussion of District Judge Sofaer,¹³⁷ who distinguished *Jewel Tea* from *Connell, Pennington*, and *Allen Bradley*, by looking to the three *Mackey* factors, without referring to *Mackey*:

Jewel Tea . . . is the only one of the four Supreme Court cases on the non-statutory exemption that involves a collective bargaining agreement whose terms concern only the bargaining unit and that resulted from the arm's length . . . bargaining Moreover, . . . their purpose was strongly supported by federal labor policy, because wages, hours, and working conditions . . . are mandatory subjects of bargaining.¹³⁸

The district court's holding, later affirmed by the Second Circuit, is a virtual carbon copy of the *Mackey* test.¹³⁹ It points to the effect outside the bargaining relationship, the actual arm's-length bargaining, and the subject of the bargaining. The two tests are entirely indistinguishable.

The *Clarett* court further criticized *Mackey* as being inapplicable to cases such as *Clarett's* where the plaintiff sues a multi-employer bargaining unit over a restraint in the labor market.¹⁴⁰ However, the Second Circuit consistently used the

¹³⁵ See *id.* at 932–33 (describing the parties' numerous attempts to negotiate a new collective bargaining agreement).

¹³⁶ 708 F.2d 95, 95 (2d Cir. 1983) (“The judgment below is affirmed for substantially the reasons given by Judge Sofaer in holding that the actions and agreements of the Guild are protected by the ‘statutory’ and ‘non-statutory’ exemptions of labor union activities from the antitrust laws.”).

¹³⁷ See *Home Box Office, Inc. v. Director's Guild*, 531 F. Supp. 578, 589–93 (S.D.N.Y. 1982), *aff'd*, 708 F.2d 95 (2d Cir. 1983); see also *Local 210, Laborers' Int'l Union v. Labor Relations Div. Associated Gen. Contractors*, 844 F.2d 69, 80 n.2 (2d Cir. 1988) (“[W]e rely on the discussion of *Jewel Tea* and *Connell Construction* by Judge Sofaer in *Home Box Office* . . .”).

¹³⁸ *Home Box Office*, 531 F. Supp. at 591–92.

¹³⁹ Compare *Home Box Office*, 531 F. Supp. at 589–93 (discussing the same three factors used in the *Mackey* test, though not attributing them to *Mackey*), with *Mackey v. Nat'l Football League*, 543 F.2d 606, 614 (8th Cir. 1976) (setting forth the three factor test for the nonstatutory exemption).

¹⁴⁰ See *Clarett v. Nat'l Football League*, 369 F.3d 124, 134 (2d Cir. 2004)

Mackey factors to decide similar cases in professional basketball disputes.¹⁴¹

In *Wood*, the Second Circuit held that the NBA's salary cap provision was a mandatory subject of bargaining,¹⁴² that it did not affect employees outside the bargaining unit,¹⁴³ and was the product of bona fide collective bargaining.¹⁴⁴ The court discussed all three *Mackey* factors without expressly applying the *Mackey* test. Similarly, in *Caldwell*, the court held that the discharge provision in Caldwell's contract was a mandatory subject of bargaining¹⁴⁵ and that it was actually bargained.¹⁴⁶ Since the plaintiff was a suspended employee who was a union member,¹⁴⁷ it was clear that the discharge provision affected a party to the bargaining relationship, and all three *Mackey* factors were discussed and met, leading the court to apply the exemption. Despite the *Clarett* court's claim that *Mackey* does not apply in situations where the plaintiff sues regarding a restraint in the labor market, the Second Circuit has repeatedly used the *Mackey* factors (while rejecting *Mackey* in name) to apply the nonstatutory exemption in exactly those cases.

