Journal of Sports & Entertainment Law
HARVARD LAW SCHOOL

"Baseball Would Certainly Fail": A History of Sports Leagues' Hyperbolic Predictions in the 20th Century's Biggest Cases and the Largely Successful Evolution of Their Arguments

Christopher R. Deubert[1]

Abstract

This Article is a contribution to the history of sports law. The Article is the first ever analysis of the arguments made by professional sports leagues and their players and players associations in legal briefs and memoranda filed in the major sports law cases of the 20th century. While there exists considerable literature on the courts' decisions, the opinions in those cases provide a limited picture of the nature and scope of the parties' arguments on novel antitrust and labor issues. By obtaining the memoranda from the U.S. National Archives and Records Administration, this Article provides an unprecedented examination of the claims and defenses of the relevant parties, and how those claims and defenses evolved over time.

In the earliest cases, Major League Baseball and the National Football League argued that any diminution of the restrictions they had placed on their players would literally lead to the destruction of their leagues and cause grave public harm. When

[1] Christopher R. Deubert is Senior Counsel with Constangy, Brooks, Smith & Prophete LLP. This Article was inspired by Jim Quinn, a legendary sports litigator involved in many of the cases discussed herein, with whom I have had the good fortune to work and guest lecture alongside. Jim frequently explained how, in many of these cases, the leagues claimed that reducing or eliminating player-related restrictions would destroy the leagues, only to be proven wrong over time. This Article summarizes the historical record in support of Jim's attestation. Jim's account of many of these cases can be found in his book, Don't Be Afraid to Win. Jim Quinn, Don't Be Afraid To Win: How Free Agency Changed The Business Of Pro Sports (Radius Book Group 2019).

the courts were not persuaded by these "doomsday" arguments, the leagues asserted that the unique nature of the sports industry, in which at least some cooperation among competitors is necessary, required that the restrictions be analyzed under antitrust law's rule of reason rather than be declared per se illegal. Eventually prevailing on that argument, and with the aid of a law student's theorizing, in the 1970s the leagues convinced the courts that the restrictions should be exempt from antitrust scrutiny so long as they were the result of collective bargaining with the players unions. The boundaries of that exemption were not clarified until the Supreme Court addressed the issue in 1996. For better and worse, the leagues and unions have been negotiating and litigating accordingly ever since.

Table of Contents

Introduction

In a 1922 brief to the United States Supreme Court in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs* ("*Federal Baseball*"),[2] the entities today collectively known as Major League Baseball ("MLB") argued that the reserve clause, the system through which there was no free agency and clubs unilaterally decided player salaries, was "absolutely necessary" to prevent "disastrous results to the sporting public."[3] Further, MLB said the reserve system was "absolutely essential to the existence of so obviously a wholesome and popular sporting event as the world's series."[4]

These arguments proved incorrect. As discussed herein, the reserve system died in the 1970s but not only did MLB and the World Series not suffer the same fate, they thrived in the subsequent decades. The other major American sports leagues — the National Football League ("NFL"), National Basketball Association ("NBA"), and National Hockey League ("NHL") — all made similar arguments as to the purported essentialness of their player restraint mechanisms in numerous cases in the second half of the 20th century. Those arguments too proved inaccurate.

This Article is the first of its kind to analyze the arguments made by leagues, their players, and players associations in these cases by examining the contents of the legal briefs and memoranda filed therein. While there exists considerable literature on the courts' decisions in these cases,[5] the

[2] 259 U.S. 200 (1922).

[3] Brief on Behalf of Defendants in Error at 14, *Fed. Baseball Club of Baltimore*, 259 U.S. 200 (1922) (Apr. 4, 1922) (No. 204) [hereinafter Organized Baseball Brief].

[4] *Id.* at 72.

[5] *See, e.g.*, William B. Gould IV, *Labor Issues in Professional Sports*, 15 Stan. L. & Pol'y Rev. 61 (2004); Derek D. Yu, *The Reconciliation of Antitrust Laws and Labour Laws*

opinions in those cases provide only a small picture of the nature and scope of the parties' arguments. By obtaining the memoranda from the U.S. National Archives and Records Administration, this Article provides an unprecedented examination of the claims and defenses of the relevant parties, and how those claims and defenses evolved over time.

While MLB received an antitrust exemption in *Federal Baseball* that endured for decades, the other leagues were not so fortunate, as determined by the Supreme Court in *Radovich v. NFL*.[6] Then, in the 1970s, all the leagues suffered major losses in cases brought by players challenging the leagues' restrictions on player salaries and movement. These losses occurred despite dire predictions by the leagues that finding in the players' favor would effectively amount to a doomsday for their sports. In fact, the court decisions did not kill the sports as claimed but merely forced the leagues to negotiate in earnest with the players. Consequently, as both litigation and collective bargaining between the leagues and players evolved, so too did the parties' arguments.

Once the leagues accepted legal reality, their arguments and legal record improved. The leagues persuaded courts that the unique nature of sports required some special consideration under antitrust law. More importantly, the leagues were successful in convincing the courts that the primary avenue through which employment disputes with their players should be resolved is through labor law and collective bargaining. This argument was perhaps first articulated by a Yale law student in 1971 in an article repeatedly cited by the parties and courts in considering these issues. Although the Supreme Court finally addressed some of the oft-litigated issues in 1996,[7] the tug of war over antitrust and labor law continues between players and leagues.

This Article examines the evolution of the leagues' arguments from primary source documents. Specifically, this Article proceeds in four Parts, summarizing and analyzing: (I) some of the leagues' failed doomsday arguments; (II) the courts' rejection of *per se* antitrust liability for the leagues'

---

in Professional Sports, 6 SPORTS L. J. 159 (1999); Jonathan C. Tyras, *Players Versus Owners: Collective Bargaining and Antitrust After* Brown v. Pro Football, Inc., 1 U. PA. J. LAB. & EMP. L. 297 (1998); Marc J. Yoskowitz, *A Confluence of Labor and Antitrust Law: The Possibility of Union Decertification in the National Basketball Association to Avoid the Bounds of Labor Law and Move into the Realm of Antitrust Law*, 1998 COLUM. BUS. L. REV. 579 (1998); John J. Scura, *The Time Has Come: Ending the Antitrust Non-Enforcement Policy in Professional Sports*, 2 SETON HALL. J. SPORTS L. 151 (1992); Gary R. Roberts, *Sports League Restraints on the Labor Market: The Failure of Stare Decisis*, 47 UNIV. PITT. L. REV. 337 (1986).

[6] 352 U.S. 445 (1957); *see infra,* Section I.e.

[7] *See infra*, Section IV.g.

rules; (III) the development of the non-statutory labor exemption; and (IV) the dispute as to when the non-statutory labor exemption expires.

I. The Reserve Clause is "Absolutely Essential"

MLB has four historically significant cases. As discussed in the Introduction, *Federal Baseball* presented a challenge to MLB's reserve clause, discussed in more detail below. The resulting 1922 decision from the Supreme Court granting MLB an exemption from antitrust law was revisited in 1953 in *Toolson v. New York Yankees, Inc.* ("*Toolson*")[8] and in 1972 in *Flood v. Kuhn* ("*Flood*").[9] In each case, MLB asserted a doomsday defense and hung on to its antitrust exemption. The reserve clause was finally undone in a 1975 arbitration decision at issue in *Kansas City Royals Baseball Corp. v. MLB Players Ass'n* ("*Kansas City Royals*").[10]

Understandably, the leagues that sprouted after MLB (*e.g.,* the NFL, NBA, and NHL) copied much of its business model, most notably the reserve clause. Consequently, those leagues equally believed the reserve clause was essential to their operations as best reflected in *Radovich v. NFL.*[11] In hindsight, decades removed from the reserve clause's constraints, it is clear that the leagues' arguments were wrong, as this Part explains.

a. Federal Baseball (1922)

Federal Baseball is an original sin in American sports jurisprudence. The arguments made in that case, and the Supreme Court's resultant decision, laid the groundwork for all major legal battles between players and leagues. Consequently, it is where we must begin our analysis.

In 1914, the Federal League began play, intending to compete with the National League and American League,[12] by that time jointly operating as "Organized Baseball," and recognized as the "Major Leagues" for professional baseball,[13] today known as MLB.[14] The Federal League consisted of

[8] 346 U.S. 356 (1953).
[9] 407 U.S. 258 (1972).
[10] 532 F.2d 615 (8th Cir. 1976).
[11] 352 U.S. at 448.
[12] Brief on Behalf of Plaintiff in Error at 20, Fed. Baseball Club of Baltimore v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200 (Feb. 27, 1922) (No. 204). [hereinafter Federal Baseball Brief].
[13] *Id.* at 13.
[14] *Organized Baseball*, Baseball Reference (Oct. 10 2021), https://www.baseball-reference.com/bullpen/Organized_Baseball ("Organized Baseball is the term for Major League Baseball and its associated minor leagues").

eight clubs: Baltimore; Brooklyn; Buffalo; Chicago; Indianapolis; Kansas City; Pittsburgh; and St. Louis.[15] MLB at the time had 16 clubs.[16]

The Federal League ultimately failed because of what one club, the Federal Baseball Club of Baltimore ("Baltimore"), argued were a series of unlawful agreements among the MLB clubs. Specifically, Baltimore complained about a series of provisions in MLB's governing document, the "National Agreement," which: (i) required clubs to include in their player contracts provisions which "enable[d] the club to retain the perpetual right of employment," known as the "reserve clause"; (ii) prohibited clubs from negotiating with players of another club subject to a reserve clause; and, (iii) prohibited clubs from negotiating with players who have at any time violated the reserve clause, *i.e.*, "blacklist[ing]" them.[17]

The reserve clause is of such significance that it is worth quoting in full:

> In consideration of the compensation paid to the party of the second part by the party of the first part as recited in Clause 1 hereof, the party of the second part agrees and obligates himself to contract with and continue in the service of said party of the first part for the succeeding season at a salary to be determined by the parties of such contract.[18]

Importantly, while the clause implies that the player's salary was to be mutually determined, in practice, a player was "subject to re-employment by the club with whom he ha[d] such contract, *irrespective of whether the compensation or other terms of employment are satisfactory or not*[.]"[19] If the player did not agree to the salary being offered by his club, "his only alternative [was] *to quit professional baseball*."[20]

The reserve clause created an "almost insurmountable difficulty" for the Federal League in its efforts to employ high quality baseball players.[21] As explained by Baltimore, "[t]he completeness with which [MLB] dominated these players was manifested by the fear, which they expressed, that if they once entered into the employment of any independent organization, it would mean that they were forever shut out of [MLB]."[22]

---

[15] Federal Baseball Brief, *supra* note 12, at 6.
[16] *Id.* at 13.
[17] *Id.* at 31–57.
[18] *Id.* at 45–46.
[19] *Id.* at 53.
[20] *Id.* at 54.
[21] *Id.* at 57.
[22] *Id.*

After two seasons of challenged operations, in December 1915, the Federal League and its member clubs reached an agreement with MLB — known as the "Peace Agreement" — to cease play in exchange for $50,000 payments and interests in MLB clubs.[23]

Baltimore objected to the Peace Agreement and instead chose to file a lawsuit against MLB, its member clubs, and its former business partners in the Federal League. Baltimore brought suit under the Sherman Antitrust Act ("Sherman Act"),[24] but, at least in its eventual brief to the Supreme Court, did not specify the provision of the Sherman Act it believed was violated. The Sherman Act was passed in 1890[25] and thus when Baltimore initiated its action in or about 1916, the understanding and application of the law was still relatively new. Baltimore phrased its complaint as follows:

> first, for damage to its business as a result of the monopoly of the business of providing exhibitions of professional baseball which defendants in error had established and maintained throughout the United States, and a conspiracy on their part to restrain interstate commerce in said business; and, second, for injury sustained by plaintiff in error as a result of a conspiracy on the part of the defendants in error to wreck and destroy, *and the actual wrecking and destruction* of the Federal League, of which plaintiff in error was a constituent member, and the existence of which League was essential to the carrying on of the business of plaintiff in error; this conspiracy being one to monopolize a part of interstate commerce and in restraint thereof.[26]

Today, we can recognize Baltimore to have been raising claims under both Sections 1 and 2 of the Sherman Act. Section 1 of the Sherman Act, as written, prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States[.]"[27] Section 2 punishes any "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[.]"[28] In short, the Sherman Act prohibits anticompetitive conduct that affects interstate commerce, which we shall see was a major issue in *Federal Baseball*.

The reserve clause was central to Baltimore's lawsuit.[29] Baltimore argued that

---

[23] *Id.* at 81–82.
[24] *Id.* at 2.
[25] *See* 15 U.S.C. § 1-38.
[26] Federal Baseball Brief, *supra* note 12, at 2.
[27] 15 U.S.C. § 1.
[28] 15 U.S.C. § 2.
[29] Federal Baseball Brief, *supra* note 12, at 165–71.

> This subjection of all these thousands of players by means of an elaborate system of restrictions upon their liberty of action, which was nothing more *than a system of peonage,* was clearly shown to be, notwithstanding the pretences (sic) under which its real object was sought to be disguised, for the purpose of rendering it impossible for any independent organization to enter the business of providing games of professional baseball in competition with [MLB].[30]

Baltimore declared the reserve clause a "vicious restriction upon ordinary human rights"[31] and argued "[t]here is no more reason for one organization to corral and tie up all the baseball players in the United States than there is for a manufacturer of glass to corral and tie up all of the glassblowers, or a publishing house the printers and engravers, and so on throughout all the branches of industry."[32]

Of note, Baltimore was not the first party to challenge the reserve clause — star player Nap Lajoie tried approximately 14 years earlier. Lajoie had been a star player for the Philadelphia Phillies of the National League before signing with the Philadelphia Athletics of the new American League prior to the 1901 season.[33] For the Athletics in 1901, Lajoie hit .426, with 232 hits, 48 doubles, 14 home runs, and 125 RBI, all of which led the league.[34]

The Phillies then sought an injunction preventing Lajoie from playing for the Athletics based on the reserve clause.[35] Lajoie argued the contract was unenforceable for a "lack of mutuality," meaning that the parties' remedies for a breach were not equal.[36] A trial court found in Lajoie's favor but the Supreme Court of Pennsylvania reversed and granted the Phillies an injunction in an April 21, 1902 decision.[37]

Notwithstanding the court's decision, Lajoie signed a contract to play for the Cleveland Bronchos for the 1902 season believing that another state would not honor Pennsylvania's ruling.[38] Indeed, in an August 16, 1902

---

[30] *Id.* at 7-8.

[31] *Id.* at 168.

[32] *Id.* at 165.

[33] C. Paul Rodgers III, *Napoleon Lajoie, Breach of Contract and the Great Baseball War*, 55 SMU L. Rev. 325, 327–28 (2002).

[34] *Nap Lajoie*, Baseball Reference, https://www.baseball-reference.com/players/l/lajoina01.shtml (last visited Jan. 3, 2023).

[35] Phila. Ball Club v. Lajoie, 202 Pa. 210, 218–19 (Pa. 1902).

[36] *Id.* at 219.

[37] *See Lajoie*, 202 Pa. 210; C. Paul Rodgers III, *Napoleon Lajoie, Breach of Contract and the Great Baseball War*, 55 SMU L. Rev. 325, 327–28 (2002).

[38] C. Paul Rodgers III, *Napoleon Lajoie, Breach of Contract and the Great Baseball War*, 55 SMU L. Rev. 325, 334 (2002).

decision, an Ohio trial court ruled that "the Pennsylvania court had no jurisdiction to issue its order of injunction to control the acts of Lajoie in Ohio" and declared the injunction had no effect.[39] Lajoie thus remained with Cleveland.[40] Of note, the Ohio court referenced the parties arguing about the applicability of the Sherman Act but did not ultimately address the issue.[41]

Consequently, the application of the Sherman Act was a live issue in Baltimore's lawsuit. A jury found in Baltimore's favor, awarding the club $80,000 in damages, trebled to $240,000 pursuant to the Sherman Act,[42] plus an additional $24,000 in attorney's fees.[43] However, the Court of Appeals of the District of Columbia vacated the jury's award.[44] As described by Baltimore, "[t]he Court of Appeals in its opinion reversing the judgment. . . dealt exclusively with the question of whether or not the business involved in this case in which the parties were engaged was interstate commerce" and "reached the conclusion that it was not."[45] As a result, Baltimore could not state a claim under the Sherman Act.[46]

Baltimore appealed the court's decision to the Supreme Court. In a 202-page brief, Baltimore outlined the facts of the case and asserted that MLB was in fact engaged in interstate commerce.[47] Nevertheless, the Supreme Court unanimously, and now infamously, affirmed the Court of Appeals' decision.[48]

---

[39] Phila. Baseball Club v. Lajoie, 13 Ohio Dec. 504, 512–13 (Cuyahoga County CP 1902).

[40] *See Nap Lajoie*, Baseball Reference, https://www.baseball-reference.com/players/l/lajoina01.shtml (last visited Jan. 3, 2023).

