



Sports-League Player Restraints, Section 1 of the
Sherman Act, and Federal Labor Law
in the Context of the National Football League

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INTRODUCTION

America loves the National Football League (“NFL” or “League”).^{3,4} And that love is worth a lot of money: in 2010, the NFL brought in an

³ Although the subject matter and concepts contained herein are applicable to all sports leagues, this Article focuses on antitrust claims against labor restraints in the National Football League for two reasons. First, the fact that the labor restraints imposed by the NFL have historically been viewed as the most restrictive compared to those imposed by any of the other major American professional sports leagues

estimated \$8.3 billion in revenue and \$979 million in operating income.⁵ The average team was valued at \$1.04 billion.⁶ To put these numbers in perspective, Major League Baseball (“MLB”), America’s second most successful league sport,⁷ generated only 73% of the revenue and 50% of the operating income of the NFL.⁸ The average MLB club was worth half as much as its NFL counterpart.⁹ These comparisons are even more surprising

means that the analysis presented herein should survive scrutiny when applied to the less restrictive restraints imposed by other leagues. Second, many sports commentators have attributed the NFL’s overwhelming popularity at least in part to these comparatively restrictive player restraints (most notably the NFL’s “hard” salary cap). See, e.g., Keith Wagstaff, *How Revenue Sharing Helped the NFL Dominate Pro Sports*, THE UTOPIANIST (Feb. 3, 2011), <http://utopianist.com/2011/02/how-revenue-sharing-helped-the-nfl-dominate-pro-sports/>, archived at <http://perma.law.harvard.edu/08NDymxpbhM>; Michael Fitzpatrick, *Why the NFL is the Most Popular Sport in America*, BLEACHER REPORT (Feb. 29, 2008), <http://bleacherreport.com/articles/11481-why-the-nfl-is-the-most-popular-sport-in-america>, archived at <http://perma.law.harvard.edu/0YJRxMy14As>.

⁴ The NFL is an association of independently owned American professional football clubs. Currently, thirty-two clubs are members. CONST. & BYLAWS OF THE NAT’L FOOTBALL LEAGUE art. III, § 3.1 (Effective February 1, 1970, Revised 2006), archived at <http://perma.law.harvard.edu/B4U2-TJ9P>. Functions constitutionally vested in the NFL include: defining League membership eligibility requirements (art. III), setting playing rules (art. XI), setting the season schedule (art. XIII), and setting rules governing the acquisition and distribution of players (art. XII, XIV, XV, XVI, XVII, XVIII). The League Commissioner, often viewed as the custodian of the League, is vested with significant powers to make decisions affecting the League. These powers range from chief TV and labor negotiator to discipline czar for on-field misconduct. *Id.* art. VIII.

⁵ Kurt Badenhausen, Michael K. Ozanian, and Christina Settini (Eds.), *The Business of Football*, FORBES (Sep. 7, 2011), http://www.forbes.com/lists/2011/30/nfl-valuations-11_rank.html, archived at <http://perma.law.harvard.edu/0r3zgBYPshJ> (providing financial metrics for 2010 league season).

⁶ See *id.*

⁷ MLB is the second most “successful” league sport based on both financial metrics (i.e., revenue, operating income, and team value), see *infra* note 6, and on opinion polls measuring sport popularity. See Regina A. Corso, *Football is America’s Favorite Sport as Lead Over Baseball Continues to Grow*, HARRIS INTERACTIVE (Jan. 25, 2012), archived at <http://perma.law.harvard.edu/0EtEVgPT4gS>.

⁸ Kurt Badenhausen, Michael K. Ozanian, and Christina Settini (Eds.), *The Business of Baseball*, FORBES (Mar. 22, 2011), http://www.forbes.com/lists/2011/33/baseball-valuations-11_land.html, archived at <http://perma.law.harvard.edu/0A6HnJQT2Vk> (providing financial metrics for 2010 league season). MLB revenue totaled \$6.1 billion, and operating income totaled \$494 million.

⁹ See *id.* The average MLB club value was \$523 million. See *id.* For reference, in 2010, the NBA generated \$3.8 billion in revenue, \$183 million in operating income, and the average team value was \$369 million. Kurt Badenhausen, Michael

considering that the NFL season lasts only six months — two months fewer than the MLB season.¹⁰

Fueling the NFL's financial dominance, of course, is unbridled consumer demand. In 2006, *The Economist* wrote that “[the NFL] remains the most popular of the four big American sports on almost every measure, from opinion polls to television ratings.”¹¹ This statement is no less true today. In a recent poll, thirty-six percent of adults who reportedly follow more than one sport chose the NFL as their favorite, while only thirteen percent of respondents chose Major League Baseball.¹² In 2011, the NFL produced a staggering nine of the top-ten single telecasts¹³ and four of the top-ten regularly scheduled primetime television programs.¹⁴

Continuing to cash in on its popularity, the NFL recently signed multi-year national television contract extensions with CBS, FOX, NBC, and ESPN, which will add over \$2 billion annually to the NFL's member

K. Ozanian, and Christina Settini (Eds.), *The Business of Basketball*, FORBES (Jan. 26, 2011), http://www.forbes.com/lists/2011/32/basketball-valuations-11_rank.html, archived at <http://perma.law.harvard.edu/0A6HnJQT2Vvk>. Additionally, in 2010, the NHL generated \$3.1 billion in revenue, \$127 million in operating income, and the average team value was \$240 million. Kurt Badenhausen, Michael K. Ozanian, and Christina Settini (Eds.), *The Business of Hockey*, FORBES (Nov. 30, 2011), <http://www.forbes.com/nhl-valuations/list/>, archived at <http://perma.law.harvard.edu/0uwBNDRUaUH>.

¹⁰ The 2011–12 NFL season began with the first major slate of pre-season games played on August 11, 2011, and ended with the Super Bowl played on February 5, 2012. See *Schedules: Preseason Week 1*, NFL, <http://www.nfl.com/schedules/2011/PRE1>, archived at <http://www.nfl.com/schedules/2011/PRE1>; *Schedules: Post Season 2011*, NFL, <http://www.nfl.com/schedules/2011/POST>, archived at <http://perma.cc/4S3N-WZKK>. The 2011 MLB season began with the first major slate of spring training games played on February 26, 2011, and ended with Game 7 of the World Series played on October 28, 2011. See *MLB Schedule – Feb 26, 2011 – Mar 4, 2011*, ESPN, <http://espn.go.com/mlb/schedule?date=20110226>, archived at <http://perma.cc/43BB-LT6Z>; *MLB Schedule – Oct 25, 2011 – Oct 31, 2011*, ESPN, <http://espn.go.com/mlb/schedule?date=20111025>, archived at <http://perma.cc/9W7Y-D7NZ>.

¹¹ *In a league of its own: America's National Football League offers a business lesson to other sports*, THE ECONOMIST, Apr. 27, 2006, archived at <http://perma.law.harvard.edu/09AZvGrCzpW>.

¹² Corso, *supra* note 7 (referring to a poll conducted by Harris Interactive). “Pro football” and “Baseball” are the actual response choices used in the poll, as opposed to the “NFL” and “MLB,” but given the monopoly status that these leagues enjoy in their respective sports, it is safe to assume that the adults polled were referring to these leagues when responding to the survey.

¹³ *Nielsen's Tops of 2011: Television*, NIELSEN (Dec. 21, 2011), archived at <http://perma.law.harvard.edu/0RBDz2Gkbtmt>. Seven of the nine telecasts were actual NFL games, while the other two telecasts were Super Bowl pre-game shows. See *id.*

¹⁴ *Id.*

clubs' coffers.¹⁵ No less significant, corporate sponsors are readily paying beaucoup bucks to bask in the glow of the NFL's halo.¹⁶ For instance, Anheuser-Busch InBev has reportedly agreed to pay \$1.2 billion over six years for the right to call its Bud Light brand "The Official Beer of the NFL," even though MillerCoors and other competitors likely will continue to purchase advertising during NFL games.¹⁷ In short, America's businesses and consumers appear to be screaming at the top of their lungs, "Hey NFL, keep up the good work!"

Fortunately for football fans, the NFL has been afforded the opportunity to do just that . . . at least through the end of the 2020 season.¹⁸ On August 4, 2011, the NFL and the National Football League Players Association ("NFLPA")¹⁹ memorialized their latest Collective Bargaining Agreement ("CBA").²⁰ The accord brought labor peace to the League and ensured that the hard-fought gridiron battles waged on Sunday afternoons would continue uninterrupted every autumn for the next ten years. The deal was struck, though, only in the aftermath of another battle waged not on the playing field, but in the courtroom.²¹

¹⁵ Dex McLuskey & Aaron Kuriloff, *NFL Signs Nine-Year Extensions of Television Contracts With CBS, FOX, NBC*, BLOOMBERG (Dec. 15, 2011), <http://www.bloomberg.com/news/2011-12-14/nfl-renews-television-contracts-with-cbs-fox-nbc-networks-through-2022.html> (last visited Jan. 12, 2014), *archived at* <http://perma.law.harvard.edu/0GddYC8yqg>. The deals will increase NFL revenue from these sources from \$4 billion to, on average, \$6 billion during each year of the deals. *See id.* The CBS, FOX, and NBC contracts were extended for nine years, while the ESPN contract was extended for eight years. *Id.*

¹⁶ The halo effect is a marketing term used to describe the bias shown by customers towards products that are affiliated with other products with which the customer has already had a positive experience.

¹⁷ Anthony Crupi, *Anheuser-Busch Goes Long With NFL Pact: \$1.2 billion deal will drive fans to Bud Light*, ADWEEK (Aug. 12, 2011), <http://www.adweek.com/news/advertising-branding/anheuser-busch-goes-long-nfl-pact-134113>, *archived at* <http://perma.law.harvard.edu/0NNMhddRmk1>.

¹⁸ *See* 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 69.1 (Aug. 4, 2011), *archived at* <http://perma.law.harvard.edu/0UcXeAWR7o8>.

¹⁹ The National Football League Players Association ("NFLPA") is the union for professional football players in the National Football League. The primary role of the NFLPA is to represent all players in matters concerning the wages, hours and working conditions of their employment, ensuring that the terms of the CBA are met, and negotiating and monitoring retirement and insurance benefits. *See* NAT'L FOOTBALL LEAGUE PLAYERS ASS'N CONST. (Mar. 2007), *archived at* <http://perma.law.harvard.edu/0XRJezxuNRU>.

²⁰ *See* 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT (Aug. 4, 2011), *archived at* <http://perma.law.harvard.edu/0UcXeAWR7o8>.

²¹ *See* Brady v. Nat'l Football League (Brady II), 644 F.3d 661 (8th Cir. 2011).

A class-action lawsuit filed by ten representative plaintiffs and headlined by all-pro quarterback Tom Brady²² was merely the latest skirmish in a complicated and confusing decades-long war fought between NFL labor and the NFL member clubs. The gravamen of the dispute has hinged on the proper application of Section 1 of the Sherman Act²³ to League-imposed player restraints.²⁴ Unfortunately but unsurprisingly, the suit did nothing to reconcile how antitrust law and federal labor law should apply to these restraints.²⁵ And although a settlement²⁶ and the latest CBA have provided

²² *Id.* The nine other named plaintiffs, suing both individually and on behalf of all others similarly situated, were Drew Brees, Vincent Jackson, Ben Leber, Logan Mankins, Peyton Manning, Von Miller, Brian Robison, Osi Umenyiora, Mike Vrabel. *Id.* A class of five former players also filed suit against the NFL and its member clubs, and the two classes were consolidated into one class. *See id.* Those five former players were: Carl Eller, Priest Holmes, Obafemi Ayanbadejo, Ryan Collins, and Antawan Walker. *Id.*

²³ 15 U.S.C. § 1 (2012). Section 1 of the Sherman Act provides: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” *Id.*

²⁴ Examples of past player-restraint antitrust challenges have included *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996) (holding that a standard salary for practice-squad players does not constitute a Sherman Act Section 1 antitrust violation); *Radovich v. Nat’l Football League*, 352 U.S. 445, 454 (1957) (holding that blacklisting and threat of penalties for signing blacklisted player against team in affiliated league by NFL and member clubs potentially constitutes Sherman Act Section 1 antitrust violation); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1189 (D.C. Cir. 1978) (holding that the NFL annual player college draft as it existed in 1968 constituted Sherman Act Section 1 antitrust violation); *Kapp v. Nat’l Football League*, 586 F.2d 644, 646–47 (9th Cir. 1978) (alleging that the annual player college draft, tampering rule, standard player contract, option rule, and Rozelle rule constitute Sherman Act Section 1 antitrust violations); *Mackey v. Nat’l Football League*, 543 F.2d 606, 623 (8th Cir. 1976) (holding that the Rozelle rule requiring the team signing a free agent to compensate the player’s former team constitutes a Sherman Act Section 1 antitrust violation); *McNeil v. Nat’l Football League*, 790 F.Supp. 871, 875–76 (D. Minn. 1992) (alleging that proposed “Plan B,” in which NFL member clubs would substitute standardized wage scale for individualized contracts constitutes Sherman Act Section 1 antitrust violation); *Powell v. Nat’l Football League*, 678 F. Supp. 777, 778 (D. Minn. 1988), *rev’d*, 930 F.2d 1293, 1295 (8th Cir. 1989) (alleging Right of First Refusal/Compensation system and standard player contract constitute Sherman Act Section 1 antitrust violations).

²⁵ *See Brady v. Nat’l Football League (Brady I)*, 779 F.Supp.2d 992, 1043 (D. Minn. 2011), *vacated*, 644 F.3d 661 (8th Cir. 2011). Although the complaint alleged violations of Section 1 of the Sherman Act against the NFL and its member clubs for the imposition of the salary cap, the franchise tag, and the annual draft, the court’s decision only reached the preliminary issue of whether the NFL “lockout” was likely an illegal “group boycott” because the players had decertified their

a temporary reprieve from this issue, there is little doubt that it will resurface as the expiration date of the latest CBA draws near. Scholarly debate about the merits of such claims, then, is as relevant now as ever.

Also important is providing at least a basic understanding of these issues to the public. The fervent football fan is unquestionably affected by any work stoppages and/or changes to League-wide player allocation rules that could result from such litigation. And, arguably, the football fan's interests are just as significant as the League's and players' when one considers that consumer welfare was the primary purpose for enacting the Sherman Act in the first place.²⁷ To date, however, almost all work in this area has delved deep on discrete aspects of the issue,²⁸ and it is nearly impossible for

union. Because the district court determined that the players were likely to succeed on this claim, it issued an injunction against the implementation of the lockout. *See Brady v. Nat'l Football League (Brady II)*, 644 F.3d 661, 661 (8th Cir. 2011). The subsequent appeals focused on whether the district court had the authority to issue such an injunction under the Norris-LaGuardia Act ("NLGA"). The Eighth Circuit eventually decided that the NLGA precluded the issuance of such an injunction imposed against current employees, but that an injunction could potentially be issued to prevent the implementation of a lockout against "non-employees" (i.e., free agents and prospective players). *Brady I*, 779 F.Supp.2d at 1039. Thus, in this litigation no court ever reached the questions pertaining to the legality of the player allocation rules being challenged under Section 1. *See Brady I*, 779 F.Supp.2d at 1039 ("This Court is not presently addressing the merits of the antitrust claims regarding [p]layer restrictions and is not ruling on whether the non-statutory labor exemption shields the League from such claims.").

²⁶ *See* 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 1 (Aug. 4, 2011), archived at <http://perma.law.harvard.edu/0UcXeAWR7o8>.

²⁷ *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979))) (providing general rationale for implementation of Sherman Act); *see also* John B. Kirkwood and Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191 (2008) (arguing that consumer welfare, as opposed to business efficiency, is the main purpose of the Sherman Act); Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTI-TRUST L.J. 707 (2007) (exploring how monopsony affects consumer welfare); Alan Devlin, *Questioning the Per Se Standard in Cases of Concerted Monopsony*, 3 HASTINGS BUS. L.J. 223 (2007) (arguing that monopsony often does not deserve per se treatment because its negative effects on consumers are not as clear as monopoly's negative effects).

²⁸ For information pertaining to the proper scope of the nonstatutory labor exemption, *see* Michael C. Harper, *Multiemployer Bargaining, Antitrust Law, and Team Sports: The Contingent Choice of a Broad Exemption*, 38 WM & MARY L. REV. 1663, 1666 (1997) (discussing how *Brown's* holding regarding the scope of the nonstatutory labor exemption failed "to provide a proper clarification of how antitrust law

anyone to quickly develop a sound understanding of all the relevant economic and legal concepts.

should accommodate federal labor law”); Michael S. Jacobs and Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971) (demonstrating the impact that the labor exemption has on antitrust challenges); Jeffrey L. Kessler & David G. Feher, *What Justice Breyer Could Not Know At His Mother's Knee: The Adverse Effects of Brown v. Pro Football on Labor Relations in Professional Sports*, 14-SPG ANTITRUST 41 (2000) (arguing that the scope of the nonstatutory labor exemption established in *Brown* would lead to more, rather than less, labor strife); Derek D. Yu, *The Reconciliation of Antitrust Laws and Labour Laws in Professional Sports*, 6 SPORTS LAW J. 159 (1999) (recommending two alternatives to the scope of the nonstatutory labor exemption articulated in *Brown*); Note, *An Examination of the Nonstatutory Labor Exemption from the Antitrust Laws, In the Context of Professional Sports*, 23 FORDHAM URB. L.J. 955 (1996) (providing a history of the development of the nonstatutory labor exemption). For arguments regarding whether sports leagues should be treated as single entities and be exempt from Section 1 of the Sherman Act, see Lee Goldman, *Sports, Antitrust, And The Single Entity Theory*, 63 TUL. L. REV. 751 (1989) (arguing that each league member team is an independent firm for Section 1 purposes); Myron Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications for the Consumer Welfare Model*, 82 MICH. L. REV. 1 (1983) (analogizing professional sports-leagues to law firm partnerships and explaining that section 1 antitrust lawsuits against the leagues should fail under the intraenterprise conspiracy doctrine); Gary R. Roberts, *The Antitrust Status of Sports Leagues Revisited*, 64 TUL. L. REV. 117 (1989) (explaining why Goldman's view that each league member team is an independent firm for Section 1 purposes is incorrect); Gary R. Roberts, *The Single Entity Status of Sports Leagues Under Section 1 of the Sherman Act: An Alternative View*, 60 TUL. L. REV. 562 (1986) (arguing that league member teams should be viewed as a single entity for Section 1 purposes with respect to team location restrictions); John Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 DUKE L.J. 1013 (1984) (arguing that greater weight should be given to the corporate nature of leagues' enterprises, and such emphasis would lead to doctrine supporting the antitrust policy of enhancing consumer welfare). For historical arguments proving that labor restraints are statutorily exempted from the Sherman Act by Section 6 of the Clayton Act, see Robert H. Jerry, II and Donald E. Knebel, *Antitrust and Employer Restraints in Labor Markets*, 6 INDUS. REL. L.J. 173 (1984) (arguing that all labor restraints, regardless of the industry, are exempted by the statutory labor exemption); Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19 (1986) (arguing that player restraints should be exempt from Sherman Act scrutiny under both the statutory and nonstatutory labor exemptions). For arguments pertaining to the joint venture status of sports league's member teams, see Alan Devlin and Michael Jacobs, *Joint-Venture Analysis After American Needle*, 7 J. COMP. L. & ECON. 543 (2011). For arguments pertaining to the ancillary restraint doctrine, see Gary R. Roberts, *The Evolving Confusion of Professional Sports Antitrust, The Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943 (1988) [hereinafter Roberts, *Evolving Confusion*].

Thus, in this Article I attempt to provide a primer on the antitrust and labor law principles generally considered applicable to sports league player-restraint cases, and to explain why player restraints should be placed beyond the purview of antitrust courts despite the prevailing belief to the contrary. Throughout the Article I attempt to show that the unique structure of sports leagues (in which member clubs must simultaneously collaborate and compete) and the fact that member clubs are monopsonists²⁹ (not monopolists³⁰) with respect to labor, have been largely responsible for the confusion and disagreement in this area of the law.

Specifically, Part I explains the general nature of player-restraint antitrust claims, and the stakes involved in such litigation. Part II explains and expounds on the principal antitrust defenses against holding league-wide player restraints illegal under Section 1 of the Sherman Act: (A) the NFL's member clubs are not — nor could they ever be — economic competitors because they are a single entity incapable of conspiring according to Supreme Court precedent; (B) proper rule of reason analysis reveals that player restraints' procompetitive effects outweigh their anticompetitive effects and therefore should be held lawful; and (C) labor restraints are ancillary restraints necessary to the production of any athletic competition, and thus should always be exempted from scrutiny under Section 1 of the Sherman Act.

Part III presents the traditional defenses available when an antitrust lawsuit challenges conduct that specifically restrains labor: (A) the Clayton Act statutorily exempts labor restraints from the ambit of the Sherman Act; and (B) the nonstatutory labor exemption exempts employers from antitrust attack while they are engaged in a collective-bargaining relationship with a union.

Additionally, Part III.C introduces a novel argument for why player-restraint antitrust challenges should fail. Approaching the issue from the vantage point of federal labor law, I show that the NFL is a "single employer" under established National Labor Relations Board ("NLRB") and Supreme Court precedent,³¹ and as such, that its member clubs are incapable

²⁹ "Monopsony" is the term used to describe a market situation in which there is only one buyer for the product or services offered by several sellers. Monopsony is sometimes referred to as a "buyer's monopoly." See BARRON'S DICTIONARY OF FINANCE AND INVESTMENT TERMS 368 (JOHN DOWNES & JORDAN ELLIOT GOODMAN eds., 5th ed. 1998).

³⁰ "Monopoly" is the term used to describe a market situation in which only one firm sells a particular product or service. See *id.* at 367–68.

³¹ See *Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965) (adopting the National Labor Relations

of “combining” or “conspiring” when it comes to player restraints. I further argue that it would be impractical (if not impossible) to maintain anything other than a league-wide bargaining unit when the NFL and players engage in collective bargaining. Because this league-wide unit represents the “smallest appropriate bargaining unit,” it is fallacious to claim that league-wide player restraints are the product of “multiemployer” collaboration. I make the case that courts should adopt this “smallest appropriate bargaining unit” standard as an alternative to the NLRB’s and Supreme Court’s test when determining whether multiple entities should, in fact, be classified as a “single employer.” Finally, I reason that member clubs — as a single employer — should be permitted to act collectively with respect to labor regardless of whether a collective bargaining relationship exists.

Part IV briefly analyzes the latest player-initiated antitrust lawsuit, *Brady v. National Football League*.³² I show that, notwithstanding the District Court’s dicta, the Players’³³ attempt to circumvent the nonstatutory labor exemption by decertifying the NFLPA constituted a sham — and that permitting players to perpetrate such shams frustrates the federal labor policy of encouraging management and labor to set the terms and conditions of employment free from judicial interference.

I. BACKGROUND

A. *Player-Restraint Section 1 Cases: The Nature of the Claim*

Section 1 of the Sherman Act proclaims that “[e]very contract, combination . . . or conspiracy in restraint of trade . . . is declared to be illegal.”³⁴ Virtually all “intraleague”³⁵ player-restraint lawsuits alleging that the NFL

Board (“NLRB”) definition for “single employer”) (“In determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise. The controlling criteria . . . are interrelation of operations, common management, centralized control of labor relations and common ownership.” (internal citations omitted)); *see also infra* Section III.C.1.

³² 779 F.Supp.2d 992 (D. Minn. 2011).

³³ The capital “P” is used when referring to the plaintiffs in *Brady*.

³⁴ 15 U.S.C. § 1 (2012).

³⁵ The parties that are affected by the player-restraint in question determine whether the restraint is an “intraleague” or “interleague” labor restraint. When the player restraint merely affects parties within the NFL — that is, the League, the member clubs, and NFL players — then it is an “intraleague” player restraint. *See infra* Section II.C. On the other hand, if a third-party, such as a rival league, is also affected by the restraint, then the restraint is best classified as an “interleague”

and its member clubs have violated this statute are based on one of two theories: that one of the League's rules constitutes a "contract, combination or conspiracy" that restrains trade by either (1) artificially lowering the compensation that a player would have received absent the rule — that is, in a free market for player services;³⁶ or (2) excluding a particular player or class of players from League employment (otherwise known as a "group boycott").³⁷

The first theory is perhaps best exemplified by antitrust lawsuits challenging the legality of a league-wide salary cap.³⁸ The salary cap can be

labor restraint. This distinction is vitally important because interleague player restraints inherently reduce competition to the detriment of consumers, or at the very least, do not provide consumers with any benefits. See *infra* Section II.B.

³⁶ Generally, these types of restraints are referred to as "allocation rules." Allocation rules can be defined as those rules "that assign to a single league member the exclusive 'rights' to each player, thereby restricting his ability to negotiate freely with any team of his choice." Gary R. Roberts, *Sports League Restraints on the Labor Market: The Failure of Stare Decisis*, 47 U. PITT. L. REV. 337, 338 (1986) [hereinafter Roberts, *Sports League Restraints*]. Although the salary cap does not technically fall within this definition, its effects are similar to those that other allocation rules bring about since it potentially decreases the compensation level that a player would receive absent the rule (albeit to a lesser degree). It can therefore be properly grouped together with traditional allocation rules.

³⁷ *Id.* Generally, these types of restraints are referred to as "exclusionary rules." Exclusionary rules can be defined as those rules "that bar the plaintiff athlete(s) from league play, either permanently or temporarily."

³⁸ See, e.g., *Brady v. Nat'l Football League (Brady I)*, 799 F.Supp.2d 992, 1004 (D. Minn. 2011) (also challenging the annual college player draft, and the franchise tag). Two other rules that have been targets of player antitrust attacks may also help elucidate the theory underlying allocation player-restraint antitrust challenges. First, in the 1970s, players brought a series of suits alleging that the Rozelle Rule, and subsequent variations thereof, violated Section 1 of the Sherman Act. See *Mackey v. Nat'l Football League*, 543 F.2d 606, 609 (8th Cir. 1976); *Powell v. Nat'l Football League*, 678 F. Supp. 777, 779–80 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989). "The Rozelle Rule essentially provide[d] that when a player's contractual obligation to a team expire[d] and he sign[ed] with a different club, the signing club [had to] provide compensation to the player's former team." *Mackey*, 543 F.2d at 609 n.1. The players argued that, because of this rule, signing clubs reduced the amount of money they otherwise would have been willing to spend to sign a free agent player had the clubs not also been forced to provide compensation to the player's former team. In effect, the rule transferred some of the value paid for the player's services from the player to the player's former club. Accordingly, the players claimed that the Rozelle Rule constituted an illegal "contract" or "combination" in "restraint of trade." *Mackey*, 543 F.2d at 616.