The *Clarett* court's final reason for disregarding *Mackey* was that it did not "comport with the Supreme Court's most recent treatment of the non-statutory labor exemption"¹⁴⁸ in *Brown v. Pro Football, Inc.*¹⁴⁹ Because *Brown* dealt with a dispute over post-impasse implementation of terms rather than an existing collective bargaining agreement, Brown's antitrust claim is

(distinguishing *Clarett*'s labor market complaint from "cases in which employers use agreements with their unions to disadvantage their competitors in the product or business market"), *cert. denied*, 125 S. Ct. 1728 (2005).

¹⁴¹ See, e.g., *Caldwell v. Am. Basketball Ass'n*, 66 F.3d 523 (2d Cir. 1995); *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987); see also *supra* Part II.

¹⁴² *Wood*, 809 F.2d at 962 ("We also agree with the district court that all of the above matters are mandatory subjects of bargaining . . .").

¹⁴³ See *id.* at 960–61.

¹⁴⁴ See *id.* at 959 ("The draft and salary cap are not, however, the product solely of an agreement among horizontal competitors but are embodied in a collective agreement between an employer or employers and a labor organization reached through procedures mandated by federal labor legislation.").

¹⁴⁵ *Caldwell*, 66 F.3d at 529.

¹⁴⁶ See *id.* at 530.

¹⁴⁷ See *id.* at 526.

¹⁴⁸ See *Clarett v. Nat'l Football League*, 369 F.3d 124, 134 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005).

¹⁴⁹ 518 U.S. 231 (1996); see also *supra* notes 114–20 and accompanying text.

distinguishable from *Clarett's*.¹⁵⁰ Despite the factual differences, the Supreme Court in *Brown* actually reaffirmed the three factors of the *Mackey* test, holding that the NFL's conduct "took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship."¹⁵¹ In this passage, the Court held that the NFL met all three of the *Mackey* factors, and applied the nonstatutory exemption. Rather than not comports with the *Brown* decision, the *Mackey* test appears to have been affirmed by it.

Despite explicitly rejecting the *Mackey* test, the *Clarett* court actually applied all three of its factors in applying the nonstatutory exemption to the NFL eligibility rule. The court noted that the issue before it was whether subjecting the rule to antitrust scrutiny would run counter to federal labor principles.¹⁵² In deciding that it would, the court discussed the *Mackey* factors, holding that the eligibility rule is a mandatory subject of collective bargaining because the NFL's system of player salaries and rosters depends on it having a built-in restraint on the market for incoming players.¹⁵³ Further, the court stated that *Clarett* was not outside of the bargaining relationship because the NFLPA represents the interests of prospective employees in addition to actual employees.¹⁵⁴ Lastly, the court held that, despite its omission from the text of the collective bargaining agreement, the eligibility rules were the product of actual bargaining because of the reference in the agreement to the NFL Constitution and Bylaws.¹⁵⁵ As a result, the court applied the nonstatutory exemption.¹⁵⁶ Although the *Clarett* court specifically rejected the *Mackey* test in name, just a few pages later, it applied all three of its factors in deciding to

¹⁵⁰ See *supra* notes 114–20 and accompanying text.

¹⁵¹ *Brown*, 518 U.S. at 250.

¹⁵² See *Clarett*, 369 F.3d at 138.

¹⁵³ See *id.* at 139–40 (stating that "we find that the eligibility rules are mandatory bargaining subjects"). The court speculated but declined to hold that all eligibility rules are mandatory bargaining subjects. See *id.* at 139.

¹⁵⁴ See *id.* at 140–41.

¹⁵⁵ See *id.* at 142.

¹⁵⁶ See *id.* at 125 n.1, 143 ("[W]e find that the eligibility rules are immune from antitrust scrutiny under the non-statutory exemption . . .").

apply the exemption.

While the Second Circuit has never officially adopted *Mackey* as the proper test for applying the nonstatutory exemption, the boundaries it has established are virtually indistinguishable, and the three factors have been at the center of the relevant Second Circuit decisions. *Mackey*'s three prongs are all grounded in the Supreme Court's early nonstatutory exemption jurisprudence, and subsequent cases have only made it clearer that *Mackey* provides the necessary framework for applying the nonstatutory exemption.