[41] *See Phila. Baseball Club*, 13 Ohio Dec. at 508 ("Much time was occupied by counsel in a discussion of the question as to whether the provisions of. . . the act of May 26, 1890, Sec. 905, Federal Statutes, were applicable to decrees in equity.")

[42] *See* 15 U.S.C. § 15(a) (providing that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee").

[43] Federal Baseball Brief, *supra* note 12, at 2.

[44] *Id.* at 3.

[45] *Id.*

[46] *Id.* at 113–14.

[47] *Id.* at 116–57.

[48] Fed. Baseball Club of Baltimore v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200 (1922).

As will be further discussed herein, in time, the Supreme Court's decision in *Federal Baseball* was heavily criticized[49] and recognized by the Supreme Court as "an exception and an anomaly," and "an aberration confined to baseball."[50] Further, the Supreme Court definitively stated in 1972 that "[p]rofessional baseball is a business and it is engaged in interstate commerce."[51]

Early twentieth century jurisprudence on the definition of interstate commerce is not our focus here, however. Instead, we are concerned with the arguments made by MLB and its clubs in defense of the reserve clause.

The defendants made clear in their brief to the Supreme Court that they viewed the reserve clause as "absolutely essential"[52] to their operations:

> From the point of view of the club, the reserve clause is absolutely necessary, for otherwise a skillful player developed at the expense of one club would be snapped up by another and the clubs would always be engaged in a competition for players[.] Experience shows the disastrous results to the sporting public, to the clubs and to the players, which have always ensued at times when reservations have not been respected, and there has been unrestrained bidding for players.[53]

Further, the defendants repeatedly claimed that if the reserve clause was eliminated, the World Series would not be possible.[54] In so doing, MLB stressed that the World Series was a "great and popular event"[55] "in which the public takes so wholesome and vital an interest."[56] For these rea-

---

[49] Craig Calcaterra, *Happy birthday to baseball's antitrust exemption*, NBC SPORTS (May 29, 2019), https://mlb.nbcsports.com/2019/05/29/happy-birthday-to-baseballs-antitrust-exemption/ [https://perma.cc/DW3A-YHL8].

[50] Flood v. Kuhn, 407 U.S. 258, 282 (1972).

[51] *Id.*

[52] Organized Baseball Brief, *supra* note 3, at 72.

[53] *Id.* at 14.

[54] *Id.* at 46 ("the "World's Series" games cannot be continued at all unless under the restraint of elaborate interleague organizations and the Sherman Act ought not to be so interpreted as to make this great and popular event an impossibility"); *id.* at 70–71 ("The question in the case before the Court is not whether the world's series games can be conducted to greater public advantage if the National Agreement is dissolved, but whether Congress intends that the crowning feature of the national game should be done away with"); *id.* at 72 ("the Sherman Act should not be construed to apply to a combination absolutely essential to the existence of so obviously a wholesome and popular sporting event as the world's series").

[55] *Id.* at 46.

[56] *Id.* at 70.

sons, MLB argued, the Sherman Act "should not be construed to apply" to the reserve clause.[57]

MLB's arguments sound in a form of public policy but today can also be recognized as an early form of the rule of reason defense in antitrust cases. Recall that Section 1 of the Sherman Act prohibits "every contract, combination . . . or conspiracy [ ] in restraint of trade."[58] In its seminal 1911 case breaking up the Standard Oil monopoly, the Supreme Court subsequently clarified that only "unreasonable" restraints are illegal.[59]

As is discussed in more detail in Part II, certain practices — such as price fixing, market division, or group boycotts — are considered so pernicious and without any procompetitive justification that they are *per se* illegal, to which there can be no defense.[60] Nevertheless, as discussed in Part II, courts have avoided finding certain practices in the sports industry to be *per se* illegal.

Instead, to assess what is reasonable, courts considering Section 1 cases today (sports and otherwise) generally apply the "rule of reason," a three-step, burden-shifting framework that provides as follows: (1) the plaintiff must first show that the challenged restraint has a substantial anticompetitive effect; (2) if the plaintiff carries that burden, the defendant must show a procompetitive rationale for the restraint; and, (3) if the defendant satisfies its burden, the plaintiff must show that the procompetitive benefits can be achieved through less restrictive means.[61]

MLB's arguments in *Federal Baseball* were effectively seeking to establish the second element of the analysis: that the reserve clause served procompetitive purposes. As discussed above, MLB argued that it could not operate without the reserve clause — that permitting players to freely negotiate their place of employment and compensation would be financially ruinous and spell the league's doom, to the detriment of the adoring public. As articulated by Baltimore, "[i]t is asserted that their gigantic business cannot be carried on except in the way they have conducted it," "that defendants in error cannot attain their own selfish objects without creating a monopoly, and therefore the law should not be held to condemn this monopoly."[62]

Baltimore strenuously rejected MLB's defenses and emphasized that there was no evidentiary support for them in the record:

---

[57] *Id.* at 72.
[58] 15 U.S.C. § 1.
[59] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 87 (1911).
[60] White Motor Co. v. United States, 372 U.S. 253, 259, 262 (1963).
[61] *See* NCAA v. Alston, 141 S. Ct. 2141, 2160 (2021).
[62] Federal Baseball Brief, *supra* note 12, at 162.

> [T]here is not a word in the National Agreement or the Rules and Regulations enacted in pursuance thereof regarding the World's Series. And the contention, we submit with great respect, is not worthy to be taken seriously that the huge combination known as Organized Baseball, with all of its devices for controlling completely the business of baseball and excluding the possibility of all competition therein, can be justified because of the custom of playing a few games of baseball at the end of each season between the pennant-winners of two of those leagues. There is not a line of testimony to support such a contention and it is obviously repugnant to reason. Simply because it is not claimed by plaintiff in error that the playing of the few games of the World's Series, taken by themselves, do not constitute anything illegal, affords no basis for the argument of defendants in error that freedom from wrongdoing with reference to this simple detail of their business furnishes immunity from responsibility for a long series of other illegal acts.

It will be observed that defendants in error see by emphatic assertion and reiteration to establish an identity between their business as they have organized it and the public interest in the sport of baseball. They would have it appear that any interference with any of the practices by which they have controlled for their own great profit the purely business side of the enterprise will affect injuriously the interests of the public in the sport of baseball. There is, however, no shadow of support for such a view, even assuming it to be relevant to the issues of the case. Every fact in the Record establishes that the purging of this business of the sordid interests and motives of those who have heretofore by a succession of palpably illegal practices obtained control over it, will in the end operate most advantageously for the public and everyone connected either in a business way or otherwise with the same.[63]

Despite the fact that the parties used meaningful portions of their enormous briefs to make these arguments, the Supreme Court did not address them. The Supreme Court's three-page opinion focused exclusively on the issue of whether MLB was engaged in interstate commerce and, agreeing with the Court of Appeals that it was not, found it "unnecessary to consider other serious difficulties in the way of the plaintiff's recovery."[64]

Thus was born MLB's exemption from antitrust law, leaving the reasonableness of the reserve clause to be revisited in future litigation.

---

[63] Supplement to Brief for Plaintiff in Error, at 3–4, Fed. Baseball Club of Baltimore v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200 (Apr. 11, 1922) (No. 204).

[64] *Fed. Baseball Club of Baltimore,* 259 U.S. at 208.

b. Toolson (1953)

In 1949, George Toolson was a minor league pitcher for the Newark Bears, a class AAA minor league baseball team owned and controlled by the New York Yankees.[65] Toolson finished the 1949 season with a 5-5 record and a 4.74 ERA.[66] The Yankees then reassigned Toolson to its class A team in Binghamton, but Toolson refused to report to the club.[67] The National Association of Professional Baseball Leagues, a consortium of the minor leagues,[68] consequently placed Toolson on the ineligible list, effectively blacklisting him from future employment in baseball.[69]

Toolson brought a lawsuit that raised the same arguments made by Baltimore in *Federal Baseball*: that the rules enacted by MLB and its clubs — particularly including the reserve clause — restrained commerce and monopolized professional baseball in violation of the Sherman Act.[70] The United States District Court for the Southern District of California quickly dismissed the case, citing *Federal Baseball* as controlling and noting that the decision had been cited approvingly on multiple occasions by the Supreme Court, Circuit Courts of Appeal, and District Courts.[71] Yet, in one of those cases, Judge Jerome Frank of the Second Circuit, did opine (in *dicta*) that MLB was engaged in interstate commerce and otherwise criticized the reserve clause.[72] Nevertheless, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's dismissal of Toolson's case in one sentence.[73]

Contemporaneous with Toolson's lawsuit, in 1951, the House Antitrust Subcommittee held hearings on baseball's exemption from the antitrust laws.[74] As summarized by the Yale Law Journal in 1953, MLB argued

---

[65] Petitioner's Opening Brief on Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit at 10, Toolson v. N.Y. Yankees, 346 U.S. 356 (Sept. 16, 1953) (No. 18) [hereinafter Toolson Opening Brief].

[66] *George Toolson*, Baseball Reference, https://www.baseball-reference.com/register/player.fcgi?id=toolso001geo (last visited Jan. 3, 2023).

[67] Toolson Opening Brief, *supra* note 65, at 10.

[68] *See id.* at 4 ("Every Minor League is a member of the Defendant National Association of Professional Baseball Leagues.").

[69] *Id.* at 10.

[70] *Id.* at 5–6.

[71] Toolson v. N.Y. Yankees, 101 F. Supp. 93, 93–95 (S.D. Cal. 1951).

[72] Gardella v. Chandler, 172 F.2d 402, 403, 409–15 (2d Cir. 1949).

[73] Toolson v. N.Y. Yankees, 200 F.2d 198, 199 (9th Cir. 1952).

[74] J. Gordon Hylton, *Why Baseball's Antitrust Exemption Still Survives*, 9 Marq. Sports L. J. 391, 396 (1999); *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 Yale L. J. 576, 578 (1953).

during those hearings "that baseball, like other team sports, faces problems unique in the realm of business; that the sport demands restraints on economic competition if it is to survive as an amusement industry; and implicitly that the industry merits special consideration under the antitrust laws."[75] Consequently "friends of the sport in both the Senate and House of Representatives proposed bills" reaffirming baseball's antitrust exemption and extending it to other sports.[76] No legislation was ultimately passed,[77] leaving it once again up to the Supreme Court to determine the applicability of the antitrust laws to sports.

The Supreme Court first did so by granting Toolson's petition to hear the case.[78] In his petition, he explained that "[t]hose in control of professional baseball assert that the great American pastime cannot continue" if his lawsuit was successful.[79] He elaborated on this point in his opening brief: "It is argued that baseball requires special consideration under the Anti-Trust Laws, because such a team sport cannot exist in completely free economic competition."[80]

In its opening brief, MLB made the argument, which still holds today, for why competition between sports teams is different than competition between businesses:

> The finest baseball club in the world is valueless as either a sporting or financial proposition unless it has other clubs of approximately equal playing ability with which to compete. Two or three clubs are insufficient. The public would soon tire of seeing only two or three clubs playing each other and would cease patronizing their games.
>
> Hence the necessity of at least six to eight clubs grouped together in a league, and those dubs must be as nearly equally balanced as possible. If the games or pennant race become too one-sided, public interest is lost.
>
> Each club is almost as interested in the financial success of the others in the league as it is in its own success. For instance, it would be only a temporary advantage to Los Angeles and San Francisco if they operated in

---

[75] *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L. J. 576, 614 (1953).

[76] *Id.* at 630.

[77] *Id.*

[78] The Court also agreed to hear two other cases challenging MLB's antitrust exemption: *Kowalski v. Chandler*, 202 F.2d 413 (6th Cir. 1953) and *Corbett v. Chandler*, 202 F.2d 428 (6th Cir. 1953).

[79] Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit and Brief in Support Thereof at 13, Toolson v. N.Y. Yankees, 346 U.S. 356 (Mar. 7, 1953) (No. 647).

[80] Toolson Opening Brief, *supra* note 65, at 44.

> the black and all the other clubs in the Pacific Coast League operated in the red. The losers would soon cease to function. San Francisco and Los Angeles would have no one else with whom to play.[81]

MLB went on to argue that the reserve clause was an essential element of this intra-league system of cooperation and mutual interest, arguing that "the reserve clause and player regulations cannot be considered apart from the unique nature of baseball."[82] While MLB acknowledged that "[i]t would probably be an overstatement to assert that if the *Federal Baseball* case were reversed there would be no more professional baseball," it argued that doing so "would undoubtedly result in the wrecking of the present organization of the game."[83]

Putting aside some of the hyperbole, some of MLB's arguments have proven correct. For example, MLB foresaw that large market teams, *e.g.,* the Yankees and Dodgers, would try to sign many of the game's best players with lucrative contracts:

> To excite public interest the baseball game must be a reasonably equal contest and uncertain as to result. This competition on the field can not be maintained if a club is free to induce a Ted Williams, a Stan Musial, and a Roy Campanella to change clubs and thus to build up an overwhelming player superiority.
>
> If at the end of any playing season the players of each club were free to negotiate with any other club in the same or another league, it takes little imagination to foresee that a few of the wealthier clubs would absorb all the star talent, thus unbalancing the playing talent of their own and all other leagues.[84]

Nevertheless, MLB never envisioned that such concerns could be addressed through a collective bargaining agreement with its players.

As in *Federal Baseball*, MLB's arguments in *Toolson* sounded in the second element of the rule of reason analysis, arguing procompetitive justifications for the restraints. The Boston Red Sox submitted an amicus curiae brief to the Supreme Court furthering these arguments:

> No realistic appraisal can fail to disclose that unbridled competition as applied to baseball would not be in the public interest. The element that must predominate in the game is competition on the playing field and not

---

[81] Brief for Respondents at 56, Toolson v. N.Y. Yankees, 346 U.S. 356 (Oct. 2, 1953) (No. 18).

[82] *Id.* at 57.

[83] *Id.* at 66–67.

[84] *Id.* at 66.

> in the market place. Actual experience has shown that this is so, for on earlier occasions the Leagues have for brief periods indulged in unrestricted competition. This did not improve conditions, but instead had the opposite effect and produced what was described at the time as "'disgusting' revelations of the seamy side of base ball through the contract-juggling tactics of magnates and players, their wrangles in court and press, and their apparent determination to defeat each other regardless of the cost to the game — a pitiless exposition of the commercialism of professional base ball which has driven hundreds of thousands of patrons away from the game and to other sports, all of which are now flourishing as never before, while the greatest sport of all, base ball, is languishing."[85]

The Red Sox closed their brief by claiming the "unique and anomalous characteristic of the baseball enterprise" and arguing that the Supreme Court should not disturb *Federal Baseball* given its age and that Congress had not addressed the decision.[86]

Indeed, MLB had made this argument in its brief as well, declaring that "where, as here, the precise question was unanimously decided by this Court more than thirty years ago and all of the business interests and practices of those engaged in giving professional baseball exhibitions have been carried on in reliance upon that decision, the remedy, if it be needed, should be left to and formulated by Congress."[87]

In a single page opinion, the Supreme Court ruled 7-2 in favor of MLB, affirming the lower courts' decisions.[88] Notably, however, the Supreme Court did not address any of MLB's procompetitive or policy arguments. Nor did the Court opine on whether MLB was engaged in interstate commerce. Instead, the Supreme Court relied entirely on the argument that addressing this issue was now up to Congress:

> Congress has had the [*Federal Baseball*] ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if

---

[85] Brief for Boston American League Base Ball Company as Amicus Curiae at 14–15, Toolson v. N.Y. Yankees, 346 U.S. 356 (Sept. 30, 1953) (No. 18) (quoting Francis C. Richter, *The 1915 Base Ball Season,* REACH OFFICIAL AMERICAN LEAGUE BASE BALL GUIDE, 1916, at 10).

[86] *Id.* at 16.

[87] Brief for Respondents at 64, Toolson v. N.Y. Yankees, 346 U.S. 356 (Oct. 2, 1953) (No. 18).

[88] *Toolson*, 346 U.S. at 356.

> there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.[89]

While MLB once again emerged victorious, it had not achieved the victory it wanted. Despite hundreds of pages of briefing on the issue, in neither *Federal Baseball* nor *Toolson* did the Supreme Court endorse MLB's argument that the reserve clause was so essential to the game, and the public's interest in the game, that it merited exemption from the antitrust laws. Because this remained a live issue, future litigation was perhaps inevitable.

c. Flood (1972)

Judge Irving Cooper of the United States District Court for the Southern District of New York provided a useful introduction to the Curt Flood case:

> On October 8, 1969, Curtis C. Flood, then a major league professional baseball player for the St. Louis Cardinals, was "traded," his contract transferred and assigned to another National League baseball club, the Philadelphia Phillies, as part of a multi-player transaction between the two clubs. At the time of the trade he was thirty-two years old, a veteran of twelve years service with the Cardinals, co-captain of the team, and acknowledged to be a player of exceptional and proven baseball ability. Unhappy and disappointed, Flood was unwilling to play for Philadelphia, but forbidden by his contract and the rules of organized professional baseball from negotiating with any other ball club.
>
> He initiated this action on January 16, 1970 against the twenty-four major league clubs comprising the American and National Leagues of organized baseball, their respective Presidents, and against the Commissioner of Baseball asserting in four separate causes of action that baseball's "reserve system" is unlawful. Briefly stated, the reserve system, commonly referred to as the "reserve clause," consists of a number of baseball rules, regulations and uniform contract terms which together operate to bind a player to a ball club and restrict him to negotiating with that club only.[90]

Judge Cooper denied Flood's motion for a preliminary injunction declaring him a free agent, or, "alternatively permitting him to remain as a player for St. Louis pending a final determination of the merits . . . on the grounds that it would disturb the status quo."[91] The Court did, however, grant Flood's request for an early trial, held from May 19 to June 10,

---

[89] *Id.*

[90] Flood v. Kuhn, 316 F. Supp. 271, 272 (S.D.N.Y. 1970) *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

[91] *Id.* at 273.

