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THE EFFECT OF COLLECTIVE BARGAINING ON THE BASEBALL ANTITRUST EXEMPTION

I. Introduction

In 1922, the Supreme Court, in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,¹ ruled that the professional baseball industry was exempt from the application of the antitrust laws.² In 1972, in *Flood v. Kuhn*,³ the Court reaffirmed baseball's antitrust exemption.⁴ The Court, however, has refused to extend an antitrust exemption to the other professional sports.⁵ Baseball remains the only professional sport exempt from antitrust scrutiny.⁶

During the 1970's, athletes in all other major professional sports succeeded in effectuating major modifications in their reserve systems,⁷ primarily through antitrust challenges.⁸ The unique status of

1. 259 U.S. 200 (1922).

2. *Id.* at 208-09.

3. 407 U.S. 258 (1972).

4. *Id.* at 284.

5. See *Haywood v. National Basketball Ass'n*, 401 U.S. 1204 (Douglas, Circuit Justice 1971) (professional basketball subject to antitrust laws); *Radovich v. National Football League*, 352 U.S. 445 (1957) (professional football not exempt from antitrust scrutiny); *United States v. International Boxing Club of New York, Inc.*, 348 U.S. 236 (1955) (professional boxing subject to antitrust review). See *infra* notes 41-65 and accompanying text for a discussion of these cases.

6. As a result of the baseball antitrust exemption, organized baseball is permitted to operate in a classic cartel fashion through a series of interlocking agreements binding the baseball clubs to each other with respect to almost every phase of the business operations of the baseball club. See M. Miller, Statement before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary 7 (Feb. 24, 1982) (available in the Fordham Law School Library) [hereinafter cited as Miller].

The major league clubs are bound to each other pursuant to the Major League Agreement. The National Association Agreement binds every minor league club to every other minor league club. The Professional Baseball Agreement binds every major league club to every minor league club. As a result of these agreements, as well as rules and regulations promulgated pursuant to these agreements, each professional club is able to rely on every other club to refrain from tampering with contracted players in return for its agreement to do the same. Therefore, formal agreements not to compete are present in areas where baseball clubs would normally be expected to compete. "Markets are divided, prices fixed, and free and open economic competition effectively eliminated." See Miller, *supra* at 7-8.

7. The baseball reserve system, as it existed prior to 1976, included several related contractual provisions which operated to restrict not only the contractual freedom of the baseball players, but also the ability of the owners to negotiate for the players. The primary component of the reserve system is the reserve clause. A reserve clause is a rule or agreement among all the clubs that the services of each player are

in effect the permanent property of the team holding his contract. See Allison, *Professional Sports and the Antitrust Laws: Status of the Reserve System*, 25 BAYLOR L. REV. 1, 18-19 (1973) (reserve system in professional baseball perpetually binds player to club); Note, *Reserve Clauses in Athletic Contracts*, 2 RUT.-CAM. L.J. 302, 303 (1970) (reserve clause effectively binds player for life); Note, *Baseball's Antitrust Exemption and the Reserve System: Reappraisal of an Anachronism*, 12 WM. & MARY L. REV. 859, 862 (1971) (reserve clause forces player to either play for team holding his contract or retire from professional baseball).

The practical result of the pre-1976 rules was that, once a player signed a contract with a team, he was forced to bargain exclusively with that team and could not sell his services to any other baseball club. See, Pierce, *Organized Professional Team Sports and the Antitrust Laws*, 43 CORNELL L.Q. 566, 583 (1958) (reserve clause gives perpetual option on player's services); Steinberg, *Application of the Antitrust and Labor Exemptions to Collective Bargaining of the Reserve System in Professional Baseball*, 28 WAYNE L. REV. 1301, 1302 (1982) (baseball player bound to employer throughout career unless traded, released or sold). For a discussion of reserve systems in other sports, see Lee, *A Survey of Professional Team Sport Player—Control Mechanisms Under Antitrust and Labor Law Principles: Peace at Last*, 11 VAL. L. REV. 373 (1977); Note, *Reserve Clauses in Athletic Contracts*, 2 RUT.-CAM. L.J. 302 (1970). For a case discussing the reserve system as it existed prior to 1976, see *Flood v. Kuhn*, 407 U.S. 258, 259 n.1 (1972).

The 1976 collective bargaining agreement between the Players' Association and the Professional Baseball Clubs changed the reserve system. Under this agreement, although the ballplayer is still drafted by a single professional club with whom he must bargain exclusively, he may choose to wait until the next player draft and bargain with the new club that selects him. If he then chooses not to negotiate, the player must give up a career in professional baseball. See Miller, *supra* note 6, at 11-12. However, if he has been in the league for six years or has been discharged from service, the player may declare that he is a free agent. As a free agent he may, subject to certain league restrictions, sign a contract with any club. Basic Agreement Between the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs and the Major League Players' Association, art. XVIII(B)-(C) (Jan. 1, 1980) [hereinafter cited as 1980 Basic Agreement]. Unless the player achieves free agent status, he may not seek employment as a professional baseball player in the United States, Canada, Latin America or Japan. This is because of interlocking agreements among all professional baseball clubs, nationally and internationally, prohibiting the signing of reserved players. See Miller, *supra* note 6, at 12.

The right of a team to assign a player's contract has also been limited. A player who has played at least 10 years in the major leagues, the last five of which have been with one club, cannot be assigned to another major league club without his written consent. 1980 Basic Agreement, *supra*, art. XVII, A(1). Additionally, a player with five or more years of major league service cannot be assigned to other than a major league club without the player's written consent. *Id.* art. XVII, A(2). The 1980 Basic Agreement has been extended, with some modifications, until December 31, 1984. See Memorandum of Agreement Between the Major League Clubs—Player Relations Committee and the Major League Baseball Players' Association 13 (July 31, 1981) (available in the Fordham Law School Library).

8. See *Smith v. Pro Football*, 420 F. Supp. 738, 744 (D.D.C. 1976), *modified*, 593 F.2d 1173 (1978) (NFL draft system violates antitrust laws); *Mackey v. National Football League*, 407 F. Supp. 1000, 1007-08 (D. Minn. 1975), *modified*, 543 F.2d 606 (1976), *cert. dismissed*, 434 U.S. 801 (1979) (enjoining enforcement of NFL rule providing that any club signing free agent compensate agent's former employer); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 895 (S.D.N.Y. 1975) (basketball player restraint systems violate antitrust laws under any circumstances);

major league⁹ baseball under the antitrust laws has prevented baseball players from pursuit of such an antitrust line of attack.¹⁰ The baseball

Kapp v. National Football League, 390 F. Supp. 73, 82 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) (rule requiring any club acquiring free agent to compensate former club is patently unreasonable); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 517-18 (E.D. Pa. 1972) (National Hockey League market monopoly violated antitrust laws).

9. The term "major leagues" for the purpose of this Note will include the National and American Leagues, the individual baseball clubs in those leagues and the Major League Commissioner's office.

10. This Note focuses only on the relationship among the major leagues, the major league players, and the players' collective bargaining representative, the Major League Players' Association. However, the baseball antitrust exemption is also used by the league against cities, current owners, prospective owners and other leagues. Thus, for example, in *Wisconsin v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W.2d 1 (Sup. Ct. Wis. 1966), the state of Wisconsin filed a state statutory antitrust suit against the Atlanta Braves and the National League following that team's move to Atlanta from Milwaukee. The complaint charged that by moving the Braves to Atlanta without replacing the team in Milwaukee, the defendants had violated Wisconsin's antitrust laws. The Wisconsin Supreme Court dismissed the state's case, declaring that professional baseball was exempt from state and federal antitrust laws. *Id.* at 732, 144 N.W. 2d at 18. If this action had occurred in any other sport, the antitrust claim would have been heard.

In *Washington Professional Basketball Corp. v. National Basketball Ass'n* 147 F. Supp. 154 (S.D.N.Y. 1956), a corporation organized to purchase the Baltimore Bullets of the National Basketball Association (hereinafter NBA), was denied league approval. The corporation charged that the NBA had conspired to monopolize professional basketball. An NBA motion to dismiss was denied on the grounds that the plaintiff was entitled to its day in court. *Id.* at 155.

In 1976, the Oakland Athletics of the American League agreed to sell Joe Rudi and Rollie Fingers to the Boston Red Sox for two million dollars and Vida Blue to the New York Yankees for 1.5 million dollars. The sale was negated by League Commissioner Bowie Kuhn, who declared that the sale was not in "the best interests of baseball." Charles Finley, the owner of the Athletics, filed suit declaring that the Commissioner's action violated federal antitrust laws. *See Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 531 (7th Cir. 1978), *cert. denied*, 439 U.S. 876 (1978). Finley's antitrust action was dismissed by the Seventh Circuit. *Id.* at 541. The court declared that the Supreme Court had intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws. *Id.*

Professional baseball has remained unchallenged by a competing league. During the 1960's and 1970's, actions by other established professional sports leagues were often challenged by the new leagues. *See, e.g., American Football League v. National Football League*, 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963) (American Football League charged that National Football League had monopolized professional football). A new baseball league would not be able to mount similar challenges. In *Portland Baseball Club, Inc. v. Kuhn*, 491 F.2d 1101 (9th Cir. 1974), Portland's minor league team filed an antitrust action against Major League Baseball Commissioner Bowie Kuhn, charging that the awarding of major league franchises to Seattle and San Diego constituted an invasion of the Pacific Coast League territory. The claim was summarily dismissed. *Id.* at 1102-03. For a com-

players and the Major League Baseball Players' Association (Players' Association), the collective bargaining representative of the ballplayers, have vigorously contested this incongruity.¹¹ Some commentators have suggested, however, that the baseball players no longer need to rely upon the antitrust laws to effectuate modifications in their reserve system.¹² These commentators argue that the Players' Association can modify the reserve system through the collective bargaining process.¹³ However, under the labor exemption to the antitrust laws, certain provisions embodied in a collective bargaining agreement are exempted from antitrust scrutiny.¹⁴ The commentators declare that, because the players have had the opportunity to bargain over the reserve system, the labor exemption would prevent the players from an antitrust attack of the reserve system.¹⁵ They conclude that, because of the equal bargaining strength of the parties, the labor exemption would operate to shelter from scrutiny even a term that was unilaterally imposed by the owners.¹⁶

plete discussion of the relationships between the major leagues and parties other than the ballplayers, such as cities, owners and prospective owners, see L. Sobel, Statement before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary 28-38 (July 15, 1981) (available at the Fordham Law School Library) [hereinafter cited as Sobel].