Another League rule that has been the frequent target of player-initiated antitrust attacks is the annual player selection draft. See *Brady I*, 779 F.Supp.2d 992; *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1175 (D.C. Cir. 1978). The draft is the

defined as the maximum amount of money that any one club is permitted to spend on player services during a given season.³⁹ Without the salary cap, players argue, clubs with greater financial means would capitalize on that advantage by spending more than the salary cap limit to acquire the best players in an attempt to increase their chances of winning.⁴⁰ Accordingly,

procedure in which college football players' exclusive negotiating rights are allocated to specific teams. The team with the worst record during the preceding season selects the college football player to which it would like exclusive rights, then the team with the next-worst record selects another player to which it would like exclusive rights, and so on until all teams in the league have selected. At this point, a "round" is complete, and the teams repeat the process. In 2011, there were 7 rounds. *See generally* 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 6 (Aug. 4, 2011), *archived at* <http://perma.law.harvard.edu/0UcXeAWR7o8>. The players argue that the draft "restrains trade" because the drafted player is prohibited from selling his services to any other club besides the club that selected him. Absent the draft, the argument goes, clubs would compete with one another to obtain the player's services. That is, the player would be afforded the opportunity to auction his services, allowing him to achieve more favorable compensation than he would otherwise be able to extract through negotiations with a single team. *See generally Smith*, 593 F.2d at 1183–84.

³⁹ 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 1 (Aug. 4, 2011), *archived at* <http://perma.law.harvard.edu/0UcXeAWR7o8>. The NFL enforces the salary cap by imposing a variety of penalties on those clubs that exceed its limit. *Id.* art. 14. It is important to note that the NFL also enforces a salary floor, or "minimum team cash spending" — that is, it requires each club to spend at least a certain amount of money on players' services. *Id.* art. 12.9. For the 2013–20 seasons, minimum team cash spending is set at 89% of the salary cap. *See id.*

⁴⁰ In fact, the Dallas Cowboys and Washington Redskins appeared to engage in this practice during the uncapped 2010 season. That is, the 2006 CBA stipulated that there would be no salary cap during the 2010 season if the NFL opted out of that agreement, which is in fact what happened. Without a salary cap, then, the Cowboys and Redskins front-loaded player contracts signed before the 2010 season so that their payrolls were significantly higher than most other clubs' during that season. Presumably, however, the Cowboys and Redskins did this because they anticipated the return of the salary cap in future seasons. Accordingly, because these front-loaded contracts distributed a significant portion of the total value of the contracts during the 2010 season, the Cowboys and Redskins sought to artificially increase the amount of cap room they would have to sign other players in future seasons once the cap returned. The NFL, however, caught onto this scheme and reduced the amount of money that both the Cowboys and Redskins could spend on players during the 2012 and 2013 seasons, with the reduction being allocated to the salary cap of every other team in the League (save the Oakland Raiders) to maintain League-wide player compensation. Whether the value of the contracts signed before the uncapped 2010 season was higher than it otherwise would have been is debata-

the salary cap artificially depresses player salaries and constitutes an illegal “restraint of trade.”⁴¹

The second theory is best illustrated by the NFL’s rule that a player must be three full college football seasons removed from high school graduation before being allowed to play in the NFL.⁴² The argument here is that, absent punishment in the form of fines and loss of draft picks, clubs would employ the best players regardless of age.⁴³ Accordingly, the rule precludes talented young players from earning an NFL salary for all of the years that NFL member clubs legitimately desire their services.⁴⁴

B. *Player-Restraint Section 1 Cases: The Stakes*

A court decision holding that a League-imposed player restraint has violated Section 1 of the Sherman Act would bring with it severe economic consequences. Damages, generally calculated as the difference between what the player actually earned and what he would have earned absent the illegal restraint, would be awarded to every similarly situated player affected by the restraint.⁴⁵ Section 4 of the Clayton Act stiffens the penalty by trebling the amount of damages awarded.⁴⁶ If the players could prove that NFL member clubs would have spent on average just two percent more on player salaries than they actually spent because of the cap, single-season damages would amount to approximately \$229 million,⁴⁷ or 23% of League operating

ble. See Judy Battista, *N.F.L. Strips Cowboys and Redskins of Salary Cap Room*, N.Y. TIMES (Mar. 13, 2012), archived at <http://perma.law.harvard.edu/0YZXuvP7QT2>.

⁴¹ First Amended Class Action Complaint at ¶¶134–39, *Brady I*, 779 F.Supp.2d 992, (No. 11 Civ. 639).

⁴² See 2011 NAT’L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 6.2 (Aug. 4, 2011), archived at <http://perma.law.harvard.edu/0UcXeAWR7o8a>.

⁴³ See generally *Clarett v. Nat’l Football League*, 369 F.3d 124 (2d Cir. 2004).

⁴⁴ See generally *id.*

⁴⁵ See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1189 (D.C. Cir. 1978).

⁴⁶ Section 4 of the Clayton Act provides: “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” 15 U.S.C. § 15 (1997).

⁴⁷ The figures used here are merely illustrative and do not purport to mirror evidence that would be presented at an actual damages hearing. These calculations assume that every NFL team spent 100% of the salary cap, which for the 2011 season totaled \$120 million per club. ESPN.com news services, *Sources: Sides Agree to Rookie Wages*, ESPN (Jul. 15, 2011), archived at <http://perma.law.harvard.edu/0ycxnB2sdBa>. Club roster size is currently capped at 53 players. 2011 NAT’L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 25.4 (Aug. 4, 2011), archived at <http://perma.law.harvard.edu/0UcXeAWR7o8>. Accordingly, in 2011,

income.⁴⁸

The financial penalty imposed for violating Section 1 is therefore harsh. But the money that would be forfeited pales in comparison to the power the League and its member clubs forfeit when they lose a player-restraint anti-trust lawsuit: that is, the power to set the rules governing the *strategic* competition inherent in all league sports. The rules governing strategic competition⁴⁹ — those that pertain to the acquisition and distribution of talent throughout the League — have arguably been as important to the NFL's rise to sports and entertainment domination as the rules governing *on-field* competition.⁵⁰ Specifically, much of the NFL's success and popularity over the past two decades⁵¹ can be attributed to the fact that the hard

the average NFL player earned approximately \$2,264,000 (\$120 million / 53 players). There are currently 32 member clubs. See NAT'L FOOTBALL LEAGUE PLAYERS ASS'N CONST. art III.1 (Mar. 2007), *archived at* <http://perma.law.harvard.edu/0XRJezxuNRU>. If the players can prove that clubs would have spent on average just 2% more in player salaries if not for the salary cap, teams would have spent approximately \$45,000 more per player (2,264,000 x 0.02). Approximately 1,696 players (53 players per club x 32 clubs) would be eligible to receive, on average, this amount. Consequently, compensatory damages would total \$76,320,000 (\$45,000 per player x 1,696 players). After trebling this amount pursuant to Section 4 of the Clayton Act, damage awards would total \$228,960,000. See *supra* note 46.

⁴⁸ See *The Business of Football*, *supra* note 5, and accompanying text (\$229 million / \$979 million = 0.23).

⁴⁹ "Strategic competition," as I have defined it, does not include rules that *exclude* certain players or classes of players. Thus, while the definition does include rules governing the acquisition of players, the acquisition relates to the *process* by which players may be acquired, not the *players eligible* to be acquired. This distinction has important consequences in any rule of reason analysis, which weighs the procompetitive and anticompetitive effects of a given player restraint to the end consumer. See Roberts, *Sports League Restraints*, *supra* note 36.

⁵⁰ Bill Parcells, a Professional Football Hall of Famer, longtime front office executive and two-time Super Bowl-winning head coach has noted how important the acquisition of talent can be to success when he stated, "The business of professional football is the talent acquisition business." *SportsCenter Special: Bill Parcells Draft Confidential* (ESPN television broadcast Apr. 26, 2011).

⁵¹ Consider that NFL and MLB league revenues were virtually identical — NFL revenue totaled ~\$1.82B while MLB revenue totaled ~\$1.87B — when the NFL decided to institute a "hard" salary cap in 1994. John Vrooman, *The Football Players' Labor Market*, ECONOMICS OF THE NATIONAL FOOTBALL LEAGUE (2011) at 12; Associated Press, *1994 Strike Was a Low Point for Baseball*, ESPN (Aug. 10, 2004), *archived at* <http://perma.law.harvard.edu/0ZtPb3PSxke> (1993 MLB revenue is used because 1994 revenue was curtailed due to the MLB players' strike). Since then, total NFL revenue has increased by approximately 361% to \$8.3B, while MLB revenue has increased by only 242% to \$6.5B. See *supra* notes 5–8 and accompanying text. Additionally, during that timeframe, the NFL has successfully added four franchises

salary cap has provided every NFL club with an equal opportunity for on-field success, regardless of the size of the market in which the club is located.⁵² A League in which the Dallas Cowboys could spend millions more than the Green Bay Packers to acquire the best players would be a very different League indeed.⁵³ And such a League likely would result from a court decision determining that the salary cap violates Section 1. Accordingly, the stakes for the NFL — and its fans — could not be higher.

II. ANTITRUST DEFENSES

Sports-league player-restraint antitrust lawsuits have varied in their outcomes. More often than not, though, leagues and their member clubs have failed when making arguments similar to those presented below.⁵⁴ But

to its League (i.e., Carolina Panthers and Jacksonville Jaguars in 1995, Cleveland Browns in 1999 [the original Cleveland Browns relocated to Baltimore and became the Ravens in 1996], and the Houston Texans in 2002) while MLB has only added two (Arizona Diamondbacks and Tampa Bay Devil Rays in 1998). *Expansion Team*, WIKIPEDIA, archived at <http://perma.law.harvard.edu/0oAevYJ86vf>. And, in 1993, Harris Interactive reported that only 24% of adults who follow more than one sport chose the NFL as their favorite, while 18% selected MLB, compared to 36% and 13%, respectively, today. See *supra* note 7 and accompanying text.

It has been suggested that eliminating the salary cap would not decrease the ability of small-market clubs to compete, pointing to the uncapped 2010 season as proof. *Brady v. Nat'l Football League*, 779 F.Supp.2d 1043, 1049 (D. Minn. 2011), *rev'd*, 640 F.3d 785 (8th Cir. 2011). This argument is weak however, since the clubs most likely anticipated that the salary cap would return as soon as the labor dispute was settled. Indeed, those clubs that did not respect a *de facto* cap were subject to penalties *ex post facto* after the cap returned. See Andrew Brandt, *Cowboys, Redskins Salary Cap Penalties Approved by NFL Owners But Still Raise Questions*, HUFFINGTON POST (Mar. 30, 2012), archived at <http://perma.law.harvard.edu/0PejbfRvp3c>.

⁵² See, e.g., Wagstaff, *supra* note 3, at 2; Fitzpatrick, *supra* note 3, at 2. “The result [of the salary cap] is a financially engineered equality that allows a small town team in Green Bay, Wisconsin, to compete with a metropolis like New York.” 60 Minutes, *The NFL Commissioner: Roger Goodell*, (CBS television broadcast Jan. 29, 2012), transcript archived at: <http://perma.law.harvard.edu/0JAvorPGN7D>. Of course, a number of other factors may have also contributed to these results (for example, the MLB players’ strike in 1994, and the performance enhancing drug scandal of 2004-05).

⁵³ The fact that small-market clubs are often unable to resign their best players because they do not have the same financial resources as large-market clubs is a principal difference between the MLB and the NFL.

⁵⁴ See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183–90 (finding that annual draft’s anticompetitive effects substantially outweigh its procompetitive effects and affirming the district court’s ruling that the draft violates Section 1) (D.C.

as Oliver Wendell Holmes, Jr. once wrote, “[t]he life of the law has not been logic: it has been experience.”⁵⁵ This statement’s validity is evidenced by the continuously evolving manner in which the Sherman Act has been applied to various types of business conduct throughout the twentieth and twenty-first centuries.⁵⁶ Thus, despite the fact that courts previously have

Cir. 1978); *Mackey v. Nat’l Football League*, 543 F.2d 606, 620–23 (8th Cir. 1976) (finding that Rozelle’s Rule’s anticompetitive effects outweigh any procompetitive effects and that it therefore violates Section 1). *But see, e.g., Neeld v. Nat’l Hockey League*, 594 F.2d 1297, 1299–1300 (9th Cir. 1979) (holding that rule excluding one-eyed hockey player from competition was not per se illegal group boycott under Section 1, and that summary judgment in favor of NHL was appropriate under rule of reason because anticompetitive effects were *de minimis*).

⁵⁵ OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

⁵⁶ Presumably the reason for this phenomenon can be traced to the fact that the Sherman Act, passed in 1890, regulates economic activity, while neo-classical economic thought was not even fully developed until 1910. Thus, while judges at the turn of the twentieth century were no doubt very bright men, they lacked the theoretical knowledge necessary to apply the Sherman Act properly. Although it would be unfair to blame them for the confused state of antitrust law that exists today which resulted from the decisions they authored, it is entirely fair — and in fact critical to developing a coherent understanding of antitrust law — to catalogue major missteps.

The first critical error was made when Justice White abandoned the ancillary restraints doctrine in *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911), and fashioned the “Rule of Reason” from whole cloth. *See infra* note 111 and Section II.C.3. Numerous courts then compounded his mistake by misunderstanding from whose perspective procompetitive and anticompetitive effects of a restraint are to be weighed when attempting to apply the Rule. *See infra* Section II.B. The last major error was made when the doctrine of ancillary restraints made a comeback and modern-day judges erroneously interpreted then-Judge Taft’s opinion in *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) *aff’d as modified*, 175 U.S. 211 (1899). *See infra* Section II.C.3.

Fortunately, as the field of economics has developed and been embraced by the law, antitrust jurisprudence has for the most part adapted to incorporate economic principles. *See Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (holding companies’ joint venture to sell separately branded gasoline to service station owners at same price was not per se an illegal horizontal price fixing agreement); *State Oil v. Khan*, 522 U.S. 3 (1997) (holding vertical maximum price fixing is not a per se violation of the Sherman Act); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (holding that a parent corporation and its wholly owned subsidiary were not legally capable of conspiring with each other under Section 1 of the Sherman Act); *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) (holding that issuance of a blanket license did not constitute price fixing when that license was more efficient to issue and enforce than individual licenses); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (holding that location restriction was not per se illegal because it did not eliminate intrabrand competition). Unfortunately,

failed to grasp the merits of many of the arguments put forth by sports leagues, *stare decisis* does not appear to pose as high a hurdle in this arena as it might in other areas of the law.⁵⁷ The leagues, therefore, should not lose hope; nor should they stop making these very same arguments.⁵⁸

A. The “Single Entity” Defense

One defense that the NFL and its member clubs can proffer against players’ allegations is that they are not — nor could they ever be — economic competitors, and that they are consequently incapable of “conspiring” within the meaning of Section 1 of the Sherman Act. Because Section 1 applies only to “contract[s], combination[s] . . . or conspirac[ies],”⁵⁹ the “question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it . . . restrains trade.”⁶⁰ Stated another way, only *concerted* action may form the basis of a Section 1 violation, while both *concerted* and *independent* action may form the basis of a Section 2 violation.⁶¹ Thus, if the NFL and its member clubs are incapable of engaging in a “contract, combination . . . or conspiracy” such

because of the principle of *stare decisis*, very few of the cases that failed to incorporate more modern economic understanding were ever explicitly overruled. Thus, lawyers and judges have been left with an extensive, complex, contorted, and often contradictory set of precedents.

⁵⁷ See Roberts, *Sports League Restraints*, *supra* note 36, for an illustration of the way courts have ignored precedent and antitrust policy in evaluating Section 1 of the Sherman Act sports league antitrust lawsuits.

⁵⁸ Especially since the Supreme Court has never definitively ruled on the legality of a league-imposed player restraint.

⁵⁹ 15 U.S.C. § 1.

⁶⁰ *Am. Needle, Inc. v. Nat’l Football League*, 130 S.Ct. 2201, 2206 (2010).

⁶¹ *Compare* 15 U.S.C. § 1 (1976) (“Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”), *with* 15 U.S.C. § 2 (1976) (“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, or with foreign nations, shall be deemed guilty of a felony”). “The meaning of the term “contract, combination . . . or conspiracy” is informed by the basic distinction in the Sherman Act between concerted and independent action that distinguishes Section 1 of the Sherman Act from Section 2. Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers both concerted and independent action, but only if that action “monopolizes,” or “threatens actual monopolization,” a category that is narrower than restraint of trade.” *American Needle*, 130 S.Ct. at 2208 (internal quotation marks and citations omitted).

that they “must be viewed as . . . a single enterprise for purposes of § 1,”⁶² then any claim alleging that their conduct has violated Section 1 necessarily must fail.⁶³

Courts and commentators have struggled to determine when, if ever, sports leagues and their member teams should be viewed as a single entity as opposed to separate entities⁶⁴ whose joint conduct is subject to full Section 1 scrutiny.⁶⁵ On the one hand, teams appear to be separate entities because “each [team] is independently owned[,] . . . competes against the others on the field, and seemingly competes against them for fans and other sources of revenue.”⁶⁶ On the other hand, “each team by itself is a meaningless en-

⁶² *Copperweld Corp., v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

⁶³ This distinction is important because “[c]oncerted activity inherently is fraught with anticompetitive risk,” *Copperweld*, 467 U.S. at 768–69, and thus such activity is “judged more sternly than unilateral activity under § 2.” *Id.* at 768. Without delving into what plaintiffs need to prove to show that a defendant has violated Section 2 of the Sherman Act, it is sufficient at this time to recognize that players face additional hurdles in any player-restraint antitrust challenge if they must prove a Section 2 violation as opposed to a Section 1 violation.

⁶⁴ See *Nat’l Football League v. N. Am. Soccer League*, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of *certiorari*) (analogizing professional sports leagues to law firm partnerships); *Am. Needle, Inc. v. Nat’l Football League*, 538 F.3d 736, 741 (7th Cir. 2008) (observing that “in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny, while in others a league appears to be a joint venture between independently owned teams that is subject to review under § 1”).

⁶⁵ In a Section 1 lawsuit, courts weigh and eventually decide the legality of the concerted activity being challenged according to the “Rule of Reason.” See *infra* notes 109–11 and Section II.B for a full explanation of this test. It is important to note that one such joint activity, league-wide television broadcasting, has been statutorily exempted from Section 1 scrutiny. In 1961, Congress passed the Sports Broadcasting Act, allowing a sports league and its member clubs to evade antitrust scrutiny when member clubs pool their television broadcasting rights for “sponsored telecasting.” See 15 U.S.C. § 1291 (1982). The same Act authorized the AFL-NFL merger. See *id.* It is possible, if not probable, that absent this congressional exemption, the pooling of television rights by member clubs would be held to violate Section 1 of the Sherman Act. Cf. *United States v. Nat’l Football League*, 116 F.Supp. 319, 330 (E.D. Pa. 1953) (holding that NFL rules prohibiting member clubs from selling telecasting rights to their games to stations operating in the home territories of other member clubs were lawful when the other member club was playing at home on the day of the restricted telecast, but violated Section 1 when the other member club was not playing at home); *Telecasting of Professional Sports Contests: Hearings on H.R. 8757 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. 24–6 (1961) (reprinting the previously unpublished decree made by Judge Grim in *United States v. Nat’l Football League*).

⁶⁶ Devlin and Jacobs, *supra* note 28, at 544.

tity—a person without a purpose—for its existence and profitability depend upon the success of the league”⁶⁷ as a whole. Perhaps because of these difficulties, the Supreme Court has held that the determination of whether a sports league and its members should in fact be deemed a single entity — and therefore immune to Section 1 of the Sherman Act — turns on “the alleged activity” being challenged in each particular lawsuit.⁶⁸

1. The “Single-Entity” Test

Although intuition might suggest that collaboration between entities with distinct legal statuses should fall within the ambit of Section 1, the Supreme Court has announced that this is not always the case.⁶⁹ Rather, when considering the “single-entity” inquiry,⁷⁰ “substance, not form . . . determine[s] whether . . . entit[ies are] capable of conspiring under § 1.”⁷¹ That the alleged conspirators in player-restraint lawsuits — the football clubs — are separately owned and operated therefore is not determinative.⁷² Instead, Section 1 liability attaches when “a ‘contract, combina-

⁶⁷ *Id.*

⁶⁸ *Am. Needle, Inc. v. Nat’l Football League*, 130 S.Ct. 2201, 2208 (2010) (internal quotation marks and citations omitted) (emphasis supplied) (“As the case comes to us, we have only a narrow issue to decide: . . . whether the *alleged activity* by the NFL respondents must be viewed as that of a single enterprise for purposes of § 1.”). *Id.* at 2217 (stating that “While [the interest in maintaining a competitive balance among athletic teams] applies to the teams in the NFL, it does not justify treating them as a single entity for § 1 purposes *when it comes to the marketing of the teams’ individually owned intellectual property.*”) (emphasis supplied).

⁶⁹ *See id.* at 2212 (“[I]t is not determinative that two parties to an alleged § 1 violation are legally distinct entities. Nor, however, is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture.”).

⁷⁰ *Id.* at 2211–12 (pointing out that the term “single entity” used to describe this defense” is a bit misleading: “[t]his inquiry is sometimes described as asking whether the alleged conspirators are a single entity. That is perhaps a misdescription, however, because the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved ‘seem’ like one firm or multiple firms in any metaphysical sense.”).

⁷¹ *Id.* at 2211 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773 n.21 (1984) (internal punctuation omitted)).

⁷² *Id.* at 2212 (“Because the inquiry is one of competitive reality, it is not determinative that two parties to an alleged § 1 violation are legally distinct entities.”); *id.* at 2211 (“To hold otherwise . . . would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect insofar as use of separate corporations ha[s] no economic significance.” (quoting *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962))

tion . . . or conspiracy' [exists] amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition."⁷³

The reason the Supreme Court's test focuses on the maintenance of independent centers of decisionmaking and actual or potential competition is that both yield benefits to consumers in the form of lower prices and better quality goods and services:

The Sherman Act reflects a legislative judgment that ultimately competition will not only produce lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.' The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.⁷⁴

In sum, the single-entity test attempts to ensure that the downstream marketplace benefits that flow from robust competition will continue to flow.⁷⁵ Appropriately, this inquiry focuses on whether the entities are "separate *economic* actors pursuing separate *economic* interests"⁷⁶ — i.e., whether they are "actual or potential"⁷⁷ *economic* competitors — since other forms of competition, such as on-field or strategic which are prevalent in sports, only indirectly affect marketplace outcomes.

(internal quotation marks omitted)). *But see id.* at 2212 (Court, immediately after announcing that legal status has no bearing on the single entity determination, seems to have based its determination that the 32 clubs are not a single entity at least in part on the fact that each club is independently owned).

⁷³ *Id.* at 2211 (internal quotation marks and citations omitted).

⁷⁴ *Nat'l Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 695 (1978) (quoting *Standard Oil v. Federal Trade Commission*, 340 U.S. 231, 248 (1951)).

⁷⁵ The fact that the Court has interpreted the Sherman Act to protect consumers and down-market value chain participants is reflected in the oft-quoted statement that the Act protects "competition, not competitors." *See infra* text accompanying notes 175–78. Hence, the Act does not outlaw conduct that benefits consumers despite the fact that it might also injure specific competitors. *See, e.g., Atl. Richfield Co. v. U.S. Petroleum Co.*, 495 U.S. 328, 340 (1990) (stating, for instance, "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury.").

⁷⁶ *Am. Needle*, 130 S.Ct. at 2211.

⁷⁷ *Id.*

What exactly is the nature of economic competition and how are economic competitors identified? What is meant by “potential” competition? These are not easy questions, but they are questions that must be answered before determining whether more than one legal entity should be treated as a single entity for Section 1 purposes. Careful and systematic reasoning is necessary to develop sound answers, while the short-shrift that most courts heretofore have given them have led to the half-baked and often incorrect conclusions that currently comprise the jurisprudence in this area of the law.⁷⁸

2. The NFL’s Member Clubs are not Economic Competitors

“Competition” is defined as “[t]he action of endeavoring to gain what another endeavors to gain at the same time.”⁷⁹ And, of course, the competition ends when one party has attained that which at least one other party had also endeavored to gain. If one competitor were able to eliminate all others, such that it could then attain what it seeks unencumbered, it would do so. The competition would be over, and the remaining competitor would no longer be referred to as a competitor, but instead would be declared the victor.

The ability to declare a sole winner is therefore the defining characteristic for determining whether separate entities are in fact properly classified as competitors. When it comes to economic competition, the winner is the person or organization that captures all of the dollars spent on a particular good or service. For instance, PepsiCo endeavors to gain every dollar spent on beverages. If all other beverage manufacturers were to become defunct, PepsiCo would attain that which it seeks. The relationship between PepsiCo and all other beverage manufacturers is called horizontal competition.⁸⁰

Firms that operate at different stages of a given value chain⁸¹ are not actual but potential competitors because they do not currently endeavor to gain the exact same thing. For instance, in the automobile value chain, Bose

⁷⁸ See *infra* Section II.A.2.

⁷⁹ THE OXFORD ENGLISH DICTIONARY 604, (J.A. Simpson and E.S.C. Weiner, eds., Clarendon Press, vol. 3, 2d ed. 1989).

⁸⁰ See *Dictionary*, AMERICAN MARKETING ASSOCIATION, http://www.marketingpower.com/_layouts/dictionary.aspx?dLetter=H (last visited Jan. 12, 2014), archived at <http://perma.cc/XVS7-FZR7> (defining horizontal competition as “[t]he rivalry to gain customer preference among entities at the same level, such as competition among competing wholesalers or competing retailers”).

⁸¹ “A value chain first classifies the activities of a business into the discrete steps performed to design, produce, market, deliver, and service a product.” *Dictionary*, AMERICAN MARKETING ASSOCIATION, http://www.marketingpower.com/_layouts/

endeavors to gain every dollar spent on the audio speakers that will be installed in cars, while Ford endeavors to gain every dollar that will be spent on a fully assembled car. If a firm operating at one stage of the value chain had the ability to produce as efficiently as the firms at the other levels, it would perform those steps itself so that it would no longer have to forfeit the rents that those other firms extract from the value chain.⁸² That is, if Ford were able to efficiently produce speakers, it would no longer purchase them from Bose, and would instead produce them itself. Ford would also sell the speakers it produced to other manufacturers (if it were unsuccessful in eliminating its horizontal competitors such as Toyota). In such a case, these firms would no longer be potential competitors, but would have become actual competitors. But because at present Ford and Bose only potentially endeavor to gain the same thing (dollars spent on car audio speakers), they are merely potential economic competitors.

What exactly, then, do the NFL member clubs seek? One might argue that they seek to attain all of the dollars generated from the staging of NFL games. If that were true, however, the elimination of all other clubs should benefit the lone remaining club, just as the elimination of all other beverage manufacturers would benefit PepsiCo. But this is not the case; the elimination of all other clubs would prevent the remaining club from attaining any dollars spent on the staging of NFL games, since no NFL games could be staged. The interdependence of clubs in the same sports league is axiomatic.⁸³ Indeed, the product delivered by a sports league — unlike the products and services delivered in almost all other industries — requires the existence of and agreements between multiple firms:

The product [sold by the member clubs belonging to the NFL] is the league's annual series of [256] regular season games leading to a post-season playoff-tournament and ultimately a Super Bowl champion. It is only because each game is an integral part of this mosaic that it has substantial value A league's product is thus jointly produced, and no individual game is solely the product of one or even two teams; the value of every game is largely generated by the trademark and imprimatur of the league and the participation of all league members, each of which must

dictionary.aspx?dLetter=V (last visited Jan. 12, 2014), *archived at* <http://perma.cc/6E9Y-TNF6>.