IV. THE NFL FAILS THE MACKEY TEST

The Second Circuit applied *Mackey* in substance while rejecting it in name. This Comment asserts that the *Clarett* court erred in its application of the last two *Mackey* factors by concluding that the eligibility rule was a mandatory bargaining subject and that it was the subject of bona fide arm's-length bargaining.

A. *The Eligibility Rule Did Not Affect Parties Outside the Bargaining Unit*

The first prong of the *Mackey* analysis requires that, in order to apply the exemption, the "restraint on trade primarily affect[] only the parties to the collective bargaining relationship."¹⁵⁷ The Second Circuit was correct in concluding that the NFL's eligibility rule primarily affects parties to that relationship. *Clarett* argued that, as an amateur collegiate athlete who was not a member of the NFLPA, he was an outsider to the NFL's bargaining process.¹⁵⁸ The district court agreed with *Clarett*, holding that his eligibility was not the NFLPA's "to trade away."¹⁵⁹ The Second Circuit, however, held that *Clarett* was not an outsider to the bargaining unit because the NFLPA has the discretion and power to prioritize certain groups of employees,

¹⁵⁷ *Mackey v. Nat'l Football League*, 543 F.2d 606, 614 (8th Cir. 1976).

¹⁵⁸ See Robert A. McCormick, *Pro Teams Illegally Block Clarett from Football Field*, DETROIT NEWS, Apr. 25, 2004, at 15A (indicating that *Clarett*, who is not an NFL player or a union member, is a total stranger to the NFL collective bargaining relationship).

¹⁵⁹ See *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 395 (S.D.N.Y. 2004), *rev'd*, 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005).

which includes favoring veteran players over aspiring rookies.¹⁶⁰ It is clear that this was the correct view.

In *Wood*, the Second Circuit, in applying the nonstatutory exemption to the NBA's salary cap and draft provisions, held that collective bargaining agreements may be exempt from antitrust scrutiny although they may adversely affect prospective employees.¹⁶¹ In fact, if this were not true, the entire collective bargaining process would collapse, since "[e]mployers would have no assurance that they could enter into any collective agreement without exposing themselves to" antitrust liability.¹⁶²

Similarly, in *Zimmerman v. National Football League*,¹⁶³ the district court applied the exemption to protect a unique supplemental draft bargained between the NFL and NFLPA.¹⁶⁴ Applying *Mackey*, the court held that potential future players are parties to the collective bargaining relationship because the agreement binds all employees who subsequently enter the bargaining unit.¹⁶⁵

Although *Clarett* was not a member of or directly represented by the NFLPA at the time the collective bargaining agreement was executed, these prior cases have demonstrated a judicial decision to include prospective employees as indirectly represented members of the bargaining unit.¹⁶⁶ This relationship is reflected in the NFL's collective bargaining agreement, in which the NFLPA is recognized as the bargaining representative of all present and future NFL players, including all rookies, drafted and undrafted, upon commencement of their employment negotiations with NFL teams.¹⁶⁷ Accordingly, the Second Circuit was correct in concluding that the NFL eligibility rule did not primarily affect outsiders to the bargaining unit.

¹⁶⁰ See *Clarett*, 369 F.3d at 139.

¹⁶¹ See *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 960 (2d Cir. 1987) (noting that the statutory definition of "employee" was crafted to include workers outside of the bargaining unit).

¹⁶² *Id.* at 961.

¹⁶³ 632 F. Supp. 398 (D.D.C. 1986).

¹⁶⁴ The supplemental draft was designed to allow teams to draft players playing in a rival professional football league, the USFL, without risking a selection in the annual April draft. See *id.* at 401.

¹⁶⁵ See *id.* at 405 ("Not only present but potential future players for a professional sports league are parties to the bargaining relationship.")