11. See *Flood v. Kuhn*, 407 U.S. 258 (1972); Miller, *supra* note 6, at 7-20 (no valid basis upon which to conclude baseball's privileged status is warranted).

12. See Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 1 (1971) (antitrust issue in reserve system context is issue whose "time has come and gone"); McCormick, *Baseball's Third Strike, The Triumph of Collective Bargaining in Professional Baseball*, 35 VAND. L. REV. 1131, 1162 (1982) (employees capable of protecting interests without using antitrust laws). See generally Note, *Labor Exemption to the Antitrust Laws, Shielding an Anticompetitive Provision Devised by an Employer Group in its Own Interest: McCourt v. California Sports, Inc.*, 21 B.C.L. REV. 680 (1980).

13. See Jacobs & Winter, *supra* note 12, at 21-28 (players may alter reserve system through collective bargaining); McCormick, *supra* note 12, at 1168-69 (collective bargaining will shape contours of reserve system).

14. See Local Union No. 189, *Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co.*, 381 U.S. 676, 689-90 (1965) (under limited circumstances, union-oriented provisions are protected from antitrust scrutiny); 15 U.S.C. § 17 (1976), 29 U.S.C. § 52 (1976), 29 U.S.C. §§ 101-115 (1976).

15. See *supra* note 12 for a discussion of these commentaries.

16. See Berry & Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls and Strikes*, 31 CASE W. RES. L. REV. 685, 774-75 (1981) ("[t]o hold that the labor exemption is not available when parties fail to renegotiate a contract . . . is inconsistent with [labor law] principles"). See also J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* 590 (1979) (if substance of unilateral action is influenced by give and take of prior bargaining, labor exemption is justified).

If, as these commentators suggest, the labor exemption applies in the baseball context, then baseball's unique antitrust exemption is irrelevant. The labor exemption would remain to shelter the reserve system from the antitrust laws even if the baseball antitrust exemption was removed.¹⁷

This Note discusses the use of the labor exemption by the major leagues as a defense to antitrust attacks on the reserve system.¹⁸ After tracing baseball's unique status under the antitrust laws,¹⁹ this Note examines the history of the labor exemption as developed in non-professional sport cases²⁰ and as applied to professional sports.²¹ It concludes that the major leagues may not use the labor exemption to protect the reserve system from antitrust scrutiny.²² The general unavailability of the labor exemption to shelter the collective bargaining agreement between the players and the major leagues maintains baseball's unique status under the antitrust laws and perpetuates a legal inequity.

II. The Baseball Antitrust Exemption

A. Federal Baseball and Toolson

The relationship of federal antitrust law to professional sports was first considered in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.²³ Prior to this case, the

17. See Jacobs & Winter, *supra* note 12, at 29 (labor exemption, rather than baseball antitrust exemption, is critical barrier to antitrust challenge); McCormick, *supra* note 12, at 1168 (labor exemption would foreclose attack even if baseball antitrust exemption was removed).

18. This Note deals only with major league ballplayers. The majority of professional baseball players, however, are in the minor leagues. The minor leagues operate as a grooming ground for major league ballplayers. There are approximately 4000 minor league and 750 major league players active during the baseball season. The minor league players have neither a collective bargaining representative nor a collective bargaining agreement. Telephone interview with Robert Sparks, Promotion Staff Member, National Association of Professional Baseball Clubs (Feb. 28, 1984). Therefore the labor exemption is not applicable. See Miller, *supra* note 6, at 11.

19. See *infra* notes 23-80 and accompanying text for a discussion of baseball's status under the antitrust laws.

20. See *infra* notes 92-106 and accompanying text for a discussion of the labor exemption in non-sport cases.

21. See *infra* notes 122-60 and accompanying text for a discussion of the development of the labor exemption in professional sport cases.

22. See *infra* notes 161-201 and accompanying text for this conclusion.

23. 259 U.S. 200 (1922).

baseball market consisted of three leagues: the National League, the American League and the Federal League.²⁴ The Baltimore franchise of the Federal League charged that the American and National Leagues had engaged in a conspiracy to destroy the Federal League.²⁵ Baltimore claimed that the leagues had effected this plan by purchasing some of the constituent clubs and encouraging all other clubs, except the plaintiff, to abandon the league.²⁶ The Baltimore franchise argued that the American and National Leagues thus had violated the Sherman Antitrust Act.²⁷

The Supreme Court declared that the baseball industry was not amenable to antitrust attack.²⁸ The Court reasoned that baseball games were purely intrastate activities and were not commerce

24. In 1876, the National League, consisting of fifteen teams, was founded. THE BASEBALL ENCYCLOPEDIA 11 (J. Reichler 5th ed. 1982). By 1879, because of fierce bidding wars, seven teams had dissolved. In 1881, the American Association was founded. To insure financial solvency, the leagues entered into an agreement which permitted teams to protect the contracts of certain players and thus prohibit other teams from hiring or attempting to hire protected players. *Id.* In 1884, the Union Association was organized. It dissolved after only one season. *See* McCormick, *supra* note 12, at 1141. In 1889, because of repressive owner tactics, the Players League was formed. This league had been formed by the Brotherhood of Professional Baseball Players, the first union of professional athletes. However, following the 1891 season, this league also failed. *Id.* at 1141-43. During the 1891 season the American Association withdrew from the agreement it had entered into with the National League. As a result, four American Association teams joined the National League. The American Association subsequently dissolved. *Id.* at 1143-44. In 1900, the American League was formed. In 1903, because of the success of the American League, the American and National Leagues signed an agreement which prohibited any team in either league from hiring or attempting to hire a player who was reserved to another club. *Id.* at 1144. In 1913, the Federal League was organized. In 1915, however, the Federal League, upon agreement with the other leagues, was effectively dissolved. As part of the agreement, a number of the Federal League owners were allowed to purchase American or National League franchises. The owners of the Federal League teams also received payment. *Id.* at 1144-46. For a general discussion of early baseball leagues, see LOWENFISH & LUPIEN, *THE IMPERFECT DIAMOND* (1980).

25. *Federal Baseball*, 259 U.S. at 207.

26. *Id.*

27. 15 U.S.C. §§ 1-2 (1982). The Sherman Act provides:

§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony.

28. *Federal Baseball*, 259 U.S. at 208-09.

“[with]in the commonly accepted use of [the term].”²⁹ Therefore, the Sherman Antitrust Act, which requires that the illegal activity be the result of interstate commerce,³⁰ was inapplicable.³¹ The baseball antitrust exemption, created by the Supreme Court, would remain in effect long after courts concluded that baseball did operate in interstate commerce.³²

In 1953, the Supreme Court in *Toolson v. New York Yankees, Inc.*,³³ reaffirmed *Federal Baseball*. The Court concluded that con-

29. *Id.* Justice Holmes reasoned that a baseball game was not related to production but rather was a public exhibition of the ballplayer's personal effort. The fact that the ballplayer had to cross state lines to participate in these exhibitions was merely an incident of the business. He concluded: “[t]hat which . . . is not commerce does not become commerce . . . because [of interstate] transportation . . .” *Id.*

30. See *supra* note 27 for the text of the Sherman Act.

31. The plaintiff argued that the interstate relationship among the several clubs was predominant, that the business of organized baseball represented an enormous investment, that the reason for the investment was to make a profit, that the receipts of each exhibition were shared by both teams and that baseball was in essence a business which had to be distinguished from the mere physical activity necessary to play the sport. Therefore, the plaintiff alleged, baseball was a business operating in interstate commerce. *Id.* at 201-06.

32. See *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) (professional baseball is business engaged in interstate commerce); The American League of Professional Baseball Clubs & Ass'n of Nat'l Baseball League Umpires, 180 N.L.R.B. 190, 192-93 (1969) (professional baseball is industry in or affecting interstate commerce); Note, *Baseball's Antitrust Exemption and the Reserve System: Reappraisal of an Anachronism*, 12 WM & MARY L. REV. 859, 865 (1971) (reasoning which led to *Federal Baseball* is no longer valid).

33. 346 U.S. 356 (1953). *Toolson* was a consolidation of three separate cases. *Toolson*, a minor league pitcher in the New York Yankee organization, was blacklisted for failing to report to Binghamton upon the assignment of his contract from Newark. *Toolson* alleged that the blacklisting prevented him from reaching the major leagues and deprived him of his means of livelihood. *Toolson v. New York Yankees*, 101 F. Supp. 93, 93 (S.D. Cal. 1951), *aff'd*, 200 F.2d 198 (9th Cir. 1952).

In *Kowalski v. Chandler*, 202 F.2d 413, 414 (6th Cir. 1953) (per curiam), *aff'd sub nom.*, *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), *Kowalski*, a minor league player, claimed that the league and the owners had used the draft restrictions and reserve clauses to deprive him of the reasonable value of his services and opportunities for promotion.

In *Corbett v. Chandler*, 202 F.2d 428 (6th Cir. 1953) (per curiam), *aff'd sub nom.*, *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), the El Paso Class C baseball club had contracted with four players who were bound under reservation claims to Mexican League clubs. The Mexican League and the National and American Leagues had an agreement to respect the reservation claims of each team. As a result, the four Mexican League ballplayers were returned to the Mexican League. *Corbett*, the owner of the team, brought suit, claiming that the monopolistic practices of the defendants deprived the El Paso club of the services of the four players

gressional action was necessary to remove the exemption.³⁴ The Court found that legislative inaction indicated congressional reluctance to remove the exemption.³⁵ A dissent argued that the baseball industry was involved in interstate commerce and that, therefore, the antitrust laws were applicable.³⁶

B. Other Professional Sports

The decision in *Federal Baseball* was further isolated by subsequent Supreme Court decisions which refused to extend the antitrust exemption to other professional sports. Following *Federal Baseball*, the Court refused to immunize boxing,³⁷ football³⁸ and basketball³⁹ from antitrust scrutiny.⁴⁰ In *United States v. International Boxing Club of*

and the opportunity to sell their contracts. See Note, *Baseball—An Exception to the Antitrust Laws*, 18 U. PITT. L. REV. 131, 144 (1956).

34. *Toolson*, 346 U.S. at 357. See also *Radovich v. National Football League*, 352 U.S. 445, 452 (1957) (if exemption is to be eliminated, it must be eliminated by congressional, not judicial, action).