⁸² This would be an example of vertical integration, defined as “[t]he expansion of a business by acquiring or developing businesses engaged in earlier or later stages of marketing a product.” *Id.*

⁸³ *E.g.*, *Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736, 743 (7th Cir. 2008) (“Asserting that a single football team could produce a football game is less of a legal argument than it is a Zen riddle: Who wins when a football team plays itself?”).

recognize and accept the results of every game. Each team's fortunes, no matter how the league elects to divide total league expenses and revenues, are to a greater or lesser extent inherently affected by the success or failure of every single league game. . . . [E]ach league member is incapable of independent competitive activity [because] [e]ach team's economic existence depends entirely on, and its profits derive solely from, its being an integral part of the league.⁸⁴

The idea that NFL member clubs are not actual or potential economic competitors because they must jointly produce the product being sold might be difficult to accept, particularly because the member clubs seemingly compete to generate revenues through ticket sales and merchandising.⁸⁵ But the fact that “the financial performance of each team . . . does not . . . necessarily rise and fall with that of the others”⁸⁶ does not mean that the clubs are in fact actual or potential economic competitors.

An analogy might help elucidate this point. The rivalry to attract fans and increase gate receipts that exists between NFL member clubs is akin to the rivalry that law firm partners engage in for origination credits within a law firm partnership.⁸⁷ The fact that the “financial performance” of each law firm partner (often located in various markets with differing profit potential) “does not necessarily rise and fall with that of the others,” does not mean that these folks are true economic competitors. Nor does it mean that the agreements governing how they decide to split the revenues and profits that they generate — or the agreements governing the hiring, firing, and compensation of those they employ — should be subject to Section 1 scrutiny (which, of course, they are not). Rather, “[t]he law treats the partners, officers, and employees of such structures as constituent elements of a whole,”⁸⁸ and thus immunizes agreements between them from scrutiny under Section 1 of the Sherman Act. This type of “competition” is not really competition at all, but rather is defined by economists as “coopeti-

⁸⁴ Roberts, *Evolving Confusion*, *supra* note 28, at 985–86.

⁸⁵ See *Am. Needle, Inc. v. Nat'l Football League*, 130 S.Ct. 2201, 2212 (2010). The Court in *American Needle* also states that the “teams compete . . . for contracts with managerial and playing personnel.” *Id.* at 2212–13. This competition is distinct from economic competition, and merely reflects the *strategic competition* that clubs engage in, the results of which play out in the *on-field competition*, the ultimate product that the league sells. See *supra* note 51 and accompanying text for further explanation of the nature and consumer benefits of strategic competition.

⁸⁶ *Am. Needle*, 130 S.Ct. at 2212 (quoting *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249, 1252 (2d Cir. 1982)).

⁸⁷ See Devlin and Jacobs, *supra* note 28, at 5–6.

⁸⁸ *Id.* at 5.

tion,” an internal rivalry that produces benefits for the larger organization or association.⁸⁹

Because leagues sell entertainment in the form of athletic competition, they also “openly advertise and publicly promote this internal rivalry in order to increase customer enthusiasm for the product.”⁹⁰ Indeed, “it would look suspicious to many fans and diminish local fan enthusiasm if teams were largely controlled from league headquarters and there appeared to be little economic incentive for each team to perform well on the field or to operate efficiently in the front office.”⁹¹ Despite outward appearances, then, the economic relationship between NFL member clubs is similar to that which exists between law firm partners. Indeed, even the Internal Revenue Code treats sport leagues and partnerships identically.⁹²

So it appears that member clubs do not endeavor to gain every dollar generated from the staging of NFL games. Rather, they endeavor to gain all dollars spent on spectator sports, or on entertainment generally, and they pursue this goal collectively through “coopetition.” They seek the elimina-

⁸⁹ See Wenpin Tsai, *Social Structure of “Coopetition” within a Multiunit Organization: Coordination, Competition, and Interorganizational Knowledge Sharing*, 13 ORGANIZATION SCIENCE NO. 2, 179, 181 (2002).

⁹⁰ Roberts, *Evolving Confusion*, *supra* note 28, at 989–90.

⁹¹ *Id.* at 989. See *infra* text accompanying note 134 for an overview of a potential player allocation system where a central league administrator distributes playing talent throughout the league after each season. This would presumably increase “outcome uncertainty,” but it would decrease “strategic competition,” an important feature of the league sport product. See *infra* pp. 160–61.

⁹² Roberts, *Evolving Confusion*, *supra* note 28, at 988 n.164 (“Neither a partnership (as defined by the IRS) nor a sports league pays any federal income tax as an entity. Partnerships are exempt under 26 U.S.C. § 701 (1982), and sports leagues are exempt under 26 U.S.C. § 501(c)(3) (1982). 26 U.S.C. § 501(c)(6) expressly exempts football leagues alone, and not other sports leagues, only because Congress amended the law to allow the NFL to manage the players’ pension fund without risking loss of the exemption. Partnerships are required to file a form each year with the IRS indicating what share of the partnership profit (or loss) is attributable to each individual partner. Sports leagues are also required to file the same information in IRS Form 990, which concerns league profit (or loss) distribution among the member clubs. See 26 U.S.C. § 6033 (1982). Just as league member clubs may earn different amounts each year—indeed some may earn a profit while others incur a loss—26 U.S.C. § 704 (1982) allows partners to divide profits and losses unequally.”).

tion of, among others, the MLB, NHL, NBA, and Hollywood studios.⁹³ These entities are the NFL member clubs' true economic competitors.⁹⁴

Another sports league phenomenon — member club expansion — also lends support to the notion that NFL member clubs are not truly economic competitors. One must ask whether genuine economic competitors would voluntarily invite outsiders to join their cartel — one that has already successfully monopolized the market — if there were no readily apparent competitive threat. Yet this is precisely what sports leagues' member clubs do when they decide to add clubs through expansion.⁹⁵ The reason, of course, is that the nature of live sports entertainment limits the ability of producers to expand the quantity and geographic distribution of their product unilaterally. Producers in all other industries, whether product- or service-oriented, can increase production by merely building another plant, increasing their distribution networks, or hiring more people. The NFL, on the other hand, with thirty-two clubs, is limited to producing a maximum of sixteen games at any one time. If it wishes to add a seventeenth game, it must expand by two teams. Similarly, in a thirty-two-team league, the live league product can only be offered in sixteen markets at any one time. Thus, if the NFL wants to bring its live product offering to new geographic markets, it needs to expand. The quantity and geographic constraints on current producers force them to add “competitors” to their monopolistic cartel if they wish to expand the scope of their business, proving that the term “economic competitors” does not precisely capture the relationship that exists between sports leagues' member clubs.

I therefore propose a two-part test to determine whether two or more entities that jointly produce a given good or deliver a particular service are actual or potential economic competitors. First, could any of the entities that are currently working together to produce a given product or deliver a particular service unilaterally produce that exact same product or deliver that exact same service? Second, are these entities, as part of a cartel that has successfully monopolized the market, able to expand the quantity and geo-

⁹³ See *Nat'l Football League v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of *certiorari*) (“The NFL owners . . . produce a product, professional football, which competes with other sports and other forms of entertainment in the entertainment market.”).

⁹⁴ See *id.*

⁹⁵ See *NAT'L FOOTBALL LEAGUE PLAYERS ASS'N CONST.* art. III.1.C (Mar. 2007), archived at <http://perma.law.harvard.edu/0XRJezxuNRU>, which specifies that new clubs member clubs may be admitted to the League with an affirmative vote of three-fourths of all existing League members. The Houston Texans, joining the League in 2002, were the most recent addition to the NFL.

graphic scope of production without allowing other parties to join their cartel? If the answer to either of these questions is “yes,” then the entities currently working together are — or have the potential to become — economic competitors, and agreements between them should be subject to Section 1 scrutiny. If the answer to both questions is “no,” however, then these entities are not, nor could they ever be, economic competitors in that market. They are better described as economic “partners” since they each endeavor to achieve the same end, but must pursue that end collectively.

Having established that the NFL member clubs are not economic competitors but rather economic partners in the production of football games, it is now possible to evaluate whether they are economic competitors in the acquisition of player services. This is the critical inquiry in resolving whether member-club agreements related to the acquisition of player services (e.g., annual draft) should be subject to Section 1 scrutiny since “single-entity” status does not attach absolutely, but is instead evaluated on a case-by-case basis in light of the specific activity being challenged.⁹⁶

When applying the single-entity test to player-restraint agreements, it is important to recognize that labor constitutes an *input* that clubs use to produce their product (i.e., football games) for the *output* market. That is, but for the staging of football games that generate revenue through ticket sales and television contracts, the clubs would have no need for players. This, of course, is true of any industry: an input is only necessary to the extent it is used to produce an output that has some value to a downstream market. In most industries, the demand for an input is unaffected by the number of firms purchasing any given input; rather, the demand for an input is a function of the demand for all of the output products for which that input could be used. But unlike industries in which one firm could theoretically produce any product independently, in the sports-league industry, a single firm acting alone is incapable of producing or selling anything in the output market.⁹⁷ Consequently, the demand for players in the sports-league industry depends entirely on the existence of multiple firms. That is, if there were only one sports club, demand for the input — player services — would be nonexistent, since that club would be incapable of selling anything in the output market. Similarly, if the number of firms producing NFL football games increases through expansion, the demand for NFL players would increase proportionately. Because the clubs in league sports are necessarily economic *partners* in the delivery of a product for the *output* market, it would be improper to conclude that they could simultaneously be eco-

⁹⁶ See *supra* note 68 and accompanying text.

⁹⁷ See *supra* Section II.A.2.

conomic *competitors* in the input market used to source the components necessary to deliver their joint product to the output market.⁹⁸

3. The Single-Entity Test, Player Restraints, and *American Needle*

That NFL member clubs are not economic competitors in the production of football games — and should therefore be immune from Section 1 scrutiny when making agreements pertaining to the production of football games — squares firmly with the Supreme Court’s recent decision that agreements pertaining to the joint licensing of individual team logos and trademarks should in fact be subject to scrutiny under Section 1 of the Sherman Act.⁹⁹ There are two portions of dicta within the *American Needle* decision that may appear to undermine the conclusion that NFL member clubs are in fact a single entity when it comes to player restraints and therefore should not be subject to Section 1 scrutiny. Each excerpt is addressed in turn.

First, the opinion states:

The justification for cooperation is not relevant to whether that cooperation is concerted or independent action. . . . Any joint venture involves multiple sources of economic power cooperating to produce a product. And for many such ventures, the participation of others is *necessary*. But that does not mean that necessity of cooperation transforms concerted action into independent action; a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to § 1 analysis.¹⁰⁰

Here, the Supreme Court misuses the word “necessary.” In very few joint ventures will the participation of others actually be “necessary.” It may be economically advantageous for the joint venturers to collaborate (indeed, this is most likely why they chose to collaborate in the first place), but that does not mean the collaboration was “necessary” in any absolute sense, as is the collaboration between two sports clubs staging an athletic competition. The Court is no doubt correct when it asserts that a “nut and bolt can only operate together,” but “an agreement between nut and bolt manufacturers

⁹⁸ Because monetary compensation is often the way in which clubs attempt to attract players, it is tempting to view these clubs as economic competitors, but decisions regarding how much to pay players individually are really just a manifestation of the strategic competition in which clubs engage. This concept is further explored in Section II.C.4.

⁹⁹ See *Am. Needle, Inc. v. Nat’l Football League*, 130 S.Ct. 2201 (2010).

¹⁰⁰ *Id.* at 2214 (emphasis added).

is still subject to § 1 analysis.”¹⁰¹ But it confuses the issue since the compatibility or complementariness of the products produced by multiple firms has no bearing on the Section 1 inquiry. Rather, agreements between nut and bolt manufacturers are subject to Section 1 scrutiny because there is theoretically no reason why the nut manufacturer could not also manufacture bolts, and the bolt manufacturer nuts; because both of these entities could unilaterally produce the exact same product that the other produces, they are potential economic competitors.¹⁰²

Second, the Court opines:

If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from § 1, then any cartel could evade the antitrust law simply by creating a joint venture to serve as the exclusive seller of their competing products. . . . However, competitors cannot simply get around antitrust liability by acting through a third-party intermediary or joint venture.¹⁰³

Again, this language does not refute or contradict the notion that the NFL member clubs should not be subject to Section 1 scrutiny in player-restraint lawsuits. The fact that NFL clubs decide to partially share profits and losses has no bearing on whether they should be entitled to Section 1 immunity. Nor should the simple fact that they have created a “joint venture.” Under the two-part test proposed in the prior subsection, the member clubs’ immunity would derive from situations in which the product produced by the venture would not exist but for their collaboration, demonstrating that in such an instance they are economic partners, rather than economic competitors. Consequently, “[a]ny cartel,” could not “evade the antitrust law simply by creating a joint venture”¹⁰⁴ because the individual members of those cartels could unilaterally produce the exact same product that they currently produce jointly. Indeed, apparel manufacturers could still attain the product jointly delivered and at issue in *American Needle* (the license to produce apparel with the logo of each NFL club) even if the clubs were precluded from collectively negotiating the rights to all club logos. The Supreme Court was on point when it reasoned that “even if leaguwide [sic] agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce foot-

¹⁰¹ *Id.*

¹⁰² In other words, they fail the first part of the two-part test proposed in Section II.A.2.

¹⁰³ *Am. Needle*, 130 S.Ct. at 2215-16 (internal quotation marks and citations omitted).

¹⁰⁴ *Id.* at 2215.

ball.”¹⁰⁵ That is, “[t]o a firm making hats, the [clubs] are . . . potentially competing suppliers of valuable trademarks. When each NFL team licenses its intellectual property, it is not pursuing the common interests of the whole league but is instead pursuing interests of each corporation itself”¹⁰⁶ In contrast, when clubs make agreements pertaining to the production of football games (including agreements related to the allocation and distribution of playing talent throughout the League), which no single club could independently produce, they necessarily pursue the common interests of the whole League.

In sum, NFL member clubs are not economic competitors, but economic partners in the production of NFL football games. This fact is concealed by the “athletically competitive nature of the product itself, and the need to maintain public confidence in the athletic separateness of the teams engaging in sporting competition.”¹⁰⁷ However, careful analysis reveals that this “competition” is not really competition at all, but “coopetition,” similar to that which takes place internally within many organizations, such as law firm partnerships. Because the clubs are not economic competitors in the production of football games, it would be improper to conclude that they are economic competitors in the input market from which they necessarily must draw to produce their joint product for the output market. And, because the clubs are not economic competitors in the production of football games, agreements between them pertaining to the production of football games do not deprive the marketplace of independent centers of decision-making, nor the benefits that accrue from actual or potential competition. Accordingly, when it comes to player-restraint agreements, the NFL member clubs should fit within the Supreme Court’s definition of a “single entity” and rest beyond the purview of Section 1.

B. *The Rule of Reason*

Assuming, *arguendo*, however, that Section 1 applies,¹⁰⁸ the legality of any league-wide player restraint will most likely be judged according to the “rule of reason.”¹⁰⁹ That is, notwithstanding specific language outlawing

¹⁰⁵ *Am. Needle*, 130 S.Ct. at 2214 n.7.

¹⁰⁶ *Id.* at 2213 (internal quotation marks and citation omitted).

¹⁰⁷ Roberts, *Evolving Confusion*, *supra* note 28, at 989.

¹⁰⁸ See *supra* Section II.A.

¹⁰⁹ The Rule of Reason (capital R’s) should be distinguished from a rule of reason (small r’s) inquiry. The Rule of Reason encompasses both *per se* categories of illegality, as well as the more searching rule of reason inquiry, which attempts to weigh

“every contract, combination . . . or conspiracy,”¹¹⁰ Section 1 only prohibits conduct that “unreasonably” restrains trade.¹¹¹ And that determination turns on “whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”¹¹² More simply stated, the question is

the procompetitive effects of a given restraint against its anticompetitive effects. *See infra* note 111 and accompanying text.

¹¹⁰ 15 U.S.C. § 1 (2012).

¹¹¹ Because every private contract in some way restrains trade, the Supreme Court has held that the Act cannot be applied literally, lest the abilities of parties to contract with one another be destroyed. *See Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911) (“[A]s the contracts or acts embraced in the provision were not expressly defined . . . [the] classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce . . . and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason . . . was intended to be the measure”).

¹¹² *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918). Certain categories of restraints are so pernicious that their anticompetitive consequences almost always outweigh any procompetitive effects. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (horizontal price fixing); *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102–03 (1980) (vertical price fixing); *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972) (horizontal market allocation); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 293–94 (1985) (noting group boycotts deserve *per se* treatment, but holding that concerted refusals to deal do not). As a result, restraints belonging to these categories have been deemed *per se* illegal, meaning that the perpetrator is precluded from providing an explanation for his conduct and judgment is immediately rendered against him.

Experience has also proven, however, that the joint productive nature of certain industries makes a presumption of illegality inappropriate in those industries regardless of whether the challenged restraint would otherwise fit into a *per se* illegal category. *See Mackey v. Nat’l Football League*, 543 F.2d 606, 619 (8th Cir. 1976) (“[W]hen faced with a unique or novel business situation, courts have eschewed a *per se* analysis in favor of an inquiry into the reasonableness of the restraint under the circumstances.”). Most courts confronting a sports league Section 1 antitrust lawsuit have recognized to various extents that the very existence of sports leagues requires a certain degree of collaboration and cooperation. *See, e.g., Los Angeles Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381, 1389 (9th Cir. 1977) (“It is true the NFL clubs must cooperate to a large extent in their endeavor in producing a “product” — the NFL season culminating in the Super Bowl.”). Thus, every time the Supreme Court or a circuit court has presided over player restraint antitrust litigation, they have rightly declined to hold any conduct by

whether the challenged conduct's procompetitive effects outweigh its anticompetitive effects.¹¹³

1. What Are "Procompetitive" and "Anticompetitive" Effects?

Before the effects of challenged conduct on competition can be measured, a normative standard must be established to identify from whose perspective any such effects are to be evaluated; failure to do so would make any attempt at classification futile.¹¹⁴

More than a century's worth of antitrust jurisprudence has firmly established that any restraint's effects must be evaluated from the consumer's perspective.¹¹⁵ Consequently, the impact that a given restraint has on a product's price, output and/or quality determines the conduct's procompeti-

sports leagues or their member clubs *per se* illegal under Section 1, choosing instead to judge the challenged conduct according to the rule of reason. *See id.*; *see also* N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1259 (2d Cir.1982); Smith v. Pro Football, Inc., 593 F.2d 1173, 1177–82 (D.C. Cir. 1978); Mackey, 543 F.2d at 618–20. It should be noted, however, that a few district courts have declared sports league conduct to be *per se* illegal. *See* Boris v. U.S. Football League, No. CV 83-4980 LEW (Kx), 1984 WL 2864 (C.D. Cal. Jan. 30, 1984); *see also* Linesman v. World Hockey Ass'n, 439 F.Supp. 1315, 1323 (D. Conn. 1977); Smith v. Pro Football, Inc., 420 F. Supp. 738, 745 (D.D.C. 1976), *rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978); Mackey v. Nat'l Football League, 407 F.Supp. 1000, 1007 (D. Minn. 1975), *modified*, 543 F.2d 606 (8th Cir. 1976); Robertson v. Nat'l Basketball Ass'n, 389 F.Supp. 867, 890–91 (S.D.N.Y. 1975); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1066 (C.D. Cal. 1971).

¹¹³ *See e.g.*, Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 898–99 (2007) (explaining that the rule of reason should be applied in "a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones").

¹¹⁴ Devlin, *supra* note 27, at 226–27. For example, if Party A contracts to sell 500 widgets to Party B, exhausting Party A's remaining supply, Party C, also wanting to purchase the widgets, is aggrieved by this "contract in restraint of trade." From Party C's perspective, the contract appears to be "anticompetitive," while it appears to be "procompetitive" from the perspectives of Parties A and B. *See infra* text accompanying notes 173–77.

¹¹⁵ This is because consumer welfare is the overriding purpose of the Sherman Act. Associate Justice Breyer, while still sitting on the First Circuit, wrote: "[T]he law assesses both harms and benefits in light of the Act's basic objectives . . . [to] bring[] . . . consumers the benefits of lower prices, better products, and more efficient production methods." *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 486 (1st Cir. 1988) (Breyer, J.). "Some scholars maintain that there are social and political goals which should play a role in antitrust enforcement policy, but even these dissenters recognize that the economic interests of the consumer should be the primary goal." Roberts, *Evolving Confusion*, *supra* note 28, at 984–85 (1988).

tive or anticompetitive nature. That is, a decrease in price, or increase in output and/or quality is considered “procompetitive,” while the opposite effects are considered “anticompetitive.”

Keeping this standard in mind, it is obvious that seller-side (i.e., monopolistic) cartels banding together to *raise* prices in an *output* market leads to anticompetitive effects, and thus, such conduct is usually held illegal under Section 1. But it is not readily apparent that buyer-side (i.e., monopsonistic) cartels banding together to *lower* prices in the *input* market leads to anticompetitive effects.¹¹⁶ After all, if buyers were to leverage their collective buying power to reduce the costs of their inputs, they could then theoretically pass on those savings to consumers in the output market.¹¹⁷ It thus appears that, unlike monopolistic conduct, monopsonistic conduct may actually lead to procompetitive effects.

But the Supreme Court has declared monopsonistic conduct illegal on numerous occasions,¹¹⁸ and its harmful nature is implied by those who call

It is imperative not to confuse the fact that a challenged restraint’s procompetitive and anticompetitive effects must always be evaluated from the consumer’s perspective with the proposition that the application of that standard — and thus the Sherman Act itself — protects not only consumers, but also many constituencies. See *infra* text accompanying notes 173–77.

¹¹⁶ For purposes of this discussion, “buyers” are businesses that will purchase materials from other sellers, transform those materials into something of value, and then sell that transformed good to another business or an end-user (i.e., consumer).

¹¹⁷ Research has indicated, however, that monopsonists rarely, if ever, pass these savings onto consumers, preferring instead to keep these rents for themselves. For instance, speaking on behalf of the U.S. Department of Justice Antitrust Division, R. Hewitt Pate explained: “A casual observer might believe that, if a merger lowers the price the merged firm pays for its inputs, consumers will necessarily benefit. The logic seems to be that because the input purchaser is paying less, the input purchaser’s customers should expect to pay less also. But that is not necessarily the case. Input prices can fall for two entirely different reasons, one of which arises from a true economic efficiency that will tend to result in lower prices for final consumers. The other, in contrast, represents an efficiency-reducing exercise of market power that will reduce economic welfare, lower prices for suppliers, and may well result in higher prices charged to final consumers.” *Antitrust Enforcement in the Agricultural Marketplace: Statement Before the Senate Comm. on the Judiciary* 4 (Oct. 30, 2003) (statement of R. Hewitt Pate, Assistant Att’y Gen., Antitrust Div., U.S. Dept. of Justice), archived at <http://perma.cc/0351BqMmHD7>.

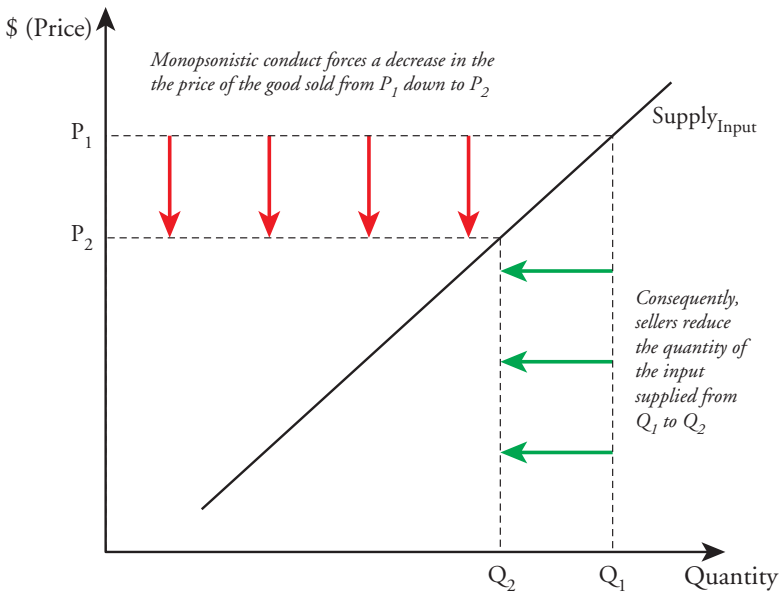
¹¹⁸ See *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co., Inc.*, 549 U.S. 312, 320–25 (2007) (holding that the test for judging whether predatory bidding is illegal should be the logical equivalent of the test for predatory pricing); see also *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 246 (1948) (holding that an allegation that a group of sugar beet refiners illegally conspired to

monopsony “the mirror image of monopoly.”¹¹⁹ Considering that NFL member clubs act as monopsonists with respect to labor — i.e., clubs purchase player labor, and reduced labor costs could be used to lower ticket prices or build better stadiums — more than just a surface-level understanding of monopsonistic conduct is necessary to determine when such conduct does in fact lead to anticompetitive effects. Only then will it be possible to properly evaluate whether player restraints are “unreasonable” restraints of trade, and thus illegal.

2. Monopsony Usually Leads to Anticompetitive Effects

In most industries, monopsonistic conduct leads to decreases in output, and consequently to increases in price. This results from sellers’ responses to monopsonistic conduct. Assuming the input targeted by monopsonists has an upward-sloping supply curve, a forced decrease in the price paid for that input would cause sellers of the input to cumulatively decrease the quantity that they will sell.

FIGURE 1

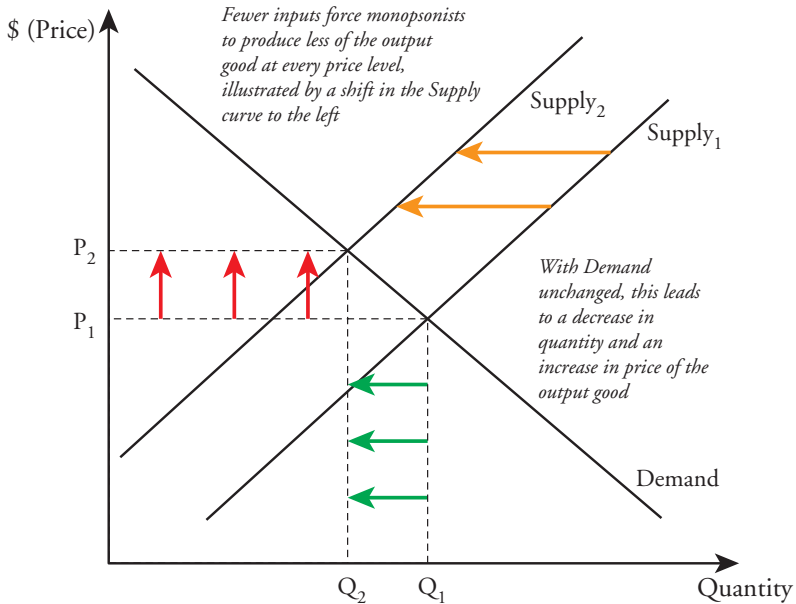


fix the prices of the beets they purchased from the growers clearly states a cause of action under the Sherman Act).

¹¹⁹ Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1502, 1514 (2013).