¹⁶⁶ See *Koch*, *supra* note 129, at 305.

¹⁶⁷ CBA, *supra* note 18, pmb1.

B. The Eligibility Rule Was Not a Mandatory Subject of Collective Bargaining

The second prong of the *Mackey* test ensures that only mandatory subjects of collective bargaining receive the benefits of the nonstatutory exemption.¹⁶⁸ Federal labor law provides a statutory definition for mandatory bargaining subjects, requiring employers and the employees' representatives to collectively bargain "with respect to wages, hours, and other terms and conditions of employment."¹⁶⁹ As the Supreme Court gave shape to the nonstatutory exemption, one of the key controversies was whether to issue a blanket exemption for all provisions concerning mandatory subjects.¹⁷⁰ This dispute played out in *Jewel Tea*, where Justice Goldberg's concurrence advocated a total exemption for mandatory subjects, but the Court's opinion required analysis of additional factors.¹⁷¹ While not all agreements concerning mandatory subjects are necessarily exempt, the requirement that any agreement seeking the exemption concern a mandatory subject has been at the heart of the Supreme Court's decisions.¹⁷² The issue, as it was in *Jewel Tea*, was whether the eligibility rule is intimately related to wages, hours, and other terms and conditions of employment.

The Second Circuit held that the eligibility rule was a mandatory subject of bargaining for two reasons. First, it strongly suggested that all eligibility rules for professional sports leagues would be mandatory bargaining subjects.¹⁷³ Second, the court held that as a result of the unique economic imperatives of professional sports, such as capped salaries, fixed rosters, and free agency, the eligibility rule has "tangible effects" on the

¹⁶⁸ *Mackey v. Nat'l Football League*, 543 F.2d 606, 614 (8th Cir. 1976) (holding that "federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining").

¹⁶⁹ 29 U.S.C. § 158(d) (2000).

¹⁷⁰ See *supra* notes 69–75 and accompanying text (referencing the difference in opinion, between Justices White and Goldberg, with respect to blanket exemptions for mandatory bargaining subjects).

¹⁷¹ See *supra* notes 69–75 and accompanying text.

¹⁷² See *supra* Part I.

¹⁷³ *Clarett v. Nat'l Football League*, 369 F.3d 124, 139 (2d Cir. 2004) ("Though tailored to the unique circumstance of a professional sports league, the eligibility rules for the draft represent a quite literal condition for initial employment and for that reason alone might constitute a mandatory bargaining subject."), *cert. denied*, 125 S. Ct. 1728 (2005).

wages and working conditions of NFL players.¹⁷⁴ This Comment asserts that the Second Circuit was incorrect in holding that the eligibility rule was a mandatory bargaining subject on either ground.

The *Clarett* court strongly suggested that all player eligibility rules may be mandatory bargaining subjects because they serve as total bars to employment.¹⁷⁵ In reaching this conclusion, the Second Circuit cited its decision in *Caldwell v. American Basketball Ass'n*,¹⁷⁶ in which it applied the nonstatutory exemption to the termination provisions in players' contracts, as binding authority.¹⁷⁷ However, while *Caldwell* held that the instances under which an employer may refuse to hire an employee constitute a mandatory bargaining subject, it only discussed the refusal to hire an employee already discharged—a veteran basketball player unable to sign with any other team.¹⁷⁸ The decision of each team to refuse to hire an existing employee is completely distinguishable from a league-wide mandate to refuse eligibility. The *Caldwell* decision was therefore clearly not binding on *Clarett*.

The Second Circuit then concluded that because the competitive imperatives of professional sports require a highly regulated economic structure, the NFL's eligibility rule had a sufficient effect on wages and working conditions to qualify it as a mandatory bargaining subject.¹⁷⁹ In the professional sports context, courts have determined that salary caps,¹⁸⁰ compensation systems for free agents,¹⁸¹ and player selection drafts¹⁸² are all mandatory subjects of bargaining because of their fairly clear effects on employee wages and working conditions. Salary caps serve as an obvious limitation on employee wages. The reserve clause regulates player movement for veteran players, while the draft process serves the same

¹⁷⁴ See *id.* at 140.