35. *Toolson*, 346 U.S. at 357. The Court reasoned that overruling *Federal Baseball* would cause more harm than good as “[t]he business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation.” *Id.*

36. *Toolson*, 346 U.S. at 357 (Burton, J., dissenting). Justice Burton argued that it is contradictory to claim that the defendants are not engaged in interstate commerce when large capital investments are made to conduct games between teams, the teams travel interstate, the equipment is purchased interstate, radio and television coverage extends baseball’s audiences outside the state, and advertising is conducted interstate. *Id.* at 357-58. Justice Burton concluded that the antitrust exemption had been improvidently granted by the Court. Therefore in the absence of congressional action granting an exemption, baseball should be required to comply with the antitrust laws. *Id.* at 364-65. Justice Burton argued that there was no judicially implied exemption for “any sport that is so highly organized as to amount to an interstate monopoly or which restrains interstate trade or commerce.” *Id.* Because baseball has become a large monopoly, it should be required to comply with the antitrust laws. *Id.* For a discussion of *Toolson*, see Note, *The Supreme Court, 1953 Term*, 68 HARV. L. REV. 105, 136-38 (1954); Note, *Legislation—Interpretation and Construction of Statutes—Use of the Doctrine of Legislative Silence in Implying Adoption of a Judicial Interpretation—Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), 32 TEXAS L. REV. 890 (1954).

37. *United States v. International Boxing Club of New York, Inc.*, 348 U.S. 236 (1955). See *infra* notes 41-49 and accompanying text for a discussion of the case.

38. *Radovich v. National Football League*, 352 U.S. 445 (1957). See *infra* notes 50-56 and accompanying text for a discussion of the case.

39. *Haywood v. National Basketball Ass’n*, 401 U.S. 1204 (Douglas, Circuit Justice 1971). See *infra* notes 57-65 and accompanying text for a discussion of the case.

40. Lower courts have also refused to extend *Federal Baseball*. See *Drysdale v. Florida Team Tennis, Inc.* 410 F. Supp. 843 (W.D. Pa. 1976); *Robertson v. National*

New York,⁴¹ the Supreme Court concluded that *Federal Baseball* and *Toolson* did not immunize all professional sports from application of the Sherman Act.⁴²

In *International Boxing*, the Government brought a civil antitrust suit⁴³ against three corporations and two individuals engaged in the promotion of professional championship boxing events.⁴⁴ The defendants asserted that the exemption established in *Federal Baseball* applied to all professional sports.⁴⁵ The Court, however, concluded that *Federal Baseball* could not be relied upon as a basis for exempting other segments of the professional sports industry.⁴⁶ The Court distinguished *International Boxing* from *Federal Baseball* by reasoning that the issue in *International Boxing* was not whether a previously granted exemption should continue, but whether an exemption should be granted at all.⁴⁷ The Court concluded that only Congress could grant an exemption.⁴⁸ A dissent noted that it was virtually impossible

Basketball Ass'n, 389 F. Supp. (S.D.N.Y. 1975); *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260 (N.D. Ga. 1973); *Nassau Sports v. Hampson*, 355 F. Supp. 733 (D. Minn. 1972).

41. 348 U.S. 236 (1955).

42. *Id.* at 242.

43. The complaint alleged that the defendants had "restrained and monopolized . . . 'the promotion, exhibition, broadcasting, telecasting, and motion picture production and distribution of professional championship boxing contests in the United States'—through a conspiracy to exclude competition in their line of business." *Id.* at 239.

44. *Id.* at 237. "The corporate defendants [were] the International Boxing Club of New York, Inc., the International Boxing Club, and Madison Square Garden Corporation." *Id.* at 237 n.1. The conspiracy, as charged by the government, commenced with an agreement between the defendants and heavyweight champion Joe Louis. As part of the agreement, Louis agreed to resign his title. The four leading contenders for the vacant championship were then convinced to engage in an elimination contest. The defendants obtained exclusive broadcast rights to those contests. The complaint alleged that the defendants had effectuated this scheme by forcing each contender to agree, as a prerequisite to fighting for the title, that if he won the title, he would take part only in future contests which were promoted by the defendants. *Id.* at 239-40.

45. *Id.* at 242.

46. *Id.* at 242-43.

47. *Id.* at 243.

48. *Id.* at 244. The Court noted that Congress had addressed the issue of the applicability of the antitrust laws to professional sports in 1951. Following extensive discussion by the Subcommittee of the House Judiciary on the Study of Monopoly Power, the Subcommittee refused to extend an exemption to the professional sports industry. With respect to baseball, however, the Subcommittee recommended a postponement of action until further judicial clarification of *Federal Baseball*. *Id.* at 243-44. See H. R. REP. NO. 2002, 82d Cong., 2d Sess. 230 (1951).

to distinguish baseball from other professional sports under an anti-trust analysis.⁴⁹

*Radovich v. National Football League*⁵⁰ tested the applicability of the Sherman Antitrust Act to professional football. Radovich began his professional career in 1938 with the Detroit Lions of the National Football League (NFL). In 1946 Radovich broke his contract and signed with the Los Angeles Dons of the All-America Conference,⁵¹ a competitor of the NFL. In 1948 Radovich was offered the position of player-coach of the San Francisco Clippers of the Pacific Coast League, which was affiliated with the NFL and was not a competitor. The Clippers retracted the offer when they discovered that Radovich had been blacklisted by the NFL and that the club would suffer harsh penalties if they hired him.⁵²

Radovich initiated an antitrust action against the NFL, asserting that the League conspired to monopolize and control organized professional football in violation of sections one and two of the Sherman Act.⁵³ Radovich claimed that the NFL had tried to destroy the All-America Conference, and that the NFL had boycotted Radovich and prevented him from securing employment in the Pacific Coast League.⁵⁴ The Court ruled that federal antitrust law applied to the business of professional football.⁵⁵ The Court declared that the *Fed-*

49. *International Boxing*, 348 U.S. at 248-51 (Frankfurter, J., dissenting). Justice Frankfurter declared that "[i]t would baffle the subtlest ingenuity to find a single differentiating factor between other sporting exhibitions . . . and baseball insofar as the conduct of the sport is relevant to the criteria or considerations by which the Sherman Law becomes applicable to a 'trade or commerce'." *Id.* at 248. For a further discussion of *International Boxing*, see Note, *Monopolies—Sherman Antitrust Act—Multistate Promotion of Professional Championship Boxing Contests*, 29 TUL. L. REV. 793 (1955); Comment, *Constitutional Law—Interstate Commerce—Boxing Exhibitions and Theatrical Productions Under the Sherman Antitrust Act*, 35 B.U.L. REV. 447 (1955); Comment, *Constitutional Law—Boxing and Interstate Commerce*, 26 MISS. L.J. 271 (1955); Comment, *Constitutional Law—Promotion of Professional Boxing Contests Constitutes "Commerce" Within the Scope of the Sherman Act*, 29 TEMP. L.Q. 103 (1955).

50. 352 U.S. 445 (1957).

51. *Id.* at 448. Following the 1945 season Radovich asked to be traded to a team in the Los Angeles area so that he could be near his ailing father. The Detroit Lions refused to trade Radovich to a team in or near Los Angeles. *Id.*

52. *Id.*

53. *Id.* at 446-47.

54. *Id.* at 447.

55. *Id.* at 451-52. The Court specifically limited *Federal Baseball* to the business of organized baseball. *Id.* at 451.

eral *Baseball* decision was only applicable to the baseball industry and refused to extend it beyond its facts.⁵⁶

In *Haywood v. National Basketball Association*,⁵⁷ Spencer Haywood challenged the validity of certain components of the National Basketball Association's (NBA) player draft and reserve clause,⁵⁸ particularly its "four year rule" denying players eligibility as draftees until the graduation of their college class.⁵⁹ After playing on the 1968 United States Olympic basketball team, Haywood enrolled at the University of Detroit. Prior to graduation, he signed a contract with the American Basketball Association (ABA), a competitor of the NBA.⁶⁰ Haywood later repudiated the contract and signed with the Seattle Supersonics of the NBA.⁶¹ The NBA threatened to terminate Haywood's contract because a league rule declared that a player could not be signed for four years after his college class had enrolled.⁶² Haywood commenced an antitrust suit and a federal district court issued an injunction which permitted him to play for the season.⁶³ The Ninth Circuit stayed the injunction, which was reinstated by the

56. *Id.* Justice Clark noted that, if the Court had been considering the question of the application of the antitrust laws to baseball for the first time, there would be little doubt that an exemption would not have been granted. *Id.* at 452. For a further discussion of *Radovich*, see Note, *Anti-trust Laws—Sherman Antitrust Act—Professional Sports*, 36 N.C.L. Rev. 315 (1958); Note, *Antitrust Laws—Interstate Commerce—Professional Football*, 11 Sw. L.J. 516 (1957).

57. 401 U.S. 1204 (Douglas, Circuit Justice 1971).

58. *Id.* at 1204-05.

59. *Id.* By-law 2.05 of the National Basketball Association Rules provided: [A] person who has entered college but is no longer enrolled, shall not be eligible to be drafted or to be a Player until the time when he would have first become eligible had he remained enrolled in college. Any negotiations or agreements with any such person during such period shall be null and void and shall confer no rights to the services of such person at any time thereafter.

See *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1055 (C.D. Cal. 1971) (citing text of by-law).

60. *Haywood*, 401 U.S. at 1204-05.

61. *Denver Rockets v. All-Pro Management*, 325 F. Supp. 1049, 1054 (C.D. Cal. 1971). In 1969, Haywood was voted Rookie of the Year and Most Valuable Player of the league. Consequently, he renegotiated his contract with the ABA's Denver Rockets. Haywood was promised a contract of \$1,900,000 but received a contract of \$394,000. However, he signed the contract believing that the agreed upon salary was included. He later learned of the deception and after an unsuccessful attempt at further renegotiation, rescinded his contract. *Id.* at 1052-54. The Denver Rockets brought suit to force him to play for the team and to enjoin him from playing elsewhere.

62. *Haywood*, 401 U.S. at 1205.

63. *Id.*

Supreme Court.⁶⁴ The Court declared that professional basketball was not exempt from the antitrust laws and that *Federal Baseball* would not be extended to include other professional sports.⁶⁵

C. *Flood v. Kuhn*

In 1972, the Supreme Court, for the third time in fifty years,⁶⁶ was given an opportunity to rule on the scope of federal antitrust law as applied to the professional baseball industry. In *Flood v. Kuhn*,⁶⁷ the Court again held that the baseball industry is exempt from application of the Sherman Act.⁶⁸

In October 1969, Curt Flood was traded from the St. Louis Cardinals to the Philadelphia Phillies.⁶⁹ In December, Flood complained to the Commissioner of Baseball and asked that he be declared a free agent,⁷⁰ and permitted to pursue contractual negotiations with other major league clubs. Flood's request was denied.⁷¹ He subsequently filed suit charging that the reserve system⁷² and the players' lack of contractual freedom constituted an unlawful restraint of trade.⁷³ The Court acknowledged that professional baseball is a business in interstate commerce.⁷⁴ It declared that baseball's antitrust exemption was indeed an anomaly, but that the aberration was an established one that rested on the recognition and acceptance of baseball's unique

64. *Id.* at 1206-07.