1970.[92] Consequently, as Judge Cooper put it, "[f]or the first time in almost fifty years opponents and proponents of the baseball reserve system. . . had to make their case on the merits and support it with proof in a court of law."[93]

On that point, for the first time, a court expressed support, albeit qualified, for MLB's arguments that the reserve clause had procompetitive benefits, stating:

> Clearly the preponderance of credible proof does not favor elimination of the reserve clause. With the sole exception of plaintiff himself, it shows that even plaintiff's witnesses do not contend that it is wholly undesirable; in fact they regard substantial portions meritorious. It lends support to our view, expressed at another point in this opinion, that arbitration or negotiation would extract such troublesome fault as may exist in the present system and, preserving its necessary features, fashion the reserve clause so as to satisfy all parties.[94]

Despite substantially agreeing with MLB's long-held position, the Court nonetheless held that "[e]xisting and, as we see it, controlling law renders unnecessary any determination as to the fairness or reasonableness of this reserve system."[95] The Court explained that "[s]ince baseball remains exempt from the antitrust laws unless and until the Supreme Court or Congress holds to the contrary, we have no basis for proceeding to the underlying question of whether baseball's reserve system would or would not be deemed reasonable if it were in fact subject to antitrust regulation."[96] The Court's decision, and deference to *Federal Baseball* and *Toolson*, is not surprising, and, in fact, was correct as a matter of law.

The Second Circuit easily dispatched of Flood's appeal, declaring itself "compelled" to do so based on prior precedent.[97] The court's opinion was sympathetic to Flood's "frustrating predicament"[98] and reiterated its past criticism of *Federal Baseball*, particularly salient since the Supreme Court had held that the NFL was subject to antitrust law in 1957:

> We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinc-

---

[92] *Id.*
[93] *Id.* at 284.
[94] *Id.* at 276.
[95] *Id.* at 284.
[96] *Id.* at 278.
[97] Flood v. Kuhn, 443 F.2d 264, 265 (2d Cir. 1971).
[98] *Id.* at 268.

> tion between baseball and other professional sports is "unrealistic," "inconsistent" and "illogical." *Radovich v. National Football League,* 352 U.S. 445, 452, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957). . . . However, . . . we continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom. While we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled, we are not at all certain the Court is ready to give them a happy despatch [sic].[99]

In deferring to precedent, the Second Circuit side-stepped MLB's arguments on the merits. Nevertheless, Judge Leonard P. Moore penned a concurring opinion far more sympathetic. Judge Moore began his opinion with a nostalgic description of the history of the sport and its best players to, in his words, "put in proper perspective the Supreme Court decision" in *Federal Baseball*.[100] In Judge Moore's view, "the history of organized professional baseball over the last 50 years. . . has shown without Court interference remarkable stability under self-discipline. . .. If baseball is to be damaged by statutory regulation, let the congressman face his constituents the next November and also face the consequences of his baseball voting record."[101] Consequently, and in contradiction of what the other judges on the Second Circuit had previously stated, Moore declared "the soundness of *Federal Baseball* and *Toolson*" "without any reservations or doubts."[102]

The Supreme Court agreed to hear Flood's case and in its brief to the Court, MLB laid out four arguments as to why, in its opinion, the reserve clause was necessary: (a) the need to maintain balanced competition; (b) the preservation of integrity and public confidence; (c) the high costs of player development; and (d) the benefits from economic stability.[103] The claims tracked those MLB had been making for more than fifty years, including that "the reserve system has provided to the public continuously stimulating competition to a degree that would have been impossible without it."[104] MLB once again argued that the reserve clause was essential to the public confidence in the game, and that without it, "baseball would certainly

---

[99] *Id.* at 266 (quoting Salerno v. American League, 429 F.2d 1003, 1005 (2d Cir. 1970)).

[100] *Id.* at 268–70.

[101] *Id.* at 272.

[102] *Id.*

[103] Brief for Respondents at 6-12, Flood v. Kuhn, 407 U.S. 258 (Jan. 31, 1972) (No. 71-32).

[104] *Id.* at 8 n*.

fail."[105] In sum, "[t]he importance of the reserve system to baseball — all of baseball — cannot be seriously challenged."[106]

Publicly, club owners were saying the same thing. Calvin Griffith, the then owner of the Minnesota Twins described the reserve clause as "the salvation of our sport. Without it, we can't protect our players, there will be no competition."[107] Elaborating, Griffith said "[e]limination of the reserve clause would destroy our balance. . . . The rich would be domineering."[108]

Flood responded dramatically:

> The reserve clause is an indentured servitude that works upon all professional baseball players through a worldwide blacklist and group boycott. Until this Court brings it within the purposes of the Thirteenth Amendment, which freed Americans from bondage, and the Sherman Act, the charter of our economic liberties, it will continue to be a blight upon our national sport. . . .[109]

> It is time to abolish the anomaly that prevents the most skilled of their profession from offering their skills in a reasonably free market. The Court should reverse the decision below and remand for proceedings not inconsistent with its decision.[110]

The Supreme Court ultimately affirmed the lower courts' decisions and reestablished MLB's exemption from antitrust laws.[111] The Court did declare that "[p]rofessional baseball is a business and it is engaged in interstate commerce" and that consequently, "[w]ith its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball."[112] Nevertheless, in light of the fact that "since 1922, baseball, with full and continuing congressional awareness, has been allowed to develop and expand unhindered by federal legislative action," and "the confusion and retroactivity problems that inevitability

---

[105] *Id.* at 8.
[106] *Id.* at 12.
[107] *Lament by Griffith: Rich Teams to Rule if Flood's Suit Wins*, N.Y. TIMES, Oct. 20, 1971, at 57.
[108] *Id.*
[109] Petitioner's Reply Brief at 17, Flood v. Kuhn, 407 U.S. 258 (Feb. 25, 1972) (No. 71-32).
[110] *Id.* at 18.
[111] *See* Flood v. Kuhn, 407 U.S. 258, 285 (1972).
[112] *Id.* at 282.

would result with a judicial overturning of *Federal Baseball*,"[113] "the remedy, if any is indicated, is for congressional, and not judicial, action."[114]

Notably, in deciding the case on *stare decisis* grounds, the Supreme Court did not engage with MLB's arguments in favor of the reserve clause.

MLB's exemption from antitrust law would last untouched until 1998. That year, Congress passed the Curt Flood Act, which provided that:

> the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce.[115]

The law though did not repeal (but also did not codify) baseball's antitrust exemption for matters unrelated to the employment of major league baseball players, such as the operation of minor league baseball.[116] The continuance of that exemption is currently the subject of litigation.[117]

d. Kansas City Royals Baseball Corp. (1976)

Unable to dismantle the reserve clause under antitrust law, MLB players changed legal tactics, seeking to instead challenge the reserve clause under contract law. The relevant facts are as follows:

> For the 1974 season, John A. Messersmith signed a Uniform Player's Contract with the Los Angeles Dodgers, and David A. McNally signed a Uniform Player's Contract with the Montreal Expos. Neither one of those players were able to come to agreement with their respective clubs on contract terms for the 1975 baseball season. As a result, pursuant to paragraph 10(a) of the Uniform Player's Contracts of each player, the respective clubs renewed those contracts for the 1975 baseball season. Neither Mr. Messersmith nor Mr. McNally ever signed a Uniform Player's Contract for the 1975 season, but played for their Clubs under the terms of the 1974

---

[113] *Id.* at 283.

[114] *Id.* at 285.

[115] 15 U.S.C. § 26b(a).

[116] 15 U.S.C. § 26b(b).

[117] *See* Nostalgic Partners, LLC v. Office of Commissioner of Baseball, No. 21-cv-10876, 2022 WL 14963876 (S.D.N.Y. Oct. 26, 2022) (granting motion to dismiss antitrust claim brought by former minor league baseball clubs and discussing possibility of review by Supreme Court).

> Contracts, as those contracts had been renewed by the Clubs pursuant to paragraph 10(a).[118]

At the conclusion of the 1975 season, the Major League Baseball Players Association (MLBPA) initiated grievances on behalf of the players,[119] "assert[ing] that there was no longer any relation between the respective Clubs and the Players involved, for the reason that the renewal year [under the reserve clause] had expired" and "as such the individual players were free to negotiate for employment with any Major League Baseball Club, and each Major Baseball Club was free to negotiate with them."[120]

A panel of three arbitrators, in a 2-1 vote, agreed with the players and granted them their requested relief.[121] Before the arbitration hearing took place, MLB and its clubs initiated a lawsuit in a Missouri federal court and sought an injunction, arguing that the issues were not subject to arbitration.[122] The lawsuit was stayed pending the outcome of the arbitration, as the parties stipulated that the arbitration panel could determine whether it had jurisdiction over the dispute,[123] which it ultimately did.[124]

MLB and its owners were outraged by the arbitration decision. Commissioner Bowie Kuhn responded as follows:

> I am enormously disturbed by this arbitration decision. It is just inconceivable that after nearly 100 years of developing this system for the overall good of the game, it should be obliterated in this way. It is certainly desirable that the decision should be given a thorough judicial review.[125]

---

[118] Brief of Appellee Major League Baseball Players Ass'n at 2-3, Kansas City Royals Baseball Corp. v. MLB Players Ass'n, 532 F.2d 615 (8th Cir. Feb. 20, 1976) (No. 76-1115).

[119] The grievances were brought pursuant to the MLB-MLBPA CBA, agreed upon in 1973. *Id.* at 3.

[120] *Id.*

[121] Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 409 F. Supp. 233, 260-61 (W.D. Mo. 1976) (providing arbitration decision in full); Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615, 619 n.3 (8th Cir. 1976) ("The arbitration panel's decision was written by Peter Seitz, the impartial chairman. Marvin Miller, the Players Association's representative, concurred. John Gaherin, the Club Owners' representative, dissented.").

[122] *Kansas City Royals Baseball Corp.*, 532 F.2d at 619.

[123] *Id.*

[124] *See Kansas City Royals Baseball Corp.*, 409 F. Supp. at 260-61 (quoting arbitration decision in which arbitration panel found the grievances to be "within the scope of the provisions of Article X of the Basic Agreement; and, accordingly are within the duty and the power of the Arbitration Panel to arbitrate.")

[125] Joseph Durso, *Arbitrator Frees 2 Baseball Stars*, N.Y. TIMES, Dec. 24, 1975, at 1.

Similarly, Lee MacPhail, then President of the American League, and Charles Feeney, then President of the National League, said "[t]he decision attacks a fundamental principle which has proved to be the keystone of competitive balance and integrity in professional baseball."[126]

After the arbitration decision, the parties restarted the litigation with MLB requesting the court to vacate the arbitration decision and the MLBPA requesting the court to enforce the arbitration decision.[127] The district court ruled in favor of the players and ordered MLB and its clubs to comply with the arbitration award.[128] In so doing, the court noted derisively that MLB refers to the reserve clause "as the 'core,' or 'heart,' or 'guts' of 'Baseball's career-long player control mechanism,' whatever those words might mean."[129]

MLB appealed to the Eighth Circuit. The principal issue on appeal was whether the parties had agreed to arbitrate grievances such as those brought on behalf of Messersmith and McNally.[130] While MLB's brief focused on this issue,[131] the Eighth Circuit noted that the parties "agree that some form of a reserve system is needed if the integrity of the game is to be preserved and if public confidence in baseball is to be maintained."[132] Nevertheless, the Eighth Circuit determined that the "panel's award drew its essence from the collective bargaining agreement, and that the relief fashioned by the District Court was appropriate."[133]

The *Kansas City Royals* decision marked a historic turning point in baseball labor relations. Within months of the Eighth Circuit's decision, MLB and the MLBPA reached a new collective bargaining agreement which, for the first time ever, provided players with free agency.[134] That agreement granted players the right to be free agents after six years of service,[135] the same rule that is in place today.[136]

---

[126] *Id.*

[127] *Kansas City Royals Baseball Corp.*, 532 F.2d at 619.

[128] *Kansas City Royals Baseball Corp.*, 409 F. Supp. at 261.

[129] *Id.* at 245.

[130] *Kansas City Royals Baseball Corp.*, 532 F.2d at 620.

[131] *See* Appellants' Brief, *Kansas City Royals Baseball Corp.*, 532 F.2d 615 (8th Cir. Feb. 20, 1976) (No. 76-1115).

[132] *Kansas City Royals Baseball Corp.*, 532 F.2d at 632.

[133] *Id.*

[134] GLENN M. WONG, ESSENTIALS OF SPORTS LAW, 4th ed., Ex. 11.4 (Praeger 2010).

[135] *Id.*

[136] *See* MLB-MLBPA Basic Agreement 2017-2021, Section XX(B)(1), available at https://www.mlbplayers.com/cba ("Following the completion of the term of his Uniform Player's Contract, any Player with 6 or more years of Major League service

e. Radovich (1957)

Outside of MLB, the NFL faced a legal threat to its reserve clause in a lawsuit brought by William Radovich. Radovich played for the Detroit Lions of the NFL from 1938-41 and again in 1945, after serving in World War II.[137] In 1946, he requested the Lions to trade him to the Los Angeles Rams so he could be closer to his ill father.[138] When the Lions refused, Radovich signed with the Los Angeles Dons, a club with the All-America Conference, a short-lived competitor to the NFL.[139] Radovich played with the Dons in 1946 and 1947 before trying to sign as a player-coach with the San Francisco Clippers of the Pacific Coast League.[140] At the time, the Pacific Coast League was affiliated with the NFL.[141] The NFL informed the Clippers that Radovich was blacklisted for having broken his contract (and its reserve clause) with the Lions and that any club that signed him would suffer severe penalties.[142] The Clippers consequently did not sign Radovich.[143]

Radovich sued, alleging that the NFL, its member clubs, the Pacific Coast League, and the Clippers, had entered into an illegal "conspiracy to monopolize and control organized professional football in the United States."[144] In response, the NFL made some of the same arguments MLB had made in its prior cases. As summarized by the Ninth Circuit, according to the NFL, "the business of professional football is dependent on having teams of reasonably comparable strength. The reserve clause which keeps players from being free agents prevents the players from going into the market place seeking annual bidders. Prevention of this tends to prevent the strong from becoming stronger and the weak weaker."[145]

The United States District Court for the Northern District of California dismissed the case[146] (for which there appears not to have been a written opinion). The Ninth Circuit affirmed the dismissal.[147] In so doing, the

---

who has not executed a contract for the next succeeding season shall become a free agent").

[137] Radovich v. NFL, 231 F.2d 620, 621 (9th Cir. 1956).

[138] Radovich v. NFL, 352 U.S. 445, 448 (1957).

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.* at 446.

[145] Radovich v. NFL, 231 F.2d 620, 622 (9th Cir. 1956).

[146] *See id.* at 622 ("the complaint was dismissed by the district judge").

[147] *Id.* at 620.

Ninth Circuit briefly engaged with the NFL's antitrust defense, stating that "we doubt that the alleged means, restraint by the reserve clause and its enforcement, is legally sufficient to support, without more, a conclusion that these means were calculated to prejudice the public or unreasonably restrain interstate commerce."[148] Nevertheless, the decision was primarily based on *Toolson*.[149] The Ninth Circuit explained that "it appears reasonable for us to assume that if Congressional indulgence extended to and saved baseball from regulation, then the indulgence extended to other team sports."[150]

In October 1956, the Supreme Court agreed to hear the case.[151] In its briefing to the Supreme Court, the NFL reiterated its argument that the reserve clause was integral to the sport:

> It is obvious to the patrons of the sports that the so-called "reserve clause" is essential in order to maintain balance in the player personnel of the various teams and thus assure competition among teams of comparable strength. The device employed is but an option in the player's contract, granting to the club the right of renewal of the agreement for the services of the player. By such device is the public reassured that the player can be interested only in the success of the team to which he is under contract and to which it is likely his future playing days will be devoted. It is an insurance against the bestowal of "favors" upon an opponent team with whom the player may desire future affiliation.[152]

The NFL also did not miss out on a chance to hyperbolically warn the Court of the disastrous results if it were unable to enforce the reserve clause:

> [I]f the teams of the National Football League could not lawfully protect their property rights in their players, by the use of their uniform contract, the League might well be utterly destroyed since nothing but chaos would result to the entire organization, built upon the sanctity of player contracts for thirty-five years.[153]

---

[148] *Id.* at 623.

[149] *See id.* at 622.