With fewer inputs, the buyers/monopsonists will not be able to produce as much of the finished product for the output market as they could before. Their inability to produce the same quantity of the finished product is represented by a shift in the monopsonists' output-market supply curve to the left. As a result, this shift leads to a decrease in quantity and an increase in price, clear anticompetitive effects for consumers.

FIGURE 2



Because demand in the output or product market remains unchanged, however, monopsonists may attempt to substitute another input for the input targeted by their monopsonistic conduct. This would allow them to produce the same quantity of the finished product for the output market as they had before they engaged in the monopsonistic conduct.¹²⁰ Besides any effect that substitution might have on product quality, the substitution will be inefficient,¹²¹ resulting in an overall increase in the monopsonistic firms' marginal costs.¹²² "As profit-maximizing entities sell their goods at the

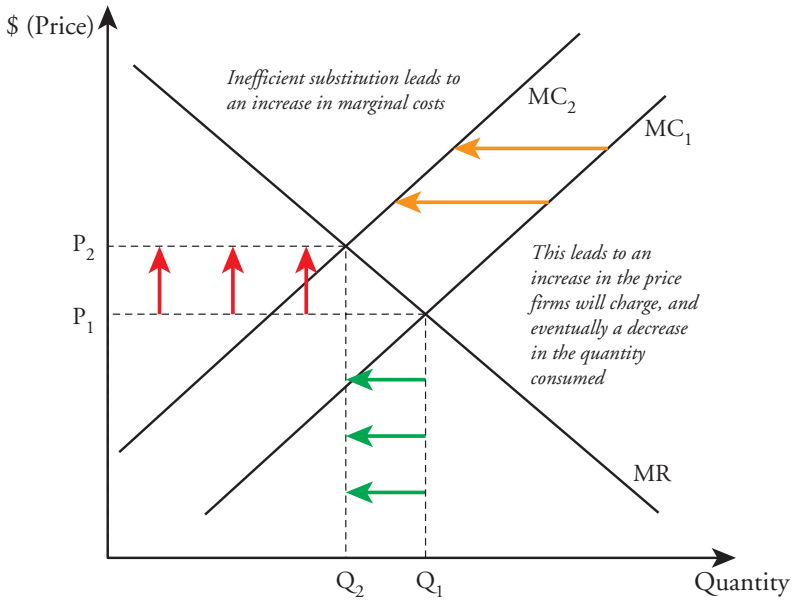
¹²⁰ Devlin, *supra* note 27, at 231.

¹²¹ *Id.* at 231 n.39 ("Given the assumption of profit maximization, we can be confident of the resulting inefficiency, for were the substitution efficient, it would already have taken place prior to the exercise of upstream monopsony power.")

¹²² *Id.* at 231.

point where marginal revenue equals marginal cost, a higher marginal cost will lead to higher prices.”¹²³

FIGURE 3



Whereas in the prior example a decrease in quantity produced led to an increase in price, here an increase in price leads to a decrease in quantity consumed.¹²⁴ Either way, the anticompetitive effects of monopsonistic conduct are clear. Armed now with at least a basic understanding of what is meant by “procompetitive” and “anticompetitive” effects, as well as why monopsonistic conduct is usually anticompetitive, a determination can be made regarding whether sports-league player restraints are “unreasonable,” and thus illegal under Section 1.

3. Evaluating the Effects of Sports-League Player Restraints

It is usually true in the world of sports that the more evenly matched the competitors or teams, the more exciting and enjoyable the competition

¹²³ *Id.*

¹²⁴ *See id.*

is to the spectator.¹²⁵ In short, increased on-field competitiveness — or increased outcome uncertainty — enhances product quality, and thus consumer welfare.¹²⁶

The salary cap, along with the salary floor, increases outcome uncertainty by establishing a tight dollar range that player salaries must stay within, and therefore creates a league in which the quality of playing talent is spread relatively evenly across all member clubs.¹²⁷ Yet despite starting a season with similar payrolls — and presumably a relatively equal amount of talent — clubs end the season with vastly different win-loss records. Players get injured, talent develops or erodes more quickly than anticipated, the particular players on a given club fit together better or worse than expected, and sometimes the talent evaluators that decide how much a player is worth are just plain wrong. The playing season illustrates that the clubs are not as evenly matched as their payrolls had indicated they were at the beginning of the season. At this point, the annual college player draft steps in.¹²⁸ By

¹²⁵ See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1176 (D.C. Cir. 1978) (“Evenly-matched teams make for closer games, tighter [playoff] races, and better player morale, thus maximizing fan interest, broadcast revenues, and overall health of the sport.”); *Mackey v. Nat’l Football League*, 543 F.2d 606, 621 (8th Cir. 1976) (“We do recognize . . . that the NFL has a strong and unique interest in maintaining competitive balance among its teams.”).

¹²⁶ See generally Jake I. Fisher, *The NFL’s Current Business Model and the Potential 2011 Lockout 10* (May 4, 2010) (unpublished economics paper), archived at <http://perma.law.harvard.edu/0ZF6oPfutoT> (“By giving all teams and fans hope for a playoff appearance and Super Bowl Championship, the NFL maintains demand in the sport. Weekly regular season games become more interesting when the victor is unknown.”). Perhaps NFLPA Executive Director DeMaurice Smith put it best when, asked at an NFL game why the league has been so successful, he responded, “You know who’s gonna win this game? Neither do I. And you know what? It’s fantastic.” *60 Minutes: The Commissioner*, *supra* note 52.

¹²⁷ In fact, a huge difference between the NFL and MLB is that the NFL implements a “hard” salary cap and MLB does not. Compare 2011 NAT’L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 12.9 (Aug. 4, 2011), archived at <http://perma.law.harvard.edu/0UcXeAWR7o8> with 2012–2016; with 2012–2016 BASIC AGREEMENT art. 23, archived at <http://perma.cc/AKF9-9CBV>. MLB does limit spending on player salaries to increase the competitiveness of the League, but in a much less restrictive — and therefore much less effective — manner through the imposition of a “competitive balance tax.” See 2012–2016 BASIC AGREEMENT art. 23, archived at <http://perma.cc/AKF9-9CBV>. The competitive balance tax is a surcharge put on the aggregate payroll of a team to the extent it exceeds a predetermined level. See generally *id.* A team is thus dissuaded, although not prohibited, from having a payroll exceeding this threshold because doing so would result in paying more for the playing talent than it is objectively worth.

¹²⁸ See *supra* note 38 for a description of how the draft operates.

allowing the least competitive club a better opportunity to acquire the best new talent, the draft attempts to create a more competitive league and increase outcome uncertainty for the following season.¹²⁹

In fact, almost all player restraints increase outcome uncertainty (albeit to various extents).¹³⁰ For instance, restraining the number of players that any one team can employ limits the ability of a particularly wealthy club to stockpile all the best talent.¹³¹ There also appears to be a direct correlation between the restrictiveness¹³² of a given player restraint and outcome uncertainty.¹³³ For instance, a more restrictive system than the combination of the salary cap and annual college player draft would be to pay all players the same amount and have a central league administrator reassign players to each club at the end of each season to balance playing talent throughout the league as evenly as possible. Theoretically, employing this system would increase outcome uncertainty.¹³⁴ And the restraints that do not appear to enhance outcome uncertainty provide other benefits, such as increased team

¹²⁹ See *Smith*, 593 F.2d at 1194-1205 (MacKinnon, J., concurring in part and dissenting in part) for an informative description of the early failings of the NFL and how the annual college player draft increased the competitiveness of the League and led to success.

¹³⁰ Again, the restraints referenced here are those that primarily affect the *process* by which talent is acquired and the *distribution* of playing talent throughout a league. This statement does not encompass player restraints that *exclude* particular players or classes of players, though some exclusionary player restraints also increase outcome uncertainty. See *infra* note 131 and accompanying text.

¹³¹ Although some of the talent stockpiled by a club would not be utilized, that talent would not be able to compete against the club either.

¹³² The “restrictiveness” of a player restraint is based upon the level of autonomy that players have in choosing for which club they will play, and the level of autonomy that club general managers have to sign the players they desire the most. Thus, the hard salary cap is more restrictive than a competitive balance tax because the competitive balance tax merely imposes a financial hardship that club general managers and owners can choose to endure to sign whichever players they want, while the hard salary cap actually bars clubs from exceeding a certain threshold. See *supra* note 39 and accompanying text for a description of the salary cap; see *supra* note 127 and accompanying text for a description of the competitive balance tax.

¹³³ See *infra* figure 4 and text accompanying notes 217–18.

¹³⁴ On the other hand, playing quality would most likely decrease because of the lack of continuity. Whether the net outcome of these countervailing effects would enhance or diminish product quality and consumer interest is debatable. Additionally, such a system might diminish fan enthusiasm. See *supra* note 91 and accompanying text.

continuity and/or strategic competition,¹³⁵ which also enhance product quality and consumer welfare.¹³⁶

Conversely, player restraints governing strategic competition¹³⁷ do not lead to anticompetitive effects. Recall that monopsonistic conduct usually leads to an increase in price and/or decrease in the quantity or quality of the finished product because sellers of the targeted input will decrease the quantity that they would otherwise supply absent the monopsonistic conduct.¹³⁸ In most industries, monopsonistic conduct targeting the labor market also leads to these anticompetitive effects.¹³⁹ A brief hypothetical shows why: if competing manufacturers previously paying factory workers \$15/hour were able to band together to drive down the cost of labor to \$10/hour, it is possible that some workers would decide to quit (i.e., a decrease in sup-

¹³⁵ See *infra* figure 5 and text accompanying notes 222–31 for further description regarding the benefits of enhanced strategic competition.

¹³⁶ The “franchise tag” may fall into this category. It arguably enhances product quality, though, by allowing clubs an additional opportunity to maintain team chemistry, which leads to higher-quality play. Additionally, it allows clubs to keep players they might otherwise lose. This arguably enhances consumer welfare because club fans are generally more attached to players they already have than to players they might get in the future. This psychological concept is referred to as “loss aversion.” See generally Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39(4) AM. PSYCHOL. 342-50 (1984) (first explaining the theory of loss aversion). See *infra* notes 219–31 for further description of how the franchise tag operates and its procompetitive benefits.

¹³⁷ Again, this statement and the arguments that follow in this section only concern player restraints that govern the *process* of player acquisition, and the *distribution* of player talent throughout the League. It does not encompass player restraints that *exclude* players or classes of players from the League. Such restraints do have an anticompetitive effect by depriving the consumer of the enjoyment of watching the most talented athletes compete — athletes that would be competing if not for the player restraint. These player restraints, however, may have other procompetitive benefits, such as protecting the integrity of the League or enhancing the safety of its players. These benefits increase the stability of the League and may outweigh these anticompetitive effects, making the exclusion of certain players or players who engage in certain practices legal under Section 1. See generally, e.g., *Clarett v. Nat'l Football League*, 369 F.3d 124 (2d Cir. 2004); *Neeld v. Nat'l Hockey League*, 594 F. 2d. 1297 (9th Cir. 1979); *Molinas v. Nat'l Basketball Ass'n*, 190 F.Supp. 241 (S.D.N.Y. 1961); see also *supra* notes 36-37.

¹³⁸ See *supra* figures 1–2 and text accompanying notes 120–24.

¹³⁹ This is particularly true when that labor is engaged in relatively unrewarding, menial, low-paying jobs, because other alternatives to employment become immediately attractive.

ply).¹⁴⁰ The workers might decide to drive a taxi, wait tables, stay at home to raise their children or do any number of other things with their time. As a result, the monopsonistic manufacturers would no longer be able to produce the same quantity of goods as they could before they conspired to lower employee wages.¹⁴¹ This decrease in the production of finished goods will cause the price of these goods to increase.¹⁴² Alternatively, the monopsonistic manufacturers may decide to inefficiently substitute capital for the lost labor, which will increase the marginal cost of producing the good, leading to a corresponding increase in the price of the good in the output market, culminating in a decrease in quantity consumed.¹⁴³

But sports leagues are not like most industries, and being a professional athlete is nothing like being a factory worker. Playing sports is fun.¹⁴⁴ There are currently 1,696 players in the NFL.¹⁴⁵ Considering that millions of Americans play sports recreationally on a regular basis, there is a good chance that NFL member clubs would still be able to fill their rosters even if they all agreed to not pay their players a single penny.¹⁴⁶ Because the sup-

¹⁴⁰ Assuming, of course, that they do not instead choose to form a union and collectively bargain, Congress's preferred method for labor and management to set the wages, terms and conditions of employment. See *infra* Section III.

¹⁴¹ This assumes that the workers that quit were necessary for producing a certain quantity of goods. This is a safe assumption since a profit-maximizing firm would have already laid-off unnecessary workers.

¹⁴² See *supra* figures 1–2 and text accompanying notes 120–24.

¹⁴³ See *supra* figures 1–2 and text accompanying notes 120–24.

¹⁴⁴ In fact, a few professional athletes have even indicated their willingness to play sports for free. For instance, star soccer player Luca Toni recently stated that he would play for former club Bayern Munich for free. *Toni: I Would Play for Bayern for Free*, ESPNSTAR (Jan. 24, 2012), <http://www.espnstar.com/home/news/detail/item740803/> (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/0A1ZRI4HiCS>. Additionally, Chad Ochocinco indicated that he would be willing to play Major League Soccer (“MLS”) for free. *Chad Ochocinco Begins MLS Tryout*, ESPN (Mar. 24, 2011), <http://sports.espn.go.com/nfl/news/story?id=6250413> (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/0vQ3UQg7fwf>. Tangentially, it is somewhat surprising that star athletes who have already earned exorbitant sums of money do not volunteer to play for the league minimum so that their club can use the money saved to sign other quality players, thereby increasing the club's chances of winning a championship. Presumably the reason why this hasn't happened is that if a player did this, it would set precedent that would put significant pressure on all athletes to accept less money, creating a race to the bottom, and diminish overall player welfare. Union leaders have most likely advised star players of the detrimental effects that would result from making such a seemingly honorable and gracious gesture.

¹⁴⁵ See *supra* note 47.

¹⁴⁶ See *supra* note 144.

ply of labor in sports leagues is inelastic, monopsonistic conduct by NFL clubs has absolutely no impact on the price or quantity of NFL games produced.¹⁴⁷ But, of course, a game played between a bunch of “Regular Joes” — as opposed to squads composed of finely-tuned athletes like Adrian Peterson and J.J. Watt — would not be as enjoyable to watch.¹⁴⁸ Thus, the real anticompetitive threat that exists when sports leagues’ member clubs engage in monopsonistic conduct is not an increase in price or decrease in output, but a decrease in player quality, leading to a decrease in product quality.

The argument that clubs’ monopsonistic conduct would reduce player quality — and therefore consumer welfare — goes as follows:

Depressing wages below the competitive level would discourage some potential players from becoming professionals. Even if few potential players have alternative opportunities outside their sport, a reduction in salary levels at the least reduces the incentive for some young people to invest the human capital necessary to become a skilled professional and thereby subtracts from maximum potential consumer satisfaction.¹⁴⁹

This argument, though, is weak.

First, college athletics ensure that any diminution in human capital investment created by league-wide monopsonistic conduct is rendered virtually nil. Most young people enrolled in middle and high school are still not fully developed (physically or skill-wise) such that they can predict with absolute certainty whether their dream of playing a professional sport will be fulfilled. In most cases, college athletics provide a training and proving ground for the athlete. So long as college scholarships (not to mention the “celebrity” that goes along with playing a varsity sport) are provided to athletes, there should not be a significant decrease in the incentive for young people to invest the human capital necessary to become a professional ath-

¹⁴⁷ “Where the input elasticity of supply is perfectly inelastic, there will be no reduction in the quantity of input, no increase in marginal cost, and no consumer harm.” Devlin, *supra* note 27, at 232; see also Jay M. Zitter, *What Constitutes Monopsony Within Meaning of § 2 of the Sherman Act* (15 U.S.C.A. § 2), 49 A.L.R. Fed. 2d 515, § 2 (2010) (“[F]or monopsony power to exist: . . . (2) the supply curve for the input in question must be upward sloping.”). Furthermore, NFL clubs, unlike the manufacturers, could not substitute another input for a shortage of player labor even if they wanted to. Such a shortage would result, however, in contraction, or a reduction in output, although it is doubtful that this would lead to an increase in price as it would for normal goods.

¹⁴⁸ Adrian Peterson is an all-pro running back, playing for the Minnesota Vikings, and J.J. Watt is an all-pro defensive end, playing for the Houston Texans.

¹⁴⁹ Harper, *supra* note 28, at 1665 n.12.

lete. This is driven home by the fact that only one percent of college athletes become professional athletes.¹⁵⁰ Although the overwhelming majority of college athletes will never receive financial remuneration for their athletic achievements, reality has demonstrated that they are still willing to invest incredible amounts of time and energy to participate in athletics.¹⁵¹

Second, few children begin playing sports to ensure that they will earn a particular income fifteen or twenty years later.¹⁵² Rather, in most circumstances, children begin playing sports because their parents believe it will teach them the value of hard work, discipline, and teamwork, and because exercising is good for health and physical development.¹⁵³ As children grow older, they play sports because they enjoy playing.¹⁵⁴ They gravitate toward the most popular sports and those in which they have the most natural talent.¹⁵⁵ While natural talent cannot be influenced, the popularity of a sport can be. Since more restrictive player restraints lead to an increase in out-

¹⁵⁰ Stephanie Stark, *College Athletes Suffer the Greatest Injustice from NCAA*, USA TODAY (Aug. 28, 2011), <http://www.usatodayeducate.com/staging/index.php/blog/college-athletes-suffer-the-greatest-injustice-from-ncaa> (last visited Jan. 12, 2014), archived at <http://www.perma.cc/0HBr2Dw6Yvg>. Indeed, the NCAA's advertising slogan — “there are nearly 400,000 NCAA student-athletes, and almost all of us will be going pro in something other than sports” — has praised and popularized this statistic.

¹⁵¹ See *id.* (“One would think, with the staggering statistics and the depressing lingering of past prestige of college athleticism that only remains on dusty shelves and Facebook photos, these former student athletes would regret it. However, as for the people interviewed, not one said they wish they would have had a college career without athletics.”).

¹⁵² The author acknowledges that some parents may push their children towards certain activities because of the potential to eventually extract a lucrative financial reward. This effect, though, is most likely completely overshadowed by the increase in the number of children who want to become a particular type of athlete because the sport is extremely popular. See *infra* notes 153–57 and accompanying text.

¹⁵³ See, e.g., Mark Hyman, *A Survey of Youth Sports Finds Winning Isn't the Only Thing*, N.Y. TIMES (Jan. 30, 2010), <http://www.nytimes.com/2010/01/31/sports/31youth.html> (last visited Jan. 12, 2014), archived at <http://www.perma.cc/0fc95ezZBY>; Emily J. Crandall, *Why Children Play Sports: A Parent's, Coach's, and Athlete's Perspective* (2007) (unpublished Ed.M. thesis), archived at <http://perma.cc/0h1bryKV4eE>; Carleton Kendrick, *Why Most Kids Quit Sports*, FAMILY-EDUCATION.COM, <http://life.familyeducation.com/sports/behavior/29512.html> (last visited Jan. 12, 2014), archived at <http://www.perma.cc/05EhXFgejEx>.

¹⁵⁴ See Vern Seefeldt, Martha Ewing and Stephan Walk, *Overview of Youth Sports in the United States* 55, archived at <http://perma.cc/N92M-HATG> (listing “to have fun” as the most common reason both boys and girls play sports).

¹⁵⁵ See *id.* (listing “to do something I'm good at” as the second most common reason boys play sports).

come uncertainty,¹⁵⁶ and outcome uncertainty leads to an increase in consumer interest,¹⁵⁷ it stands to reason that the more restrictive the monopsonistic conduct by a league's member clubs, the greater the number of children that will want to invest the human capital necessary to play that particular sport at the highest level.

In fact, this is precisely what has happened. Despite average yearly salaries for baseball players increasing sixty-five percent between 2000 and 2009,¹⁵⁸ the number of kids playing youth baseball declined by twenty-four percent during this timeframe.¹⁵⁹ Meanwhile, the number of kids participating in youth tackle football increased by twenty-one percent¹⁶⁰ and NFL salaries more than doubled during this same timeframe.¹⁶¹ The fact that

¹⁵⁶ See *supra* text accompanying notes 132–33.

¹⁵⁷ See *supra* notes 125–26 and accompanying text.

¹⁵⁸ The average salary earned by MLB players in 2000 was \$2.0 million. See *2000 MLB Salaries by Team*, USA TODAY, <http://content.usatoday.com/sportsdata/baseball/mlb/salaries/team/2000> (last visited Jan. 12, 2014), *archived at* <http://perma.cc/6WHK-KXG4>. The average salary earned by MLB players in 2009 was \$3.3 million. See *2009 MLB Salaries by Team*, USA TODAY, <http://content.usatoday.com/sportsdata/baseball/mlb/salaries/team/2009> (last visited Jan. 12, 2014), *archived at* <http://perma.cc/P7QW-SQLW>.

¹⁵⁹ See Matthew Futterman, *Has Baseball's Moment Passed?: On Opening Day, Gloomy Studies Suggest Kids Are Losing Interest; Hank Crone Laces 'Em Up*, THE WALL STREET JOURNAL (Mar. 31, 2011), <http://online.wsj.com/article/SB10001424052748703712504576232753156582750.html> (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/0rvs9u369Pr>.

¹⁶⁰ *Id.* It is worth noting, however, that since 2009, youth participation in Pop Warner, the nation's largest youth football program, has dropped amid growing concerns regarding the long-term effects of concussions. See Steve Fainaru and Mark Fainaru-Wada, *Youth Football Participation Drops*, ESPN (Nov. 14, 2013), http://espn.go.com/espn/otl/story/_/page/popwarner/pop-warner-youth-football-participation-drops-nfl-concussion-crisis-seen-causal-factor (last visited Jan. 12, 2014), *archived at* <http://perma.cc/D2F8-NCNM> (noting a 9.5% drop between 2010 and 2012).

¹⁶¹ The average salary earned by NFL players in 2000 was \$930,000. See *2000–01 NFL Salaries by Team*, USA TODAY, <http://content.usatoday.com/sportsdata/football/nfl/salaries/team/2000> (last visited Jan. 12, 2014), *archived at* <http://perma.cc/YBX9-XZVU>. The average salary earned by NFL players in 2009 was \$1.9 million. See *2009–10 NFL Salaries by Team*, USA TODAY, <http://content.usatoday.com/sportsdata/football/nfl/salaries/team/2009> (last visited Jan. 12, 2014), *archived at* <http://perma.cc/47V7-S7KK>.

It is also interesting to note that the average MLB career lasts approximately 5.6 years, meaning that average lifetime earnings for an MLB player using 2009 salaries would be approximately \$18.48 million. See Sam Roberts, *Just How Long Does a Baseball Career Last?*, N.Y. TIMES (Jul. 15, 2007), http://www.nytimes.com/2007/07/15/sports/baseball/15careers.html?_r=0 (last visited Jan. 12, 2014),

youth baseball participation has declined even though MLB salaries have increased is unsurprising considering that, of the four major American sports leagues, MLB is the league with the least restrictive player restraints, and thus the smallest degree of outcome uncertainty, while the opposite is true of the NFL.¹⁶² It is also unsurprising that youth football participation has increased at a slower pace than NFL player salaries have increased, because the compensation to professional athletes is not the primary driver inducing young people to invest the human capital necessary to become a professional athlete. Rather, children start playing sports for the love of the game, which is influenced by the sport's popularity, which is increased by a greater degree of outcome uncertainty, which is increased by employing restrictive player restraints.

Third, the argument that monopsonistic conduct will discourage some child athletes from becoming professional athletes concedes that any such effect will be tempered by the athlete's next best occupational alternative. Today, in the United States, the average annual income for a college-educated individual is about \$45,000.¹⁶³ Though becoming a professional athlete requires a great deal of time and energy, it is hard to imagine that a significant premium over this figure is necessary to induce young people to develop their athletic gifts, especially when doing so might yield a free college education. The risk of clubs' monopsonistic conduct discouraging students from becoming professional athletes would be real if clubs were able to drive professional player salaries below \$45,000, but the chance of that actually happening in today's environment is remote.

First, driving compensation down to the point that the league's pool of athletic talent becomes noticeably shallower will cause the league itself to

archived at <http://perma.cc/3LBU-6SF2>. Meanwhile, the average NFL career lasts approximately 3.5 years, meaning that the average lifetime earnings for an NFL player using 2009 salaries would be approximately \$6.55 million. See *The Average NFL Player*, BLOOMBERG BUSINESS WEEK (Jan. 27, 2011), http://www.businessweek.com/magazine/content/11_06/b4214058615722.htm (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/0zCD7o7uGcX>. Thus, kids hoping to be professional athletes could expect to earn 182% more money by playing baseball instead of football.

¹⁶² Regression analysis demonstrates that there is a weak correlation between club revenue and on-field success in the NFL, but a strong correlation between these variables in MLB. Fisher, *supra* note 126, at 11-12. Additionally, in every season since 2003, the NFL has had at least one club go from last place in one season to first place in the following season. See *60 Minutes: The Commissioner*, *supra* note 52.

¹⁶³ *Fast Facts: Income of Young Adults*, NATIONAL CENTER FOR EDUCATION STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=77> (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/0sLTjM6D2Gn>.

suffer, since it is likely that fewer people would want to watch a bunch of “Regular Joes” as opposed to world-class athletes.¹⁶⁴ If the drain on talent due to monopsonistic conduct reduces consumer welfare to the point that consumers reduce their willingness to pay for the product, clubs will no doubt respond to the market by tempering such conduct and return compensation to the level requisite to bring consumer demand back to its former level.

Second, monopsonistic conduct that drives compensation down to such depressed levels actually leads to an *increase* in marketplace competition, which further insulates consumer welfare from any anticompetitive effects that might result. This is because the greater the players’ dissatisfaction with the current league, the more attractive starting a rival league becomes to outside investors. Although there are significant entry barriers to establishing a rival league, the biggest barrier is luring enough premier athletic talent away from the established league to engender consumer interest.¹⁶⁵ The threat of a rival league provides an important check on the current league by incentivizing the current league to maintain compensation levels at least high enough to discourage outside investment. This check yields compensation levels that are high enough to induce young people to invest the human capital necessary to become a professional athlete in that sport.

Most importantly, even if courts unequivocally declared that league-wide player restraints could never violate the Sherman Act, it is doubtful that player compensation levels would ever be depressed to the point that it would cause a reduction in the number of young people willing to invest the human capital necessary to become a professional athlete. The reason is encoded in the National Labor Relations Act, which grants players the right to form a union¹⁶⁶ — i.e., to establish a legal monopoly over the supply of labor. Although such a holding might tilt the bargaining power that each side currently possesses, it is unlikely that the players — utilizing the weapons available to them under federal labor law, including the strike — would be unable to procure compensation levels sufficient to make playing a pro-

¹⁶⁴ See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1195-99 (D.C. Cir. 1978) (J. MacKinnon, concurring in part and dissenting in part) (describing the troubles that the NFL had in its early days because it could not generate enough revenues to attract the best athletes to continue playing football after college).