65. *Id.* at 1205.

66. See *Federal Baseball*, 259 U.S. 200 (1922); *Toolson*, 346 U.S. 356 (1953).

67. 407 U.S. 258 (1972).

68. *Id.* at 284.

69. *Id.* at 265.

70. A free agent in professional sports is a player who has completed his contractual obligation to a team. The player is thereafter, subject to league rules and restrictions, permitted to pursue employment with other teams. See WEISTART & LOWELL, *supra* note 16, §5.03(d) at 523. See 1980 Basic Agreement, *supra* note 7, at XVIII(B) for the current rules pertaining to free agency.

71. *Flood*, 407 U.S. at 265. Flood had played for the St. Louis Cardinals for twelve years. He was neither informed of the trade, nor permitted to contest it.

72. See *supra*, note 7 for a definition of the reserve clause.

73. *Flood*, 407 U.S. at 265-66. Flood alleged violations of federal antitrust laws, civil rights statutes, state antitrust statutes, as well as violation of the thirteenth amendment's prohibition against involuntary servitude. *Id.*

74. *Flood*, 407 U.S. at 282. The National Labor Relations Board, in *American League of Professional Baseball Clubs & Ass'n of Nat'l Baseball League Umpires*, 180 N.L.R.B. 190, 192 (1969), had concluded three years earlier that baseball was a business in interstate commerce.

characteristics and needs.⁷⁵ The Court was reluctant to overturn *Federal Baseball* and *Toolson* because Congress allowed these decisions to stand for "so long without changing them."⁷⁶ Congressional inaction thus implied that Congress intended to continue the baseball antitrust exemption.⁷⁷

The antitrust exemption has been described by the Supreme Court as an historical anomaly.⁷⁸ Despite almost universal judicial and academic agreement of its inequitable application and logical inconsistency,⁷⁹ the Court has refused to remove the exemption. Instead, the

75. *Flood*, 407 U.S. at 282.

76. *Id.* at 282-85. In his dissent, Justice Douglas declared that *Federal Baseball* "is a derelict in the stream of the law that we, its creator, should remove." *Id.* at 286. Justice Douglas stated that equity mandated a reversal of *Federal Baseball*, declaring that baseball players had been victimized by the reserve clause. *Id.* at 287.

Justice Marshall, in a separate dissent, declared that, despite a general reluctance to overrule prior constructions of federal statutes, the Supreme Court must overrule *Federal Baseball* as its effect was to deny substantial federal rights as guaranteed by the antitrust laws. *Id.* at 292-93. For a discussion of *Flood*, see Keeffe, *The Flood Case at Ebb Tide*, 59 A.B.A.J. 91 (1973); Morris, *In the Wake of the Flood*, 38 LAW & CONTEMP. PROB. 85 (1973).

77. *Id.* at 283. In 1976, Baseball's antitrust exemption was discussed by the House Select Committee on Professional Sports (commonly referred to as the Sisk Committee). The final report of the Committee states:

Baseball's justification for retention of its antitrust exemption rests fundamentally on the premise that it has relied for many years on that exemption and evolved a way of doing business that would be jeopardized if it were suddenly subjected to current antitrust standards. Moreover, it is argued, the status quo should be maintained because no protectable public interest or group has been harmed as a result of its enjoyment of the exemption, and in fact there has been tangible public benefit from its operations under the exemption The reliance defense is faulty both from a legal point of view and in its implicit suggestion that no other method of business operation is possible for it which would be compatible with our nation's antitrust policy and at the same time allow baseball to be a viable profitable enterprise.

Hearings before the Select Comm. on Professional Sports, 94th Cong., 2d Sess. 53 (1977). The Committee concluded that adequate justification did not exist for baseball's special exemption from the antitrust laws and that its exemption should be removed in the context of overall antitrust reform. *Id.* at 60. The Select Committee, however, refused to specifically recommend legislation. The Committee recommended that a successor committee be appointed to prepare a report on sports antitrust law and to make specific recommendations. *Id.*

78. See *Flood v. Kuhn*, 407 U.S. 258, 282 (1972); *Radovich v. National Football League*, 352 U.S. 445, 452 (1957).

79. See *Salerno v. Professional Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971) (*Federal Baseball* was "not one of Mr. Holmes' happiest days" and the rationale for *Toolson* is "extremely dubious"). See also *Gardella v. Chandler*, 172 F.2d 402, 408-09 (2d Cir. 1949) (baseball antitrust

Court has steadfastly declared that Congress must act in order to end the exemption.⁸⁰

III. The Labor Exemption

In *Flood v. Kuhn*,⁸¹ Justice Marshall, in a dissenting opinion, noted that the advent of the Players' Association⁸² as the collective bargaining representative of the baseball players and the subsequent signing of a collectively bargained agreement raised the possibility that the labor exemption⁸³ might be available to shelter baseball's reserve system from antitrust attack.⁸⁴ The Court did not apply the parameters of the labor exemption to the professional sports industry in general or to baseball in particular.⁸⁵ The next section will trace the history of the labor exemption and determine the extent of its application to baseball and other professional sports.

exemption is "impotent zombie"). The baseball antitrust exemption has been the subject of numerous law review articles. For a discussion of this exemption, see Note, *Baseball's Antitrust Exemption: The Limits of Stare Decisis*, 12 B.C. INDUS. & COM. L. REV. 737, 746 (1971) (only rationale left for *Federal Baseball* is that forty-nine years ago Court held that baseball was not interstate activity); Note, *Antitrust and Professional Sport: Does Anyone Play by the Rules of the Game?*, 22 CATH. U.L. REV. 403, 426 (1973) (antitrust laws should apply equally to all sports); Note, *Baseball's Antitrust Exemption and the Reserve System: Reappraisal of an Anachronism*, 12 WM. & MARY L. REV. 859, 877 (1971) (subsequent economic developments and expansion of antitrust jurisdiction demand review of the exemption).

80. See *supra* notes 23-36 and accompanying text for the Supreme Court's conclusion that the baseball antitrust exemption can only be ended by congressional action.

81. See *supra* notes 66-77 and accompanying text for a discussion of the case.

82. In 1969 the National Labor Relations Board declared baseball to be an industry in interstate commerce and therefore subject to the National Labor Relations Act. See *American League of Professional Baseball Clubs*, 180 N.L.R.B. at 192-93. The Board subsequently recognized the Major League Baseball Players' Association as a labor organization, 29 U.S.C. § 152(5) (1982), and as the exclusive bargaining representative for all members of the association. 29 U.S.C. § 159(a) (1982). See Note, *Nearly a Century in Reserve: Organized Baseball: Collective Bargaining and the Antitrust Exemption Enter the 80's*, 8 PEPPERDINE L. REV. 313, 334-35 (1981).

83. See *supra* note 14.

84. *Flood*, 407 U.S. at 293-94. (Marshall, J., dissenting).

85. The labor exemption, though briefed by the parties, was not mentioned in the majority opinion. *Id.* at 258-84.

A. Historical Background

The labor exemption is derived from three federal statutes: sections six and twenty of the Clayton Act,⁸⁶ and the Norris-LaGuardia Act.⁸⁷

86. Section 6 of the Clayton Act, 15 U.S.C. § 17 (1976), enacted in 1914, provides:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations, from lawfully carrying out the legitimate objects thereof; nor shall such organizations or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 20 of the Clayton Act, 29 U.S.C. § 52 (1976), enacted in 1914, provides in part:

No restraining order or injunction shall be granted by any Court of the United States, or the judge or the judges thereof in any case between an employer and employees, or between . . . persons employed and persons seeking employment. involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

87. The Norris-LaGuardia Act, 29 U.S.C. § 101 (1976), enacted in 1932, provides:

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

Section 113(c) of this act explains that

[t]he term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

The Sherman Antitrust Act, as originally passed, did not specifically exempt union activity from the antitrust laws. *See* *Allen Bradley Co. v. Local 3 IBEW*, 325 U.S. 797, 801 (1945). Federal courts applied the Act to unions and issued injunctions restraining union activity. In response to vigorous protest from employee groups against application of the Act to them, Congress passed the Clayton Act in 1914. *Id.* at 802-03. This act was broadly interpreted by many as labor's "magna carta", wholly exempting the unions from inclusion within the antitrust acts. *Id.* at 804. The Supreme Court, however, declined to interpret the Clayton Act as providing a total exemption and, in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), and *Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n of N. Am.*, 274 U.S. 37 (1927), applied the Sherman Act to labor organizations.

Congress drafted the labor exemption in recognition that a union must be permitted to use certain economic tactics, such as strikes, picketing and boycotts, to secure the rights of the employees.⁸⁸ Use of such tactics infringes on the antitrust laws, but enforcement of the antitrust violation is sacrificed to insure the strength of the union in the collective bargaining process.⁸⁹

These statutes, however, protect only unilateral union activity and do not extend to agreements between union and employer groups.⁹⁰ The Supreme Court extended the labor exemption to include the product of the union's efforts, the collectively bargained agreement.⁹¹

In response to these decisions and the resulting union pressure, Congress in 1932 passed the Norris-LaGuardia Act, which emphasized the importance of insuring the rights of employees to organize into unions and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection. *Id.* at 805. See Siegel, Connolly & Walker, *The Antitrust Exemption for Labor—Magna Carta or Carte Blanche?*, 13 DUQ. L. REV. 411, 415-20 (1975); Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 30-32 (1963).

88. See Handler & Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459, 469 (1981) (Congress, recognizing that certain union activity may be illegal under antitrust laws, drafted labor exemption to protect such activity). For a full discussion of the legislative history, see Kovner, *The Legislative History of Section 6 of the Clayton Act*, 47 COLUM. L. REV. 749 (1947).

89. See *Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 621-22, *reh. den.*, 423 U.S. 884 (1975) (statutory labor exemption protects specific union activity from application of antitrust laws); *United Mine Workers v. Pennington*, 381 U.S. 657, 661-62 (1965) (labor exemption shelters only certain union activity from application of Sherman Act). The scope of the statutory labor exemption was articulated by the Supreme Court in *United States v. Hutcheson*, 312 U.S. 219 (1941). In *Hutcheson* the Court dismissed criminal antitrust indictments against a union which had picketed an employer following an unsuccessful battle with a rival union to secure the right to erect and dismantle machinery for the Anheuser-Busch Brewing Company. *Id.* at 232-37. The Court concluded that,

[s]o long as a union acts in its self interest and does not combine with non-labor groups, the licit and the illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id. at 232 (footnote omitted). See also *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489-93 (1940) (violent sitdown strike, in violation of state law, to compel closed shop agreement was beyond substantive reach of Sherman Act).