¹⁷⁵ See *id.* at 141 (“[C]larett is . . . no different from the typical worker who is confident that he or she has the skills to fill a job vacancy but does not possess the qualifications or meet the requisite criteria that have been set.”).

¹⁷⁶ 66 F.3d 523 (2d Cir. 1995).

¹⁷⁷ See *Clarett*, 369 F.3d at 139–40.

¹⁷⁸ See *supra* notes 104–10 and accompanying text.

¹⁷⁹ See *Clarett*, 369 F.3d at 139–40.

¹⁸⁰ See *Nat'l Basketball Ass'n v. Williams*, 45 F.3d 684, 691 (2d Cir. 1995).

¹⁸¹ *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193, 1198 (6th Cir. 1979); *Mackey v. Nat'l Football League*, 543 F.2d 606, 615 (8th Cir. 1976).

¹⁸² *Williams*, 45 F.3d at 691.

function for incoming players, ensuring that entering rookies will not have the ability to auction their services to the highest bidder.¹⁸³ The connection between player eligibility and wages and working conditions is not nearly as clear-cut.¹⁸⁴

The *Clarett* court held that rookie eligibility, along with team salary caps, team rookie salary caps, and salary minimums, was part of the scheme by which individual player salaries are established.¹⁸⁵ It is difficult to see how the eligibility rule fits into this complex puzzle. While it is true that the NFL's capped salary structure guarantees that every player's salary has some impact on the salaries of his teammates,¹⁸⁶ expanding the pool of eligible rookies would do little to affect any player's salary, except to ensure that the previously ineligible player is earning one. The eligibility rule does not serve as a limitation on the number of players in the NFL, since the roster limitations in the CBA regulate roster size.¹⁸⁷ Instead, the eligibility rule limits the number of prospective players competing for spots on team rosters and money under the NFL's rookie salary cap.¹⁸⁸ It is clear that teams would not pay Clarett and his ineligible peers higher salaries. In fact, chief among the NFL's justifications for the eligibility rule was the insufficient psychological and emotional maturity of younger players to play professional football, as well as their "peculiar susceptibility to injury."¹⁸⁹ If these players are ill-equipped to handle the rigors of their employment and are at a high risk of injury, it is highly unlikely that they would be paid disproportionately higher salaries. It is equally unlikely that younger players would make salaries disproportionately low enough to jeopardize the job status of

¹⁸³ See *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 959–60 (2d Cir. 1987).

¹⁸⁴ See *Koch*, *supra* note 129, at 306 (stating that "the league age restriction has nothing to do with the working hours or wages in the NFL").

¹⁸⁵ See *Clarett v. Nat'l Football League*, 369 F.3d 124, 140 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005).

¹⁸⁶ See *id.*

¹⁸⁷ See CBA, *supra* note 18, art. XXXIII.

¹⁸⁸ See *id.* art. XVII.

¹⁸⁹ *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 387 (S.D.N.Y. 2004), *rev'd*, 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005). Not everyone in professional football agrees with this contention. Indianapolis Colt Edgerrin James, a running back like Clarett, felt Clarett could thrive in the NFL at 19 years old. See Interview by Michael Silver with Edgerrin James, in *My Take*, SPORTS ILLUSTRATED, Sept. 20, 2004, at 37.

established veterans as feared by the Second Circuit.¹⁹⁰ A team could not devote a significant number of roster spots to these younger players, pay them reduced salaries, and comply with the league's rookie salary cap, since each player would still have to be paid the league's individual salary minimum.¹⁹¹