[150] *Id.*

[151] Radovich v. NFL, 352 U.S. 818 (1956).

[152] Brief of Respondents NFL, Chicago Cardinals Football Club, Inc., N.Y. Giants Football Club, Inc., Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club in Opposition to Petition for a Writ of Certiorari at 9, *Radovich* 352 U.S. 818 (U.S. June 14, 1956) (No. 94).

[153] Brief for Respondents NFL, Chicago Cardinals Football Club, Inc., N.Y. Giants Football Club, Inc., Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club at 39–40, *Radovich* 352 U.S. 818 (U.S. Dec. 2, 1956) (No. 94).

Principally though, the NFL argued that there was no basis to treat the NFL any differently from MLB and therefore the NFL should be entitled to the same antitrust exemption that MLB had received through *Federal Baseball* and *Toolson*.[154]

The Supreme Court, in a 6-3 decision, was not persuaded. It held that the antitrust exemption was "specifically limit[ed]" to "the business of organized professional baseball."[155] According to the Court, "[I]f this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer" that MLB received its antitrust exemption from a prior Supreme Court case whereas "[n]o other business claiming the coverage of those cases has such an adjudication."[156] The Supreme Court further articulated that "[a]s long as the Congress continues to acquiesce we should adhere to — but not extend — the interpretation of the [Sherman] Act made in those cases."[157]

The Court then reversed the dismissal of Radovich's complaint, but only briefly finding that he had sufficiently stated a claim for relief.[158] The Court did say it found the NFL's "remaining contentions. . . to be lacking in merit,"[159] but which contentions is unclear. More clearly, the Court stated that "We think that Radovich is entitled to an opportunity to prove his charges. Of course, we express no opinion as to whether or not respondents have, in fact, violated the antitrust laws, leaving that determination to the trial court after all the facts are in."[160]

Radovich thus forced the leagues other than MLB to loosen their player restrictions and come up with new legal defenses, as will be discussed below.

f. The Leagues Were Wrong

As is discussed in Parts II and III below, during the 1970s all of the leagues continued to make various claims as to the essentialness of their player restrictions and the calamity that would result if those restrictions

---

[154] *See* Brief of Respondents NFL, Chicago Cardinals Football Club, Inc., N.Y. Giants Football Club, Inc., Chicago Bears Football Club, Inc., Detroit Football Company and Los Angeles Rams Football Club in Opposition to Petition for a Writ of Certiorari at 12, *Radovich* 352 U.S. 818 (No. 94) ("It is inconceivable that a decision upon the basis of the facts set forth in the Toolson complaint would be inapplicable to the facts alleged in the Radovich complaint. The only distinguishing feature is that one sport is called 'baseball' and the other 'football'.").

[155] *Radovich*, 352 U.S. at 451.

[156] *Id.* at 452.

[157] *Id.* at 451.

[158] *Id.* at 453-54.

[159] *Id.* at 454.

[160] *Id.*

were reduced or eliminated. The most hyperbolic claims were made by the NFL in *Mackey*, discussed in Section II.d. As a preview, the NFL argued to the Eighth Circuit that if the Rozelle Rule limiting player movement were eliminated, it would lead to the "destruction" of the NFL, that "many NFL clubs would be bankrupted," and "great public harm would result."[161] In fact, the Rozelle Rule was eventually eliminated, and nothing occurred like that which the NFL warned.

Indeed, the leagues' doomsday prophecies all look quite foolish today. While historical data is generally not available, the current financial situations of each of the leagues demonstrates that they have been extraordinarily lucrative and worthwhile investments. In 2022, the leagues had the following approximate revenue totals: $18 billion (NFL);[162] $11 billion (MLB);[163] $10 billion (NBA);[164] and, $5.2 billion (NHL).[165] Meanwhile, the average franchise was worth $4.14 billion in the NFL,[166] $3 billion in the NBA,[167] $2.31 billion in MLB,[168] and $1 billion in the NHL.[169] Further, teams in

[161] Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976); *see infra* Section II.d.

[162] Kurt Badenhausen, *NFL National Revenue Totals a Record $11 Billion for 2021*, SPORTICO (July 14, 2022), https://www.sportico.com/leagues/football/2022/nfl-national-revenue-2021-1234682461/ [https://perma.cc/ZD3F-KNZ4].

[163] Barry M. Bloom, *MLB Gross Revenue Back to Nearly $11 Billion*, SPORTICO (Oct. 31, 2022), https://www.sportico.com/leagues/baseball/2022/mlb-gross-revenue-to-nearly-11-billion-manfred-says-1234693131/ [https://perma.cc/4X96-B6RH].

[164] Jabari Young, *NBA projects $10 billion in revenue as audiences return after Covid, but TV viewership is a big question*, CNBC (Oct. 18, 2021), https://www.cnbc.com/2021/10/18/nba-2021-2022-season-10-billion-revenue-tv-viewership-rebound.html [https://perma.cc/7KY9-GLL5].

[165] Barry M. Bloom, *NHL Revenues Rebound to $5.2 Billion on TV Deals and a Full Schedule*, SPORTICO (June 16, 2022), https://www.sportico.com/leagues/hockey/2022/nhl-revenues-rebound-to-5-2-billion-on-tv-deals-and-a-full-schedule-1234678974/ [https://perma.cc/N5VV-Y2ZB].

[166] Kurt Badenhausen, *NFL Team Valuations 2022: Cowboys Rule at $7.6B As Average Tops $4B*, SPORTICO (Aug. 1, 2022), https://www.sportico.com/valuations/teams/2022/nfl-team-valuations-2022-cowboys-1234684184/ [https://perma.cc/UU6C-8CS7].

[167] Kurt Badenhausen, *NBA Valuations: Warriors Top $7.6 Billion as Teams Average $3 Billion*, SPORTICO (Dec. 13, 2022), https://www.sportico.com/feature/nba-valuations-average-team-worth-billion-warriors-1234698263/ [https://perma.cc/3BB2-CNNJ].

[168] Kurt Badenhausen, *Yankees Lead MLB Valuations at $7 Billion, Tops Across All Sports*, SPORTICO (Apr. 14, 2022), https://www.sportico.com/valuations/teams/2022/yankees-red-sox-dodgers-mlb-valuations-1234671197/ [https://perma.cc/K43L-VJPV].

the leagues increased by an average of 12 to 19 times their value from 1996 to 2021.[170]

One cannot for certain draw a connection between the loosening of the leagues' rules on players and the substantial financial figures at play today. Nevertheless, it would also not be reasonable to dispute that there is at least some connection. Forcing club owners to compete for players likely also forced them to compete in all areas of the business, including but not limited to sponsorships, broadcasting, tickets, and stadiums. Moreover, clubs compete not just among themselves but also against other forms of entertainment.

Sports leagues and teams have, for the most part, masterfully sourced, developed, and grown revenues in all of these domains. As a result of the players participating in a free market for their services (or relatively free compared to years earlier), the clubs have been forced to create better and more attractive workplaces. In short, over time, the leagues and clubs have developed substantially better products, both on and off-the-field. Such results are one of the goals of antitrust law.[171] The leagues were wrong not only in their legal arguments but also in delaying their embrace of capitalism within sports.

II. The Leagues' Rules Are Not *Per Se* Violations of Antitrust Law

Part I examines arguments by MLB and the NFL that the reserve clause was essential to their operations and consequently should not be disturbed. Also as discussed in that Part, no court ever fully endorsed these views. Consequently, the leagues expanded and honed their defensive arguments. At the same time, antitrust jurisprudence matured, providing fresh angles of scrutiny.

More specifically, in *Federal Baseball, Toolson, Radovich,* and *Flood*, the leagues effectively argued that the reserve clause was reasonably necessary to

---

[169] Kurt Badenhausen, *NHL Valuations 2022: Leafs and Rangers Lead, Average Franchise Worth $1B*, Sportico (Nov. 1, 2022), https://www.sportico.com/valuations/teams/2022/nhl-valuations-2022-leafs-rangers-average-franchise-worth-1234693094/ [https://perma.cc/GQR6-K7PM].

[170] Lev Akabas, *Cowboys Top Valuations, But Warriors and Pats Have Appreciated More: Data Viz*, Sportico (Aug. 11, 2022), https://www.sportico.com/valuations/teams/2022/sports-team-valuations-history-patriots-warriors-1234685476/ [https://perma.cc/TCA4-VMHG].

[171] *See* Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 482–83 (2006) (Breyer, J., concurring in part and dissenting in part) (discussing objectives of antitrust law); Sullivan v. NFL, 34 F.3d 1091, 1096–97 (1st Cir. 1994) (same).

sustain the leagues' operations. Yet in none of those cases did the parties or the courts specifically identify or engage in what we know today as the "rule of reason" analysis under antitrust law.

Juxtaposed with the rule of reason analysis, the Supreme Court held in 1958 that "[t]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[172] These practices are considered "*per se*" violations of antitrust law,[173] *i.e.*, violations "standing alone, without reference to additional facts,"[174] and do not require additional analysis.[175] Price fixing, division of markets, group boycotts, and tying arrangements were identified as *per se* antitrust violations.[176]

In the 1960s and early 1970s, the Supreme Court began to clarify the rule of reason analysis and in what situations it should or should not be used. In 1963 and 1967, the court held that vertical territorial limitations imposed by manufacturers on dealers and distributors were not *per se* violations but instead must be evaluated under the rule of reason.[177] Next, in 1967 and 1968, the court found price fixing schemes in two different cases to be *per se* violations.[178] Then, in 1972, the court held that agreement among competitors to allocate territories was a horizontal restraint and *per se* violation.[179] Finally, in 1973, the court held that a utility company with monopoly power committed a *per se* violation of Section 2 of the Sherman Act by refusing to sell power to existing or proposed systems in various cities and towns.[180]

While some of these cases would be overruled in future Supreme Court decisions,[181] the decisions provided a bevy of new legal considerations for teams and players in their ongoing fights about restrictions on player move-

---

[172] Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

[173] *Id.*

[174] *Per se*, Black's Law Dictionary (11th ed. 2019).

[175] *Northern Pac. Ry. Co.*, 356 U.S. at 5.

[176] *Id.*

[177] United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379-81 (1967); White Motor Co. v. United States, 372 U.S. 253, 261–64 (1963).

[178] *See* Albrecht v. Herald Co., 390 U.S. 145, 152–54 (1968); United States v. Sealy, Inc., 388 U.S. 350, 357–58 (1967).

[179] United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972).

[180] Otter Tail Power Co. v. United States, 410 U.S. 366, 375–81 (1973).

[181] *See* State Oil Co. v. Khan, 522 U.S. 3, 7 (1997) (overruling *Albrecht*, 390 U.S. 145); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58 (1977) (partially overruling *Arnold, Schwinn & Co.*, 388 U.S. 365).

ment, as discussed below. Over time, the courts began to accept that the normal application of antitrust law to the sports industry did not make sense.

a. Haywood (1971)

In 1967, Spencer Haywood graduated from a Detroit high school as an All-American basketball player.[182] In 1968 he led the United States to a gold medal at the Olympics.[183] After one season of college basketball at the University of Detroit, Haywood signed a contract with the Denver Nuggets, then of the competitor American Basketball Association (ABA), in 1969.[184] Haywood was the ABA Rookie of the Year and Most Valuable Player in the 1969–70 season.[185] After a contract dispute with Denver, in December 1970, Haywood signed a six-year contract with the Seattle Supersonics of the NBA.[186] However, at the time, the NBA had a rule that prohibited players from playing in the NBA until at least four years had elapsed since their high school graduation.[187]

In a lawsuit initially brought by Denver in an effort to enforce its contract against Haywood, Haywood crossclaimed against the NBA and its 17 member clubs, alleging the eligibility rule violated Sections 1 and 2 of the Sherman Act.[188] Haywood therefore sought a preliminary injunction against enforcement of the rule.[189]

In response, the NBA argued the eligibility rule and the NBA Draft structure of which it was a part, were essential to the game. As summarized by the court, the NBA argued that "[t]he draft system is designed to maintain the various NBA teams, as nearly as feasible, at roughly equivalent levels of playing ability, so that the games played between league teams shall be as attractive as possible to spectators and others interested in the sport of professional basketball."[190] It is not clear why, in the NBA's view, the four-year component of the eligibility rule was integral to the NBA Draft.

---

[182] Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1052 (C.D. Cal. 1971).
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.* at 1052–54.
[187] *Id.* at 1055.
[188] *Id.* at 1054.
[189] *Id.* at 1052.
[190] *Id.* at 1056.

The court disagreed, finding that the eligibility rule "is a group boycott on the part of the NBA and its teams against otherwise qualified players who come within the terms of said provision, and that it is an arbitrary and unreasonable restraint upon the rights of Haywood and other potential NBA players to contract to play for NBA teams until the happening of an event (*i.e.*, the passage of four years from the graduation of a potential player's high school class) fixed by the NBA without the consent or agreement of such potential player."[191] As a matter of law, the court explained a "group boycott is illegal per se and the reasonableness of it is no defense to its illegality."[192] The court thus enjoined the NBA from enforcing the rule.[193]

Yet, on February 16, 1971, thirteen days after the district court's order, the Ninth Circuit stayed the injunction.[194] The Ninth Circuit's reasoning was only a paragraph long, finding that "on balance the circumstances are such as to call for a stay of injunction pending the National Basketball Association's appeal."[195]

On March 1, 1971, the Supreme Court had the last word. Justice William O. Douglas granted Haywood's application for a stay of the Ninth Circuit's order.[196] In so doing, Douglas reasoned that the district court's decision best preserved the status quo pending final determination of the suit.[197]

Notably, in its memorandum to Justice Douglas, the NBA did not argue that the eligibility rule or the NBA Draft were essential to its business or otherwise legal under antitrust law,[198] even though Haywood and the Sonics argued the opposite in their briefs.[199]

---

[191] *Id.*

[192] *Id.* at 1058.

[193] *Id.* at 1058–59.

[194] Denver Rockets v. All-Pro Mgmt., Inc., 1971 LEXIS 11846 (9th Cir. Feb. 16 1971).

[195] *Id.* at *1.

[196] Haywood v. NBA, 401 U.S. 1204, 1204 (1971).

[197] *Id.* at 1206–07.

[198] *See* Memorandum of the National Basketball Association in Opposition to the Petition of Spencer Haywood, Haywood v. Merrill, 401 U.S. 952 (1971) (No. _____), 1971 U.S. S. Ct. Briefs LEXIS 6 (Feb. 26, 1971).

[199] *See* Statement by Co-Party in Support of Petitioner's Petition for a Writ of Injunction to the United States Court of Appeals for the Ninth Circuit, Haywood v. Merrill, 401 U.S. 952 (1971) (No. _____) 1971 U.S. S. Ct. Briefs LEXIS 5 (Feb. 22, 1971), at ¶ 2 (Sonics incorporating Haywood's arguments into its brief), ¶¶ 5–7 (arguing that NBA's conduct violates antitrust law).

Haywood and the NBA then settled the case, with the NBA agreeing to allow players who were less than four years removed from high school graduation to enter the NBA if they could demonstrate "financial hardship."[200] In 1976, the eligibility rule was removed in its entirety, before a new rule was imposed in 2005, requiring players to be one year removed from high school.[201]

b. Philadelphia World Hockey Club, Inc. (1972)

In 1972, the legal disputes over player rights reached the NHL. That year, a professional hockey player, John McKenzie, and the World Hockey Association ("WHA"), an NHL competitor, sued the NHL alleging that the NHL's version of a reserve clause and other activities violated antitrust law.[202]

The district court found that antitrust law did not apply neatly to the sports industry. Rejecting the WHA's argument that the reserve clause was a *per se* antitrust violation, the court noted that "by the nature of a sports contest, there must always be an adversary."[203] Moreover,

> For maximum customer receptivity and profit it is in the best interest of any club that its opponents not generally be viewed by the public as totally incompetent and utterly unable to compete effectively. For if the latter occurs, thousands of customers will not spend their dollars for tickets to view hundreds of games when the contest seems to present no more of a challenge than an ant confronting an elephant. Thus, if it is not possible to keep the competitive challenge of all teams within some reasonable parameters, some type of intraleague reserve clause or system may be desirable and in fact necessary.[204]

On these grounds, the court declined to find that the reserve clause was a Section 1 violation, deferring a finding on that issue until it could be more fully examined.[205] In support, the court cited the district court's conclusion in *Flood* "that some type of reserve clause system is desirable and essential

---

[200] Christopher R. Deubert, I. Glenn Cohen, & Holly Fernandez Lynch, *Comparing Health-Related Policies and Practices in Sports: The NFL and Other Professional Leagues*, 8 HARV. J. SPORTS & ENT. L. 1, 193 (2017).

[201] *Id.*

[202] Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972).

[203] *Id.* at 503.

[204] *Id.* at 504.