90. See *Connell Constr. Co.*, 421 U.S. at 622 (statutory labor exemption does not exempt agreements between unions and non-labor groups from application of antitrust laws); *Pennington*, 381 U.S. at 662 (statutory labor exemption only applicable to union acting alone).

91. See *Connell Constr. Co.*, 421 U.S. at 622 (some union-employer agreements granted exemption from antitrust laws); *Pennington*, 381 U.S. at 665 (union wage

In *Connell Construction Co. v. Plumbers & Steamfitters Local No. 100*⁹² the Court declared that "a proper accommodation between the Congressional policy favoring collective bargaining under the NLRA and the Congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions."⁹³

The nonstatutory exemption has its source in the promotion of a strong national labor policy favoring the association of employees to eliminate competition over wages and working conditions.⁹⁴ Union success in organization and negotiation will affect price competition among employers, with its attendant antitrust implications, but the success of federal labor policy is dependant on a relaxation of the antitrust laws.⁹⁵ The nonstatutory exemption is of limited application.⁹⁶ The union-employer agreement will be accorded an exemption from antitrust scrutiny only if the labor interests override antitrust concerns.⁹⁷

The Supreme Court, in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*,⁹⁸ discussed the various factors necessary for balancing labor interests against antitrust concerns. In *Jewel Tea*, a food retailer brought an antitrust action against a union with which it had signed a collective bargaining agreement.⁹⁹ The employer alleged that a restriction within the agreement, which prohibited the sale of meat before 9:00 A.M. and after 6:00 P.M., constituted an illegal restraint of trade.¹⁰⁰

agreements with employer protected under certain circumstances by labor exemption).

92. 421 U.S. 616 (1975).

93. *Id.* at 622. See *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 688-90 (1965).

94. See *Connell Constr. Co.*, 421 U.S. at 622; *Pennington*, 381 U.S. at 666.

95. See *Connell Constr. Co.*, 421 U.S. at 622; *Pennington*, 381 U.S. at 666; *Jewel Tea*, 381 U.S. at 689-90; *Allen Bradley Co v. Local 3 IBEW*, 325 U.S. 797, 805 (1945).

96. See *Connell Constr. Co.*, 421 U.S. at 622 (exemption to be given limited application); *Allen Bradley Co.*, 325 U.S. at 809 (exemptions granted unions were special exemptions).

97. See *Mackey v. National Football League*, 543 F.2d 606, 613 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (before applying labor exemption to immunize union-employer agreement, court must examine circumstances of case and determine that federal labor law policy deserves preeminence over federal antitrust concerns).

98. 381 U.S. 676 (1965).

99. *Id.* at 680-82.

100. *Id.* at 681-82. During contract negotiations, Jewel Tea and other members of the multi-employer bargaining unit sought a relaxation of this restriction. Jewel Tea was particularly interested in a relaxation of the time restriction as 174 of their 196 stores were equipped to sell meat in a self-service manner. These stores did not need a

Use of the labor exemption acknowledges a violation of the antitrust laws.¹⁰¹ An overriding concern with promotion of national labor policy, however, mandates that the antitrust violations inherent in any collective bargaining agreement be tolerated.¹⁰² The Court concluded that for the labor exemption to apply, the labor interests must override the antitrust effect of the agreement.¹⁰³ Labor interests will be held pre-eminent if the disputed subject is intimately related to wages, hours and conditions of employment and is proffered by the union in pursuit of its own labor policies and not at the behest of or in combination with a non-labor group.¹⁰⁴ If these criteria are satisfied, the labor interests will override the natural antitrust effect.¹⁰⁵

butcher on duty to monitor the sale of meat. The union refused to remove the condition. *Jewel Tea*, under threat of strike and despite its protests that such a restriction violated antitrust laws, reluctantly signed the agreement. *Id.* at 680-82.

101. See *supra* notes 88-97 and accompanying text for a discussion of the antitrust implications inherent in the use of the labor exemption.

102. See *supra* notes 93-97 and accompanying text for a discussion of the nonstatutory labor exemption.

103. See *supra* note 97.

104. See *Id.*

105. The Court concluded that the particular hours of the day and the particular days an employee would work were intimately related to wages, hours and working conditions. *Id.* at 691. The Supreme Court has discussed the scope of the labor exemption in two other important cases. In *Allen Bradley Co., v. Local 3 IBEW*, 325 U.S. 797 (1945), manufacturers of electrical equipment from outside New York charged that Union Local No. 3 of the International Brotherhood of Electrical Workers, through agreements and industry-wide understandings with New York electrical manufacturers and contractors, had in effect closed the New York City market to out-of-town manufacturers. *Id.* at 798-800. The Supreme Court concluded that Congress had intended for agreements between unions and nonlabor groups such as the electrical manufacturers and contractors to have limited protection from antitrust scrutiny. *Id.* at 809-10. The labor exemption could not be used by the unions to aid nonlabor groups to create business monopolies or to control the marketing of goods and services. *Id.* The Court noted that an individual agreement between a union and an employer prohibiting the purchase of foreign goods would be sheltered by the labor exemption, and thus provide the union with protection from antitrust attack. *Id.* at 809. However, an agreement which was part of a general conspiracy to aid a complete and unfair insulation of a particular industry would not enjoy similar protection. *Id.*

In *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), the Court further limited the scope of the labor exemption by refusing to permit use of the exemption to a union which had "agreed with one set of employers to impose a certain wage scale on other bargaining units." *Id.* at 665. In *Pennington*, Phillips Brothers Coal Company charged that the United Mine Workers had conspired with a group of larger coal companies to impose certain terms on the smaller companies in an effort to eliminate the smaller companies from the market. *Id.* at 659-61. The Court focused on the conspiratorial nature of the agreements and noted that a union may conclude a wage agreement with an employer and seek similar wages from other

Jewel Tea demonstrates that a court determining the application of the labor exemption should review the action of the union to determine if the provision is one which a union, in pursuit of its employees' best interests, would naturally attempt to secure.¹⁰⁶

IV. The Labor Exemption and Its Application to Professional Sports

The cases in which the Supreme Court delineated the scope of the labor exemption all involved labor organizations seeking shelter within the exemption.¹⁰⁷ In the professional sports industry, however, the team owners and the leagues, both employer groups, seek to use

employers. *Id.* at 664. However, a union may not conspire with one set of employers to impose a certain wage scale on other bargaining units. *Id.* at 665. A union cannot, as part of a collective bargaining agreement, restrict discretion in negotiation outside the bargaining unit. *Id.* at 665-67.

106. *Jewel Tea*, 381 U.S. at 689-90 (1965). In 1975 the Supreme Court concluded that a union did not merit protection of the labor exemption. In *Connell Constr. Co.*, 421 U.S. 616 (1975), *reh'g denied*, 423 U.S. 884 (1975), the union was a party to a multi-employer collective bargaining agreement with a local mechanical subcontractors' association. *Id.* at 619. The union attempted to convince Connell, a general contractor, to subcontract mechanical work only to firms that had an existing agreement with the union. *Id.* at 619-20. Connell refused and was picketed by the union. *Id.* at 620. Eventually, Connell signed the agreement under protest. *Id.* Connell subsequently brought suit charging the union with a violation of the antitrust laws. *Id.* at 619-21. The Court declared that, while the agreement reflected the valid union interest in organizing non union subcontractors, *id.* at 625, the method used operated as a direct restraint on the business market. *Id.* at 623. The union had effectively insured, by securing agreements with various general contractors, that non union subcontractors would be ineligible to compete for work. The Court concluded that the antitrust concerns outweighed the labor interests and that the agreement was therefore outside the protection of the labor exemption. *Id.* at 623-26. The Court noted, in balancing the requisite factors, that the agreement between Connell and the union had not even been the product of collective bargaining. *Id.* at 635. The union had not organized Connell's workers, nor did it have any intention of doing so. *Id.* at 631. The Court concluded, however, that the antitrust effect in Connell was such that even if the restriction had been the product of collective bargaining, the union would not have been granted an exemption. *Id.* at 625-26. *Connell* demonstrates that the extent of the antitrust effect is an important factor in the balancing process and that, despite substantial labor interests, the effect of the agreement may be such as to prevent the application of the labor exemption. *Id.* at 625.

The *Connell* decision has engendered considerable debate. For a discussion of *Connell*, see Janofsky & Hay, *Connell—Consistent with the Past, Indicative of the Future*, in PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-NINTH ANNUAL CONFERENCE ON LABOR 3 (1976); St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603 (1976); Note, *Labor Law—Antitrust Liability of Labor Unions—Connell Construction Co. v. Plumbers Local 100*, 17 B.C. INDUS. & COM. L. REV. 217 (1976).

107. See *supra* notes 98-106 and accompanying text for a discussion of cases.

the exemption to prevent antitrust scrutiny.¹⁰⁸ There is little in the history of the labor exemption to suggest that the exemption may be used by an employer to override employee interests.¹⁰⁹

The owners have argued that the labor exemption should no longer be limited to provisions which are solely in the interest of the union and its employees.¹¹⁰ They assert that both parties to the collectively bargained agreement, having successfully participated in the collective bargaining process, should be rewarded through equal use of the nonstatutory labor exemption.¹¹¹ Some commentators have further suggested that the mere participation in the collective bargaining process, regardless of whether an agreement is reached, would warrant equal protection from antitrust scrutiny.¹¹² Therefore, they argue, an employer, after bargaining to impasse, could unilaterally impose a term of employment and protect that term from antitrust scrutiny under the labor exemption.¹¹³

A. Employer Use of the Labor Exemption Generally

The labor exemption originally provided statutory protection for unilateral union action.¹¹⁴ The Supreme Court in *Jewel Tea* recognized the need to judicially extend the exemption to protect the collective bargaining agreement from antitrust scrutiny.¹¹⁵ Only provisions

108. See *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1197-1203 (6th Cir. 1979) (National Hockey League attempted to block antitrust attack on free agent compensation system); *Mackey v. National Football League*, 543 F.2d 606, 609 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1979) (National Football League attempted to protect free agent compensation provision from antitrust review); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 884-85 (S.D.N.Y. 1975) (NBA attempted to shelter player restraint system from antitrust purview); *Kapp v. National Football League*, 390 F. Supp. 73, 84 (N.D. Cal. 1974), *cert. denied*, 441 U.S. 907 (1979) (NFL attempted to shelter free agent compensation provision from antitrust scrutiny).