¹⁶⁵ See *id.* Furthermore, the USFL at one time seemed like a legitimate challenger to the NFL because it was able to bring marquee athletes, like Hershel Walker, into its league. *ABOUT THE USFL*, USFL.INFO, <http://www.usfl.info/about.html> (last visited Jan. 12, 2014), *archived at* <http://perma.cc/ObEqFxfASj5>. Poor management decisions, however, led to its premature demise. *SMALL POTATOES: WHO KILLED THE USFL?* (Triple Threat Television 2009).

¹⁶⁶ See 29 U.S.C. § 151 (2006).

fessional sport more desirable than pursuing a career in virtually any other profession. In fact, so long as even a handful of players could earn supra-competitive wages, an overall reduction in average player salaries would be unlikely to affect the investment that young athletes make to develop their skills.¹⁶⁷ That is, kids do not dream of becoming an average professional player; they dream of becoming superstars. So long as superstars earn incredible sums of money and have off-field endorsement opportunities, young athletes will invest in their talents, believing that they too can one day become superstars and earn these supra-competitive wages.

Each of these counter-arguments, when considered in isolation, could be considered strong enough to refute the notion that league-wide monopsonistic conduct reduces player quality by reducing the incentive to invest in becoming a professional athlete. Considered collectively, it is apparent this notion is wholly without merit.

In sum, player restraints do not yield any noticeable anticompetitive effects — i.e., increases in price, or decreases in output or product quality.¹⁶⁸ In contrast, they have procompetitive effects on product quality, in the form of increased outcome uncertainty, on-field product quality, and enhanced strategic competition. And even if one were to concede that the talent pool might drain slightly when clubs engage in monopsonistic conduct, it appears that when one also considers player-restraints' procompetitive effects, on balance any given restraint's effects could at worst be deemed "competitively neutral." A holistic understanding of the purpose of the Sherman Act and the meaning of procompetitive and anticompetitive effects thus reveals that all player restraints¹⁶⁹ are inherently "reasonable," and should be presumptively lawful under Section 1.

But players may still make one last-ditch effort to challenge this conclusion. The only way to do so, of course, is to challenge the premise upon

¹⁶⁷ This labor economic concept is generally known as "tournament theory." See Brian L. Connelly, Laszlo Tihanyi, T. Russell Crook & K. Ashley Gangloff, *Tournament Theory: Thirty Years of Contests and Competitions*, 40 J. MGMT. 16, 16–17 (2014). Tournament theory posits that in certain situations it is more efficient to compensate individuals not based on marginal productivity, but instead based upon relative differences in performance. Edward P. Lazear & Sherwin Rosen, *Rank Order Tournaments as Optimum Labor Contracts*, 89 J. POL. ECON. 841, 841 (1981). "For example, the large salaries of executives may provide incentives for all individuals in the firm who, with hard labor, may win one of the coveted top positions." *Id.* Thus, relatively small differentials in playing talent or contributions to a team's success may result in disproportionately large compensation differentials.

¹⁶⁸ *But see supra* note 49.

¹⁶⁹ Referring only to "allocation" restraints, not "exclusionary" restraints. See generally *supra* notes 36-37; *supra* note 49.

which it ultimately stands: that the purpose of the Sherman Act is consumer welfare. The players will claim that “[the Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.”¹⁷⁰ They will claim that “[t]he Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.”¹⁷¹ They will claim that labor, too, may seek the protection of the Act; that labor, too, is entitled to the benefits of unfettered competition.¹⁷²

All of these claims no doubt are true. But they fail to serve the purpose for which the players offer them. *Every* contract restrains trade to some extent,¹⁷³ and some party is always aggrieved as a result.¹⁷⁴ But the Sherman Act only outlaws those restraints that are “unreasonable.” And even though many constituencies could benefit from a more expansive interpretation of the Act, the purpose of “the Act is not [meant] to protect businesses from the working of the market; it is to protect the public from the failure of the market.”¹⁷⁵ Indeed, as antitrust expert Herbert Hovenkamp recently stated, “[t]he first sign of a bad antitrust case is lack of consumer harm.”¹⁷⁶ Thus, the reasonableness of any restraint can only be evaluated from the perspective of the consumer. Inquiring into the nature of a restraint from the perspective of the aggrieved party renders any such inquiry moot — from the perspective of the aggrieved, the effects are always anticompetitive.

The players are correct when they claim that labor may claim the protection of the Act.¹⁷⁷ With regard to sports-league player restraints, how-

¹⁷⁰ *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982) (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)).

¹⁷¹ *Id.*

¹⁷² See *supra* notes 39–43 and accompanying text for an explanation of the theory underlying the players’ claim that unfettered competition would yield higher compensation.

¹⁷³ See *supra* note 111.

¹⁷⁴ See *supra* note 114.

¹⁷⁵ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (alteration in original).

¹⁷⁶ Claire Cain Miller & Nick Wingfield, *Google Pushed Hard Behind the Scenes to Convince Regulators*, N.Y. TIMES (Jan. 3, 2013), <http://www.nytimes.com/2013/01/04/technology/googles-lawyers-work-behind-the-scenes-to-carry-the-day.html?pagewanted=all> (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/0n6SaJCMo5b> (quoting Herbert Hovenkamp’s explanation for why the Federal Trade Commission closed its investigation of Google’s search practices without bringing a complaint).

¹⁷⁷ See *supra* notes 138–43 and accompanying text (discussing how monopsonistic conduct directed at labor ordinarily results in an increase in price and decrease in output, thus negatively impacting consumer welfare).

ever, the procompetitive effects on product quality clearly outweigh the anticompetitive effects on product quality, if any exist at all. The oft-repeated axiom that the antitrust laws were enacted to “protect *competition*, not *competitors*,”¹⁷⁸ could easily be rephrased to say that they were enacted to “protect *labor*, not *laborers*.” “It is of no relevance that challenged conduct may adversely affect . . . the players, unless that effect can be translated into an overall injury to consumer interests.”¹⁷⁹ Holding player restraints illegal under Section 1 would actually *reduce* consumer welfare because the “only predictable effects [to consumers] of requiring league members to engage in intraventre rivalry for players’ services are: (1) to bid up the salaries of the players and thereby increase league production costs; (2) to diminish the athletic balance among the member clubs,”¹⁸⁰ thereby diminishing outcome uncertainty; (3) to limit the degree of strategic competition that clubs engage in to acquire talent;¹⁸¹ and (4) to reduce the quality of on-field competition by interfering with the clubs’ ability to maintain roster continuity.¹⁸² Such anticompetitive effects are actually the type the Act was designed to avoid. Accordingly, it is wrong and perverse to hold player restraints illegal under Section 1.

C. Ancillary Restraints

The development of the “Rule of Reason” to judge the legality of joint business conduct under Section 1 appears to have been borne out of necessity, since Section 1 literally reads that “[e]very contract . . . in restraint of trade . . . is declared to be illegal.”¹⁸³ But it might (and should) seem a bit suspicious that, when Congress drafted and passed the Sherman Act in 1890, it actually meant to outlaw *every* contract, since doing so would eviscerate the economy by crippling the ability of businesses to contract with one another.¹⁸⁴ Indeed, courts applied Section 1 without difficulty for

¹⁷⁸ *E.g.*, *Leegin Creative Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 (1986); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 n.14 (1984); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

¹⁷⁹ Roberts, *Evolving Confusion*, *supra* note 28, at 985.

¹⁸⁰ *Id.* at 1014-15.

¹⁸¹ See *infra* figure 5 and text accompanying note 230.

¹⁸² See *supra* note 136.

¹⁸³ 15 U.S.C. § 1 (2012) (emphasis added).

¹⁸⁴ See *supra* note 111.

twenty-one years before the “Rule of Reason” was ever even fashioned.¹⁸⁵ And they didn’t do so by outlawing every contract.

1. Section 1 Only Outlaws “Naked” Restraints

When Congress passed the Sherman Act, it intended to merely federalize and codify the then-existing common law pertaining to business conduct.¹⁸⁶ “At pre-1890 common law, restrictions on unfettered competition were of two types: (1) naked restraints, which were agreements furthering no lawful business transaction . . . and (2) ancillary restraints, which were agreements that were attached and reasonably related to an otherwise lawful transaction or enterprise.”¹⁸⁷

In layperson’s terms, a “naked restraint” is a restraint that is good for, at most, two things: increasing price and reducing quantity. For example, when a group of competitors already selling the same good come together to form a cartel and agree that they will not sell the good below a certain price, that agreement is a “naked” restraint on competition — its sole purpose and effect is to increase price. It does not, for instance, enhance the ability of the cartel’s members to produce the good more efficiently, to bring the good to market cheaper or faster, or to improve the good’s quality.

“Naked” restraints, however, are fairly rare. “Usually a contract in restraint of trade is ancillary to or supportive of another contract which is the principal one. If it were not for such principal contract, the ancillary contract would never be made.”¹⁸⁸ Thus, under pre-1890 common law, so long as the principal contract furthered a “legitimate transaction,”¹⁸⁹ and it is doubtful that without agreement on the ancillary issue the principal contract would have been consummated, the ancillary restraint would usually be held lawful.¹⁹⁰

The classic English case, *Mitchel v. Reynolds*,¹⁹¹ clearly illustrates this concept. In that case, Reynolds agreed to lease his bakery-shop business to

¹⁸⁵ See Roberts, *Evolving Confusion*, *supra* note 28, at 992-1001.

¹⁸⁶ See *id.* at 996 n.187 and accompanying text.

¹⁸⁷ *Id.* at 992-93.

¹⁸⁸ 1 EARL W. KINTNER, FEDERAL ANTITRUST LAW 54 (1980).

¹⁸⁹ See ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 27 (1966) (providing that an “ancillary restraint” is a “subordinate and collateral [agreement] to a separate, legitimate transaction . . . in the sense that it makes the main transaction more effective in accomplishing legitimate purposes”).

¹⁹⁰ 1 KINTNER, *supra* note 188, at 54 (“As a general rule, however, the ultimate question in each case is whether the ancillary covenant is reasonably necessary to protect the property or other interest covered by the principal contract.”).

¹⁹¹ *Mitchel v. Reynolds*, (1711) 24 Eng. Rep. 347 (K.B.).

Mitchel for 5 years.¹⁹² A provision in the lease prohibited Reynolds from working as a baker within the same parish for the duration of the lease.¹⁹³ If Reynolds breached this condition, not only would the entire lease be voided, but Reynolds would also be forced to pay Mitchel a fee.¹⁹⁴ When Reynolds opened up a rival bakery, Mitchel sued Reynolds for breaking his promise not to compete. Interestingly, Reynolds made no attempt to deny having violated the provision, but instead attempted to convince the court that the provision of the lease restricting his ability to practice his trade was an illegal restraint of trade, and should therefore be severed from the lease as against public policy.¹⁹⁵ The court, however, did not agree. Rather, it upheld the provision as legally enforceable because it determined the provision was ancillary to the leasing of the business.¹⁹⁶ That is, since the leasing of a business is a legitimate transaction, and the restraint prohibiting Reynolds from working as a baker within the parish for the duration of the lease facilitated this transaction,¹⁹⁷ the restraint was deemed “ancillary” to the principal contract, and therefore upheld as legal and enforceable.¹⁹⁸

The doctrine of ancillary restraints crafted in *Mitchel v. Reynolds* illustrates that restraints ancillary to a legitimate, principal contract are presumably lawful. Further doctrinal developments held that the presumption of legality could be rebutted if the restraint was not “reasonably necessary.” Although there has been some confusion regarding the actual meaning and proper application of the “reasonably necessary” standard,¹⁹⁹ a careful examination of the jurisprudence reveals two ways in which the ancillary restraint must be reasonable to maintain its presumption of legality: (1) the restraint cannot be unduly injurious to the public;²⁰⁰ and (2) settlement of the issue

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *See id.* at 348.

¹⁹⁷ That is, without such a guarantee that Reynolds would not compete as a rival baker, it is doubtful that Mitchel would have ever leased the business in the first place. *See id.* at 350-51.

¹⁹⁸ *See id.* at 351.

¹⁹⁹ *See infra* notes 210–12 and accompanying text.

²⁰⁰ Ancillary restraints at pre-1890 were most often in the form of covenants not to compete, and thus needed to be reasonable in both geography, and scope, as not to deprive the public of the benefits of the “industry and skill of a party in an employment useful to the public.” 1 KINTNER, *supra* note 188, at 72 (quoting *Union Strawboard, Co. v. Bonfield*, 193 Ill. 421, 427, 61 N.E. 1038, 1040 (1901)); *see also, e.g.*, *Horner v. Graves*, (1831) 131 Eng. Rep. 284 (C.P.) 287 (“Whatever restraint is larger than the necessary protection of the party [requires], can be of no benefit to either; it can only be oppressive; and if oppressive, it is, in the eye of the

underlying the restraint must be “reasonably necessary” before the parties would agree to finalize the principal transaction.²⁰¹ This second requirement merely ensures that the restraint is, in fact, “ancillary” to the principal transaction in accord with the pre-1890 common law understanding. For instance, an agreement between auto manufacturers not to compete in the sale of automobiles is not ancillary to a joint venture between those same manufacturers for the purpose of conducting antipollution control research because the agreement not to compete has no relation to or bearing upon the principal transaction, researching antipollution.²⁰²

Since the Sherman Act did not actually intend to outlaw *every* restraint, but merely *naked* restraints, sports-league player restraints should first be evaluated to determine whether they are naked or ancillary; and then, if ancillary, whether they are “reasonably necessary” to the consummation of a principal transaction to maintain their presumptive lawfulness.

2. Player Restraints Are Ancillary and “Reasonably Necessary” Restraints

Several agreements must be reached before any athletic competition can take place. Agreements governing how the game will be played and how a winner will be declared are the most obvious examples. For instance, before a tennis match can be played, the proposed competitors must agree on how high the net should be, the dimensions of the court, how many points it will take to win a game, how many games to win a set, and on and on. Although over time most of these rules have become norms codified by neutral third-party organizations (such as the United States Tennis Association), competitors must agree to either abide by these norms or else reach consensus on how they should be modified. In tennis, the “game, set, match” framework is an arbitrary way to structure tennis competition, but nevertheless has become generally accepted. This is not to say that individual competitors, or even the rulemaking bodies governing the sport, could not modify this framework.²⁰³ But it is not particularly important to which

law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy.”). Thus, “although undoubtedly nobody thought of [ancillary restraints] in these terms in the nineteenth century,” the “injury to the public” prong resembles the current rule of reason emphasis on consumer welfare. See Roberts, *Evolving Confusion*, *supra* note 28, at 1005.

²⁰¹ The underlying issues being distinguished from the terms of the actual restraint. See *infra* notes 210–12 and accompanying text.

²⁰² See Roberts, *Evolving Confusion*, *supra* note 28, at 1010.

²⁰³ The arbitrariness in the rules of tennis is exemplified by the different rules regarding tiebreakers at major championships. The Australian Open, French Open,

specific framework the competitors eventually agree; what is important is agreement itself, since those who fail to reach consensus on the rules governing the competition will never stage it. As a result, all of the rules that must be agreed to before the competitors will compete are properly classified as “ancillary restraints.” That is, if not for the agreement to stage an athletic competition, it would not be necessary to consummate any other agreements pertaining to that competition either.

In team sports, it is just as necessary for there to be agreement over the delegation of particular players to particular teams as there is for agreement over the rules of the game itself. All of us remember gathering on the sandlot when we were kids to play, for instance, a football game. We placed cones down to set the boundaries of the field and the end zones. We argued over whether runners would be “down” after they were tackled, touched with two hands, or had a sock pulled from their shorts. We argued over whether “kickoffs” actually needed to be kicked or could be thrown, and whether after a team scored it would keep the ball or let the other team have a try. Importantly, we also argued over how the composition of each team would be established. Usually we elected “captains.” Then we had to decide which captain would choose first, and whether the captain with the second choice would get two consecutive picks. After all this was settled and the captains made their selections, the game began.

The decision to designate captains who then made alternate selections was, of course, completely arbitrary. Suppose for a moment that the father of one of the players who had gathered on the sandlot is a world-renowned chef, and that this player announces to the group, “If you decide to play on my team, and we win, you can all come over to my house for dinner to-

and U.S. Open, all provide that matches will be decided by a 7-point tiebreaker if the competitors are tied at six games apiece in the fifth set (the third set for women). But a competitor must best his opponent by two full games in the fifth and final set to be declared the winner at Wimbledon, no matter how many games this might take.

All sport rules are inherently arbitrary, and no matter how long any particular rule has governed, it is always subject to change if the competitors, or organization with rulemaking authority that the competitors agree to be bound by, decide to amend it. A case in point is baseball, the American version of which can be traced back as far as 1791. But the substitution rules in Little League (in which a player can re-enter the game after being removed from the game) differ from the substitution rules in the Major Leagues (in which a player is ineligible to return to a game after being removed). Many high school baseball leagues, utilize an “extra hitter,” while even the American and National Leagues as part of Major League Baseball have agreed to slightly different rules, with the American League allowing teams to substitute a “designated hitter” in place of its pitcher in its offensive line-up.

night!” Most likely, all of the players would beg to be on his team. After the player with the famous chef father selected the best players to join him, the players remaining would be forced to join together to play against them. Those players, however, might realize that they have a small chance of winning, and decide to go to the movies instead. The football game might never take place. This simple allegory²⁰⁴ makes clear that before any team athletic competition can take place, there must also be agreement on the rules governing the delegation of players to each team.

Turning to professional sports leagues, the term “player restraint” is synonymous with the phrase “a rule governing strategic competition,” and thus with the acquisition and distribution of playing talent throughout a league. Although player restraints employed by professional sports leagues are often much more complex than the restraints used in the schoolyard, they are of the same fundamental nature and serve the same purpose. If member clubs could not agree on how new players will be acquired, or on the process by which clubs could acquire players who have already played for another club, the league would never be formed, or, if already formed, could cease to operate. Thus, the rules governing the acquisition and distribution of playing talent to each team are ancillary restraints to the principal transaction: the operation of the league sport.

Because player restraints are ancillary to the formation and continued operation of a legitimate, principal transaction, they are presumably lawful. But player restraints must also be “reasonably necessary” to retain their presumptive lawfulness. To be considered “reasonably necessary” player restraints cannot be unduly injurious to the public.²⁰⁵ As already demonstrated, player restraints are at worst neutral, and in many ways quite beneficial to the public.²⁰⁶ Additionally, it is “reasonably necessary” for member clubs to come to an agreement on the issue underlying player restraints — how talent will be acquired and distributed throughout the league — or the principal transaction would not come to fruition. Stated another way, contracts setting the terms of player restraints would not exist

²⁰⁴ Clubs located in “big markets” like New York or Chicago are similar to the child with the famous chef father. Clubs located in these markets generally have far greater financial resources enabling them to pay more money than their small-market brethren. Off-the-field marketing opportunities are also likely greater for players playing in big markets. Thus, if one were to start a new league, it is likely that a prospective ownership group proposing a club to be located in, for instance, Topeka, KS, would vigorously negotiate the player allocation rules before forking over the cash required to become a member in the league.

²⁰⁵ See *supra* text accompanying note 200.

²⁰⁶ See *supra* Part II.B.3.

but for the underlying contract to produce a league sport. Thus, the ancillary restraint doctrine compels a finding that all player restraints are inherently lawful.

3. Misinterpreting “Reasonably Necessary” to Mean the “Least-Restrictive Alternative”

Until the Supreme Court turned antitrust jurisprudence on its head by “ignor[ing] Congress’s intended meaning of the term ‘restraint of trade’ by incorrectly interpreting it to encompass every agreement or contract instead of merely naked restraints,”²⁰⁷ the ancillary restraint doctrine was the mode of analysis that courts used to evaluate business conduct under Section 1.²⁰⁸ Despite being supplanted by the Rule of Reason for the better part of the twentieth century, the ancillary restraint doctrine has recently resurfaced in Supreme Court and lower court jurisprudence, especially in Section 1 cases implicating joint ventures.²⁰⁹

Unfortunately, however, modern courts applying the ancillary restraint doctrine have often incorrectly applied the second prong of the “reasonably necessary” standard to the *terms* embodied by the restraint rather than to the underlying *issue* that those terms help resolve.²¹⁰ Courts have held that, to retain its presumptive lawfulness, the *terms* of any ancillary restraint must be “absolutely essential” or “the least restrictive alternative” to meet the goals of the parties agreeing to the restraint. However, their inquiry should have focused on whether agreement on the *issue* — simply *embodied* by the terms of the restraint — helps effectuate the underlying transaction.²¹¹ The courts’ mistake is fatal to any coherent application of this doctrine.

The primary problem with requiring the terms of any restraint to be “absolutely essential” or the “least restrictive alternative” to achieving the

²⁰⁷ Roberts, *Evolving Confusion*, *supra* note 28, at 998.

²⁰⁸ See *id.* at 992-1001.

²⁰⁹ See *id.* at 1006-07.

²¹⁰ The error can most likely be traced to *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), the last Supreme Court decision to rely on the ancillary restraints doctrine before the Court changed its course in *Standard Oil*. See *supra* note 111 and accompanying text. In the opinion authored by Judge Taft (later President and Chief Justice of the Supreme Court) the Sixth Circuit opined: “Before such agreements [i.e., ancillary restraints] are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary . . . to the enjoyment by the buyer of the property, good will, or interest in the partnership bought.” *Addyston Pipe*, 85 F. at 281.

²¹¹ See *supra* text accompanying note 202 for an example of a restraint that addresses an issue not absolutely essential to effecting the underlying transaction.

principal transaction's goals is that such a test substitutes the uninformed, disinterested views of a judge for the well-informed views of the parties interested in the transaction. For instance, Mitchel needed some protection from Reynolds's decision to immediately open a rival bakery in order to capitalize on the goodwill associated with the business, but wouldn't a four-year non-compete have been sufficient to satisfy Mitchel's interest? Perhaps two years should have been deemed the "least restrictive alternative," since Mitchel still might have purchased Reynolds's bakery with a twenty-four month restriction.

The point is that any line-drawing is necessarily arbitrary, and courts should not substitute their judgment for the judgment of the parties — at least absent unequal bargaining power or public injury.²¹² In fact, the precise term that the parties ultimately settle on will often be an important part of the consideration exchanged in the principal transaction. Had Mitchel and Reynolds agreed to a two-year restrictive covenant, as opposed to a five-year non-compete, it is likely that the price Mitchel agreed to pay for the business would not have been as high. Whether the parties' *goal* is legitimate and reasonably necessary should be the sole focus of any Section 1 inquiry. The terms eventually agreed to are wholly irrelevant.

4. Sports and "Least-Restrictive Alternatives" (or Lack Thereof)

The shortcomings of applying a "least restrictive alternative" or "absolutely essential" standard to determine whether a sports-league restraint is legal under Section 1 are illustrated by attempting to apply such a standard to an antitrust lawsuit that could be filed by NFL placekickers.²¹³

²¹² Non-compete clauses in a simple employment context cannot be said to be "reasonably necessary" to the employment in most circumstances. That is, even if non-compete agreements were outlawed in an employment context — as they largely are in California, for instance — employers would still need to hire employees. This situation is distinct from the situation found in *Mitchel v. Reynolds*, which was not an employer-employee non-compete, but a non-compete designed to effectuate the sale of a business. As a result, in most cases, employment non-compete agreements should not be deemed "ancillary," because they are not "absolutely essential" to facilitating the underlying employment, but rather evaluated as "naked" restraints, if they are to be evaluated under antitrust principles at all. That is, the "reasonableness" of non-compete agreements in the employment context often incorporates contract law principles, such as the consideration received for agreeing not to compete for a specified duration and geographic scope, and the relative bargaining power of the parties to the agreement.

²¹³ The idea for this hypothetical lawsuit comes from Goldman, *supra* note 28, at 796 n.213.

Placekickers could file suit challenging the rules that award three points for converted field goal attempts and six points for touchdowns. They would argue that this scoring system unreasonably restrains trade by artificially reducing the amount that clubs are willing to pay for their services. That is, if field goals were worth more, kickers would have a greater impact on the outcome of games, and, as a result of their increased importance, owners would bid up kickers' salaries. Of course, the NFL and its member clubs would respond that scoring touchdowns is more difficult than kicking field goals, and that teams should therefore earn a greater reward for scoring a touchdown than converting a field goal attempt. Or perhaps they would argue that the purpose of football is to acquire territory, and touchdowns represent the ultimate fulfillment of this goal, while the field goal is a consolation prize for acquiring a substantial, albeit incomplete amount of territory. But the awarding of four or even five points for a field goal conversion would not preclude the fulfillment of either of these objectives. Thus, employing a "least restrictive alternative" or "absolutely essential" mode of analysis could lead to the conclusion that the "three points for field goals and six points for touchdowns" restraint should be declared an illegal restraint under Section 1.

Of course, awarding five points for converted field goals would reduce the incentive for teams to "go for it" in "fourth and goal" situations. And since that situation is one of the more exciting plays in football, devaluing the field goal in relation to the touchdown clearly has "procompetitive" effects on product quality because such a framework presumably leads to a greater number of exciting plays. Perhaps, then, field goals should be worth only two points, to induce teams to "go for it" even more often. The point is that the relationship between the number of points awarded for a touchdown and those awarded for a field goal is completely discretionary. There is no *objectively* optimal relationship. The NFL and its member clubs, football experts who reap the financial consequences of such decisions, are better qualified and positioned to set the parameters of that relationship than a comparatively unknowledgeable and disinterested court. Accordingly, the clubs should be allowed to exercise their expert discretion when it comes to these matters.

Therefore, not only is applying the "least restrictive alternative" standard to *terms* rather than *issues* doctrinally incorrect, it is also unwise policy in the playing-rules context. Given that player allocation rules are just as vital to the staging of any athletic competition as are playing rules,²¹⁴ employing a "least restrictive alternative" analysis appears to be just as inap-

²¹⁴ See *supra* text accompanying notes 203–06.

propriate in the player allocation context. A thorough understanding of the nature of player allocation rules reveals that this is precisely the case.²¹⁵

Determining whether a given restraint is the “least restrictive alternative” or “absolutely essential” to achieving a particular objective first requires identifying the objective that the restraint is designed to achieve. Most often, the NFL and its member clubs have claimed that increased on-field competitiveness, or outcome uncertainty — which increases excitement and therefore product quality — is the objective sought when imposing player restraints.²¹⁶ One of the principal player restraints used by the NFL in striving for on-field competitiveness is through the imposition of the salary cap. Of course, a salary cap is not the only way to increase on-field competitiveness. MLB employs a less restrictive alternative to achieve outcome uncertainty in the form of a competitive balance tax.²¹⁷ However, evidence suggests the competitive balance tax is not as successful as the hard salary cap in achieving outcome uncertainty.²¹⁸ To achieve an even greater level of outcome uncertainty than that generated by the salary cap, the NFL could also use a more restrictive alternative, such as a system in which a central league administrator allocates all players to each team each season.

This means that on-field competitiveness, or outcome uncertainty, is not an absolute or fixed objective, but one that is relative, just as the relationship between the amount of points to be awarded for a touchdown and field goal. That is, on-field competitiveness or outcome uncertainty exists on a continuum. A game that ends 49-0 is less competitive than a game that ends 25-24, but more competitive than a game that ends 98-0. Simi-

²¹⁵ Despite this fact, two courts have in fact employed a “least restrictive alternative” analysis when deciding Section 1 sports league cases. See generally *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381 (9th Cir. 1984).