[205] *Id.* at 504.

for the maintenance of a baseball league."[206] The court did not affirmatively discuss the potential application of the rule of reason, but did cite to a Supreme Court case and law review article examining the issue.[207]

Nevertheless, the district court found that the "numerous interlocking agreements NHL has fashioned and shaped over the years to monopolize a hockey player's professional career" were "unreasonable, and in violation of Section 2 of the Sherman Act."[208] Consequently, the district court issued a preliminary injunction enjoining the NHL and its member clubs from enforcing the reserve clause.[209]

In response, the NHL "replac[e]d the perpetual reserve clause with a one year option clause in the standard player's contracts."[210] This system was replaced with a Rozelle Rule-like free agency/compensation system[211] as part of a collective bargaining agreed to in 1976.[212] This new rule would be challenged in *McCourt*, discussed below in Section III.i.

c. Robertson (1975)

Oscar Robertson is rightly remembered as one of the best players in NBA history. But his impact on the game off the court was perhaps even more profound. In 1964, Robertson helped lead a 21-minute strike in which the players participating in the NBA All-Star Game refused to take the floor until the owners agreed to provide the players with a pension.[213] Consistent with the leadership role, Robertson became President of the players union, the National Basketball Players Association (NBPA).[214]

In the late 1960s, the recently formed ABA provided a meaningful alternative to the NBA, as players were able to negotiate between the two

---

[206] *Id.*

[207] *See id.* at 504 n.28, (citing Silver v. N.Y. Stock Exchange, 373 U.S. 341, 348–49 (1963) and *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486 (1966)).

[208] *Id.* at 508.

[209] *Id.* at 519.

[210] Ian Craig Pulver, *A Face Off Between the National Hockey League and the National Hockey League Players' Association: The Goal a More Competitively Balanced League*, 2 MARQ. SPORTS L. J. 39, 47 (1991).

[211] *See* discussion i*nfra* Section II.d for an explanation of the Rozelle Rule.

[212] Ian Craig Pulver, *A Face Off Between the National Hockey League and the National Hockey League Players' Association: The Goal a More Competitively Balanced League*, 2 MARQ. SPORTS L. J. 39, 47 (1991).

[213] JIM QUINN, DON'T BE AFRAID TO WIN, 6-7 (Radius Book Group 2019).

[214] *Id.* at 26.

leagues for higher salaries.[215] Nevertheless, the financial competition was too much for the two leagues and in 1969 they agreed to merge.[216]

The players, led by Robertson, did not want to see an end to the competition between the leagues and sued to stop the merger.[217] On April 17, 1970, the United States District Court for the Southern District of New York granted the players a temporary restraining order against the merger, finding that "[s]uch a merger raises serious questions as to its legality under Sections 1 and 2 of the Sherman Act."[218] Indeed, the court noted that the "net effect" of the merger "would be to eliminate all competition between them," which would result in "immediate and irreparable injury" to the players.[219]

The case dragged on for years as the NBA and ABA continued to negotiate a potential merger under the oversight of Congress.[220] When no agreement materialized which was acceptable to the players, the case inched forward.[221]

The case was also notable in terms of the counsel. Several attorneys who would go on to be have important careers in sports and the law made their first appearances in such cases. Jim Quinn of Weil, Gotshal & Manges LLP helped represent the players, a role he would inhabit for the next 50 years.[222] Howard Ganz from the law firm now known as Proskauer Rose LLP appeared on behalf of the NBA.[223] Ganz had an illustrious career representing professional sports leagues and teams.[224] Appearing with Ganz from Proskauer were future NBA Commissioner David Stern and Jeff Mishkin, a future attorney at the NBA[225] and long-time leader of the sports law practice at Skadden, Arps, Slate, Meagher & Flom LLP.[226]

---

[215] *Id.* at 22–24.

[216] *Id.* at 23–24.

[217] Robertson v. NBA, 389 F. Supp. 867, 872 (S.D.N.Y. 1975).

[218] Robertson v. NBA, 1970 LEXIS 12039, at *1 (S.D.N.Y. Apr. 17, 1970).

[219] *Id.*

[220] Jim Quinn, Don't Be Afraid to Win, 28–29 (Radius Book Group 2019); *Robertson*, 389 F. Supp. at 873.

[221] *See* Jim Quinn, Don't Be Afraid to Win, 28–48 (Radius Book Group 2019) (discussing the litigation history of the *Robertson* case).

[222] *See generally* Jim Quinn, Don't Be Afraid to Win (Radius Book Group 2019) (discussing Quinn's career in sports and the law).

[223] *Id.* at 31.

[224] *Id.*; *Proskauer Mourns the Passing of Howard Ganz*, Proskauer (Jan. 6, 2021), https://www.proskauer.com/release/proskauer-mourns-the-passing-of-howard-ganz [https://perma.cc/F826-YAKB].

[225] Jim Quinn, Don't Be Afraid to Win, 31 (Radius Book Group 2019).

[226] Michael McCann & Scott Soshnick, *Longtime NBA Lawyer Mishkin Moving to Arbitration After Skadden Arps*, Sportico (Oct. 18, 2021), https://

In February 1975, the court issued a lengthy ruling on a variety of issues. In addition to challenging the merger, the players also alleged that the NBA's reserve clause, uniform contract, college draft, and other policies and practices violated Sections 1 and 2 of the Sherman Act.[227] The court noted that all of these practices "appear to be per se violative of the Sherman Act."[228] However, citing *Flood*, the court noted that

> Some degree of economic cooperation which is inherently anti-competitive may well be essential for the survival of ostensibly competitive professional sports leagues. Without these mechanisms unrestrained price wars for the service of the most proficient players will ensue, or so runs the argument, with the wealthiest teams capturing the top talent and the poorer teams facing demise due to the loss of fans and profit.[229]

While the court did not substantively engage in a rule of reason analysis, it implicitly identified the third element of that analysis — that if the defendant satisfies its burden to show a procompetitive rationale for the restraint, the plaintiff must show that the procompetitive benefits can be achieved through less restrictive means.[230] The court acknowledged that "survival necessitates some restraints," but that does not mean "that insulation from the reach of the antitrust laws must follow. Less drastic protective measures may be the solution."[231] In light of the uncertainty on these issues, the court denied the NBA's motion for summary judgment.

Another significant issue in the court's decision was whether the NBA's practices were protected by the non-statutory labor exemption, which will be addressed below in Section III.d.

The court's decision set the stage for a potential trial. Nevertheless, after approximately 150 depositions in preparation for trial,[232] the parties reached a new collective bargaining agreement which resolved the lawsuit.[233] The players got a form of free agency and $4,365,000 in damages.[234] Separately, the ABA folded and the NBA absorbed four of its clubs.[235]

---

www.sportico.com/law/news/2021/nba-legal-counsel-mishkin-skadden-arps-1234644177/ [https://perma.cc/VGF5-H3DK].

[227] Robertson v. NBA, 389 F. Supp. 867, 873–75 (S.D.N.Y. 1975).

[228] *Id.* at 891.

[229] *Id.* at 892.

[230] *See* NCAA v. Alston, 141 S.Ct. 2141, 2160 (2021).

[231] *Robertson*, 389 F. Supp. at 892.

[232] Jim Quinn, Don't Be Afraid to Win, 37 (Radius Book Group 2019).

[233] *Id.* at 46.

[234] *Id.*

[235] *Id.* at 47.

d. Mackey (1976)

In December 1975, Judge Earl Larson of the United States District Court for the District of Minnesota addressed head on the issues danced around in *Philadelphia World Hockey Club* and *Robertson.* In the case, a class of current players, led by John Mackey, a Pro Bowl tight end and President of the National Football League Players Association (NFLPA), alleged that the NFL's "Rozelle Rule," in conjunction with the NFL's reserve clause, constituted a *per se* violation of the antitrust laws.[236] The Rozelle Rule, named for NFL Commissioner Pete Rozelle, was a unilaterally imposed rule whereby players could sign with other teams upon the expiration of the contract, but the Commissioner could award players to the club which the player left.[237] The Rule had a chilling effect on player movement, as only four players changed clubs between 1963 and 1973.[238]

After a 55-day trial, the court ruled in the players' favor.[239] The court rejected the NFL's argument that the Rule was not a *per se* violation and therefore needed to be evaluated under the rule of reason.[240] After making a variety of factual findings as to the Rule's restraining effect on player movement and wages, the court declared the "Rule and its related practices constitute a concerted refusal to deal and a group boycott" which is "so clearly contrary to public policy that it is per se illegal."[241]

Despite this finding, the court also examined the rule under the rule of reason.[242] Finding the Rule unreasonably broad in its application and duration, and harmful to players, the court also found the Rozelle Rule to be in violation of antitrust law.[243] In so doing, the court rejected the NFL's argument that the Rule was necessary for competitive balance and found that "[e]limination of the Rozelle Rule would have no significant immediate disruptive effect on professional football."[244] Further, the court stated, "[i]f the effects of this decision prove to be too damaging to professional football, assuming justification existed, Congress could possibly grant special treat-

---

[236] Mackey v. NFL, 407 F. Supp. 1000, 1002–03 (D. Minn. 1975).
[237] *Id.* at 1004.
[238] *Id.* at 1004, 1006–07.
[239] *See* Mackey, 407 F. Supp. at 1000.
[240] *See id.* at 1002 (describing NFL's defense).
[241] *Id.* at 1007.
[242] *Id.* at 1007–08.
[243] *Id.*
[244] *Id.* at 1008.

ment to the National Football League based upon its claimed unique status."[245]

The court also rejected the NFL's argument that the Rule was exempt from antitrust law due to the non-statutory labor exemption, an important issue on appeal which is discussed in Section III.f.

The Eighth Circuit reversed the district court's determination that the Rozelle Rule was *per se* illegal, declaring that the "unusual circumstances" of the NFL "render[ ] it inappropriate to declare the Rozelle Rule illegal per se without undertaking an inquiry into the purported justifications for the Rule."[246] The Eighth Circuit elaborated on this point:

> the NFL assumes some of the characteristics of a joint venture in that each member club has a stake in the success of the other teams. No one club is interested in driving another team out of business, since if the League fails, no one team can survive. Although businessmen cannot wholly evade the antitrust laws by characterizing their operation as a joint venture, we conclude that the unique nature of the business of professional football renders it inappropriate to mechanically apply per se illegality rules here, fashioned in a different context.[247]

In defense of the Rule, the NFL broke out the doomsday arguments:

- Defendants think it fundamentally clear that, without the qualified limitation on NFL player transfer privileges embodied in the Rozelle Rule, the present levels of fan interest in NFL football (and the present levels of club income) could not be maintained, with resultant damage to the interests of fans, cities, municipal stadium authorities, owners, and players alike.[248]

- But if the NFL were compelled to function without player rules capable of preserving team balance, player employment conditions within the NFL would be dramatically altered. Weak teams would lose their more talented players and the more talented players would be attracted to currently winning teams, with their opportunities for postseason money, as well as to cities offering commercial endorsements, greater off-season job opportunities, more attractive climates, and higher payroll potential.[249]

- Witness after witness testified that the elimination of the Rozelle Rule would **destroy** the present levels of competitive balance among the

---

[245] *Id.*

[246] Mackey v. NFL, 543 F.2d 606, 618–19 (8th Cir. 1976).

[247] *Id.* at 619.

[248] Brief for Appellants Twenty-Six Member Clubs of the NFL at 15–16, *Mackey*, 543 F.2d 606 (8th Cir. May 3, 1976) (No. 76-1184).

[249] *Id.* at 28.

> NFL teams, ultimately leading to a deterioration of the League's income potential for players and clubs alike.[250]
>
> - The Rozelle Rule does not prohibit player-initiated transfers within the NFL; rather, it permits such transfers in a fashion which prevents disruptions and playing field distortions and preserves fan interest in the League's games. In defendants' view, plaintiffs' litigation objectives are not only shortsighted, they are directed at the **destruction** of the very employment potential which football presently offers to players.[251]
>
> - Simply stated, the thesis of these witnesses was that, if there were no Rozelle Rule, the problems of competitive balance and club survival could be resolved by moving large numbers of NFL franchises into New York and Los Angeles. This impractical suggestion ignores the problems presented by inadequate stadium facilities, problems of television coverage, dilution of fan support and civic allegiances and adverse social effects. And in the course of such realignment, many NFL clubs would be *bankrupted* and the NFL, in its present "nationalized" sense, would be destroyed.[252]
>
> - [A]s defendants abundantly demonstrated at trial, a victory by plaintiffs in this litigation will, in all probability, result in declining fan interest, smaller team squads, reduced player-job opportunities, the loss of franchises by many NFL cities, the loss of municipal stadium tenants, and the reduction of professional football operations nationally. In short, not public benefit, **but great public harm would result**.[253]

The players responded by calling out the NFL's apocalyptic predictions:

> Defendants' argument as to what would happen if there were no Rozelle Rule abounds with speculation and hyperbole. For example, defendant clubs quote in support of their argument Jim Finks' testimony: ". . . What would you have if all of a sudden a club in our league could go in and sign the Pittsburgh Steelers front four . . ." This is obviously hyperbole. It presupposes all four were free agents at the same time and have not come to contract terms with the Steelers. It assumes each is willing to go elsewhere. It assumes that all are willing to go to this one team. It implicitly assumes that the new team is willing to expend unlimited funds to acquire their services. It assumes the Steelers sit idly by. A host of unstated assumptions are contained in the statement, all of which would have to be

---

[250] *Id.* (emphasis added).
[251] *Id.* at 30 (emphasis added).
[252] *Id.* at 31 (emphasis added) (citation omitted).
[253] *Id.* at 33 (emphasis added).

> true before the hypothetical could become a reality. The defendants' briefs are replete with such conjecture and exaggerated fears.[254]

The Eighth Circuit was not persuaded by the NFL's arguments and affirmed the district court's decision that the Rozelle Rule violated the rule of reason.[255] The court held that:

> the asserted need to recoup player development costs cannot justify the restraints of the Rozelle Rule. That expense is an ordinary cost of doing business and is not peculiar to professional football. Moreover, because of its unlimited duration, the Rozelle Rule is far more restrictive than necessary to fulfill that need.[256]

Additionally, while the court acknowledged that "the NFL has a strong and unique interest in maintaining competitive balance among its teams," it determined that the "Rozelle Rule is significantly more restrictive than necessary to serve any legitimate purposes it might have in this regard."[257]

The NFL petitioned the Supreme Court to review the case, focusing almost entirely on the labor exemption issue,[258] but was denied.[259]

In March 1977, five months after the Eighth Circuit's decision, the NFL and NFLPA agreed to a new collective bargaining agreement that replaced the Rozelle Rule with a process by which clubs had the right of first refusal to their own free agents and agreed upon compensation in the event the club lost the player.[260] That system would be challenged in *Powell*, discussed below in Section IV.b.

e. Kapp (1978)

At the same time current players were seeking to end the Rozelle Rule in *Mackey*, a former player, Joe Kapp, filed suit seeking damages arising out of the Rozelle Rule.[261] Kapp, a quarterback, played for the New England

---

[254] Brief for Appellees at 20-21, Mackey v. NFL, 543 F.2D 606 (8th Cir. June 1, 1976) (No. 76-1184).

[255] *Mackey*, 543 F.2d at 623.

[256] *Id.* at 621.

[257] *Id.* at 621–22.

[258] *See* Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, NFL v. Mackey, 434 U.S. 801 (Jan. 5, 1977) (No. 76-932).

[259] *Mackey*, 434 U.S. 801.

[260] *See* Chris Deubert, Glenn M. Wong, & John Howe, *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League,* 19 UCLA Ent. L. Rev. 1, 8 (2012).

[261] *See* Kapp v. NFL, 390 F. Supp. 73, 75 (N.D. Cal. 1974).

Patriots in 1970 after being traded from the Minnesota Vikings.[262] Kapp and the Patriots were unable to agree to terms for the 1971 season.[263] In his suit, Kapp alleged that the Rozelle Rule and its related regulations prevented him from meaningfully negotiating with other clubs in violation of antitrust law, implying it effectively ended his career.[264]

In a December 1974 decision, the United States District Court for the Northern District of California granted Kapp summary judgment on some of his claims.[265] Citing *Flood* and *Philadelphia World Hockey Club*, the court determined that "the per se rule is inappropriate and inapplicable to sports league activities" given their "unique nature and purpose."[266] Applying the rule of reason test, the court found that the Rozelle Rule,

> imposing restraint virtually unlimited in time and extent, goes far beyond any possible need for fair protection of the interests of the club-employers or the purposes of the NFL and that it imposes upon the player-employees such undue hardship as to be an unreasonable restraint and such a rule is not susceptible of different inferences concerning its reasonableness; it is unreasonable under any legal test and there is no genuine issue about it to require or justify trial.[267]

The court also rejected the NFL's labor exemption argument as discussed below in Section III.g.

Given that the *Kapp* decision was issued almost exactly a year before the district court's decision in *Mackey*, it is surprising that the district court in that case did not cite *Kapp*. On the *Mackey* appeal, the Eighth Circuit did cite *Kapp* in support of its antitrust analysis of the Rozelle Rule.[268] Then, on the *Kapp* appeal, the Ninth Circuit cited the Eighth Circuit's decision in *Mackey* as support for the district court's decision.[269]

Despite that decision, a jury determined that Kapp could not prove that he had been damaged as a result of the Rozelle Rule.[270]

Both parties appealed. In its appeal, the NFL did not go full doomsday, but did continue to argue the necessity of the Rozelle Rule system:

---

[262] *Id.* at 77.
[263] *See id.*
[264] *See id.* at 78.
[265] *Id.* at 86.
[266] *Id.* at 81.
[267] *Id.* at 82.
[268] *See* Mackey v. NFL, 543 F.2d at 616 n.6, 617, 619 (8th Cir. 1976).
[269] *See* Kapp v. NFL, 586 F.2d 644, 646 n.11 (9th Cir. 1978).
[270] *Id.* at 648.