109. See *supra* notes 86-106 and accompanying text for a discussion of the history of the labor exemption.

110. See *supra* note 12.

111. *Id.*

112. See *WEISTART & LOWELL, supra* note 16, § 5.06 (c) at 590; *Berry & Gould, supra* note 16 at 774-75 (labor exemption should be available despite failure to negotiate collective bargaining agreement); *McCormick, supra* note 12, at 1161-69.

113. See *supra* note 16 and accompanying text.

114. See *supra* notes 86-91 and accompanying text for a discussion of the statutory labor exemption.

115. See *Jewel Tea*, 381 U.S. at 689-93.

initiated by the union in the best interests of the employees are protected by the labor exemption.¹¹⁶

Courts have recognized that an employer may be permitted a limited use of the exemption to insure employees' benefits.¹¹⁷ An employer may benefit from the labor exemption only to the extent necessary to secure the rights of the employees.¹¹⁸ The employer is not sheltered by the labor exemption as of right or as a result of participation in the collective bargaining process.¹¹⁹ For example, if a union signs a collectively bargained agreement with employer A which includes a standard wage settlement, employer B may believe that the wage agreement will ultimately affect price competition among competitors and violate antitrust law. The union, however, would be immune from antitrust attack by B under the labor exemption.¹²⁰ Employer B would also be unable to sue Employer A since, to protect the rights of the employees, it is necessary that certain provisions of the collective bargaining agreement be sheltered from a collateral antitrust action.¹²¹ To protect these provisions, employer A must be permitted to use the exemption.

116. See *id.* at 689-90 (labor exemption only protects union pursuing benefits for employees).

117. See *Carpenters Local Union No. 1846 v. Pratt-Farnsworth Inc.*, 690 F.2d 489, 530 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 335 (1983) ("[labor] exemptions are for the benefit of employees and their unions, and offer no shelter for the acts of employers, except perhaps only incidentally"); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 886 (S.D.N.Y. 1975) (employers are to be afforded derivative use of exemption, which becomes effective only when they are sued by third parties for acts of union); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 499-500 (E.D. Pa. 1972) (employer may not use exemption offensively by engaging in anticompetitive or monopolistic practices).

118. The Court in *Connell* noted that "the nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Connell*, 421 U.S. at 622.

119. See *Carpenters Local Union No. 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 530-31 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 335 (1983) (labor exemption only for benefit of employees and union); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 884-85 (S.D.N.Y. 1975) (exemption extends only to union activities); *Cordova v. Bache & Co.*, 321 F. Supp. 600, 605-06 (S.D.N.Y. 1970) (sole purpose of labor exemption is to protect activity of labor).

120. See *supra* notes 86-106 and accompanying text for a discussion of union protection under the labor exemption.

121. The employer-employee relationship in the labor exemption context was recently discussed by the Fifth Circuit in *Carpenters Local Union No. 1846 v. Pratt-Farnsworth*, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 335 (1983). In *Pratt-Farnsworth* two unions which represented construction workers in the New Orleans area charged that Pratt-Farnsworth, a New Orleans construction company with whom they had a collective bargaining agreement, and Associate General Contractors of Louisiana Inc. (AGC), a trade organization consisting of construction

B. Sport Cases

The extent to which an employer may use the labor exemption has received extensive discussion in the area of professional sports. In *Robertson v. National Basketball Association*,¹²² the NBA sought to use the labor exemption to block an antitrust action brought by active and retired basketball players.¹²³ These players charged that the uniform player contract,¹²⁴ reserve clause¹²⁵ and college draft¹²⁶ violated the antitrust laws.¹²⁷ The players also sought an injunction to prevent the NBA from merging or entering into a noncompetition agreement with the American Basketball Association.¹²⁸

companies throughout Louisiana, had conspired to restrain competition in the contractor services market in New Orleans. *Id.* at 497-99. Pratt-Farnsworth and AGC had effected the conspiracy by carving out an enclave of non-union carpentry work to which union contractors were denied access. The unions claimed that the construction companies had entered into agreements among themselves and with other construction companies in the New Orleans area to employ only nonunion contractors and subcontractors. These agreements resulted in a reduction of work opportunity for union members, decreased wages and less favorable working conditions. *Id.* at 529. The Fifth Circuit refused to permit the construction companies use of the exemption. The Court declared that the nonstatutory exemption to the antitrust laws was for the benefit of the employees and their unions. Employers could only be sheltered by the exemption as incidental beneficiaries. As the antitrust claims did not even allege that the defendants had entered into a collective bargaining agreement with the union, the exemption could not be utilized. *Id.* at 530-31.

122. 389 F. Supp. 867 (S.D.N.Y. 1975).

123. Plaintiffs included players with significant experience and recognition in the league. *Id.* at 872-73.

124. The Uniform Player Contract must be signed by every drafted player. The contract requires that the player may only play with the club with which he has a contract and that the club has the exclusive and unlimited right to assign the contract. Furthermore, if the player refuses to play, the club may either terminate the contract or enjoin the player from playing basketball for any other team. *Id.* at 874.

125. The reserve clause is part of the Uniform Contract. If the player refuses to sign the contract, the club is entitled to extend the contract for another year on the same terms and conditions. Prior to 1971, the contract could be renewed unilaterally at a 25% reduction in salary. *Id.* at 874. See *supra* note 7 for a discussion of the baseball reserve clause.

126. The college draft gives each NBA club the exclusive right to select the college players with whom it wishes to negotiate. If the player chooses not to negotiate with the club that selected him, he may not negotiate with any other NBA club. *Id.* at 874.

127. The players charged that the NBA had engaged in a conspiracy to monopolize and restrain trade in professional basketball by controlling the terms upon which professional basketball is played, dividing up the market, enforcing league procedures through boycotts, blacklisting and refusals to deal. *Id.* at 873-74.

128. *Id.* at 876.

The Court concluded that the NBA could not use the labor exemption because it extended only to labor or union activities and not to the activities of employers.¹²⁹ The employer would only be permitted a derivative use of the exemption if a collectively bargained agreement with the union had been secured and a provision of that agreement, involving an area of proper union concern, was attacked by a third party.¹³⁰

In *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*,¹³¹ the reserve system¹³² of the National Hockey League was challenged by a competitor, the World Hockey Association, as violative of federal antitrust law.¹³³ The National Hockey League claimed that these provisions were exempt from antitrust scrutiny under the labor exemption.

The Court rejected the league's claim and declared that:

[t]he labor exemption which could be defensively utilized by the union and employer as a shield against Sherman Act proceedings when there was bona fide collective bargaining, could not be seized upon by either party and destructively wielded as a sword by engaging in monopolistic or other anti-competitive conduct. The shield cannot be transmuted into a sword and still permit the beneficiary to invoke the narrowly carved out labor exemption from the anti-trust laws.¹³⁴

The Court concluded that the National Hockey League was not the ideal candidate to be a beneficiary of the labor exemption because it

129. *Id.* at 884-85.

130. *Id.* at 886. The Court quoted *Cordova v. Bache & Co.*, 321 F. Supp. 600, 605-06 (1970). The "sole purpose and effect of the [labor exemption] is to exempt activities and agreements on the part of labor . . . organizations . . . Congress . . . was concerned with the right of labor and similar organizations . . . [and] not with the right of employers" *Id.* at 886.

131. 351 F. Supp. 462 (E.D. Pa. 1972).

132. Under the Standard Players' Contract, which the hockey player was required to sign, the player was required, on the request of the club, to enter into a contract after completion of the season, upon the same conditions as the contract he was signing. The only term that could be discussed was salary. *Id.* at 480.

133. *Id.* at 466-67. *Philadelphia World Hockey* was a consolidation of five cases. The World Hockey Association, a newly formed competitor of the established National Hockey League, claimed that the league had so structured its relationship with the hockey players with whom it had contracted as to preclude the players from signing with the World Hockey Association. *Id.* at 466-68. For a complete discussion of the market control of the National Hockey League in 1972, see *id.* at 474-86; Roberts & Powers, *Defining the Relationship Between Antitrust Law and Labor Law: Professional Sports and the Current Legal Battleground*, 19 WM. & MARY L. REV. 395, 405-06 (1978).

134. *Philadelphia World Hockey*, 351 F. Supp. at 499-500.

was "primarily responsible for devising and perpetuating a monopoly over the product market of all professional hockey players via the reserve system."¹³⁵

Employers have argued that the labor exemption extends to provisions in the collective bargaining agreement which neither were initiated by the union, nor directly benefit the union.¹³⁶ They claim that the entire collective bargaining agreement, and not only the union-initiated provisions, must be protected. Thus, once an agreement has been completed, both parties should be protected equally.¹³⁷

This argument, however, is not supported by Supreme Court interpretations of the labor exemption or by legislative history.¹³⁸ It was never the intent of the Supreme Court or Congress to permit non-labor groups the equal protection of the labor exemption.¹³⁹ The employer group is limited to using the exemption to the extent necessary to insure protection of employee rights.¹⁴⁰

The reserve system is a provision devised and advanced in the best interests of management.¹⁴¹ It is not the type of provision a union would pursue, since its effect is to frustrate rather than to further

135. *Id.* at 500.

136. See *supra* note 12 for a discussion of these commentaries.

137. The Sixth Circuit, in *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979), has adopted the owners' position. *McCourt* involved a challenge to the National Hockey League reserve system. The reserve system, despite the union's disapproval, was eventually included in the collective bargaining agreement. The court concluded that the inclusion of the reserve compensation clause was the product of good faith, arm's length bargaining, and thus was protected from antitrust scrutiny by the labor exemption. *Id.* at 1203. The court reasoned that despite the player objections and union disapproval of the clause, the inclusion of the clause in the collective bargaining agreement mandated the league's protection, as long as there had been good faith bargaining. Under *McCourt*, for the labor exemption to apply, the union and employer should be on equal footing and have participated in good faith negotiations. *Id.* at 1198-1203. Thus, for example, if a new union were to arise to represent the new United States Football League (USFL), it is possible that this union would not have the requisite power to be on equal footing. In this case, the *McCourt* decision would be inapplicable.

138. See *supra* notes 86-106 and accompanying text for a discussion of labor exemption cases and the legislative history of the exemption.