Every NFL team must simultaneously abide by both the rookie salary cap and the team salary cap. Accordingly, there is competition between rookies and veterans for roster spots and playing time.¹⁹² However, expanding the number of eligible rookies would not substantially increase the competition between rookies and veterans because the fixed rookie salary cap would guarantee that teams could not afford to pay an increased number of rookies on their rosters while still paying them the league-wide minimum salary. Instead, expanding the number of eligible rookies would spark greater competition among rookies for roster spots and pieces of the rookie salary pie. Since the amount of money teams pay their rookies is fixed, and teams cannot pay them unusually low salaries and would not pay them unusually high salaries, expanding the rookie pool would not result in any greater threat to veteran job security, and would have little impact on wages and working conditions in the NFL.

Nor would abolishing the eligibility requirement have the dramatic effect on the length of NFL careers as the Second Circuit feared.¹⁹³ A player entering the NFL immediately after graduating high school would gain, at most, three additional seasons. The NFL has concluded that younger players are at a much higher risk of injury,¹⁹⁴ which makes younger players' careers unlikely to be lengthened, since playing at a younger age is counterweighted by the accompanying heightened injury risk. Similarly, because the risk of injury is so high for these younger players, and their maturity so low, it is hard to believe that very many will be drafted or signed. Players like Clarett will still be the rare exception. Accordingly, because so few younger players will be drafted or signed, their effect on the NFL labor market

¹⁹⁰ See *Clarett*, 369 F.3d at 140 ("Because the size of NFL teams is capped, the eligibility rules diminish a veteran player's risk of being replaced by [a rookie].").

¹⁹¹ CBA, *supra* note 18, art. XXXVIII.

¹⁹² See, e.g., Viv Bernstein, *Manning Does His Part to Start a Controversy*, N.Y. TIMES, Aug. 20, 2004, at D1 (detailing New York Giants quarterback competition between veteran Kurt Warner and rookie Eli Manning).

¹⁹³ See *Clarett*, 369 F.3d at 140.

¹⁹⁴ See *Clarett*, 306 F. Supp. 2d at 387.

will be minimal at best.

The Second Circuit's conclusion that the eligibility rule was an integral part of the NFL's salary structure is not reflected in the collective bargaining agreement. The court cited the eligibility rule as operating in concert with the draft, the team and rookie salary caps, and free agency to regulate the economics of professional football.¹⁹⁵ Those other provisions were all described in significant detail in the collective bargaining agreement.¹⁹⁶ The eligibility rule is not included anywhere in the text of the agreement. In addition, the commissioner is vested with the authority to declare as eligible a player three seasons removed from his graduation.¹⁹⁷ If regulating the market for incoming players were so critical to the economic foundation of the NFL, and if expanding that market to include younger players had such detrimental consequences, the bargaining parties would certainly have included it in the collective bargaining agreement, avoiding any grant of discretionary power to the commissioner.

Because the eligibility rule does not affect wages, hours, or working conditions in the NFL, it is not a mandatory subject of bargaining and accordingly cannot be shielded from antitrust scrutiny under the nonstatutory exemption.

C. The Rule Was Not the Product of Bona Fide Arm's-Length Bargaining

The third and final factor in the *Mackey* test requires that the restraint be the product of bona fide arm's-length bargaining.¹⁹⁸ Since the nonstatutory exemption is based on judicial recognition of the need to insulate the products of collective bargaining from antitrust liability, courts have required a showing that the restraint was actually bargained over.¹⁹⁹ The district court held that the eligibility rule was not the product of negotiations.²⁰⁰ In reaching this conclusion, the

¹⁹⁵ See *Clarett*, 369 F.3d at 140 ("The eligibility rules in other words cannot be viewed in isolation, because their elimination might well alter certain assumptions underlying the collective bargaining agreement . . .").

¹⁹⁶ See CBA, *supra* note 18, arts. XVI (NFL Draft), XVII (Rookie Salary Cap), XIX–XX (Free Agency), XXIV–XXV (Salary Cap).