> All these rules are designed to give the weaker NFL teams an opportunity to maintain and improve their playing strength, and to handicap the stronger and better situated teams in achieving positions of dominance. The rules assure, to the extent practicable, an equality of playing field strength among the teams in the League that is essential to make NFL football an entertaining and popular "product." The rules thus serve player and club interests alike.[271]

The Ninth Circuit nonetheless rejected Kapp's argument that the instructions to the jury concerning Kapp's damages were improper,[272] and said it was unnecessary to review the district court's decision concerning the reasonableness of the Rozelle Rule.[273] The Supreme Court denied Kapp's petition for review.[274]

f. Smith (1978)

There was a final, major NFL antitrust case of the 1970s, but this time, the target was the NFL Draft rather than the Rozelle Rule. James McCoy (Yazoo) Smith, an outstanding defensive back at the University of Oregon, was drafted by the Washington Redskins in the first round of the 1968 NFL Draft.[275] Smith signed a one-year contract with the Redskins for a total of $50,000.[276] When a neck injury at the end of the season ended Smith's career, he brought a lawsuit alleging that the NFL Draft prevented him from "negotiat[ing] a contract reflecting the free market or true value of his services" in violation of the antitrust laws.[277]

Smith persuaded the United States District Court for the District of Columbia that the Draft was a *per se* violation of the antitrust laws.[278] The court explained as follows:

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

---

[271] Brief for Appellees and Cross-Appellants NFL, Twenty-Five NFL Member Clubs, Rozelle, and Finks at 23, *Kapp*, 586 F.2d 644 (9th Cir. Mar. 11, 1977)(Nos. 76-2849 & 76-2879).

[272] *See Kapp*, 586 F.2d at 648.

[273] *See id.* at 649–50.

[274] Kapp v. NFL, 441 U.S. 907 (1979).

[275] Smith v. Pro-Football, 420 F.Supp. 738, 740 (D.D.C. 1976).

[276] *See id.*

[277] *Id.* at 740–41.

[278] *Id.* at 744.

> vice which has long been condemned as a per se violation of the antitrust laws.[279]

The court was also dismissive of the NFL's rule of reason arguments. The NFL argued that the Draft was essential for maintaining competitive balance among the clubs.[280] However, the court said "[t]he evidence on these points was at best equivocal."[281] Moreover, the court stated that the NFL was "unable to produce any credible evidence of a significant correlation between the opportunity to draft early in the draft (i.e., the preferred position) and improvement in team performance."[282]

In light of the court's findings, it found that Smith had been damaged in the amount of $92,200, which was trebled to $276,600 pursuant to the Sherman Act.[283]

The Court of Appeals reversed the district court's holding that the NFL Draft was a *per se* violation of antitrust law.[284] The court determined that the *per se* rule is not intended to apply "where, given the peculiar characteristics of an industry, the need for cooperation among participants necessitated some type of concerted refusal to deal, or where the concerted activity manifested no purpose to exclude and in fact worked no exclusion of competitors."[285] Further, the court explained that the Draft "is designed not to insulate the NFL from competition, but to improve the entertainment product by enhancing its teams' competitive equality."[286] Consequently, the Draft should be evaluated under the rule of reason.[287]

Nevertheless, the Court of Appeals affirmed the district court's determination that the Draft constituted an unreasonable restraint of trade because it "virtually eliminates economic competition among buyers for the services of sellers."[288]

The Court of Appeals did, however, remand the case for revised damages calculations.[289] On remand, Smith was determined to have suffered $4,000 in damages, trebled to $12,000.[290]

---

[279] *Id.*
[280] *Id.* at 745.
[281] *Id.* at 746.
[282] *Id.*
[283] *Id.* at 749.
[284] *See* Smith v. Pro Football, 593 F.2d 1173, 1181 (D.C. Cir. 1978).
[285] *Id.* at 1180.
[286] *Id.* at 1179.
[287] *Id.* at 1182.
[288] *Id.* at 1184–85.
[289] *Id.* at 1191.
[290] Smith v. Pro-Football, 528 F. Supp. 1266, 1267 (D.D.C. 1981).

III. The Non-Statutory Labor Exemption Protects The League's Rules

As the cases discussed above show, the 1970s was a particularly litigious decade in American sports history. In all the leagues, players by then had formed unions[291] which were working to find their feet against hostile club owners. Moreover, the established leagues faced competition from upstart leagues that provided the players with options and leverage. Consequently, the players were willing to challenge the leagues and their restraints in court.

The leagues were successful in arguing that due to the unique nature of the sports industry, the application of *per se* antitrust analysis was inappropriate. Nevertheless, the leagues were still faced with the challenge of defending their rules on the merits, of which courts were increasingly skeptical.

The leagues thus turned to a new primary argument — that a judicially created non-statutory labor exemption protected their player restraints from antitrust scrutiny. This argument derived out of cases unrelated to the sports industry, but has come to underpin labor relations in sports.

a. The Development of the Non-Statutory Labor Exemption by the Supreme Court and a Law Student

In 1965, the Supreme Court decided a pair of cases in tandem that would come to have a significant impact on the sports industry.

First, in *Amalgamated Meat Cutters v. Jewel Tea Co.*, ("*Jewel Tea*"),[292] "9,000 Chicago retailers of fresh meat" and seven unions "representing virtually all butchers in the Chicago area" agreed as part of a collective bargaining agreement that no meat would be sold between 9 am and 6 pm.[293] The retailers subsequently requested that this restriction be relaxed, which the butchers refused.[294] The retailers sued, alleging that the rule was a violation of antitrust law.[295]

The Supreme Court ruled for the unions:

---

[291] *See* Christopher R. Deubert, I. Glenn Cohen, & Holly Fernandez Lynch, *Comparing Health-Related Policies and Practices in Sports: The NFL and Other Professional Leagues*, 8 Harv. J. Sports & Ent. L. 1, 30 (2017) (providing dates of formation for each union).

[292] 381 U.S. 676 (1965).

[293] *Id.* at 680.

[294] *See id.* at 680-81.

[295] *See id.* at 681.

> the marketing-hours restriction. . . is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.[296]

In a similar case decided the same day as *Jewel Tea*, *United Mine Workers of America v. Pennington* ("*Pennington*"), the Supreme Court analyzed whether an agreement between the United Mine Workers, a union representing mine workers, and the operators of several mines, which governed the wages and terms and conditions of the miners' employment was exempt from antitrust law:[297]

> We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws and that it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers.[298]

The *Jewel Tea* and *Pennington* cases thus established an exemption from antitrust law grounded in labor law and policy which had not previously existed.

In contrast, as explained in *Pennington*, the 1914 Clayton Act (which amended the Sherman Act), specifically declared that the antitrust laws did not apply to unions "instituted for the purposes of mutual help" of its "individual members."[299] Because this exemption was specifically created by statute, it has since become known as the "statutory labor exemption."[300]

Nevertheless, the Supreme Court in *Pennington* acknowledged that the statutory labor exemption did not address "arrangements or agreements between unions and employers."[301] Therefore, the exemption crafted by the Supreme Court in *Jewel Tea* and *Pennington* became known as the "non-statutory labor exemption."[302] In so doing, the Court declared that it was "concerned. . . with harmonizing the Sherman Act with the national policy expressed in the National Labor Relations Act of promoting 'the peaceful

---

[296] *Id.* at 689-90.

[297] 381 U.S. 657, 669 (1965).

[298] *Id.* at 664.

[299] *See id.* at 661–62; 15 U.S.C. § 17.

[300] *See* Brown v. Pro Football, 518 U.S. 231, 236 (1996) (discussing history of statutory and non-statutory labor exemptions).

[301] *Pennington*, 381 U.S. at 662.

[302] *See Brown*, 518 U.S. at 236 (discussing history of statutory and non-statutory labor exemptions).

settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.'"[303]

At the time of the *Jewel Tea* and *Pennington* decisions, little thought had been given to the application of these cases to the sports industry. That changed in the early 1970s. First, as will be discussed below, MLB cited the cases in the *Flood* proceedings. Second, in 1971, Ralph Winter, then a professor at Yale Law School, and his student and future professor, Michael Jacobs, published an articlein the Yale Law Journal on the issue that would become influential in sports and the law.[304] The article, entitled *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, examined the intersection of antitrust and labor law amid two ongoing legal situations in sports: the *Flood* case (which will be discussed below) and the proposed merger between the NBA and its upstart competitor, the ABA.

The background of the article is interesting. Jacobs began his third year at Yale in the fall of 1970.[305] The *Flood* case had just been decided in the Southern District of New York that summer and was now being briefed on appeal to the Second Circuit.[306] That academic year, Yale held a moot court competition that chose the *Flood* case as its subject.[307] Jacobs had taken antitrust and labor law courses, the latter from Winter, and thus began to formulate an argument that player restraints could not be challenged in court if negotiated with a union.[308] Jacobs won the moot court competition and then approached Winter about turning his work into an article.[309] Winter agreed, added his expert thoughts to Jacobs' work, and the article was published in November 1971,[310] weeks before Flood submitted his opening brief to the Supreme Court.[311]

---

[303] *Pennington*, 381 U.S. at 665 (quoting Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964)).

[304] Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L. J. 1 (1971).

[305] Interview with Michael S. Jacobs, Emeritus Distinguished Professor of Law, DePaul Coll. of Law (Sept. 2, 2022).

[306] *See* Flood v. Kuhn, 316 F. Supp. 271 (S.D.N.Y. 1970) (dated August 12, 1970); Flood v. Kuhn, 443 F.2d 264 (2d Cir. 1971) (listing argument date as January 27, 1971, which would have necessitated briefing during the final months of 1970).

[307] Interview with Michael S. Jacobs, Emeritus Distinguished Professor of Law, DePaul Coll. of Law (Sept. 2, 2022).

[308] *Id.*

[309] *Id.*

[310] *See* Michael S. Jacobs & Ralph K. Winters, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L. J. 1 (1971).

[311] *See* Brief for Petitioner, Flood v. Kuhn, 407 U.S. 258 (1972) (Dec. 17, 1971) (No. 71-32).

In the article, Jacobs and Winter expressed that "the debate over the merits of individual challenges to the reserve clause have taken insufficient account of a recent development with far reaching consequences."[312] The relevant recent development was that "[t]he terms and conditions of employment of professional athletes in baseball, basketball and football are no longer governed solely by individual contracts but have been supplanted in part by collective bargaining between the leagues and player unions."[313] As a result, Jacobs and Winter argued, "national labor policy, rather than antitrust law, is the principal and pre-eminent legal force shaping employment relationships in professional sports."[314] Further, the authors analyzed the *Jewel Tea* and *Pennington* decisions and noted that "[e]ach of these cases involved the antitrust liability, or labor law exemption, of employers as well as unions for activities engaged in as a result of collective bargaining."[315]

In short, Jacobs and Winter argued that what is now known as the non-statutory labor exemption, created in the 1965 Supreme Court cases, should be applied to the sports industry and provide antitrust protection for player restraints created by the leagues and their clubs. In their words, "in those sports where players' unions are recognized," "the reserve or option clause is not properly an antitrust issue *when raised by a player in a unit with an exclusive collective bargaining representative.*"[316] Further, the authors explained that "[c]ollective bargaining seeks to order labor markets through a system of countervailing power. . .. If such a structure is to be protected by law, then logically the antitrust claims between employers and employees must be extinguished."[317] As to the *Flood* case to soon be heard by the Supreme Court, Jacobs and Winter argued that "the defendants have an absolute defense on the merits, grounded in labor law."[318]

After writing the article, Jacobs essentially forgot about it.[319] He clerked in a federal court and then entered private practice at a large law firm.[320] Only when Jacobs eventually sought to become a professor himself, did he learn that the article had been influential in sports and the law,[321] as

---

[312] Michael S. Jacobs & Ralph K. Winters, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L. J. 1, 6 (1971).

[313] *Id.*

[314] *Id.*

[315] *Id.* at 26.

[316] *Id.* at 27 (second emphasis added).

[317] *Id.* at 22.

[318] *Id.* at 29.

[319] Interview with Michael S. Jacobs, Emeritus Distinguished Professor of Law, DePaul Coll. of Law (Sept. 2, 2022).

[320] *Id.*

[321] *Id.*

will be discussed below. Jacobs went on to have a distinguished academic career as a professor at DePaul College of Law, specializing in antitrust law in industries other than sports.[322]

As for Winter, in 1982, he became a Judge of the United States Court of Appeals for the Second Circuit, where he served until 2000.[323] He died in 2020, leaving behind a monumental legal legacy,[324] including some opinions discussed below.

Jacobs said that he never consulted with any of the sports leagues after writing the article (though he turned down a chance to interview with the NFL).[325] Consequently, it seems likely that the leagues developed their non-statutory labor exemption arguments in parallel to Jacobs, a circumstance with which Jacobs agrees.[326] Nevertheless, as will be discussed below, Jacobs' work was prescient in many ways and would be cited as persuasive authority in many of the biggest cases in sports and the law.[327]

b. Flood (1972)

While the *Flood* litigation focused primarily on MLB's antitrust exemption, it was also the first time that a sports league made the non-statu-

[322] *Michael S. Jacobs*, DEPAUL COLL. OF LAW, https://law.depaul.edu/faculty-and-staff/faculty-a-z/Pages/michael-jacobs.aspx [https://perma.cc/3ULJ-L2K6].

[323] Clay Risen, *Ralph K. Winter Jr., a Top Conservative Judicial Mind, Dies at 85*, N.Y. TIMES (Dec. 18, 2020), https://www.nytimes.com/2020/12/18/us/ralph-k-winter-jr-dead.html; *Yale Law School Mourns the Death of Judge Ralph K. Winter '60,* YALE L. SCH. (Dec. 8, 2020), https://law.yale.edu/yls-today/news/yale-law-school-mourns-death-judge-ralph-k-winter-60 [https://perma.cc/YF7H-4BNJ].

[324] Risen, *supra* note 323; *Yale Law School Mourns the Death of Judge Ralph K. Winter '60, supra* note 323.

[325] Interview with Michael S. Jacobs, Emeritus Distinguished Professor of Law, DePaul Coll. of Law (Sept. 2, 2022).

[326] *Id.*

[327] In total, the article has been cited in 15 reported case decisions involving sports and the law, including twice by the Supreme Court. See Brown v. Pro Football, Inc., 116 S.Ct. 2116, 2126 (1996); Flood v. Kuhn, 92 S.Ct. 2099, 2113 (1972); Clarett v. NFL, 369 F.3d 124, 140 (2d Cir. 1996); Wood v. NBA, 809 F.2d 954, 958 (2d Cir. 1987); McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1197 (6th Cir. 1979); White v. NFL, 585 F.3d 1129, 1137 (8th Cir. 2009); Powell v. NFL, 930 F.2d 1293, 1303 (8th Cir. 1989); Kapp v. NFL, 390 F. Supp. 738, 743 (D.D.C. 1976); Clarett v. NFL, 306 F. Supp. 2d 379, 393 (S.D.N.Y. 2004); NBA v. Williams, 857 F. Supp. 1069, 1077 (S.D.N.Y. 1994); Robertson v. NBA, 389 F. Supp. 867, 884 (S.D.N.Y. 1975); Davis v. Pro Basketball, Inc., 381 F. Supp. 1, 5 (S.D.N.Y. 1974); Chuy v. Phila. Eagles, 407 F. Supp. 717, 721 (E.D. Pa. 1976); Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc., 351 F. Supp. 462, 499 (E.D. Pa. 1972).

tory labor exemption argument, or, as MLB called it at the time, the "Labor Antitrust Exemption."[328] MLB argued at the district court that, pursuant to *Jewel Tea*, the reserve clause was exempt from antitrust law because it was a mandatory subject of collective bargaining.[329] By that time, MLB players had formed the MLBPA, and the parties had agreed to a 1966 collective bargaining agreement that addressed a range of issues related to player pay, benefits, and conditions of employment.[330] Nevertheless, the parties had not reached an agreement concerning the reserve clause.[331] The district court consequently expressed "doubt" that the clause was exempt from antitrust law but declared it "need not reach this difficult question" in light of the court's deference to *Toolson*.[332]

The Second Circuited reached the same decision, holding that because it had affirmed the district court's decision based on MLB's antitrust exemption, it was "unnecessary" to consider MLB's argument that "federal labor policy exempts the reserve system" from judicial scrutiny.[333]

MLB renewed the argument before the Supreme Court, arguing that the "reserve clause is fundamentally a labor-management dispute."[334] Moreover, it alleged that the MLBPA's direction of and financial support for *Flood*'s case constituted a "perversion of the antitrust laws."[335] Instead, MLB asserted that "the goal of federal labor policy is the settlement of employer-employee disputes through the process of collective bargaining."[336]

Like the courts before it, the Supreme Court found it "unnecessary" to address MLB's argument.[337] However, in a footnote, the Court cited the Jacobs and Winter article as "suggesting present-day irrelevancy of the antitrust issue,"[338] even though MLB had not cited the article in its brief.