139. See *supra* notes 86-89. As Judge Carter noted in *Robertson*, "if the exemption is to be applicable to both employers and labor organizations, Congress must make this purpose clear through amendment of the Clayton Act." 389 F. Supp. at 886 n.32 (1975). See also WEISTART & LOWELL, *supra* note 16, § 5.05 (d) at 549 (legislative history and Supreme Court cases indicate that primary purpose of labor exemption is to protect unions).

140. See *supra* notes 114-35 and accompanying text for a discussion of the limitations on employer use of the labor exemption.

141. See *supra* note 7 for a discussion of the history of the reserve clause.

union interests.¹⁴² Moreover, the Supreme Court has allowed the labor exemption to be invoked only when a union has made an agreement with an employer that has a deleterious antitrust effect on other unions or employers.¹⁴³ In the context of the reserve system, the labor exemption is used by the employer against the individuals for whom the exemption was drafted to protect. The employers are using the exemption as an offensive tactic.¹⁴⁴

C. Limitations on the Use of the Labor Exemption in Professional Sports

If an employer can use the labor exemption, the circumstance of such use will be controlled by the *Connell* balancing test.¹⁴⁵ The test requires a balancing of labor and antitrust interests. For the nonstatutory labor exemption to apply, the labor interests must override the antitrust concerns.¹⁴⁶

1. *The Mackey Balancing Test*

Courts have had difficulty in determining the parameters of the *Connell* balancing test, and the Supreme Court has provided little

142. The court in *Intercontinental Container Transp. Corp. v. New York Shipping Ass'n*, 426 F.2d 884 (2d Cir. 1970), noted that

[t]he test of whether the labor union action is or is not within the prohibitions of the Sherman Act is . . . whether the [provision] is in the union's self-interest in an area which is a proper subject of union concern and . . . whether the union is acting in combination with a group of employers.

Id. at 887.

143. See *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 530 (5th Cir. 1982), *cert. denied*, 104 S. Ct 335 (1983) (labor exemption applies only when union makes agreement with employer having deleterious effect on other unions or employers); WEISTART & LOWELL, *supra* note 16, § 5.06 (b) at 586 (Supreme Court has indicated that effect of agreement on third party, not intra-party effect catalyzes permissible use of exemption).

144. See *Philadelphia World Hockey Club Inc. v. Philadelphia Hockey Club Inc.*, 351 F. Supp. 462, 499-500 (E.D. Pa. 1972) (employer not permitted offensive use of labor exemption).

145. See *Connell Constr. Co.*, 421 U.S. at 622 (proper balance between labor and antitrust concerns requires that some union agreements be accorded limited exemption from antitrust laws). In *Jewel Tea*, 381 U.S. at 689-90, the Court concluded that, despite the union's ability to seek shelter within the exemption, use of the exemption was limited to those provisions which were intimately related to the wages, hours and working conditions of the employees and were of the type which a union, acting in the best interests of its employees, would normally pursue. *Id.*

146. See *Mackey v. National Football League*, 543 F.2d 606, 613 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) ("availability of the nonstatutory [labor] exemption . . . turns upon whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case").

clarification.¹⁴⁷ In *Mackey v. National Football League*¹⁴⁸ the Eighth Circuit attempted to formulate a test which would relate specifically to the professional sports industry while satisfying the requisites of *Connell*.¹⁴⁹

In *Mackey*, sixteen football players challenged an NFL rule which permitted Pete Rozelle, the league commissioner, to compel clubs acquiring free agents to compensate the free agent's prior team.¹⁵⁰ The players alleged that the "Rozelle Rule"¹⁵¹ effectively denied professional football players the right to freely contract for their services and thus constituted an illegal restraint of trade.¹⁵² The NFL claimed that if an antitrust violation did indeed exist, it was protected by the labor exemption.¹⁵³

The Court noted that under appropriate circumstances, an employer who is a party to a collectively bargained agreement may avail itself of the labor exemption.¹⁵⁴ These circumstances would exist if federal labor interests were pre-eminent to antitrust concerns.¹⁵⁵ The Court in *Mackey* fashioned a three-pronged test balancing labor interests and antitrust law. The Court concluded that labor interests would be considered paramount if: (1) the restraint on trade primarily affected only parties to the collective bargaining agreement; (2) the agreement sought to be exempted concerned a mandatory subject of collective bargaining;¹⁵⁶ and (3) the agreement was the product of bona fide arm's length bargaining.¹⁵⁷

147. See Note, B.C. L. REV., *supra* note 12, at 714. The author noted that the *Connell* balancing mechanism had been developed to steer a course between the Sherman Act and the labor policy favoring collective bargaining. However, "no clear . . . consensus exists, either at the Supreme Court or among the lower courts, as to how the labor and antitrust scales can be weighted." *Id.*

148. 543 F.2d 606 (8th Cir. 1976).

149. *Id.* at 613-14.

150. *Id.* at 609 n.2. Plaintiffs included players with significant experience and recognition in the league.

151. The rule provided that, when a player signs with a different club after his contractual obligation with an NFL club expires, the new club must provide compensation to the player's former team. If the teams are unable to reach an agreement, the NFL Commissioner may award compensation in the form of players and/or draft choices. *Id.* at 609 n.1.

152. *Id.* at 609.

153. *Id.*

154. *Id.* at 612.

155. *Id.* at 613.

156. Mandatory subjects include those subjects which vitally affect employees, including conditions outside the bargaining unit which have a substantial impact on the employees. See MORRIS, THE DEVELOPING LABOR LAW 761 (1983).

157. *Mackey*, 543 F.2d at 614.

The Court concluded that the "Rozelle Rule" affected only the parties to the agreement and that the agreement concerned a mandatory subject of collective bargaining.¹⁵⁸ However, the Rule failed to satisfy the third prong of the test because it had not been the product of bona fide arm's length bargaining.

[T]he Rozelle Rule was unilaterally imposed by the NFL and member club defendants upon the players The Rule imposes significant restrictions . . . and has . . . remained unchanged since it was unilaterally promulgated The provisions of the collective bargaining agreements . . . do not in and of themselves inure to the benefit of the . . . union.¹⁵⁹

The Court concluded that the inclusion of the "Rozelle Rule" within the collective bargaining agreement could not serve to immunize the provision from antitrust scrutiny.¹⁶⁰

2. *Baseball and the Mackey Test*

An analysis of the major league baseball collective bargaining agreement demonstrates that the owners and the league should not be permitted use of the labor exemption. The first prong of the *Mackey* test requires that the restraint of trade, embodied in the collective bargaining agreement, affect only parties to the agreement.¹⁶¹ The baseball reserve system, however, affects the ballplayer's relationship with other clubs which might desire the use of his services. This extends the effect of the agreement beyond the traditional employer-employee sphere.¹⁶² Other provisions incorporated within the collective bargaining agreement also affect players outside the bargaining unit. For example, a baseball player who is drafted by a major league club may only bargain with the club that holds the draft rights to him.¹⁶³ The player is not a party to the collective bargaining between the owners and the players until he signs a contract.¹⁶⁴ Therefore the

158. *Id.* at 615.

159. *Id.* at 616 (quoting lower court opinion, 407 F. Supp. 1000, 1010 (D. Minn. 1975)). The court recognized that if the agreements had inured to the union's benefit, the employer would have been able to use the labor exemption. *Id.*

160. *Id.*

161. *Mackey*, 543 F.2d at 614.

162. See WEISTART & LOWELL, *supra* note 16, § 5.05 (e) at 552 (player restraints affect players' relationships with other clubs in league).

163. See BASEBALL BLUE BOOK, INC., 1983 BASEBALL BLUE BOOK 513-27 (1983).

164. Closius, *Not at the Behest of Non-Labor Groups: A Revised Prognosis for a Maturing Sports Industry*, 24 B.C. L. REV. 341, 378 (1983) (player is not member of league until he is drafted, signs contract, and makes team).

draft, which is incorporated into the collective bargaining agreement, has an external restrictive effect on baseball players, non-parties to the agreement, drafted by a major league club.¹⁶⁵

The second prong of the *Mackey* test mandates that the provision subject to attack must be a mandatory subject of bargaining.¹⁶⁶ While only mandatory subjects are of sufficient import to merit protection under the labor exemption, the fact that the provision in issue is a mandatory subject of bargaining does not warrant per se immunity.¹⁶⁷ The requirement in *Jewel Tea* is that the subject be of the type that a union, in pursuit of the employees' best interests, would normally attempt to secure.¹⁶⁸ The reserve system is not in the employees' best interest. The mandatory nature of a subject of bargaining does not make that subject one which a union would initiate in pursuit of its own interests.

The third prong of the *Mackey* test requires that there be good faith, arm's length bargaining over the subject at issue and that the parties to the collective bargaining agreement be on "equal footing" in the negotiation process.¹⁶⁹ The court in *Kapp v. National Football League*¹⁷⁰ declared that the original unilateral imposition of player

165. 1980 Basic Agreement, *supra* note 7, art. XV. The draft, which is codified in Major League Rules 3 & 4, *see supra* note 163, is incorporated into the collective bargaining agreement via article XV.

166. *Mackey*, 543 F.2d at 614.

167. In *United Mine Workers v. Pennington*, the Court noted that, while the term at issue was of great relevance in determining application of the labor exemption, "there are limits to what a union or employer may offer or extract in the name of wages, and because the parties must bargain over a term does not mean that they may disregard other laws." 381 U.S. 657, 665 (1965).

168. *See supra* notes 98-106 and accompanying text for a discussion of *Jewel Tea* and limitations on the use of the labor exemption.

169. *Mackey*, 543 F.2d at 614.