¹⁹⁷ See *Clarett*, 369 F.3d at 127.

¹⁹⁸ See *Mackey v. Nat'l Football League*, 543 F.2d 606, 614 (8th Cir. 1976).

¹⁹⁹ See *McCormick & McKinnon*, *supra* note 6, at 411.

²⁰⁰ *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 396 (S.D.N.Y. 2004),

court noted that the eligibility rule predated the inception of collective bargaining in the NFL by forty years, and the only evidence that the eligibility rule was addressed during the negotiations was the declaration of an NFL lawyer.²⁰¹ Further, the eligibility rule was not contained within the text of the collective bargaining agreement itself. Instead, it was merged into the agreement through an NFLPA waiver of any right to bargain over the provisions contained in the NFL Constitution and Bylaws.²⁰² The Second Circuit disagreed, holding that the NFLPA could have chosen to bargain over the eligibility rule, but decided not to, and that the bona fide bargaining requirement does not require a showing of a quid pro quo.²⁰³ However, giving so little weight to the actual bargaining that produced the eligibility rule conflicted with significant prior precedent and is inconsistent with the very purpose of the nonstatutory exemption—that only restraints of trade that were actually bargained should be afforded protection from antitrust liability.

In *Mackey*, the Eighth Circuit did not exempt the NFL's Rozelle Rule because it was not the product of bona fide arm's-length negotiations.²⁰⁴ The court gave the collective bargaining negotiations a careful review, concluded that the Rozelle Rule was not the subject of any bargaining, and looked further at the relatively weak bargaining position of the NFLPA compared to that of the NFL.²⁰⁵ The court focused on the "little discussion concerning the Rozelle Rule."²⁰⁶ In *Mackey*, as in *Clarett*, the rule in dispute was formed before the advent of collective bargaining in the NFL.²⁰⁷ The *Mackey* court treated this as significant in holding that the rule was not the product of negotiations,²⁰⁸ whereas the *Clarett* court did not.

In contrast to the token negotiations in *Mackey*, the extensive bargaining over a similar reserve clause in professional hockey led the Sixth Circuit to apply the exemption in *McCourt v.*

rev'd, 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005).

²⁰¹ *See id.*

²⁰² *See id.*; *see also supra* note 25 and accompanying text.

²⁰³ *See Clarett v. Nat'l Football League*, 369 F.3d 124, 142–43 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005).

²⁰⁴ *See Mackey v. Nat'l Football League*, 543 F.2d 606, 615–16 (8th Cir. 1976).

²⁰⁵ *See id.*

²⁰⁶ *Id.* at 612.

²⁰⁷ *See id.* at 616.

²⁰⁸ *See id.*

*California Sports, Inc.*²⁰⁹ The court pointed to the concessions made by the league in exchange for the players' acceptance of the restraint, as well as to the negotiating pressure applied by the players, which included threats of lawsuits and work stoppages.²¹⁰ Similarly, in *Zimmerman v. National Football League*,²¹¹ the court applied the exemption to a supplemental draft that was bargained in a quid pro quo fostered by the NFL and the NFLPA. The court contrasted the detailed negotiations over the draft with the minimal bargaining over the Rozelle Rule in *Mackey*, and compared them to the lengthy negotiations in *McCourt* in deciding to apply the exemption.²¹²

The negotiations over the eligibility rule were far more similar to those in *Mackey* than those in *McCourt* or *Zimmerman*. Like in *Mackey*, the eligibility rule predated collective bargaining in the NFL and was unilaterally imposed at the beginning of the bargaining relationship, rather than actually bargained for.²¹³ Similarly, there was virtually no evidence that the eligibility rule was ever placed on the bargaining table.²¹⁴ The eligibility rule is found nowhere in the nearly 300-page, 61-article Collective Bargaining Agreement, which contains a lengthy article on the provisions and rules for the annual draft.²¹⁵ In fact, the incorporation of the rule into the Collective Bargaining Agreement is through a waiver of the right to bargain over the NFL Constitution and Bylaws.²¹⁶ In reaching its conclusion, the *Clarett* court concluded that the waiver by both parties of their right to bargain over the eligibility rule was, in itself, the product of collective bargaining.²¹⁷

The Second Circuit excused the rule's absence from the

²⁰⁹ 600 F.2d 1193, 1201–03 (6th Cir. 1979).