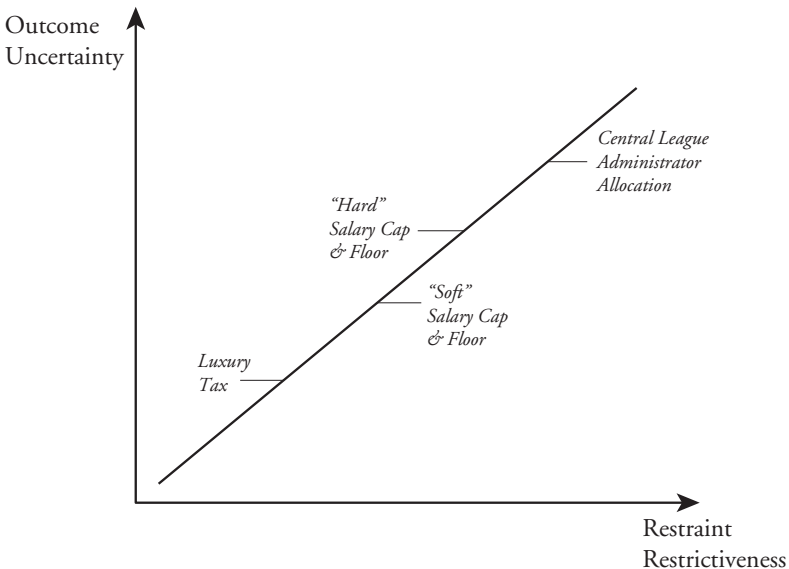
²¹⁶ See, e.g., *Smith*, 593 F.2d at 1173 (NFL annual player college draft constitutes Sherman Act Section 1 antitrust violation); *Kapp v. Nat'l Football League*, 586 F.2d 644, 646–47 (9th Cir. 1978) (alleging that annual player college draft, tampering rule, standard player contract, option rule, and Rozelle rule constitutes Sherman Act Section 1 antitrust violations); *Mackey v. Nat'l Football League*, 543 F.2d 606, 623 (8th Cir. 1976) (Rozelle rule requiring team signing a free agent to compensate the player's former team constitutes Sherman Act Section 1 antitrust violation); *Powell v. Nat'l Football League*, 678 F. Supp. 777, 778 (D. Minn. 1988) (alleging Right of First Refusal/Compensation system and standard player contract constitute Sherman Act Section I antitrust violations).

²¹⁷ For a description of the competitive balance tax, see *supra* note 127.

²¹⁸ See *Fisher*, *supra* note 126, at 11–12 for the results of a regression analysis illustrating that the correlation between team player salaries and season outcomes is by far the weakest in the NFL compared to the other three major American sports, and much less predictable.

larly, a league season in which the best team posts a record of twelve wins and four losses (12-4), is more competitive than a season in which the best team posts a record of 14-2, but less competitive than one in which the best team finishes 10-6. Thus, while *some* degree of competitiveness can no doubt be achieved through the imposition of a less restrictive player restraint, the *same* degree of on-field competitiveness cannot. This is because less restrictive player restraints, by their very nature, do not distribute talent throughout the League as evenly as more restrictive restraints. This concept is represented by Figure 4, which illustrates the theoretical positive correlation between the restrictiveness of player restraints and outcome uncertainty. Because there is not an objectively optimal amount of outcome uncertainty, and outcome uncertainty exists as a function of the restrictiveness of the player restraints imposed, the notion that there could be a “least restrictive” or “absolutely necessary” player restraint is a myth. Accordingly, courts incorrectly applying such a standard to evaluate player restraints might always find the restraints illegal.

FIGURE 4



To further illustrate this point, consider another player restraint the NFL employs: the exclusive franchise tag.²¹⁹ Normally, when a player’s con-

²¹⁹ There are two types of franchise tags: “exclusive” and “non-exclusive.” See *infra* text accompanying notes 220–21 for a description of how the “exclusive” tag

tract with a given club expires, the player becomes an unrestricted free agent, meaning that the player may offer his services to any club.²²⁰ If the club with whom the player's contract just expired decides to place the franchise tag on him, however, that club will retain the right to the player's services for the following season.²²¹ To evaluate whether the franchise tag is the "least restrictive alternative" or "absolutely necessary," the objective it seeks to accomplish must first be established to determine whether any other player-restraint option could also attain the same end.

There are at least four objectives for imposing the franchise tag: (1) to limit "big market" clubs' ability to cherry-pick all the talent it prefers; (2) to allow a club more flexibility to retain a player to which its fan-base is particularly attached; (3) to provide another strategic lever for clubs' general managers to pull as they go about assembling their teams; and (4) to provide a new form of off-season entertainment that the NFL can use to market, sell, and increase demand for its principal product, on-field competition.

As proof that player restraints are themselves a form of off-season entertainment to be marketed by the NFL, consider that all sixteen hours of the NFL Draft are broadcast live to football fans on ESPN,²²² and supplemented by numerous other television programs that discuss the strategic choices general managers must make when deciding which players to select.²²³ A plethora of television programs cover and articles are written about other strategic rules, such as how the salary cap is affecting the ability

operates. The "non-exclusive" tag works in much the same way that the "exclusive" tag works, but allows the player tagged to still negotiate with other clubs. If another club signs the player to an offer sheet, the club that designated the player its "franchise player" has the opportunity to match the terms of that offer. If the club chooses not to match the offer and thus loses the player, the club is entitled to receive two first-round draft picks as compensation. *See* 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 10 (Aug. 4, 2011), *archived at* <http://perma.law.harvard.edu/0UcXeAWR7o8>.

²²⁰ *See id.* art. 9. If a club chooses to place the franchise tag on a player, it must pay that player no less than the average of the top-five salaries at the player's position, or 120% of what the player earned the previous season, whichever is greater. *Id.* Players designated "exclusive" franchise players may not negotiate with any other team; the club that "franchised" the player owns the player's exclusive negotiating rights. *Id.* art. 6. Clubs may place the tag on only one player each season. *Id.* art. 10.

²²¹ *Id.*

²²² *See, e.g.,* Bill Gorman, *ESPN 2011 Draft Schedule*, TV BY THE NUMBERS (Apr. 14, 2011), <http://tvbythenumbers.zap2it.com/2011/04/14/espn-2011-nfl-draft-tv-schedule/89512/> (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/0H3qGPtyTXn>.

²²³ *Id.*

of certain clubs to re-sign key players,²²⁴ and which players will or should be “franchised.”²²⁵ In fact, ESPN currently employs several former general managers specifically to discuss these issues on various programs, including its flagship show SportsCenter.²²⁶ Finally, just as millions of people participate in recreational sports leagues, it is estimated that 32 million people now participate in off-field strategic sports competitions, such as fantasy football, which are significantly affected by player movement.²²⁷

Strategic competition, then, not only maintains and enhances consumer interest for the on-field product during the off-season, but player restraints — which are the embodiment of strategic competition — have become a separate and distinct marketable product in and of themselves. Sports fans do not merely watch the on-field competition; many are enthralled by player personnel decisions, including whether or not a club will

²²⁴ See, e.g., Pat Kirwan, *Salary Cap Casualties Mean Different Things To Different Teams, Players*, CBS SPORTS (Mar. 28, 2012), <http://www.cbssports.com/nfl/story/18111350/salary-cap-casualties-mean-different-things-to-different-teams-players> (last visited Jan. 12, 2014), archived at <http://www.perma.cc/0wZRXD9rpqS>.

²²⁵ See, e.g., John Clayton, *Saints Put Franchise Tag on Drew Brees*, ESPN (Mar. 4, 2012), http://espn.go.com/nfl/story/_id/7641895/new-orleans-saints-tag-drew-brees-exclusive-rights-franchise-tag (last visited Jan. 12, 2014), archived at <http://perma.law.harvard.edu/0kk7b7Zmzzq>.

²²⁶ For instance, ESPN recently hired Bill Polian, former Vice Chairman of the Indianapolis Colts and former General Manager of both the Buffalo Bills and Carolina Panthers, as an NFL analyst. See Robert Klemko, *Bill Polian Joins ESPN as NFL Analyst*, USA TODAY (Feb. 29, 2012), http://content.usatoday.com/communities/thehuddle/post/2012/02/bill-polian-joins-espn-as-nfl-analyst/1#.T3TC_ZjgB94 (last visited Jan. 12, 2014), archived at <http://www.perma.cc/0vgsGAx6ycY>. The network also employs Tom Penn, former Vice President of Basketball Operations and Assistant General Manager of the Portland Trail Blazers, to provide expert insight on advanced analytics, salary cap issues, and the NBA Draft. See Mike Tokito, *Former Blazers Executive Tom Penn Lands Job with ESPN as a NBA Studio Analyst*, THE OREGONIAN (Nov. 9, 2010), http://www.oregonlive.com/blazers/index.ssf/2010/11/post_3.html (last visited Jan. 12, 2014), archived at <http://www.perma.cc/0Pft3pVaXZh>.

²²⁷ This figure includes people in both the United States and Canada. *Fantasy Sports Participation Sets All-Time Record, Grows Past 32 Million Players*, FANTASY SPORTS TRADE ASS'N (Jun. 10, 2011), <http://www.fsta.org/blog/fsta-press-release/fantasy-sports-participation-sets-all-time-record-grows-past-32-million-players> (last visited Jan. 12, 2014), archived at <http://www.perma.cc/05XNM25Dsoo>.

place the “franchise tag” on a particular athlete.²²⁸ These fans consume and purchase strategic competition information from various media outlets.²²⁹

Just as there is no “optimal” relationship between the number of points awarded for field goals and touchdowns, or optimal amount of *on-field* competition, there is no optimal amount of *strategic* competition (i.e., player restraints). Strategic competition increases as both the quantity and complexity of decisions increase and as the financial disparities between clubs are limited to the greatest extent possible. For instance, a very restrictive player allocation system²³⁰ in which a central league administrator assigns players to each club after the previous season had ended would result in less strategic competition than a competitive balance tax player-restraint system because the quantity and complexity of decisions clubs would need to make would be severely curtailed. The salary cap and floor, however, which is *more* restrictive than the competitive balance tax system, but *less* restrictive than the central administrator system, presumably yields a *greater* degree of strategic competition than either of the other two systems because it provides general managers with a greater degree of flexibility to make decisions than the central administrator system, while limiting the financial disparities between clubs that affect general managers’ ability to execute their visions as compared to the competitive balance tax system. Thus, unlike the positive correlation that exists between the restrictiveness of player restraints and *on-*

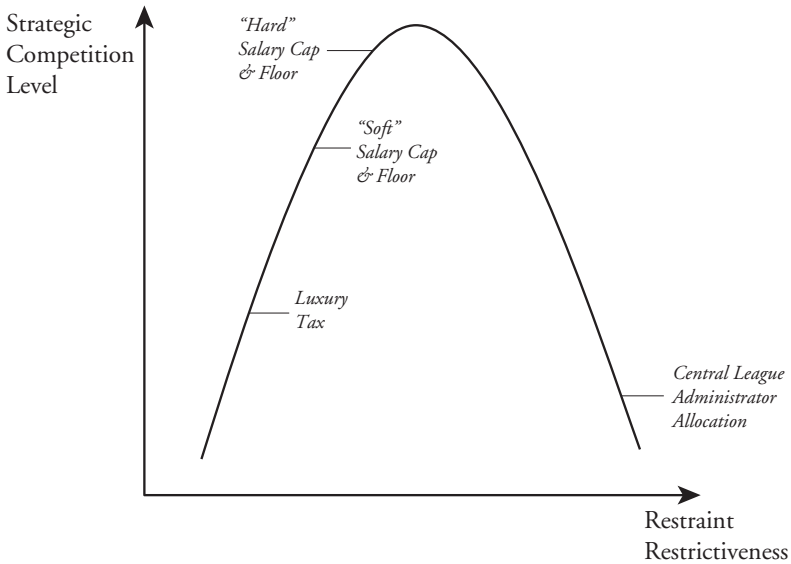
²²⁸ For instance, fans tweeted John Clayton’s ESPN.com article about the Saints’ decision to put the franchise tag on Drew Brees 245 times, re-posted it on Facebook 242 times, and posted over 2,000 comments to the story itself. See John Clayton, *Saints Put Franchise Tag on Drew Brees*, ESPN (Mar. 4, 2012), http://espn.go.com/nfl/story/_/id/7641895/new-orleans-saints-tag-drew-brees-exclusive-rights-franchise-tag (last visited Jan. 12, 2014), *archived at* <http://perma.law.harvard.edu/0kk7b7Zmzzq>. Obviously these figures pertain only to this specific article, and not to the social media buzz and other discussions generated by the event itself and captured by other media outlets and forums.

²²⁹ For example, ESPN.com’s “Insider” service, which provides subscribers access to articles not available to non-subscribers for an annual subscription fee, as of September 2012 had approximately 670,000 subscribers, and “approximately 400,000 unique subscribers, a comparable number to The New York Times’ 530,000 digital subscribers.” Editorial Team, *ESPN Pushes Digital Subscription Service in New Marketing Campaign*, ARIA SYSTEMS (Sep. 27, 2012), <http://www.ariasystems.com/blog/espn-pushes-digital-subscription-service-in-new-marketing-campaign/> (last visited Jan. 12, 2014), *archived at* <http://perma.cc/668L-7PQV>. Much of this service’s content relates to strategic competition, such as trade and free agent signing rumors. It is critical to recognize that this content is quite distinct from viewing actual sports competition, or reading about the results of such competition.

²³⁰ See *supra* note 132 for a description of what is meant by the “restrictiveness” of a given player restraint.

field competition, presumably an inverse-u-shaped relationship characterizes the correlation between the restrictiveness of player restraints and *strategic* competition. Figure 5 illustrates this theoretical relationship.

FIGURE 5



This means that the level of strategic competition, set by the imposition of various player restraints, is a discretionary choice. There is no “optimal” level of *on-field* or *strategic* competition, and thus there can never be a “least restrictive alternative.” No player restraint can ever be classified as “absolutely necessary.” Ergo, it is not only inappropriate, but also illogical for a court to engage in this type of analysis when evaluating the legality of any given player restraint in a Section 1 lawsuit. The application of legitimate ancillary restraint doctrine illustrates that player restraints are ancillary to the principal transaction — the operation of a league sport — and that player restraints do not result in public injury. Instead, the NFL and its member clubs, as expert, interested parties, should be granted the discretion, free from judicial interference, to impose the player restraints that yield the degree of on-field and strategic competition that in their opinions provide the best overall consumer experience, since it was for the consumer’s benefit that the Sherman Act was enacted in the first place.

III. LABOR DEFENSES

Federal labor law was born with the passage of three statutes: Sections 6 and 20 of the Clayton Act in 1914,²³¹ the Norris-LaGuardia Act in 1932,²³² and the National Labor Relations Act (“NLRA”) in 1935 (originally known as the Wagner Act).²³³ These statutes provide employees with the right to band together, forge a united front, and take concerted actions to counter-balance the leverage employers possess. But because “national labor policy is premised on creating incentives in both labor and management”²³⁴ to *reduce or eliminate* competition²³⁵ and “[a]ntitrust law is premised on *promoting* competition,”²³⁶ there is a “perplexing and inevitable” tension between antitrust law and national labor policy.²³⁷ As labor law jurisprudence developed, it quickly became clear that certain union and employer activities pertaining to labor and employment needed to be shielded from Sherman Act scrutiny if the labor laws were to have any meaningful impact and effect. In an effort to legitimize conduct taken by both employers and employees that would otherwise violate the Sherman Act, Congress drafted the “statutory” labor exemption, and the courts buttressed this legislation by judicially crafting the “nonstatutory” labor exemption. When evaluating the legality of sports-league player restraints — which are, at their core, agreements pertaining only to labor and employment — any analysis necessarily must first answer whether one or both of these special exemptions apply, since such application would automatically render the challenged restraint legal and preclude the need to further evaluate the players’ claims under traditional antitrust principles.

A. *The Statutory Exemption*

After the Sherman Act was enacted in 1890, courts routinely applied the statute to invalidate and enjoin labor organizations from engaging in “anticompetitive” conduct (such as strikes and boycotts) that tended to increase the costs of labor, and thus, the price of the goods that labor pro-

²³¹ 15 U.S.C. §§ 12–27 (1997).

²³² 29 U.S.C. §§ 101–15 (1997).

²³³ 49 Stat. 449 (1935) (codified as amended, 29 U.S.C. §§ 151–169 (1988)).

²³⁴ Jerry, II & Knebel, *supra* note 28, at 173.

²³⁵ National labor policy reduces or eliminates competition over wages by promoting the creation and maintenance of unions and multiemployer bargaining groups.

²³⁶ Jerry, II & Knebel, *supra* note 28, at 173.

²³⁷ *Id.*

duced.²³⁸ Responding to the dire working conditions that many laborers faced in the early twentieth century, Congress passed Section 6 of the Clayton Act in 1914,²³⁹ which reads:

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 . . . organizations, instituted for the purposes of mutual help . . . 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.²⁴⁰

Despite the enactment of Section 6, however, courts continued to declare union activities illegal under the Sherman Act if the union's conduct was directed at an organization with which it did not have a direct employment relationship; thus, courts often enjoined union activities (like secondary boycotts).²⁴¹ In response to the judiciary's obstinacy, Congress passed the Norris-LaGuardia Act in 1932 to prevent "federal courts from issuing injunctions in non-violent labor disputes because '[doing so] was necessary to remedy an extraordinary problem' of federal courts refusing 'to abide by the clear command of . . . the Clayton Act.'"²⁴² Together the Clayton Act and the Norris-LaGuardia Act comprise the "statutory exemption" to the Sherman Act, and unquestionably shield union activity from Sherman Act scrutiny.²⁴³

²³⁸ See EDWARD BERMAN, LABOR AND THE SHERMAN ACT 11-54 (1930).

²³⁹ Some commentators have argued that the legislative history accompanying the passage of the Sherman Act in fact lends strong support to the notion that the Act was never meant to apply to restraints on labor, and that when Congress enacted Section 6 of the Clayton Act it did so merely to force courts to interpret the Sherman Act in light of its original intent. Jerry, II & Knebel, *supra* note 28, at 192-99.

²⁴⁰ 15 U.S.C. § 17 (2012).

²⁴¹ See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474-79 (1921) (holding that Section 20 of the Clayton Act, which provides certain substantive and procedural limitations on injunctions sought in any case "involving, or growing out of, a dispute concerning terms or conditions of employment," 29 U.S.C. § 52 (1997), does not prohibit injunctions against "secondary boycotts").

²⁴² *Brady v. Nat'l Football League (Brady I)*, 779 F.Supp.2d 992, 1023 (D. Minn. 2011) (quoting *Burlington N. R.R. v. Bhd. of Maint. of Way Emps.* 481 U.S. 429, 437 (1987)).

²⁴³ This is true so long as the union engages in those activities "for the purpose of promoting legitimate labor objectives, such as improving wages or working conditions . . . ; however, unions have no protection from antitrust liability when they attempt to restrain the product market directly." Jerry, II & Knebel, *supra* note 28,

But the question remains whether the statutory exemption also shields employer conduct. Indeed, the first sentence of Section 6, “which declares that ‘the labor of a human being’ is not an ‘article of commerce,’” appears to exclude both “the selling and buying of labor from the scope of the Sherman Act.”²⁴⁴ Based on the language of Section 6, the NFL member clubs have argued that all labor market restraints — regardless of whether they are imposed by employees or their employers — are not combinations in restraint of trade or commerce under the Sherman Act.

The only court to have explicitly considered this argument, however, has rejected it.²⁴⁵ The Eighth Circuit reasoned that because “Section 6 of the Clayton Act was enacted for the benefit of unions to exempt certain of their activities from the antitrust laws after courts had [improperly] applied the Sherman Act to legitimate labor activities,” it does not also extend to bar the application of the antitrust laws to employer-initiated labor restraints.²⁴⁶

Notwithstanding this court’s ruling, the legislative history accompanying both the Sherman Act and Section 6 of the Clayton Act²⁴⁷ indicates that the Sherman Act only outlaws labor restraints that also yield negative consequences in a consumer market.²⁴⁸ Indeed, as even the Supreme Court has recognized:

at 212. “Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, *e.g.*, *Federation of Musicians v. Carroll*, 391 U.S. 99 (1968), the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market. *Connell Const. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622–23 (1975) (internal citation omitted).

²⁴⁴ *Jerry, II & Knebel*, *supra* note 28, at 194.

²⁴⁵ *See Mackey v. Nat’l Football League*, 543 F.2d 606, 617 (8th Cir. 1976).

²⁴⁶ *Id.*

²⁴⁷ *See Jerry, II & Knebel*, *supra* note 28, at 195 (citing proof that at least some members of Congress believed that separate legislation should cover labor markets. For instance, Senator Jones stated: “Let the Sherman law affect trade and commerce and those who deal in and with trade and commerce as it, in fact, was intended when it was passed. Take labor and labor organizations out from under the law entirely, and let us formulate a statute governing labor and its organizations [W]e must define the rights of labor so far as it affects commerce [and] . . . we should separate and legislate for it . . . but not treat it . . . as an article of commerce, because it is not an article of commerce. It is no part of commerce. It is not a commodity at all.”).

²⁴⁸ *See supra* text accompanying notes 174–79.

[T]he Sherman Act was not enacted . . . to afford a remedy for wrongs, which . . . result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a *commodity*, such as to ‘monopolize the supply, control its price, or discriminate between its would-be purchasers.’²⁴⁹

Since Section 6 makes explicit that the “labor of a human being is *not* a commodity or article of commerce,”²⁵⁰ those alleging that a labor restraint violates the Sherman Act should have to prove something more than artificially depressed wages or substandard terms and conditions of employment if they hope to succeed in a Section 1 lawsuit — that is, they should also be required to show how the labor restraint negatively affects the “commodity” (i.e., output) market.²⁵¹ Indeed, the enactment of Section 6 was necessary only because union activities tend to “increas[e] the price of wages . . . [which tend] to increase the price of the product [produced by] their labor”²⁵² in the output market, precisely the type of anticompetitive effect that the Sherman Act was designed to prevent. This point is especially relevant in the sports-league player-restraint context because in such lawsuits players typically allege only a reduction in labor market competition, not a reduction in product market competition.²⁵³ And because “an employer agreement falls within the prohibitions of the Sherman Act only if it has an anticompetitive purpose or effect on some aspect of competition other than competition over wages or working conditions,”²⁵⁴ “[c]hallenges to labor market restraints that are alleged only to have a purpose to restrain the labor market or an anticompetitive effect in a labor market do not state claims under the Sherman Act.”²⁵⁵ In sum, the rationale underlying Section 6’s enactment, its statutory text, and the Supreme Court’s own jurispru-

²⁴⁹ *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 512 (1940) (emphasis added).

²⁵⁰ 15 U.S.C. § 17 (emphasis added).

²⁵¹ See Jerry, II & Knebel, *supra* note 28, at 184–92 (1984) (noting that “even if one concludes that the Sherman Act was intended to apply to labor organizations, it does not follow that the Sherman Act applies to restraints on labor market competition” by employers).

²⁵² 21 CONG.REC. 2561 (1890), *reprinted in* EARL W. KINTNER, 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS 160 (1978).

²⁵³ *Cf. supra* notes 36–37 and accompanying text; *supra* note 52; *supra* notes 130–31; *supra* note 137.

²⁵⁴ *Cal. State Council of Carpenters v. Associated Gen. Contractors of Cal., Inc.*, 648 F.2d 527, 544 (9th Cir. 1980), *rev’d*, 459 U.S. 519 (1983) (Although the Supreme Court reversed the Ninth Circuit’s holding, it did so because it determined that the plaintiffs lacked standing. Importantly, the Supreme Court approved of the Ninth Circuit’s analysis regarding the scope of the Sherman Act.) See *id.* at 525.

²⁵⁵ Jerry, II and Knebel, *supra* note 28, at 241.

dence supports the conclusion that to be successful in any player-restraint antitrust lawsuit, the players must first allege, and then prove, that the challenged restraint yields anticompetitive effects in the output market. As already demonstrated, this is something they are unlikely to be able to do.²⁵⁶

B. *The Nonstatutory Exemption*

When Congress passed the National Labor Relations Act in 1935, it “set forth a national labor policy favoring free and private collective bargaining; which require[s] good-faith bargaining over wages, hours, and working conditions; and which delegate[s] related rulemaking and interpretive authority to the National Labor Relations Board.”²⁵⁷ By enacting this statute — as when it enacted Section 6 of the Clayton Act nineteen years earlier — Congress “hoped to prevent judicial use of antitrust law to resolve labor disputes — a kind of dispute normally inappropriate for antitrust law resolution.”²⁵⁸

But unlike Section 6 of the Clayton Act and the Norris-LaGuardia Act, the NLRA does not explicitly protect concerted action (such as collective-bargaining agreements) between unions and nonlabor parties from Sherman Act scrutiny.²⁵⁹ For instance, as part of a collective-bargaining agreement, a supermarket and a local butchers’ union might agree to limit the hours that the supermarket’s butcher shop could be held open as a way to improve the hours and working conditions of the butchers. This agreement, however, would probably be invalidated as an illegal restraint of trade under Section 1 because it clearly leads to anticompetitive effects (consumers would have one fewer outlet from which to purchase a freshly cut rib-eye in the middle of the night).²⁶⁰ Situations like this, then, made clear that the “national labor law scheme would be virtually destroyed by the routine imposition of anti-trust penalties upon parties engaged in collective bargaining.”²⁶¹ Hence, the Supreme Court crafted the “nonstatutory labor exemption” to protect

²⁵⁶ See *supra* Section II.B.3.

²⁵⁷ *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236 (1996) (internal citations omitted).

²⁵⁸ *Id.*

²⁵⁹ The exemption was crafted in a series of three Supreme Court decisions: *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Allen Bradley Co. v. Local Union No. 3, Int’l Bhd. of Electrical Workers*, 325 U.S. 797 (1945).

²⁶⁰ This example is based on the facts of *Amalgamated Meat Cutters*, 381 U.S. 676.

²⁶¹ *Brown*, 518 U.S. at 236 (describing the Supreme Court’s reasoning in *Amalgamated Meat Cutters*, 381 U.S. at 711) (internal quotation marks omitted).

these types of agreements from antitrust attack by limiting “an antitrust court’s authority to determine, in the area of industrial conflict, what is or is not a ‘reasonable’ practice. [The nonstatutory labor exemption] thereby substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict.”²⁶² In short, the exemption “applies where needed to make the collective-bargaining process work.”²⁶³ And the exemption is just as applicable to multiemployer bargaining as it is to single employer bargaining.²⁶⁴

Recent lawsuits have focused on the scope of the nonstatutory labor exemption — specifically, whether it should shield multiemployer agreements that have been unilaterally imposed after negotiations with the employees’ bargaining representatives have reached impasse.²⁶⁵ The Eighth Circuit has held that the exemption in fact does still apply in these situations because “[f]ederal labor policy sanctions . . . the goal of resisting union demands and . . . [doing so] has no anticompetitive effect unrelated to the collective bargaining negotiations.”²⁶⁶ Consequently, “[u]nder [the labor laws], a union will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains.”²⁶⁷

The Supreme Court’s most recent decision regarding the scope of the nonstatutory labor exemption — *Brown v. Pro Football, Inc.*²⁶⁸ — affirmed this reasoning when it noted that employers could take joint action with regard to labor markets “if those actions ‘grew out of and were ‘directly related to’ a multiemployer bargaining process, did not offend the federal labor laws that sanction and regulate the process, affected terms of employment subject to compulsory bargaining, and concerned only parties to the collective bargaining relationship.”²⁶⁹ Thus, although the Court has never explicitly held that the nonstatutory labor exemption protects multiemployer agreements pertaining to mandatory subjects of bargaining so long as

²⁶² *Id.* at 236–37.