Justice Thurgood Marshall gave the issue greater consideration. In a dissenting opinion joined by Justice William J. Brennan, Justice Marshall argued that *Federal Baseball* and *Toolson* should be overturned.[339] Nevertheless, Justice Marshall acknowledged that even if those cases were overturned,

---

[328] Flood v. Kuhn, 316 F. Supp. 271, 278 (S.D.N.Y. 1970).
[329] *Id.*
[330] *See id.* at 283.
[331] *See id.*
[332] *Id.*
[333] Flood v. Kuhn, 443 F.2d 264, 268 (2d Cir. 1971).
[334] *See* Brief for Respondents, *Flood v. Kuhn*, 407 U.S. 258 (1972) (No. 71-32, 45).
[335] *Id.* at 47.
[336] *Id.*
[337] Flood v. Kuhn, 407 U.S. 258, 285 (1972).
[338] *Id.* at n.22.
[339] Flood v. Kuhn, 407 U.S. 258, 288-93 (1972) (Marshall, J., dissenting).

it would "not mean that [Flood] would necessarily prevail."[340] In summarizing the "interrelationship between the antitrust laws and labor laws," the Justice identified two principles of law: (1) "'benefits to organized labor cannot be utilized as a cat's paw to pull employers' chestnuts out of the antitrust fires'";[341] and (2) "the very nature of a collective-bargaining agreement mandates that the parties be able to 'restrain' trade to a greater degree than management could do unilaterally."[342] Nevertheless, Justice Marshall noted that prior cases had examined "union-management agreements that work to the detriment of management's competitors" while *Flood* concerned a restraint (the reserve system) that "works to the detriment of labor."[343]

Justice Marshall did not believe the issue had been given due consideration. Indeed, he quoted from the Jacobs and Winter article in recognizing that the courts had declined to resolve this issue: "[t]he labor law issues have been in the corners of the case. . . moving in and out of the shadows like an uninvited guest at a party whom one can't decide either to embrace or expel."[344] Consequently, the Justice would have remanded the case for consideration as to whether *Flood* could have stated an antitrust claim "despite the collective-bargaining agreement."[345]

As for his opinions on the matter, Justice Marshall offered that "the question arises as to whether there would be any exemption from the antitrust laws" if, as *Flood* argued, "the reserve system was thrust upon the players by the owners and that the recently formed players' union ha[d] not had time to modify or eradicate it."[346]

c. Philadelphia World Hockey Club, Inc. (1972)

Two months after the Supreme Court decided *Flood*, a different sports league got a chance to make the non-statutory labor exemption argument in response to a challenge of its reserve clause. As discussed in Section II.b, in *Philadelphia World Hockey Club, Inc.*, the Eastern District of Pennsylvania found that the NHL's reserve clause likely violated antitrust law and therefore issued an injunction against its continued practice.

---

[340] *Id.* at 293.

[341] *Id.* at 294 (quoting United States v. Women's Sportswear Manufacturers Ass'n, 336 U.S. 460, 464 (1949)).

[342] Flood v. Kuhn, 407 U.S. 258, 294 (1972) (Marshall, J., dissenting).

[343] *Id.*

[344] *Id. (*quoting Michael S. Jacobs & Ralph K. Winters, Jr., *Antitrust Principles and Collective Bargaining By Athletes: Of Superstars in Peonage*, 81 YALE L. J. 1, 22 (1971)).

[345] Flood v. Kuhn, 407 U.S. 258, 296 (1972) (Marshall, J., dissenting).

[346] *Id.* at 295.

In so doing, the district court rejected the NHL's argument that the reserve clause was exempt from antitrust law because of the "labor exemption."[347] As an initial matter, the court was unable to "definitively conclude that the National Labor Relations Board ha[d] actually certified the [NHL] Players' Association as the approved collective bargaining representative."[348] Even assuming it had, the court found that there was no evidence that the reserve clause "was ever a subject of serious, intensive, arm's-length collective bargaining."[349] Consequently, "[t]o grant the National Hockey League an exemption in this proceeding would undermine and thwart the policies which have evolved over the years in disposing of labor-management and anti-trust disputes."[350]

Of note, the court did cite the Jacobs and Winter article for the proposition that even if the reserve clause had been negotiated with the union, the upstart WHA looking to compete with the NHL might still have an antitrust claim.[351]

d. Robertson (1975)

As discussed in Section II.c, in *Robertson*, NBA players alleged that the NBA's reserve clause, uniform contract, college draft, and other policies and practices violated Sections 1 and 2 of the Sherman Act.[352] In denying the NBA's motion for summary judgment, the court rejected the NBA's argument that its rules were protected from antitrust scrutiny pursuant to a "labor exemption."[353]

Citing *Jewel Tea* and *Pennington*, the NBA argued for a two-part test to determine whether restraints on the labor market are subject to antitrust law: "(1) Are the challenged practices directed against non-parties to the relationship; if they are not, then (2) are they mandatory subjects of collective bargaining? If the answer to No. 1 is no, and to No. 2 yes, then the practices are immune[.]"[354]

The court's analysis of the issue reveals the nascent status of the nonstatutory labor exemption. The court reviewed at length the history of the

---

[347] Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc., 351 F. Supp. 462, 496-500 (E.D. Pa. 1972).
[348] *Id.* at 497.
[349] *Id.* at 499.
[350] *Id.* at 500.
[351] *See id.* at 499.
[352] *See* Robertson v. NBA, 389 F. Supp. 867, 873–75 (S.D.N.Y. 1975).
[353] *Id.* at 884.
[354] *Id.* at 886.

statutory labor exemption which "was created for the benefit of unions."[355] In reviewing the Supreme Court's analysis of the issue, the court determined that "[n]o mention was made of labor exemption for employers."[356] Thus, at that time, only one exemption from the antitrust laws was definitively recognized by the courts. The court did not view the non-statutory labor exemption as a separate, judicially created exemption. As we will see below, the court's view did not hold up over time.

Relatedly, the court rejected the NBA's argument that the restrictions at issue in the litigation were mandatory subjects of bargaining.[357] This opinion too would be considered incorrect today. Mandatory subjects of bargaining are those which affect wages, the terms and conditions of employment.[358] In the sports context, there is no doubt that the standard player contract, the draft, and free agency restrictions materially affect the terms and conditions of employments and therefore are mandatory subjects of bargaining.[359]

e. Connell (1975)

The *Robertson* Court's confusion about the nature of the non-statutory exemption was clarified by the Supreme Court's June 1975 decision in *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100* ("*Connell*").[360] At issue in *Connell* was an agreement between a union and a general contractor in which the general contractor agreed to hire only subcontractors with whom the union had entered into a multi-employer collective bargaining agreement.[361] The general contractor did not employ any employees represented by the union or covered by the collective bargaining agreement and only signed the agreement with the union after picketing outside one of its construction sites.[362]

---

[355] *Id.* (citing Allen Bradley Co. v. Local Union No. 3, Int'l Brotherhood of Elec. Workers, 325 U.S. 797 (1945)).

[356] *Id.* at 887.

[357] *Id.* at 889-90.

[358] 29 U.S.C. § 158(d).

[359] *See, e.g.,* Brown v. Pro Football, Inc., 518 U.S. 231, 238 (1996) (describing player wage restriction as a "mandatory subject of bargaining"); Clarett v. NFL, 369 F.3d 124, 139 (2d Cir. 2004) (describing league's eligibility rules for the draft as a mandatory subject of bargaining); Powell v. NFL, 930 F.2d 1293, 1296 (8th Cir. 1989) (describing NFL's free agency and contract rules as "mandatory subjects of bargaining").

[360] 421 U.S. 616 (1975).

[361] *See id.* at 619–21.

[362] *See id.*

The general contractor sued, alleging that the agreement was a violation of antitrust laws.[363] The Supreme Court reversed earlier dismissals in favor of the union, holding that the agreement at issue, "which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work only to firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions."[364]

Significantly for our purposes, the Court also clarified that there are two antitrust exemptions at play. First, the Court reiterated that the Clayton Act and Norris-LaGuardia Act "declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws."[365] Next, the Court explained that "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions."[366] With that, the phrase "non-statutory labor exemption" was born.

f. Mackey (1976)

In the year after *Connell*, the phrase non-statutory exemption was used in three reported case decisions.[367] Then, in 1976, the newly refined concept was applied to the world of sports in a significant way. As explained in Section II.d, in *Mackey*, NFL players alleged that the NFL's Rozelle Rule, in conjunction with the NFL's reserve clause, violated antitrust laws. The players prevailed in a bench trial,[368] a decision affirmed by the Eighth Circuit.[369]

At both levels, the NFL raised the non-statutory labor exemption as a defense. The district court's decision, issued in December 1975, tracked

---

[363] *See id.*
[364] *See id.* at 635.
[365] *Id.* at 621–22.
[366] *Id.* at 622.
[367] *See* Pac. Maritime Ass'n v. Fed. Maritime Comm'n, 543 F.2d 395, 402 (D.C. Cir. 1976); Adams, Ray and Rosenberg v. William Morris Agency, Inc., 411 F. Supp. 403, 406 (C.D. Cal. 1976); Ackerman-Chillingworth, Div. of Marsh & McLennan, Inc. v. Pac. Elec. Contractors Ass'n, 405 F. Supp. 99, 112 (D. Haw. 1975).
[368] *See* Mackey v. NFL, 407 F. Supp. 1000 (D. Minn. 1975).
[369] *See* Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976).

that of the *Robertson* court, holding that "[t]he exemption extends only to labor or union activities, and not to the activities of employers."[370] The court's decision was primarily concerned with the findings of fact and thus analyzed minimal case law with no reference to the Supreme Court's recent decision in *Connell*.

On appeal, the NFL spent approximately 35 pages of its 75-page brief arguing that its practices were protected by the non-statutory labor exemption.[371] In a footnote, the NFL described the "labor exemption" as "less a defense than a legal, policy and practical recognition that, in regulating labor-management relationships, antitrust rights are unavailable to employees and employers as against the other party."[372] According to the NFL, "[t]he labor laws also give recognition to the fact that there is inherent conflict between labor and management and that this conflict can best be reconciled by the parties themselves—through a give-and-take process over the entire range of issues between them."[373] In making its arguments, the NFL quoted at length from *Jewel Tea*[374] and cited the Jacobs and Winter article three times.[375]

In response, the players predictably argued that the labor exemption protected only the activities of labor.[376] In support, the players quoted the court's decision in *Robertson* at length.[377] Further, the players sought to distinguish *Jewel Tea* by arguing that in that case, "unlike the instant case, the union sought the restriction and obtained it in pursuit of its own policies."[378] According to the players, "[t]here is no immunity for an employer's illegal practices simply because it gets the union to acquiesce in them."[379]

However, after making this argument for ten pages, the players, quoting the Supreme Court in *Jewel Tea*, acknowledged that the labor exemption defense may be available to the NFL if it could show that the Rozelle Rule was "so intimately related to wages, hours and working conditions that the union's successful attempt to obtain that provision [was] through arm's-

---

[370] *Mackey*, 407 F. Supp. at 1008.

[371] *See* Brief for Appellants at 40–75, *Mackey*, 543 F.2d 606 (8th Cir. 1976) (No. 76-1184).

[372] *Id.* at 41 n.24.

[373] *Id.* at 63.

[374] *Id.* at 58–60.

[375] *Id.* at 43 n.27, 57 n.37, 73 n.50.

[376] *See* Brief for Appellees at 29-40, Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976) (No. 76-1184).

[377] *Id.* at 32-34.

[378] *Id.* at 35.

[379] *Id.* at 36.

length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups."[380]

The Eighth Circuit was thus prepared to, and did, comprehensively analyze the non-statutory exemption issue. The court disagreed with the players' argument "that only employee groups are entitled to the labor exemption."[381] According to the court, "[s]ince the basis of the nonstatutory labor exemption is the national policy favoring collective bargaining, and since the exemption extends to agreements, the benefits of the exemption logically extend to both parties to the agreement."[382] With that, the Eighth Circuit introduced the term "non-statutory labor exemption" to the world of sports and the law.

The court went on to outline three factors in evaluating whether the non-statutory labor exemption applied: (1) "the restraint on trade primarily affects only the parties to the collective bargaining relationship"; (2) "the agreement sought to be exempted concerns a mandatory subject of collective bargaining"; and (3) "the agreement sought to be exempted is the product of bona fide arm's-length bargaining."[383]

Applying these factors to the present case, the court found that "there was no bona fide arm's-length bargaining over the Rozelle Rule."[384] Consequently, the non-statutory labor exemption did not apply, and the court affirmed the district court's judgment in favor of the players.[385]

The NFL petitioned the Supreme Court to review the case, focusing almost entirely on the labor exemption issue,[386] but was denied.[387]

Finally, the *Mackey* case is notable for its counsel. The NFL was represented in the case by multiple firms, including Covington & Burling in Washington, D.C. Among the Covington attorneys representing the NFL was Paul Tagliabue,[388] who would go on to serve as Commissioner of the NFL from 1989 to 2006.[389]

---

[380] *Id.* at 40 (quoting *Meat Cutters v. Jewel Tea*, 381 U.S. 676, 689–90 (1965)).
[381] Mackey v. NFL, 543 F.2d 606, 612 (8th Cir. 1976).
[382] *Id.*
[383] *Id.* at 614.
[384] *Id.* at 616.
[385] *Id.* at 616, 623.
[386] *See* Petition for Writ of Certiorari, NFL v. Mackey, 434 U.S 801 (1977) (No. 76-932).
[387] *See Mackey*, 434 U.S. 801.
[388] Mackey v. NFL, 543 F.2d 606, 609 (8th Cir. 1976).
[389] *See* City of Oakland v. Oakland Raiders, 83 Cal. App. 5th 458, 465 (Cal. Ct. App. 2022) (describing Tagliabue as having "served as League Commissioner from 1989 to 2006").

g. Kapp (1978)

As discussed in Section II.e, former quarterback Joe Kapp pursued a lengthy lawsuit against the NFL alleging that the Rozelle Rule and its related regulations prevented him from meaningfully negotiating with other clubs in violation of the antitrust laws, effectively ending his career.[390] Despite prevailing on his arguments that the Rozelle Rule violated antitrust law, a jury determined that Kapp could not prove that he had been damaged as a result of the rule.[391] The Ninth Circuit affirmed.[392]

As to the non-statutory labor exemption, the district court acknowledged a "problem" as to "the extent to which collective bargaining may immunize union-employer agreements in professional sports league activities from the antitrust laws."[393] In recognizing this question, the court cited to the Jacobs and Winter article.[394] Nevertheless, the court held that in the instant case, no such exemption could possibly apply because "the record shows that there was no such collective bargaining contract."[395] This was because the allegedly wrongful conduct against Kapp occurred "between January and May 28, 1971," after the expiration of the prior collective bargaining agreement and before a new one was executed June 17, 1971.[396]

Having prevailed at trial, the NFL did not raise the non-statutory labor exemption argument during Kapp's appeal to the Ninth Circuit.[397] The court however noted the NFL's argument that the collective bargaining agreements between the NFL and NFLPA "could have placed the rules outside the coverage of the antitrust laws under the labor exemption," citing *Jewel Tea*.[398] Additionally, in a footnote, the court noted the Eighth Circuit's holding in *Mackey* that the labor exemption did not apply.[399] Nevertheless, the issue was not ripe for the Ninth Circuit's adjudication.[400]

---

[390] *See id.* at 78.
[391] *See* Kapp v. NFL, 586 F.2d 644, 648 (9th Cir. 1978).
[392] *See id.* at 649-50.
[393] Kapp v. NFL, 390 F. Supp. 73, 85 (N.D. Cal. 1974).
[394] *Id.*
[395] *Id.*
[396] *Id.* at 85–86.
[397] *See* Defendants' Answer to Plaintiff's Petition for Rehearing, Kapp v. NFL, 586 F.2d 644 (9th Cir. 1978) (Nos. 76-2849, 76-2878, 76-2879); Brief for Appellee and Cross-Appellant, *Kapp*, 586 F.2d 644 (Nos. 76-2849, 76-2878).
[398] Kapp v. NFL, 586 F.2d 644, 646 (9th Cir. 1978).
[399] *Id.* at 646 n.1.
[400] *See id.*

h. Smith (1978)

About a month before the Eighth Circuit's helpful analysis in *Mackey*, the United States District Court for the District of Columbia evaluated the NFL's argument that the NFL draft, at issue in *Smith*, was exempt from antitrust law "by virtue of the so-called 'labor law exemption'."[401] *Citing Jewel Tea*, *Pennington*, and *Connell*, the court noted that "the precise contours" of the doctrine "are neither clear nor entirely coherent."[402] Consequently, the court undertook an extensive analysis of the matter.[403]

The court ultimately identified several factors in evaluating the potential application of the non-statutory labor exemption: (1) "a scheme advantageous to employers and otherwise in violation of the antitrust laws cannot under any circumstances come within the exemption unless and until it becomes part of a collective bargaining agreement negotiated by a union in its own self-interest";[404] (2) the restraint at issue must arise out of "an agreement on mandatory subjects of bargaining";[405] (3) the restraint must "have been arrived at as a result of genuine, arms-length bargaining, and not have been 'thrust upon' a weak players union by the owners";[406] and, (4) the restraint must not be designed to work "to the disadvantage of the competitors of the employers."[407]

These factors substantially track those outlined by the Eighth Circuit in *Mackey* a month later.[408] Indeed, the Eighth Circuit cited *Smith* in constructing its factors for the same analysis.[409]

The *Smith* court's actual application of the factors identified to the facts of the case was limited. Smith challenged the NFL Draft, which occurred for him in January 1968.[410] The first NFL-NFLPA collective bargaining

---

[401] Smith v. Pro-Football, 420 F. Supp. 738, 741–744 (D.D.C. 1976).