²¹⁰ *See id.* at 1202.

²¹¹ 632 F. Supp. 398, 406–08 (D.D.C. 1986).

²¹² *See id.* at 406.

²¹³ *See Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 396 (S.D.N.Y. 2004), *rev'd*, 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005).

²¹⁴ *Id.*

²¹⁵ *See Koch, supra* note 129, at 308; *see generally* CBA, *supra* note 18.

²¹⁶ CBA, *supra* note 18, art. III, § 1.

²¹⁷ *See* Mark Maske & Leonard Shapiro, *Draft Rule Will Be Made Much Clearer*, WASH. POST, May 27, 2004, at D3 (stating that although “[the Second Circuit] agreed with the NFL’s assertion that its draft-eligibility rule should be exempt from antitrust scrutiny because it resulted from collective bargaining,” the NFLPA acknowledged that the rule will be included within the next collective bargaining agreement to avoid challenges like *Clarett*’s).

agreement by pointing to the Supreme Court's holding in *Brown* that the nonstatutory exemption applies to provisions outside of collective bargaining agreements.²¹⁸ This conclusion is based on a significant misreading of *Brown*. The *Brown* ruling exempted the NFL's post-impasse imposition of terms, and extended the exemption to this unilateral imposition of terms because this tactic is an integral part of the collective bargaining process.²¹⁹ The *Brown* holding extended the exemption from the mere words of an existing collective bargaining agreement to the parties' tactics and strategies when that agreement expires.²²⁰ The NFL's eligibility rule is entirely distinguishable. It was not a term imposed during negotiations, but rather a rule which predated the negotiations, and was jammed into the collective bargaining agreement through a merger clause. This was hardly the intent of the Supreme Court when it expanded the scope of the nonstatutory exemption beyond the words of existing collective bargaining agreements.

Applying the three factors of the *Mackey* test to the NFL's eligibility rule reveals that the Second Circuit erred in applying the nonstatutory exemption. Although the rule primarily affected only the bargaining unit, it neither concerned a mandatory subject of bargaining, nor was the product of bona fide arm's-length negotiations. Because the NFL's eligibility rule could not meet all three prongs of *Mackey*, it should not have been exempted from antitrust liability review.

CONCLUSION

The nonstatutory exemption is a necessary evil, stemming from judicial recognition that in order to accomplish the goals of federal labor laws, some activity that would otherwise violate antitrust laws must be tolerated. However, the Supreme Court did not create a blanket antitrust exemption for every provision in every collective bargaining agreement. Rather, the Court crafted an exemption that would only insulate certain restraints that addressed mandatory subjects, that affected only those in

²¹⁸ See *Clarett v. Nat'l Football League*, 369 F.3d 124, 137 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005).

²¹⁹ See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 243 (1996).

²²⁰ See Jonathan C. Tyras, Note, *Players Versus Owners: Collective Bargaining and Antitrust After Brown v. Pro Football, Inc.*, 1 U. PA. J. LAB. & EMP. L. 297, 331-32 (1998).

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the bargaining relationship, and that were actually the fruits of collective bargaining negotiations. This Comment has suggested that in *Clarett v. National Football League*, the Second Circuit extended the nonstatutory exemption beyond its original scope—protecting the NFL’s eligibility rule that neither covered a mandatory bargaining subject nor stemmed from actual collective bargaining. The *Clarett* decision set a dangerous precedent, tipping the scales of the delicate balance between federal labor law and antitrust law too far in favor of labor law.