²⁶³ *Id.* at 234.

²⁶⁴ *See id.* at 239–40.

²⁶⁵ *See, e.g., id.*; *Powell v. Nat’l Football League*, 930 F.2d 1293 (8th Cir.1989).

²⁶⁶ *Powell*, 930 F.2d at 1301 (quoting *Amalgamated Meat Cutters & Butchers Workmen of N. Am., Local Union No. 576 v. Wetterau Foods, Inc.*, 597 F.2d 133, 136 (8th Cir. 1979)).

²⁶⁷ *Id.* (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 539–40 (1983)) (internal quotation marks omitted).

²⁶⁸ *Brown*, 518 U.S. 231 (1996).

²⁶⁹ Harper, *supra* note 28, at 1663–64 (summarizing the holding in *Brown*, 518 U.S. 231).

employees have union representation,²⁷⁰ its jurisprudence has had this practical effect.

To challenge the legality of league-imposed player restraints, then, it appears that players must first abandon the collective bargaining process²⁷¹ (through a disclaimer of interest or union decertification²⁷²). Notwithstanding Congress's preference for settling industrial disputes through collective bargaining, current jurisprudence appears to indicate that once the players have "sufficiently distan[ced themselves] in time and in circumstances from the collective bargaining process,"²⁷³ player-restraint antitrust lawsuits may proceed and be adjudicated according to traditional antitrust doctrine.²⁷⁴ Indeed, *Brown* appeared to be the impetus for the latest NFLPA decertification since failure to take this step most likely would have been fatal to any antitrust lawsuit filed by the players.²⁷⁵

C. The "Single Employer" Defense

Despite the Supreme Court's jurisprudence that the scope of the non-statutory labor exemption extends only to situations in which the parties are in some way still tied to the collective-bargaining process, it is important to normatively question whether courts should ever evaluate the merits of a Section 1 player-restraint lawsuit, regardless of whether a collective-bargain-

²⁷⁰ Indeed, the Court in *Brown* suggested that an "'extremely long' impasse, accompanied by 'instability' or 'defunctness' of [a] multiemployer bargaining unit" might be a situation where a union could then bring an antitrust challenge against the agreements made between those employers. See *Brown*, 518 U.S. at 250 (citing *El Cerrito Mill & Lumber Co.*, 316 N.L.R.B., at 1006–07).

²⁷¹ This argument will be discussed further *infra* Section IV.

²⁷² See Matt Moore, *Disclaimed Interest by NBPA? Here's What it Means to Labor Squabble*, CBS SPORTS (Nov. 15, 2011), <http://www.cbssports.com/nba/story/16130862/disclaimed-interest-by-nbpa-heres-what-it-means-to-labor-squabble> (last visited Jan. 12, 2014), archived at <http://perma.cc/7LP5-VQZM> (explaining that a "disclaimer of interest" differs from "union decertification," in that the former means the union leadership has voluntarily given up its role as the players' representative in collective bargaining, which has the benefits of speeding up the process through which players can bring antitrust lawsuits, and allows the union to regain its status as bargaining representative very quickly, as opposed to the latter in which the players vote to dissolve the union).

²⁷³ *Brown*, 518 U.S. at 250.

²⁷⁴ See *id.*

²⁷⁵ See *Brady v. Nat'l Football League (Brady I)*, 779 F.Supp.2d 992, 1000–04 (D. Minn. 2011); *supra* notes 21–26; *infra* text accompanying notes 369–71.

ing relationship exists between clubs and players.²⁷⁶ In its landmark holding clarifying the approach to analyzing a Section 1 claim, the Supreme Court opined that “[a] court must . . . consider the facts peculiar to the business to which the restraint is applied . . . [and] the nature of the restraint and its effect.”²⁷⁷ Because the restraints typically challenged in player-restraint lawsuits merely affect employees’ interests in a labor market²⁷⁸ (as opposed to consumers’ interests in a product market), established antitrust doctrine dictates that it is appropriate to consider federal labor law and policy when deciding how Section 1 should apply in this context, if at all. Furthermore, it is important to recognize that, although the players may elect to withdraw a union’s right to represent them in collective bargaining, such a decision does not withdraw them or their NFL employers from the purview of the federal labor laws. For instance, Section 6 of the Clayton Act applies to actions taken by parties other than labor organizations engaged in collective bargaining.²⁷⁹ More importantly, both the NLRA and Norris-LaGuardia Act apply to “labor disputes” — defined as “any controversy concerning terms, tenure or conditions of employment”²⁸⁰ regardless of whether a collective-bargaining relationship exists — unambiguous proof that the scope of the federal labor laws and their policies extend beyond the bounds of the union and collective-bargaining contexts.²⁸¹

Thus, first inquiring into whether NFL member clubs are economic competitors such that they should or should not be viewed as a “single entity” for purposes of Section 1 puts the cart before the horse. When a group of players allege that the joint imposition of the terms and conditions of employment by their NFL employers violates the Sherman Act, a court should instead first inquire into whether the NFL member clubs are more properly viewed as a “single employer.” If they are in fact more properly viewed as such, then the NFL member clubs should merely be subject to the

²⁷⁶ These types of restraints are distinguishable from those agreements that exclude particular persons from playing in the league at all. See *supra* note 49.

²⁷⁷ *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

²⁷⁸ Cf. *supra* notes 36–37 and accompanying text; *supra* note 49; *supra* notes 130–31; *supra* note 137.

²⁷⁹ See *supra* text accompanying note 240.

²⁸⁰ See 29 U.S.C. § 113(c); *id.* § 152(9) (defining “labor dispute” as “any controversy concerning terms, tenure 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.”).

²⁸¹ See *Brady v. Nat’l Football League (Brady II)*, 644 F.3d 661, 670–73 (8th Cir. 2011).

same standards as any firm acting unilaterally when it sets the terms and conditions of employment for its employees, irrespective of whether those employees are represented by a union or engaged in the collective-bargaining process.

1. The Current “Single Employer” Test

The NLRA unambiguously supports the conclusion that the NFL and its member clubs should be viewed as a single employer. Section 152 sets forth the definitions of terms used throughout the statute.²⁸² Subsection (2) states: “The term ‘employer’ includes any *person* acting as an agent of an employer, directly or indirectly”²⁸³ and Subsection (1) defines ‘person’ as “*one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees . . . or receivers.*”²⁸⁴ Thus, by definition, the NLRA stipulates that the term “employer” can include more than one entity, including partnerships and corporations — the most common legal forms that NFL member clubs take. Additionally, Article 1.1 of the NFL’s Constitution and Bylaws declares: “The name of this *association* shall be National Football League”²⁸⁵ Because the NLRA expressly includes associations within the definition of “employer,”²⁸⁶ it supports the conclusion that the NFL, an association comprised of member clubs, qualifies as a single employer.

Additionally, the National Labor Relations Board (“NLRB”), the agency charged with fulfilling the mandates prescribed by the NLRA,²⁸⁷ and the Supreme Court, have already established that more than one legal entity may be considered a “single employer.”²⁸⁸ The standard for determining whether “several nominally separate business entities” should be deemed “a single employer” turns on whether “they comprise an integrated enterprise.”²⁸⁹ This determination should be distinguished from the “single entity” test announced in *American Needle*,²⁹⁰ which attempts to define the

²⁸² See 29 U.S.C. § 152.

²⁸³ *Id.* § 152(2) (emphasis added).

²⁸⁴ *Id.* § 152(1) (emphasis added).

²⁸⁵ CONST. & BYLAWS OF THE NAT’L FOOTBALL LEAGUE art. I, § 1.1 (Effective February 1, 1970, Revised 2006) archived at <http://perma.law.harvard.edu/B4U2-TJ9P>.

²⁸⁶ 29 U.S.C. § 152.

²⁸⁷ See *id.* § 156.

²⁸⁸ *Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965).

²⁸⁹ See *id.* at 256.

²⁹⁰ 130 S.Ct. 2201 (2010).

degree to which several entities compete with one another economically.²⁹¹ Rather, with regard to the single-employer inquiry, “[t]he controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership.”²⁹² And “[w]hile none of these factors, separately viewed, have been held controlling, stress has normally been laid upon the first three factors which reveal functional integration with particular reference to whether there is centralized control of labor relations.”²⁹³

2. Evaluating Whether NFL Member Clubs Are a “Single Employer”

The single-employer test’s first criterion is “interrelation of operations.”²⁹⁴ As previously explained, the NFL member clubs jointly produce individual games and the primary League product (a League season that culminates with a postseason tournament and eventual champion), and a single club is incapable of independently producing anything.²⁹⁵ Recognizing this, Congress has expressly authorized the member clubs to jointly sell the broadcast rights to each game.²⁹⁶ Thus, the NFL’s member clubs’ operations are highly interrelated, and consequently this first criterion supports the notion that the member clubs are properly grouped together as a single employer for labor relations purposes.

The second criterion is “common management.”²⁹⁷ Although each club is independently owned and operated,²⁹⁸ there is also a significant degree of common management among the member clubs. A centralized management group not employed by any individual club (the “League Office”) provides advice and guidance to member clubs, and acts as a regulatory body by making management decisions on behalf of all member clubs. The League Office also provides a forum in which representatives from each or several member clubs gather to make decisions on behalf of all member clubs. For instance, the League Office maintains an Executive Commit-

²⁹¹ *Id.* at 2212.

²⁹² *Radio*, 380 U.S. at 256.

²⁹³ *NLRB v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1121 n.1 (3d Cir. 1982) (quoting *Parklane Hoisery Co.*, 203 N.L.R.B. 597, 612 (1973)).

²⁹⁴ *Radio*, 380 U.S. at 256.

²⁹⁵ *See supra* Section II.A.2.

²⁹⁶ 15 U.S.C. § 1291 (1982).

²⁹⁷ *Radio*, 380 U.S. at 256.

²⁹⁸ *See, e.g., Front Office*, GIANTS.COM, <http://www.giants.com/team/staff.html>, archived at <http://perma.cc/H82H-ACPX> (showing that club individually manages operations including player development, marketing and communications).

tee,²⁹⁹ which has the power to (among other things) impose fines “upon any member, or any owner, director, partner, officer, stockholder, player, or employee of a member of the League,”³⁰⁰ and to make decisions related to financing League business.³⁰¹ The League Office also includes a Commissioner, who is vested with significant authority, including “full, complete, and final jurisdiction and authority to arbitrate: any dispute involving two or more members of the League, any dispute between any player, coach, and/or other employee of any member of the League . . . and any member club or clubs.”³⁰² Most importantly, the Commissioner has “authority to arrange for and negotiate contracts on behalf of the League with other persons, firms, leagues, or associations.”³⁰³ Finally, the League Office controls the production of each member club’s product through the issuance of a League-wide schedule,³⁰⁴ and mandates that, when hosting a home game, each member club provide certain services, such as a physician and ambulance, to both clubs playing in that game.³⁰⁵ Thus, member clubs are to a significant extent commonly managed, further supporting a finding that the clubs should be deemed a “single employer.”

The third criterion considered under the single-employer test is “centralized control of labor relations.”³⁰⁶ NFL member clubs largely control labor relations in a centralized manner. For instance, the Commissioner has significant authority to discipline any employee of any member club,³⁰⁷ with the potential discipline for such employee including expulsion from the

²⁹⁹ CONST. & BYLAWS OF THE NAT’L FOOTBALL LEAGUE art. VI, § 6.1 (Effective February 1, 1970, Revised 2006) *archived at* <http://perma.law.harvard.edu/B4U2-TJ9P>.

³⁰⁰ *Id.* art. VI, § 6.5(A).

³⁰¹ *Id.* art. VI, § 6.5(F) (ability “to make and deliver in the name of the League a promissory note or notes evidencing any . . . loan and to pledge as security therefore any stocks, bonds, or other securities owned by the League”).

³⁰² *Id.* art. VIII, § 8.3. The Commissioner also has significant financial authority, including the ability to “incur any expense, which in his sole discretion, is necessary to conduct and transact ordinary business of the League, including but not limited to, the leasing of office space and the hiring of employees and other assistance or services.” *Id.* art. VIII, § 8.4.

³⁰³ *Id.* art. VIII, § 8.10.

³⁰⁴ *Id.* art. XIII, § 13.1.

³⁰⁵ *See id.* art. XIX, § 19.5.

³⁰⁶ *See* *Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965).

³⁰⁷ *See* CONST. & BYLAWS OF THE NAT’L FOOTBALL LEAGUE art. VIII, § 8.13 (Effective February 1, 1970, Revised 2006) *archived at* <http://perma.law.harvard.edu/B4U2-TJ9P>.

League.³⁰⁸ The League Office has also established rules governing the eligibility of players,³⁰⁹ and has mandated that all player contracts be “executed . . . in the form adopted by the member clubs of the League”³¹⁰ and filed with the League Office, not merely the member club.³¹¹ Moreover, the Commissioner has the ability to disapprove or cancel a contract made between a player and a club.³¹² Even the uniforms that players wear are strictly governed by League rules, and member clubs may not change their uniforms without prior approval by the Commissioner.³¹³ Finally, the Commissioner has the authority to negotiate collective-bargaining contracts with any players’ union on behalf of all of the member clubs.³¹⁴ These examples illustrate the degree to which labor relations are centralized in the NFL, and provide a firm basis for concluding that the member clubs should, in fact, be considered a single employer.³¹⁵

The fourth and final criterion considered when determining whether a group of nominally separate entities are in fact a single employer is “common ownership.”³¹⁶ The clubs jointly produce NFL football games (the primary League product), and are therefore common owners in the product for which they employ labor.³¹⁷ However, each member club is individually owned and operated, and has independent value.³¹⁸ Therefore, this factor probably tips against a single employer finding.

³⁰⁸ See *id.* art. IX.

³⁰⁹ See *id.* art. XII.

³¹⁰ *Id.* art. XV, § 15.1.

³¹¹ See *id.* art. XV, § 15.3.

³¹² See *id.* art. VII, § 8.14.

³¹³ See *id.* art. XIX, § 19.8-19.9.

³¹⁴ See *id.* art. VIII, § 8.10.

³¹⁵ It may seem bizarre or illogical that the extent to which separate entities have combined their labor relations practices is a factor in determining whether they are a “single employer,” and immune from Section 1 scrutiny in player restraint lawsuits, which attempt to challenge these employers’ right to make specific agreements pertaining to labor and employment. However, considering this factor is both logical and relevant because it helps to distinguish between those employers that genuinely have a high degree of centralized control of labor relations, and those that have merely engaged in “naked” restraints to reduce wages. In the latter situation, these employers would not be able to claim the “single employer” defense, and their agreement to not pay more than a certain wage to their employees would be subject to Section 1 scrutiny.

³¹⁶ See *Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965).

³¹⁷ See *supra* Section II.A.2; Section II.A.3.

³¹⁸ See *The Business of Football*, *supra* note 5.

In sum, however, especially when stressing the first three criteria as the NLRB has instructed,³¹⁹ the NFL member clubs appear to satisfy the traditional single-employer test. Consequently, they should be treated as such, and should be immune from Section 1 scrutiny when making agreements pertaining to labor and employment.³²⁰

Those who wish to resist such a conclusion may point to the Fifth Circuit's holding in *North American Soccer League v. National Labor Relations Board*.³²¹ In that case, the NLRB characterized the member clubs of the North American Soccer League ("NASL"), structured similarly to the NFL,³²² as "joint employers."³²³ (Presumably, joint employers would still be considered separate employers and thus could still be subjected to Section 1 scrutiny). It is important to note, though, that "a finding that companies are 'joint employers' assumes in the first instance that companies are 'what they appear to be' — independent legal entities that have merely historically chosen to handle jointly . . . important aspects of their employer-employee relationship."³²⁴ Thus, there is nothing to prevent this "joint employer" assumption from being challenged and eventually proven incorrect.

In *North American Soccer League*, the players voted to certify a league-wide union to represent them in the collective bargaining process.³²⁵ Because the NLRA permits multiemployer bargaining (i.e., grouping separate employers' employees into a single bargaining unit),³²⁶ a determination of whether the member clubs were better characterized as a "single employer" — as opposed to "joint employers" — was irrelevant. That is, in this instance, "assuming" that the member clubs were joint employers as opposed to a single employer had no meaningful consequences since the players' ability to maintain a single bargaining unit would be unaffected by such a determination. When the member clubs challenged the appropriateness of the league-wide bargaining unit, the Fifth Circuit concluded that

³¹⁹ See *NLRB v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1121 n.1 (3d Cir. 1982) (citing *Parklane Hosiery Co.*, 203 N.L.R.B. 597, 612 (1973)).

³²⁰ This would not, however, preclude them from being subject to Section 2. See *supra* note 61.

³²¹ 613 F.2d 1379 (5th Cir. 1980).

³²² See *id.* at 1382-83 (describing features of the NASL, many of which pertain to the NFL, and have been described herein).

³²³ See *id.* at 1381.

³²⁴ *NLRB v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1122 (3d Cir. 1982) (citing *NLRB v. Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1966)) (emphasis added).

³²⁵ *N. Am. Soccer League*, 613 F.2d at 1381.

³²⁶ See *infra* text accompanying note 332.

there was sufficient evidence to affirm the NLRB's determination that the member clubs were in fact joint employers.³²⁷ Because it was simpler to "assume" the member clubs were "joint employers," and doing so led to the same result (the maintenance of a league-wide unit by the players) as would have a determination that the clubs were in fact better characterized as a "single employer," there is no indication of how the NLRB or Fifth Circuit would have ruled had they actually considered the issue. Thus, whether sports-league member clubs should be deemed a "single employer" as opposed to "joint employers" appears to be an open question, having never been squarely addressed by either the NLRB or any court.

3. Multiemployer Bargaining Units and Unit Appropriateness

The NLRA guarantees virtually all private-sector employees the right to collectively bargain with their employers.³²⁸ Before a union is allowed to represent a group of employees, however, it must file a petition with the NLRB stating that the group of employees it seeks to organize constitutes an "appropriate unit."³²⁹ The appropriateness of the unit turns on the degree to which the workers to be included share a "community of interest."³³⁰ It is important to recognize that all of an employer's employees may not share enough of a community of interest to be grouped into a single

³²⁷ *N. Am. Soccer League*, 613 F.2d at 1383.

³²⁸ See 29 U.S.C. § 152 (defining "employer" to specifically exclude "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof.").

³²⁹ See *id.* § 159; see also, e.g., *Lundy Packing Co., Inc.*, 314 N.L.R.B. 1042 (1994); *Omni Int'l Hotel*, 283 N.L.R.B. 475, 475 (1987); *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409 (1950).

³³⁰ *Ore-Ida Foods, Inc.*, 313 N.L.R.B. 1016, 1019 (1994) (providing a comprehensive discussion of the factors considered in determining a community of interest). Some of the factors considered include: (1) the degree of functional integrations of the work in the business of the employer, e.g., *Seaboard Marine Ltd.*, 327 N.L.R.B. 556, 556 (1999); (2) whether they perform similar types of work, including the nature of the workers' skills and functions, see *Phoenix Resort Corp.*, 308 N.L.R.B. 826, 827-28 (1992); (3) whether they have regular work contact and whether they are interchangeable with other workers, see *Novato Disposal Services*, 330 N.L.R.B. 632, 632 (2000); (4) whether they are subject to similar working conditions, see *Allied Gear & Machine Co.*, 250 N.L.R.B. 679, 681 (1980); (5) whether they have similar wage and benefit packages, see *Associated Milk Producers*, 251 N.L.R.B. 1407, 1407 (1980); (6) whether they are subject to common supervision, see *id.*; (7) prior bargaining history, see *Great Atlantic and Pacific Tea Co.*, 153 N.L.R.B. 1549, 1550 (1965); and (8) the extent and form of organization, either with that employer or within that industry, see *Overnite Transp. Co.*, 322 N.L.R.B. 723, 725.

bargaining unit. For example, one company's factory workers may comprise one bargaining unit, while the same company's office clerical workers may need to seek separate union representation because they do not share enough of a community of interest with the factory workers.³³¹ It is also important to recognize that separate employers' employees may share enough of a community of interest to be grouped together into a single bargaining unit; such units are referred to as "multiemployer bargaining units."³³² Separate employers, however, cannot be forced into a multiemployer bargaining arrangement.³³³ Rather, each employer has the right to separately bargain with its own employees, and therefore each must demonstrate an intent to be bound by a joint bargaining arrangement before its employees' inclusion in the multiemployer unit will be deemed appropriate.³³⁴

Bargaining units comprised of all players in a given league — as opposed to those comprised of only players playing for a particular club, or in a particular division or conference — are the norm in the four major American sports leagues.³³⁵ Courts have always characterized these bargaining units as "multiemployer bargaining units" without considering their nature.³³⁶ This cursory classification is analogous to the cursory classification of NASL member clubs as "joint employers" in *North American Soccer League*.³³⁷ Such characterizations are important, though, because the "multiemployer bargaining unit" designation implies that league-wide bargaining units could be subdivided into smaller units at the behest of either the

³³¹ See *Mitchellace, Inc.*, 314 N.L.R.B. 536, 537 (1994) (holding that units of office clerical units are presumptively separate from production, maintenance, or warehouse units that include plant clerical workers).

³³² Public data is not available, but in 1996, "multiemployer bargaining account[ed] for more than 40% of major collective-bargaining agreements, and [was] used in such industries as construction, transportation, retail trade, clothing manufacture, and real estate, as well as professional sports." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 240 (1996).

³³³ See *Kroger Co.*, 148 N.L.R.B. 569, 573 (1964).

³³⁴ See *id.*

³³⁵ See *supra* note 19; the Major League Baseball Players Association ("MLBPA") represents all MLB baseball players. See 2012-16 *Basic Agreement*, MLBPA, archived at <http://perma.law.harvard.edu/OfmYf2qiRpz>. The National Basketball Players Association ("NBPA") represents all NBA basketball players. See *About the NBPA*, NBPA, <http://www.nbpa.org/about-us> (last visited Jan. 12, 2014), archived at <http://perma.law.harvard.edu/0ZHkQkMenSL>. The National Hockey League Players Association ("NHLPA") represents all NHL hockey players. See *Inside NHLPA*, NHLPA, <http://www.nhlpa.com/inside-nhlpa> (last visited Jan. 12, 2014), archived at <http://perma.law.harvard.edu/0TpVc5Ej3PE>.

³³⁶ See, e.g., *Brown v. Pro Football, Inc.*, 518 U.S. 231, 239 (1996).

³³⁷ See *supra* notes 321-27 and accompanying text.

clubs or players.³³⁸ According to well-settled collective bargaining principles, each employer has the right to reject the “multiemployer bargaining unit” and individually bargain with its own employees.³³⁹ As just explained, one employer’s employees sometimes must maintain separate bargaining units, and multiple employers’ employees are sometimes *permitted* to bargain together in a single bargaining unit. But it appears that if a group of employers were *compelled* to bargain together — such that any employer’s failure to evince an intent to be bound in a joint bargaining arrangement had no meaningful significance — then that group of employers should be deemed a single employer.³⁴⁰ Stated another way, if a given bargaining unit cannot be subdivided, then the management with which that unit is negotiating should be considered a single employer; on the other hand, just because management is a single employer, it does not necessarily follow that its employees will always be allowed to maintain a single bargaining unit. To analogize to a well-known maxim: a square is a rectangle, but a rectangle is not necessarily a square.

4. An Alternative to Determine “Single Employer” Status: the “Smallest Appropriate Unit” Test

In addition to a community of interest, the NLRB requires the unit to comprise the smallest appropriate unit before it will be certified.³⁴¹ Thus, if employees in a given bargaining unit “do not possess a community of interest separate and distinct from” other employees to justify maintenance of two separate units, only a petition to represent all of the employees in a single unit will be certified.³⁴² The non-exhaustive list of factors that the NLRB considers when evaluating whether distinct groups of employees possess a sufficient community of interest — and therefore whether a single bargaining unit would be more appropriate than multiple units — includes: organizational structure and operations, wages, benefits, and work rules, supervision/discipline, skills and contact, interchange and transfer, and other miscellaneous factors such as uniforms.³⁴³ A recent NLRB case, *Boeing*

³³⁸ Even if employees of multiple employers certify a union to represent all of them in a single bargaining unit, the employers must consent or demonstrate their intent to bargain collectively in a “multiemployer unit.” See *Kroger Co.*, 148 N.L.R.B. 569, 573 (1964).

³³⁹ See *id.*

³⁴⁰ See *infra* notes 341–59 and accompanying text.

³⁴¹ See *Boeing Co.*, 337 N.L.R.B. 152, 153 (2001).

³⁴² See *id.*

³⁴³ See *Ore-Ida Foods, Inc.*, 313 N.L.R.B. 1016, 1016–19 (1994); see also *supra* note 330.

Co.,³⁴⁴ illustrates how the NLRB determines whether a proposed unit is the smallest appropriate unit.

Boeing is a corporation that is involved in the building, maintenance, and repair of aircrafts.³⁴⁵ In November of 2000, a union petitioned to represent a subset of Boeing's employees.³⁴⁶ Specifically, the union sought to represent C-17 aircraft engine inspectors (known as "RAM" employees³⁴⁷) but sought to exclude from representation other employees responsible for servicing their equipment ("ESE" employees) and storing their materials ("ROR" employees). The NLRB rejected the union's petition, finding that the smallest appropriate unit constituted all three groups, rather than just the RAM employees.³⁴⁸ To make this determination, the NLRB relied on several facts: (1) the employees in each group possessed "the same skills, qualifications, and certifications;"³⁴⁹ (2) "[t]he RAM employees do not receive specialized training;"³⁵⁰ (3) the "employees do the same type of work, albeit usually on different types of equipment;"³⁵¹ (4) "the employees' work is highly integrated;"³⁵² and (5) the "employees receive the same benefits, are subject to the same personnel policies, receive comparable wages . . . and, on occasion, permanently transfer into each other's group."³⁵³ The NLRB concluded that, "[i]n sum, the Employer's servicing of the C-17 aircraft is only accomplished through the coordinated efforts of the RAM, ESE, and ROR groups."³⁵⁴ Importantly, the NLRB also stated:

We recognize that the RAM employees are separately supervised, attend separate employee meetings, [and] work in a separate area from the ESE and ROR employees These distinctions, however, are offset by the highly integrated work force, the similarity in training and job functions between the RAM and ESE employees, and the comparable terms and conditions of employment among all three groups.³⁵⁵

³⁴⁴ See Boeing Co., 337 N.L.R.B. 152, 152 (2001).

³⁴⁵ *Id.* at 153.