170. 390 F. Supp. 73 (N.D. Cal. 1974). Joe Kapp, a professional quarterback who had played for the Minnesota Vikings and the New England Patriots, brought suit against the NFL and its commissioner, Pete Rozelle. Kapp charged that, through antitrust conspiracy and monopolistic practice, the defendants had caused him to be discharged by the New England Patriots and effectively driven out of professional football in the United States. *Id.* at 75. Precipitating the suit was Kapp's refusal to sign a Standard Player's Contract for the 1971 season. When Kapp persisted in his refusal, he was told by the Patriots to leave training camp. Pursuant to league rules, Kapp was maintained on the reserve list of the club and the Patriots were permitted to claim compensation if Kapp signed with any other NFL club. *Id.* at 77-78. Kapp claimed that the "Rozelle Rule" and the Standard Player Contract constituted a conspiracy among the defendants to effectively boycott such players. *Id.* at 78. The defendants argued that these rules were immunized as they were part of a collective bargaining agreement between the NFL and the NFL Players' Association. *Id.* at 78-79.

control restraints was an illegality which could never be neutralized.¹⁷¹ In *Kapp*, the court concluded that:

[H]owever broad may be the exemption from antitrust laws of collective bargaining agreements . . . that exemption does not . . . permit immunized combinations to enforce employer-employee agreements which, being unreasonable restrictions on an [employee] . . . have been held illegal on grounds of *public policy* before and entirely apart from the antitrust laws.¹⁷²

In *McCourt v. California Sports, Inc.*,¹⁷³ the dissent declared that National Hockey League By-Law 9A,¹⁷⁴ a provision similar to the "Rozelle Rule", should not be protected by the labor exemption. The dissent declared that a profit-making business such as the National Hockey League could not justify its cartel arrangement by "securing that arrangement's introduction into a collective bargaining agreement."¹⁷⁵ The dissent concluded that permitting the National Hockey League to use the labor exemption to shelter the provision effectively "stands the labor union exemption squarely on its head."¹⁷⁶

The *Kapp* decision¹⁷⁷ and the *McCourt* dissent¹⁷⁸ illustrate that a reserve system is not the type of provision which can be protected by the labor exemption. The baseball reserve system¹⁷⁹ was originally imposed on the players as part of a secret agreement.¹⁸⁰ It has been nurtured and protected by the league and the owners through years of secret agreements and unfair practices.¹⁸¹ The perpetuation of the reserve system has frustrated the labor interests of the players.¹⁸² The

171. *Id.* at 86.

172. *Id.*

173. 600 F.2d 1193 (6th Cir. 1979). In *McCourt*, Dale McCourt brought suit after being assigned from the Detroit Red Wings to the Los Angeles Kings as compensation for the Red Wings signing of a free agent. *Id.* at 1196.

174. Under Section 9A of the By-Laws of the National Hockey League, a team which signs a free agent must compensate the former club of the newly signed player. If the clubs are unable to agree to terms, each team must submit a proposal to a selected neutral arbitrator, who will rule on the amount of compensation to be awarded. *Id.* at 1195.

175. *Id.* at 1212 (Edwards, C.J., dissenting).

176. *Id.*

177. *Kapp*, 390 F. Supp. at 73.

178. *McCourt*, 600 F.2d at 1206-18.

179. See *supra* note 7 for a discussion of the baseball reserve system.

180. See McCormick, *supra* note 12, at 1140.

181. For a general discussion of the reserve clause, see L. LOWENFISH & T. LUPIEN, *THE IMPERFECT DIAMOND* (1980).

182. See Miller, *supra* note 6, at 11-12.

major leagues should not be able to justify its cartel arrangement merely because the reserve system is present in a collective bargaining agreement.

Additionally, the *Mackey* decision assumes that negotiating parties "are on equal footing."¹⁸³ Unlike unions representing other professional athletes, the Players' Association cannot utilize the antitrust laws and arguably has diminished bargaining power.¹⁸⁴

Under the *Connell* test, the labor exemption is applicable only if the antitrust concerns outweigh labor interests.¹⁸⁵ *Mackey's* three-pronged test attempts to satisfy the *Connell* balancing requirement.¹⁸⁶ The reserve system fails the *Mackey* test¹⁸⁷ and the antitrust concerns outweigh the labor interests. Therefore, the labor exemption is inapplicable and the provision cannot be sheltered from the antitrust laws.

3. *Unilateral Imposition of a Term or Condition of Employment*

Commentators contend not only that successful collective bargaining should permit the owners and league use of the exemption, but also that mere participation in the bargaining process, whether an agreement is reached or not, should warrant equal protection under the labor exemption.¹⁸⁸ These commentators conclude that owners, after failing to reach agreement on a particular term in collective bargaining negotiations, may unilaterally impose that term on the union and seek to protect that provision from antitrust scrutiny under the labor exemption.¹⁸⁹

183. 543 F.2d at 614. See *supra* notes 168-74 and accompanying text for a discussion of the third prong of the *Mackey* test.

184. In *Flood v. Kuhn*, 407 U.S. 258, 291-93 (1972) (Marshall, J., dissenting), Justice Marshall noted in his dissent that the Supreme Court was depriving the ballplayers of needed bargaining power by refusing to permit them use of the antitrust laws and that threat of enforcement of the antitrust laws may provide the necessary impetus to reach an agreement. Justice Marshall concluded that failure to apply the antitrust laws to the baseball industry had isolated the baseball player and left him in an impotent position.

185. *Connell Constr. Co.*, 421 U.S. at 622.

186. See *supra* notes 168-75 and accompanying text for a discussion of *Mackey*.

187. See *supra* notes 176-83. Other commentators have disagreed that the reserve systems fails the first two prongs of the *Mackey* test. See, e.g., Closius, *supra* note 164, at 374. Supporters of the argument that the reserve system falls within the labor exemption have improperly applied the Supreme Court test as enunciated in *Connell* and *Jewel Tea*. See *supra* notes 96-106 and accompanying text.

188. See *supra* notes 112-13.

189. *Id.*

An employer, after bargaining to impasse,¹⁹⁰ may unilaterally impose a term if it is consistent with offers which the union has rejected.¹⁹¹ Employers argue that this unilateral term may be protected by the labor exemption.¹⁹² However, an employer is permitted only an incidental use of the labor exemption.¹⁹³ Any rights which an employer possesses result from the settling of a collectively bargained agreement with the union.¹⁹⁴ Therefore, a prerequisite to assertion of any rights by the employer is the existence of a valid collectively bargained agreement.¹⁹⁵ The nonstatutory exemption should not become effective unless there is a collective bargaining agreement.¹⁹⁶ Thus, the labor exemption should be unavailable to any provision which is not part of a collective bargaining agreement.¹⁹⁷ A term which is unilaterally imposed is not part of a collective bargaining

190. An impasse occurs when the parties, despite good faith negotiation, are deadlocked. *NLRB v. Tex-Tan Inc.*, 318 F.2d 472, 482 (5th Cir. 1963).

191. *NLRB v. Katz*, 369 U.S. 736, 747 (1962) (unilateral action by employer without discussion with union violates labor laws); *NLRB v. Almeida Bus Lines, Inc.*, 333 F.2d 729, 734-35 (1st Cir. 1964) (unilateral imposition of term after impasse not violative of labor laws); *NLRB v. United States Sonics Corp.*, 312 F.2d 610, 615 (1st Cir. 1963) (employer's unilateral imposition of term not in violation of National Labor Relations Act after good faith negotiation and subsequent impasse); *NLRB v. Intracoastal Terminal, Inc.*, 286 F.2d 954, 958 (5th Cir. 1961) (employer's unilateral imposition of term violative of labor laws if term not initially offered to union). See MORRIS, *THE DEVELOPING LABOR LAW* 563-66 (1983) for a discussion of employer unilateral imposition.

192. For example, the NBA in 1982 proposed a salary cap on the total amount an owner would be permitted to pay his team in salary and benefits. The Players' Association refused to bargain, claiming that the salary cap was an illegal subject of bargaining. The term later became part of a collective bargaining agreement. If the union had continued in its refusal to bargain, however, and the salary cap had not been an illegal subject of bargaining, the league may have imposed the salary cap without the Players' Associations' approval. Telephone interview with Lawrence Fleisher, General Counsel of the NBA Players' Ass'n (Feb. 9, 1984).

193. See *supra* note 121 for a discussion of the incidental use of the exemption.

194. See *supra* notes 114-44 and accompanying text for a discussion of the employee-employer relationship in the labor exemption context.

195. See *Connell Constr. Co.*, 421 U.S. at 622. The Supreme Court in *Connell* declared that the nonstatutory labor exemption would apply only to "some agreements." *Id.* (emphasis added).

196. See *Carpenters Local No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 531 (5th Cir. 1982), *cert. denied*, 104 S. Ct. 335 (1983). The court noted that the labor exemption was not available to the defendants because there had been no allegation that the defendants had entered into any agreements with a labor group. Under those circumstances, reasoned the court, "the nonstatutory [labor] exemption should not come into play" *Id.*

197. *Contra Berry & Gould, supra* note 16, at 774-75.

agreement.¹⁹⁸ Therefore, such a provision cannot receive shelter from antitrust scrutiny under the labor exemption.

The ramifications of the unilateral imposition of a reserve system by an owner after an unsuccessful collective bargaining attempt is particularly harmful to baseball. While these provisions can be attacked under the antitrust laws by all other professional sports unions, neither the Major League Baseball Players' Association nor the individual baseball players can utilize this remedy.¹⁹⁹ Rather, to prevent unilateral imposition, the Players' Association would have no alternative except to strike.²⁰⁰ The ability of other professional sports labor organizations to use antitrust protections provides an obstacle against such unilateral imposition and provides the impetus to return to the bargaining table.²⁰¹ This encouragement of collective bargaining is absent in the baseball industry.

V. Conclusion

The Supreme Court created the baseball antitrust exemption in *Federal Baseball* in 1922. In consideration of the Court's own recognition of the exemption's anomalous status, the Court should overrule *Federal Baseball* and end the exemption. Alternatively, Congress should place the baseball industry in the same position as other professional sports with respect to the antitrust laws by appropriate legislative action. The significance of removing the baseball antitrust exemption is not diminished due to the existence of the parallel labor exemption.

The labor exemption was passed for the benefit of unions and the employees they represent. It should not be interpreted to protect employers. If, however, employers may use the exemption, it should

198. Unilateral imposition by definition means that the parties have not agreed to the term. Therefore, the provision could not be in the collective bargaining agreement. See MORRIS, *THE DEVELOPING LABOR LAW* 563 (1983).

199. See *supra* notes 23-80 and accompanying text for a discussion of the baseball antitrust exemption.

200. The 1981 strike by the baseball players cost the ballplayers approximately 28 million dollars in salaries. The owners lost approximately 116 million dollars but were able to offset 44 million of the loss due to an insurance policy. *Strike Over, Baseball Resumes Aug. 9*, N.Y. Times, Aug. 1, 1981, at 1, col. 1. The 1981 strike also had a substantial economic impact on the cities in which major league baseball was played. For example, New York City's comptroller estimated that the strike cost the city at least \$8,400,000 in lost business and wages. *City Loss Put at 8.4 Million*, N.Y. Times, Aug. 1, 1981, at 19, col. 2.

201. See *supra* note 183 for a discussion of the necessity of using antitrust laws in collective bargaining.

be used as a defensive tactic rather than as an offensive strategy. Usage of the labor exemption to shelter unilaterally imposed terms, such as a reserve system, effectively turns labor's shield into the employer's sword.

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