³⁴⁶ See *id.*

³⁴⁷ "RAM," or "recovery and modification" employees, were responsible for "inspect[ing] and repair[ing] a specific engine part" used in the C-17 aircraft. *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² See *id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

5. The “Smallest Appropriate Unit” Test Applied to the NFL

Utilizing the same sort of analysis that the NLRB did in *Boeing*, it is not difficult to understand why the league-wide bargaining unit is the smallest appropriate bargaining unit in professional sports leagues. Indeed, all NFL players, regardless of the club they play for, or the division or conference to which that club belongs: (1) possess the same skills and qualifications; (2) do not receive any specialized training;³⁵⁶ (3) engage in the same type of work; (4) have highly integrated work;³⁵⁷ and (5) receive the same benefits, are subject to the same personnel policies, receive comparable wages, and on occasion join another club through a trade or free agency.³⁵⁸ And just as in *Boeing*, the NFL member clubs are only able to engage in their business through the coordinated efforts of all NFL member club players.³⁵⁹ Finally, under the reasoning of the NLRB in *Boeing*, the fact that the players on each NFL member club are supervised by different coaches, attend different club meetings, and practice in separate cities should not outweigh the players’ other community of interests.³⁶⁰

Consequently, if NFL member clubs amended the NFL Constitution & Bylaws to allow them to collectively bargain club-by-club, rather than as a League, it is doubtful that the NLRB would recognize this withdrawal from the League-wide unit. Similarly, if enough players on “big market” clubs decided that a “big market” club union could better represent their interests than the NFLPA, these players could attempt to decertify the NFLPA and elect a union to represent only big market clubs’ players’ interests. Again, however, it is unlikely that the NLRB would recognize such a decision given that it precluded the RAM employees from forming their own bargaining unit in *Boeing*. Thus, there is strong support for concluding that the smallest appropriate bargaining unit for NFL players is a league-wide bargaining unit.

Common sense yields the same conclusion. In most industries, the strike is an effective weapon because it may force employers to temporarily halt or reduce production, allowing the employer’s economic competitors to capitalize by increasing their own market shares. However, if NFL players

³⁵⁶ Although the quality of training varies for each club, all clubs provide professional coaching to their players.

³⁵⁷ See *supra* text accompanying notes 295–96.

³⁵⁸ See generally 2011 NAT’L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT (Aug. 4, 2011), *archived at* <http://perma.law.harvard.edu/0UcXeAWR7o8>; see also *supra* notes 307–15 and accompanying text.

³⁵⁹ See *supra* Section II.A.3.

³⁶⁰ See *Boeing Co.*, 337 N.L.R.B. 152, 153 (2001).

formed club-specific unions and decided to strike, it would do more than just interrupt their employer-club's own operations — it would compromise the entire League's operations. That the club's "competitors" would be unable to take advantage of the labor dispute further proves that the NFL member club's labor relations are interrelated,³⁶¹ and that the member clubs are not truly economic competitors.³⁶² Indeed, NFL member-club "competitors" in fact have a vested interest in ensuring labor peace between each other member club and its players.

Of course, labor disputes and work stoppages have the potential to disrupt the operations of third-party employers in most industries. For instance, if a spark plug manufacturer's employees were to strike, automobile assemblers' ability to produce their own products would be compromised. The difference is that Ford, for instance, could "second-source" spark plugs from other manufacturers. Indeed, this is precisely why the strike is effective — the spark plug manufacturer's competitors will begin increasing their market share at the manufacturer's expense. Alternatively, Ford could prepare for potential supplier work stoppages by stockpiling parts when times are good. In the NFL, however, the Washington Redskins cannot avoid the consequences that would flow from a sudden New York Giants player strike the week they are scheduled to play; since the Redskins produce live entertainment, they are incapable of stockpiling components. Furthermore, it is doubtful that "second-sourcing" (for example, attempting to field a team of replacement players to compete against regular players) would be a suitable strategy to deal with the situation. Indeed, a spontaneous strike by Giants players would compromise the entire League product because the fairness and integrity of playoff determinations would be severely impacted.

The appropriateness of an alternative to a league-wide bargaining unit also has important implications related to how far the scope of the nonstatutory labor exemption should be extended. Those who refute that the league-wide bargaining unit is the smallest appropriate bargaining unit must necessarily abandon support for the principal argument levied against the Supreme Court's holding in *Brown*. Critics contend that the holding of *Brown*, which extends the nonstatutory exemption past impasse, effectually forces the players to choose between exercising their right to engage in collective bargaining and their right to pursue relief under the antitrust laws.³⁶³ But

³⁶¹ Cf. *supra* Section III.C.2.

³⁶² Cf. *supra* Section II.A.

³⁶³ See, e.g., *id.* at 258 (Stevens, J., dissenting) ("Other employees, no less than well-paid athletes, are entitled to the protections of the antitrust laws when their employers unit to undertake anticompetitive action that causes them direct harm

such a choice would not be necessary if players could in fact form bargaining units on the club level. True, the holding in *Brown* would still preclude players from maintaining a league-wide bargaining unit if they wished to file a Section 1 antitrust lawsuit, but *Brown* would pose no impediment to their ability to collectively bargain at the club level. After forming club-specific unions, any collaboration between clubs would of course no longer be protected by the nonstatutory exemption because collective-bargaining privity between clubs would no longer exist. In fact, since league-wide collaboration is precisely the conduct attacked in any Section 1 lawsuit, *Brown*'s prohibition against maintaining a league-wide bargaining unit should not be distasteful to the players. If players had the ability to simultaneously exercise their labor law and antitrust rights, the criticism accompanying the Supreme Court's holding to extend the scope of the nonstatutory labor exemption past impasse would vanish.

Of course, the fact that courts have never even considered club-specific unionization — and perhaps more importantly, that the players themselves have never pursued it³⁶⁴ — lends credence to the fact that the league-wide bargaining unit is, in fact, the only feasible bargaining unit. Since a strike by one club-specific union would interfere with another club's players' abil-

and alters the state of employer-employee relations that existed prior to unionization.”); *Powell v. Nat'l Football League*, 930 F.2d 1293, 1306 (8th Cir. 1989) (Heaney, J., dissenting) (“It follows that the end result of the majority opinion is that once a union agrees to a package of player restraints, it will be bound to that package forever unless the union forfeits its bargaining rights.”); *id.* at 1309-10 (Lay, C.J., dissenting) (“[T]his court's unprecedented decision leads to the ineluctable result of union decertification in order to invoke rights to which the players are clearly entitled under the antitrust laws. The plain and simple truth of the matter is that the union should not be compelled, short of self-destruction, to accept illegal restraints it deems undesirable. Union decertification is hardly a worthy goal to pursue in balancing labor policy with the antitrust laws.”).

³⁶⁴ See *History*, NFL PLAYERS ASSOCIATION, <https://www.nflplayers.com/about-us/History/> (last visited Jan. 12, 2014), archived at <http://perma.law.harvard.edu/05FFgHnpUms> (noting that, “even very early on, there were not separate unions, but only one union that represented the majority of players in the league”). It should be noted that, for a few years following the announcement of a merger between the NFL and the American Football League (“AFL”), one union represented all of the AFL players, and the NFLPA represented all of the NFL players. However, during these years, the two leagues maintained completely separate schedules. Thus, a strike by one union would not significantly disrupt the operations of the other “league” or its players. The only cooperation between the “leagues” for these seasons was the staging of a single game: the Super Bowl. Thus, the collaboration and impact that a lack of collaboration between the “leagues” could have was minimal. Once the schedules merged in 1970, the two unions also agreed to a merge, with the resulting union still called the NFLPA.

ity to earn a living, it makes sense that players have never pursued club-specific unions and it appears that players are just as interested in maintaining labor peace throughout the League as are the clubs.

In sum, because antitrust doctrine dictates that the nature and effects of a given restraint should be considered when deciding how Section 1 should be applied to alleged violations, and because player restraints merely affect employees in a labor market, it is appropriate to consider whether the NFL member clubs are a single employer under labor law principles, and thus, whether they should be immune from Section 1. The NFL member clubs should indeed be considered a "single employer" regardless of whether the question is answered with the NLRB's and Supreme Court's traditional "single employer" test, or with the "smallest appropriate bargaining unit" test proposed here. Common sense and historical practice illustrate the complete impracticability of maintaining anything other than a league-wide bargaining unit. Indeed, even the Supreme Court acknowledged when it last considered an NFL player-restraint lawsuit that "[i]n the present context . . . the league [is acting] more like a single bargaining employer"³⁶⁵ than as a group of separate employers. Thus, the terms "joint employer" and "multiemployer" are misnomers and incorrectly characterize the employment relationship between NFL member clubs. Because the NFL member clubs are compelled to collaborate when determining the wages and terms and conditions of employment of NFL players whenever the players elect to engage in the collective bargaining process, it is illogical and perverse for an antitrust court to impose an absolute prohibition on this very same collaboration whenever the players decide to abandon Congress's preferred method for settling labor disputes.³⁶⁶ Rather, the clubs should be permitted to co-determine player wages and terms of conditions of employment irrespective of any formal collective-bargaining relationship.

³⁶⁵ *Brown*, 518 U.S. at 248 (1996) (determining, however, that the consideration of whether the member clubs are more properly viewed as a single bargaining employer is "irrelevant" because the nonstatutory labor exemption applied regardless).

³⁶⁶ See 29 U.S.C. § 151 ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . .").

IV. CONCLUSION

Those familiar with the contentious labor history between NFL Players and management³⁶⁷ might have foreseen the most recent player-restraint lawsuit, *Brady v. National Football League*, as the inevitable result of the NFL's decision nearly three years earlier to opt out of the final two years of its previous CBA with the Players.³⁶⁸ The NFL's decision, made in May 2008, resulted in a March 2011 rather than a March 2013 expiration date. Unable to successfully negotiate the terms of a new CBA, and in light of the Supreme Court's decision in *Brown v. Pro Football*,³⁶⁹ the NFLPA "disclaimed any interest in representing the Players in further negotiations" mere hours before the CBA was set to expire.³⁷⁰ Doing so enabled the Players to file their antitrust suit the very same day.³⁷¹

Although the lawsuit's most serious claims alleged that the member clubs' joint imposition of the salary cap, franchise tag, and annual draft constituted illegal restraints of trade under Section 1 of the Sherman Act, the litigation never addressed the merits of those claims.³⁷² Instead, it focused on the likelihood of success of the Players' Section 1 claim challenging the legality of the NFL's lockout³⁷³ — or, in the Players' language, "group boycott"³⁷⁴ — and on the federal courts' power to issue a preliminary injunc-

³⁶⁷ See *Brady v. Nat'l Football League* (Brady I), 779 F.Supp.2d 992, 998-1004 (D. Minn. 2011) (providing a detailed description of this history starting with *Mackey v. Nat'l Football League*).

³⁶⁸ *Id.* at 1003.

³⁶⁹ 518 U.S. 231 (1996). The decision potentially suggests that the nonstatutory labor exemption immunizes the League from any antitrust challenges mounted by the Players so long as the Players maintain a collective bargaining relationship with the NFL. See *supra* Section III.B.

³⁷⁰ *Brady I*, 779 F.Supp.2d at 1003.

³⁷¹ See *id.* at 1004.

³⁷² See generally *Brady I*, 779 F.Supp.2d 992; *Brady v. Nat'l Football League* (Brady II), 644 F.3d 661 (8th Cir. 2011).

³⁷³ "A lockout occurs when an employer lays off or 'locks out' its unionized employees during a labor dispute to bring economic pressure in support of the employer's bargaining position." *Brady I*, 779 F.Supp.2d at 1003.

³⁷⁴ *Brady I*, 779 F.Supp.2d at 1004. The classification of the actions being taken by the NFL's member clubs as either a "lockout" or a "group boycott" was disputed. *Id.* The NFL maintained that the players' decertification of the NFLPA was a sham, such that it still maintained a collective bargaining relationship with its employees, and that the NFL was therefore merely exercising its congressionally delegated right to implement a lockout of its employees. See *id.* at 1007, 1015. On the other hand, the Players contended that the decertification of the NFLPA was valid, and that since they no longer maintained a collective bargaining relationship, the "lockout" was actually an illegal "group boycott" under Section 1 of the Sher-

tion prohibiting a party to a labor dispute from implementing an employee lockout.³⁷⁵ Despite the District Court's conclusion that the NFL Players established a fair chance of success on the merits of their "group boycott" claim,³⁷⁶ and that they would suffer irreparable harm save the issuance of a preliminary injunction prohibiting the continuation of the lockout by the NFL,³⁷⁷ the Court of Appeals held that the Norris-LaGuardia Act prohibited federal courts from issuing such injunctions.³⁷⁸ Regardless of the legal correctness or wisdom of these holdings at the time they were issued, the events that transpired in the immediate aftermath of their issuance reveal several important insights regarding the merits of the Players' antitrust challenges to the salary cap, franchise tag, and annual draft, and more generally the role that antitrust courts should play in resolving labor disputes pertaining to the implementation of player restraints.

A. Lessons Learned in the Aftermath of Brady v. National Football League

Less than three weeks after the Eighth Circuit issued the final opinion in this latest series of litigation, the NFL Players recertified the NFLPA as their exclusive bargaining representative.³⁷⁹ And only five days after that, the NFL and NFLPA officially agreed to the terms of a new ten-year CBA, which will govern the wages and terms and conditions of NFL player employment through the end of the 2020 season.³⁸⁰ In light of these developments, the reasoning employed by the courts in this dispute appears dubious at best.

Although the District Court of Minnesota expressly stated that it was "not ruling on whether the non-statutory labor exemption shields the

man Act. *See id.* at 1040. Furthermore, they argued that since no collective bargaining relationship existed, the nonstatutory labor exemption could no longer be invoked to shield the NFL's actions from Section 1 scrutiny. *See id.*

³⁷⁵ *See id.* at 1026–32.

³⁷⁶ *See id.* at 1039.

³⁷⁷ *See id.* at 1034.

³⁷⁸ *See Brady II*, 644 F.3d at 680–81 (but also holding that the courts could issue injunctions prohibiting a party from "locking out" non-employees, which in the present context meant free agents and prospective players).

³⁷⁹ Associated Press, *Report: NFLPA Recertified as Union*, ESPN (Jul. 30, 2011), http://espn.go.com/nfl/story/_/id/6818756/report-nfl-players-union-recertified-final-negotiations-nfl (last visited Jan. 12, 2014), *archived at* <http://perma.law.harvard.edu/0QeuDSgUY98>.

³⁸⁰ 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. I (Aug. 4, 2011), *archived at* <http://perma.law.harvard.edu/0UcXeAWR7o8>.

League from [the Players'] claims,"³⁸¹ it did issue a preliminary injunction prohibiting the League from continuing its lockout. It based its decision in part on the determination that the Players' disclaimer of the NFLPA as its bargaining representative had "serious consequences for the Players."³⁸² That is, "by disclaiming their union, the Players [purportedly] [gave] up the right to strike, to collectively bargain, to have union representation in its grievances, to have union representation in benefits determinations, and to have union regulation of agents."³⁸³ Hindsight, however, reveals that this supposition was simply untrue.

First, although the NFLPA technically disclaimed its role as the Player's bargaining representative, a group of executives and lawyers not officially employed by the NFLPA along with a group of Players continued to negotiate the terms of the next CBA with the NFL's executive committee.³⁸⁴ And although the NFLPA reconstituted itself into a "trade association" (as opposed to a labor organization) and technically NFLPA officials did not sit in on these negotiations, the NFLPA readily acknowledged that it served in an advisory capacity to the Players during these discussions.³⁸⁵ Thus, despite the fact that members of the NFLPA presumably did not communicate directly with the NFL executive committee during their temporary four-month hiatus as the Players' official bargaining representative, it would be naïve to think that NFLPA executives were not orchestrating the Players' entire negotiating strategy during this timeframe. Indeed, the latest CBA was finalized and agreed to less than a week after the NFLPA was recertified, a feat the NFL and NFLPA were unable to achieve in the more than two years of negotiations that they engaged in prior to "decertification." This development undermines the District Court's conclusion that the Players had given up their right to collectively bargain by disclaiming the union. In reality, the Players did no such thing. Moreover, the fact that the Players forfeited their right to strike by decertifying the union appears meaningless since the NFL had already instituted a lockout. The fact that the decertification ended before the playing season resumed substantially

³⁸¹ *Brady I*, 779 F.Supp.2d at 1039.

³⁸² *Id.* at 1017.

³⁸³ *Id.* (quoting Reply Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction at 6, *Brady I*, 779 F.Supp.2d 992 (D. Minn. 2011) (No. 41)).

³⁸⁴ See Gary Graves, *DeMaurice Smith: NFLPA Decision to Recertify will be 'Serious, Sober'*, USA TODAY (Jul. 21, 2011), <http://content.usatoday.com/communities/thehuddle/post/2011/07/demaurice-smith-nflpa-decision-to-recertify-will-be-serious-sober/1#.UoK7gZRKnZZ> (last visited Jan. 12, 2014), *archived at* <http://perma.law.harvard.edu/0AhcaW8P5Fs>.

³⁸⁵ *Id.*

mitigated the consequences flowing from the Players' forfeiture of NFLPA representation in any grievance proceedings since those proceedings almost always flow from in-season conduct. And finally, although agent activity may have gone unregulated during this four-month period, the universal expectation that the NFLPA would be recertified and agent regulations reinforced (perhaps retroactively) rendered minimal the negative consequences of such deregulation. Thus, contrary to the District Court's affirmations, the decision to disclaim the NFLPA did not have serious consequences for the Players. Rather, the decision to disclaim was all smoke and mirrors.

Second, it is important to normatively question the wisdom of allowing players to bring Section 1 lawsuits challenging the legality of various player restraints given the impact that doing so has on labor law and policy. The District Court did not seem to think that allowing such suits to proceed would be at all troublesome when it opined, "[t]here is nothing inherently unfair or inequitable about a disclaimer effecting an immediate termination of the framework of labor law."³⁸⁶ Setting aside the fact that a union disclaimer does not immediately terminate the operation of the labor laws,³⁸⁷ allowing a party to a labor dispute to unilaterally subject its negotiating opponent to the full force of the antitrust laws with the flip of a switch has grave consequences for the collective bargaining process, and it is startling that the District Court failed to recognize them.

It is universally acknowledged that there must be some collaboration between NFL member clubs if the league sport is to exist at all.³⁸⁸ But until the legality of any such collaboration is litigated, the NFL member clubs remain unaware of whether they have crossed the line. Necessarily, then, they must be wary of any antitrust litigation, actual or potential, especially given that Section 4 of the Clayton Act trebles the damages awarded for Sherman Act violations.³⁸⁹ It is not difficult to understand that the ability of the NFLPA to unilaterally thrust the full weight of the Sherman Act onto the NFL member clubs seriously undermines the NFLPA's ability to collectively bargain in good faith. Indeed, what reason would the NFLPA have to make any agreement until it fully flexed its muscles and utilized all availa-

³⁸⁶ *Brady I*, 779 F.Supp.2d at 1021.

³⁸⁷ Both the National Labor Relations Act and Norris-LaGuardia Act apply to "labor disputes," the definition of which does not depend on the maintenance of a union or collective bargaining relationship, meaning that decertification does not effect an immediate termination of the framework of labor law. See *supra* notes 276–81 and accompanying text; see also *Brady v. Nat'l Football League (Brady II)*, 644 F.3d 661 (8th Cir. 2011).

³⁸⁸ See *supra* text accompanying note 83.

³⁸⁹ See *supra* text accompanying note 46.

ble leverage to ensure that it was getting the best possible deal? Thus, under the District Court's precedent, when negotiating over player restraints or any other terms discussed in the collective bargaining process, the NFLPA could effectively say, "Agree to our terms or else we will decertify, and not only will you be prohibited from implementing player restraints, but you will also be liable for hundreds of millions of dollars in damages." Sanctioning such conduct blurs the line separating extortion from good faith negotiation.

Yet this is precisely the result that flows from allowing such claims to move forward. Case in point is the decertification charade accompanying the *Brady* suit which challenged the legality of the salary cap, franchise tag, and annual draft — all of which were later agreed to and incorporated into the latest CBA.³⁹⁰ The Supreme Court expressly recognized the difficult situation that NFL member clubs would find themselves in — and the way in which the collective bargaining process would be undermined — if the nonstatutory exemption was not extended beyond impasse.³⁹¹ The Supreme Court explained the very purpose behind the development of the nonstatutory exemption when it stated the exemption reflects the view that:

Congress, not [antitrust] judges, was the body which should declare what public policy in . . . the industrial struggle demands. The . . . nonstatutory exemption interprets the labor statutes in accordance with this intent, namely, as limiting an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a reasonable practice. It thereby substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict.³⁹²

To allow NFL players to so easily sidestep the Supreme Court's holding in *Brown* and Congress's mandate that labor disputes are to be reconciled through the application of labor — not antitrust — laws, would force "antitrust courts to answer a host of important practical questions about how collective bargaining over wages, hours, and working conditions is to proceed — the very result that the implicit labor exemption seeks to avoid."³⁹³

³⁹⁰ In and of itself this fact should lead one to question the wisdom of allowing Players to challenge these practices and their legality. See *infra* note 394 and accompanying text.

³⁹¹ See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 247 (1996) (nothing that failure to extend the exemption past impasse would "forc[e] [NFL member clubs] to choose their collective-bargaining responses in light of what they predict or fear that an antitrust court, not labor law administrators, will eventually decide").

³⁹² *Id.* at 236-37 (internal citations and quotation marks omitted).

³⁹³ *Id.* at 240-41.

Third, when considering the legitimacy of the challenges to the salary cap, franchise tag, and annual draft mounted by the Players in *Brady*, the logical implications flowing from the fact that the Players eventually agreed to and incorporated each of these restraints into the latest CBA cannot be overlooked.³⁹⁴ It would be rare for a party aggrieved by and bringing a lawsuit against a legitimate antitrust violation to do an about-face and expressly sanction such conduct. Unlike the players who can combine, bargain, and strike, those whom the antitrust laws were actually meant to protect — consumers and third parties who do not have a direct relationship with the alleged transgressors — have no other recourse save filing a lawsuit to remedy any alleged transgressions. For instance, American Needle Co. had no other options but to file an antitrust lawsuit challenging the legality of the exclusive intellectual property licensing deal the NFL member clubs signed with Reebok. Additionally, the application of the antitrust laws to regulate monopsonistic conduct in most contexts finds strong support in the fact that the Sherman Act expressly prohibits the sellers affected by such conduct from themselves combining to form a monopoly to counter such buyer power. But permitting and encouraging workers to monopolize labor through the formation of unions so that they can effectively respond to monopsony power is precisely what Sections 6 and 20 of the Clayton Act, the Norris-LaGuardia Act, and the National Labor Relations Act authorize. The deal that eventually springs forth from the statutorily-authorized leverage that these counter-veiling forces are able to bring to bear reflects the true market value of the players' labor. Indeed, the players "should not be entitled to invoke the antitrust laws to gain something [they] could not win at the bargaining table."³⁹⁵ Rather the desirability of the outcomes that such clashes yield is a policy determination that should be made by Congress, not the antitrust courts.

Fourth, it is vitally important to not let the "underdog" status of the players blind us to the negative effects that flow from allowing such litigation to move forward. America loves the National Football League.³⁹⁶ And the imposition of restrictive player restraints has been a big contributor to the League's success by increasing the degree of on-field outcome uncertainty that would otherwise exist absent these restraints.³⁹⁷ Player restraints

³⁹⁴ See 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 6 (Aug. 4, 2011), archived at <http://perma.law.harvard.edu/0UcXeAWR7o8> (college draft); *id.* art. 10 (franchise tag); *id.* art. 12-14 (salary cap).

³⁹⁵ *Powell v. Nat'l Football League*, 930 F.2d 1293, 1309 (8th Cir. 1989) (Lay, C.J., dissenting) (explaining the rationale underlying the majority's holding).

³⁹⁶ See *supra* text accompanying notes 3-17.

³⁹⁷ See *supra* Section II.C.4.

also establish a system that attempts to maximize strategic competition, which simultaneously creates new products and increases consumers' willingness to pay for anything and everything NFL-related.³⁹⁸ The players share directly in the financial windfall that flows from the NFL's expertise in managing the rules governing the acquisition and distribution of playing talent since the collective bargaining process has yielded a system in which one of those "restrictive restraints" — the salary cap — is directly tied to League revenues.³⁹⁹

Finally, we should not forget that there is no inherent right to specific wages, terms or conditions of employment in the National Football League,⁴⁰⁰ nor can we ignore the natural market forces that protect players' interests. If any given player decides that the wages, terms or conditions of employment are unsuitable, he can pursue any other occupation, just as any other participant in the labor force must make decisions regarding whether the benefits of any given job are worthwhile enough to undertake it. This free-market check on the power of NFL member clubs prevents them from driving player wages and terms and conditions of employment down to an economically undesirable level (i.e., the level at which the talent pool becomes noticeably shallower, decreasing consumers' willingness to pay).⁴⁰¹ Additionally, imposing worse wages and terms and conditions of employment than those which the free market dictates the players deserve incentivizes others to invest in rival football leagues, which would be true economic competitors to the NFL's member clubs. Alternatively, the players can form a union, collectively bargain, and when necessary withhold their services by striking in an attempt to achieve more favorable working conditions. Practically, it is reasonable to question the oppressiveness of any given player restraint when: (1) the Players agreed to the imposition of these allegedly egregious restraints in their latest CBA, and (2) almost anyone with enough ability to become an NFL player nevertheless chooses to do so.

³⁹⁸ See *supra* Section II.C.4.

³⁹⁹ Players will no doubt continue to make more and more money as the NFL expects to increase its current \$9.4 billion revenue stream to \$25 billion by 2027. See Terry Lefton, *New Products, New Licenses Line Up with the Lucrative NFL*, SPORTS BUSINESS JOURNAL DAILY 9 (Mar. 12, 2009), <http://www.sportsbusinessdaily.com/Journal/Issues/2012/03/12/Marketing-and-Sponsorship/The-Lefton-Report.aspx> (last visited Jan. 12, 2014), *archived at* <http://perma.law.harvard.edu/0sByyZrtEYi>; see also *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1194-1205 (D.C. Cir. 1978) (MacKinnon, J., concurring in part and dissenting in part) (describing how the imposition of the college draft led to increased financial compensation for players).

⁴⁰⁰ As Commissioner Roger Goodell recently noted, "Being associated with the NFL is a privilege. It is not a right." *60 Minutes: The Commissioner*, *supra* note 52.

⁴⁰¹ See *supra* text accompanying notes 164–66.

Consequently, lawyers, judges, policymakers and the public must question the wisdom of allowing NFL players to subject these very same player restraints to Section 1 scrutiny. Whether one approaches the issue from the vantage point of the single entity defense, the rule of reason, the ancillary restraints doctrine, the statutory and nonstatutory labor exemptions, or the single employer theory, a thoughtful and nuanced understanding of antitrust doctrine, economics, and federal labor law reveals that the NFL member clubs should be free to manage the rules governing the acquisition and distribution of playing talent throughout the League as they see fit. Otherwise, the risk that disinterested judges will mangle antitrust doctrine and issue an opinion obliterating the NFL's ability to deliver the game the country has come to love will continue to loom over all sports fans like a dark cloud ready to burst.