[402] *Id.* at 741–42.

[403] *See id.* at 741–744 (analyzing existence and potential application of non-statutory labor exemption).

[404] *Id.* at 742.

[405] *Id.* at 742–43.

[406] *Id.* at 743 (quoting Flood v. Kuhn, 407 U.S. 258, 288, 295 (1972) (Marshall, J., dissenting)).

[407] *Id.* at 743.

[408] *See* Mackey v. NFL, 543 F.2d 606, 614 (8th Cir. 1976) (providing three factors in evaluating whether the non-statutory labor exemption applied: (1) "the restraint on trade primarily affects only the parties to the collective bargaining relationship"; (2) "the agreement sought to be exempted concerns a mandatory subject of collective bargaining"; and (3) "the agreement sought to be exempted is the product of bona fide arm's-length bargaining.")

[409] *See id.*

[410] Smith v. Pro-Football, 420 F. Supp. 738, 742 (D.D.C. 1976).

agreement was not executed until March 5, 1968.[411] Consequently, in the court's view, Smith's "cause of action accrued before the exemption could under any view of the law have been considered operative."[412]

While the NFL appealed various parts of the district court's decision, it did not appeal the court's determination that the non-statutory labor exemption did not apply.[413] Consequently, the District of Columbia Circuit declined to review the issue.[414]

i. McCourt (1979)

In 1978 and 1979, the NHL had the opportunity to avail itself of the caselaw that had developed during the decade. In this case, the NHL was defending By-Law Section 9A, which required that a club signing a player as a free agent provide compensation to the club from which the player came.[415] The rule was effectively the NHL's version of the Rozelle Rule.[416] After the 1977-78 season, in accordance with By-Law Section 9A, an arbitrator assigned Dale McCourt, a promising young player for the Detroit Red Wings, to the Los Angeles Kings as compensation for the Red Wings having signed Rogatien Vachon, the Kings' star goalie.[417]

McCourt sued, alleging that the By-Law and the related reserve system were violations of antitrust law.[418] The Eastern District of Michigan found that the By-Law was essentially identical to the Rozelle Rule that the Eighth Circuit had determined unreasonably restrained trade in *Mackey*.[419] The NHL resorted to doomsday arguments in response, claiming that "by-law 9A is necessary to maintain economic solvency of all the teams in the league and to maintain employment opportunities for players."[420] Without the rule, the NHL argued, "the less affluent clubs and those clubs located in less desirable cities would not be able to retain good hockey players."[421] The court was unpersuaded, finding that "[t]he goals sought by the League, if real rather than imagined, can be advanced by less restrictive means."[422]

---

411 *Id.*
412 *Id.*
413 Smith v. Pro-Football, 593 F.2d 1173, 1177 n.11 (D.C. Cir. 1978).
414 *Id.*
415 McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1194–95 (6th Cir. 1979).
416 *Id.*
417 *Id.* at 1195–96.
418 *Id.*
419 McCourt v. Cal. Sports, Inc., 460 F. Supp. 904, 907, 909 (E.D. Mich. 1978).
420 *Id.* at 909.
421 *Id.*
422 *Id.* at 910.

The NHL also argued that By-Law 9A was protected by the non-statutory labor exemption.[423] Although the By-Law was unilaterally incorporated into the standard player contract in 1974,[424] it had been incorporated into a collective bargaining agreement agreed to in May 1976, with retroactive effect to September 15, 1975.[425] Nevertheless, the court held that, "[l]ike the Eighth Circuit Court of Appeals in Mackey,. . . we find that the mere inclusion of bylaw 9A in the collective bargaining agreement cannot serve to immunize it from antitrust sanctions. The evidence offered at the hearing persuades us that the parties did not collectively bargain for bylaw 9A."[426] Instead, the NHL had made clear in the negotiations that By-Law 9A was non-negotiable.[427]

Having denied the NHL's arguments, in a September 28, 1978 ruling, the court granted McCourt's request for a preliminary injunction preventing enforcement of the arbitrator's award.[428]

The parties agreed to an expedited appeal process.[429] The parties filed their appellate briefs on October 13, 1978, about two weeks after the district court's ruling.[430] Interestingly, the Kings and NHL were represented by separate counsel. The Kings filed a brief which substantively addressed only three issues: (1) whether McCourt had suffered an antitrust injury sufficient to give him standing; (2) whether McCourt had satisfied the elements necessary to be awarded injunctive relief; and (3) whether McCourt's $10,000 bond was too low.[431] Yet, the brief did identify as additional issues the application of the non-statutory labor exemption and the reasonableness of By-Law 9A under the antitrust laws.[432] These issues were likely addressed in the NHL's brief, but research has not uncovered a copy of that

---

[423] *Id.*

[424] *Id.* at 906.

[425] *Id.* at 911.

[426] *Id.*

[427] *Id.*

[428] *Id.* at 906, 912.

[429] Plaintiff-Appellee's Brief on Appeal at 2–3, McCourt v. Cal Sports, Inc., 600 F.2d 1193 (6th Cir. 1979) (6th Cir. Oct. 13, 1978) (No. 78-1462).

[430] *See* Brief for Defendants-Appellants California Sports, Incorporated, and the Los Angeles Kings, Inc., *McCourt*, 600 F.2d 1193 (6th Cir. Oct. 13, 1978) (No. 78-1462); Plaintiff-Appellee's Brief on Appeal, *McCourt*, 600 F.2d 1193 (6th Cir. Oct. 13, 1978) (No. 78-1462).

[431] *See* Brief for Defendants-Appellants California Sports, Incorporated, and the Los Angeles Kings, Inc. at i–ii, *McCourt*, 600 F.2d 1193 (6th Cir. Oct. 13, 1978) (No. 78-1462).

[432] *Id.* at 1–2.

brief.[433] Indeed, the NHL's reply brief focused on the application of the non-statutory labor exemption.[434]

Regardless, the Kings continued the doomsday arguments in its appellate brief, arguing that fans would "suffer" if By-Law 9A were unenforceable.[435] According to the Kings, in such an outcome, "[o]nly the teams with the wealthiest owners willing to spend money (some are owned by conglomerates) will be able to afford superstar players [and] [t]hus, existing teams who cannot stay competitive will be forced out of business."[436]

On appeal, the Sixth Circuit focused on the potential application of the non-statutory labor exemption.[437] At the outset, the court held that the Eighth Circuit's decision in *Mackey* had set out the "proper standards" for analyzing this issue.[438] Nevertheless, the court disagreed with the district court that By-Law 9A was not "the product of bona fide arm's length bargaining."[439] In considering that the NHL had refused to negotiate By-Law 9A, the Sixth Circuit explained that

> nothing in the labor law compels either party negotiating over mandatory subjects of collective bargaining to yield on its initial bargaining position. Good faith bargaining is all that is required. That the position of one party on an issue prevails unchanged does not mandate the conclusion that there was no collective bargaining over the issue.[440]

In fact, the players had "developed an alternate reserve system and secured tentative agreement from the owner and player representatives, only to have the proposal rejected by the players."[441] Moreover, in the agreement, both parties obtained the right to opt-out if there was a fundamental alteration to the reserve system, specifically if the NHL and World Hockey

---

[433] The NHL's reply brief references having filed an opening brief. *See* Reply Brief of Appellant National Hockey League at 5,7, *McCourt*, 600 F.2d 1193 (6th Cir. Oct. 17, 1978) (No. 78-1463).

[434] *See* Reply Brief of Appellant National Hockey League at 3–8, *McCourt*, 600 F.2d 1193 (6th Cir. Oct. 17, 1978) (No. 78-1463).

[435] Brief for Defendants-Appellants California Sports, Incorporated, and the Los Angeles Kings, Inc. at 53, *McCourt*, 600 F.2d 1193 (6th Cir. Oct. 13, 1978) (No. 78-1462).

[436] *Id.*

[437] *See McCourt*, 600 F.2d at 1197–1203.

[438] *Id.* at 1198.

[439] *Id.* at 1198–1200.

[440] *Id.* at 1200.

[441] *Id.* at 1202.

Association merged or if the system was invalidated by the courts.[442] For these reasons, the Sixth Circuit concluded

> that the inclusion of the reserve system in the collective bargaining agreement was the product of good faith, arm's-length bargaining, and that what the trial court saw as a failure to negotiate was in fact simply the failure to succeed, after the most intensive negotiations, in keeping an unwanted provision out of the contract.[443]

The court thus held that By-Law 9A was protected by the non-statutory labor exemption, vacated the injunction, and remanded the matter for entry of judgment in favor of the Kings and NHL.[444]

IV. The Non-Statutory Labor Exemption Survives Impasse

By the close of the 1970s, it was clear that a non-statutory labor exemption could protect at least some of the player-related restraints that sports leagues and teams wished to enact. Litigation in the 1980s and 1990s would thus focus on the scope of the exemption.

a. Bridgeman (1987)

As discussed in Section II.c, one of the outcomes of the *Robertson* litigation was a new collective bargaining agreement between the NBPA and NBA. The parties subsequently negotiated additional collective bargaining agreements, including the introduction of a salary cap in 1983.[445] The 1983 agreement expired after the 1986–87 season, at which point the parties engaged in prolonged discussions about the continued existence of the salary cap, the draft, and clubs' right of first refusal as to free agent players.[446]

After the parties were unable to reach a deal prior to an agreed upon October 1, 1987 deadline, a contingent of current and former NBA players, led by NBPA President Junior Bridgeman, sued the NBA alleging that the NBA's restrictions were antitrust violations.[447] Before and after the initiation of the litigation, the NBA continued to operate under the 1983 agreement, which included provisions governing the practices at issue.[448]

---

[442] *Id.*
[443] *Id.* at 1203.
[444] *Id.*
[445] Bridgeman v. NBA, 675 F. Supp. 960, 962–63 (D.N.J. 1987).
[446] *Id.* at 963.
[447] *Id.* at 961.
[448] *Id.* at 963.

The NBA responded by asserting that the restrictions were protected by the non-statutory labor exemption.[449] According to the NBA, the antitrust immunity from the exemption "should continue after expiration of the agreement as long as the league continues to apply without modification the player restrictions that were included in the agreement."[450] The players argued that the exemption only applied so long as there was a collective bargaining agreement.[451]

In a December 29, 1987 opinion, the District Court for the District of New Jersey observed that the question at hand was an issue of first impression: does the exemption apply "where the challenged provisions were included in a collective bargaining agreement that is no longer in effect[?]"[452] The court ruled that it does, for some period of time. In examining this question, the court determined it necessary to examine "the policies underlying the labor exemption."[453] At its core, the court found that the exemption "encourages substantive, good faith bargaining."[454] For this reason, the court rejected the players' argument that the exemption ends "the instant a collective bargaining agreement expires" as well as the NBA's argument that the "exemption should continue indefinitely after an agreement expires so long as the employer maintains the status quo by not imposing any new restraints."[455] The court reasoned that either rule would discourage the parties from engaging in good faith negotiations.[456]

Alternatively, the players argued that the exemption expired at "impasse," *i.e.*, a deadlock in the negotiations.[457] The court found this argument plausible, noting that if an employer bargains with a union to impasse, it can then "make 'unilateral changes that are reasonably comprehended within his pre[-]impasse proposals.'"[458] However, the court found this rule was not sufficiently responsive to the "unique intersection of labor law and antitrust law."[459]

The court, drawing on the test set forth in *Mackey*, thus set forth a more complicated rule:

---

[449] *Id.* at 962.
[450] *Id.* at 964–65.
[451] *Id.* at 964.
[452] *Id.* at 965.
[453] *Id.*
[454] *Id.*
[455] *Id.* at 965–66.
[456] *Id.*
[457] *Id.* at 966.
[458] *Id.*, (quoting *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 476 (1967)).
[459] *Bridgeman*, 675 F. Supp. at 967.

> the exemption for a particular practice survives only as long as the employer continues to impose that restriction unchanged, and reasonably believes that the practice or a close variant of it will be incorporated in the next collective bargaining agreement. When the employer no longer has such a reasonable belief, it is then unilaterally imposing the restriction on its employees, and the restraint can no longer be deemed the product of arm's-length negotiation between the union and the employer.[460]

In the instant case, disputed facts prevented a determination as to whether the exemption applied, and thus the court denied the parties' competing motions for summary judgment.[461]

In April 1988, four months after the court's decision, the parties agreed to a new collective bargaining agreement which eliminated the right of first refusal as to certain veteran free agents and reduced the NBA draft from seven to two rounds.[462]

Of note, the players were represented by Jim Quinn of Weil, Gotshal & Manges LLP and the league was represented by Jeff Mishkin of Proskauer.[463] Also on the briefs in the case was Gary Bettman, a former Proskauer associate and then NBA attorney who became Commissioner of the NHL in 1993.[464]

b. Powell (1989)

Between 1987 and 1993, the NFL and its players engaged in a torrent of litigation concerning the application of the non-statutory labor exemption. While the litigation ultimately resulted in an overhauled collective bargaining whose principles continue to this day,[465] the relevant legal question eventually required resolution by the Supreme Court.

A collective bargaining agreement expired after the 1986 season, *i.e.*, after the 1987 Super Bowl.[466] The players went on strike for 23 days during

---

[460] *Id.* at 967.

[461] *Id.*

[462] Glenn M. Wong, ESSENTIALS OF SPORTS LAW, 4th ed., Ex. 11.5 (Praeger 2010).

[463] *Bridgeman*, 675 F. Supp. at 961.

[464] *See id.*; E.M. Swift, *Gary Bettman*, SPORTS ILLUSTRATED (Feb. 15, 1993), https://vault.si.com/vault/1993/02/15/gary-bettman [https://perma.cc/63VD-985T].

[465] *See* Chris Deubert, Glenn M. Wong, & John Howe, *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League,* 19 UCLA ENT. L. REV. 1, 11-12 (2012) (discussing history of litigation in NFL in context of 2011 collective bargaining negotiations).

[466] *Id.* at 9.

the 1987 season, during which time the NFL used replacement players.[467] The players ended their strike and instead, led by New York Jets lineman and NFLPA President Marvin Powell, filed a class action lawsuit challenging the right of first refusal/compensation system that had existed since the 1977 collective bargaining agreement,[468] agreed to shortly after *Mackey.*

The case turned on the application of the non-statutory labor exemption. Like the NBA players in *Bridgeman*, the NFL players claimed that because the collective bargaining agreement had "expired, no labor exemption from the antitrust laws shields the player restraints from antitrust scrutiny."[469] In response, the NFL asserted two defenses: (1) that the "challenged restraints are entitled to absolute immunity because they are subjects of mandatory bargaining affecting only parties to the employment relationship"; and (2) that a "'survival doctrine' provides the challenged restraints continued protection from the antitrust laws for an indefinite period following expiration of the collective bargaining agreement."[470]

Judge David S. Doty of the United States District Court for the District of Minnesota quickly disposed of the NFL's first argument, noting that "[t]he nonstatutory labor exemption has never been applied to shield league-imposed player restraints merely because such restraints are subjects of mandatory collective bargaining."[471]

Citing the *Bridgeman* decision issued a month earlier, the court did, however, agree with the NFL that non-statutory labor exemption must "survive" expiration of the collective bargaining agreement.[472] Doing so, the court reasoned, helps "to provide the parties with a stable environment in which to negotiate a new collective bargaining agreement."[473] The court, however, rejected the *Bridgeman* standard for determining when the exemption expires. According to Judge Doty, that decision's focus on "an employer's 'reasonable belief' that a practice will be incorporated into a new agreement," "encourage[es] employees to exhibit steadfast, uncompromising adherence to stated terms. . . subvert[ing] the strong federal labor law interest in promoting the collective bargaining process."[474]

---

[467] *Id.*
[468] Powell v. NFL, 678 F. Supp. 777, 778 (D. Minn. 1988).
[469] *Id.* at 781–782.
[470] *Id.* at 782.
[471] *Id.* at 783.
[472] *Id.* at 785.
[473] *Id.*
[474] *Id.* at 787.

The court also rejected the NFL's argument that the exemption "survives indefinitely" as "part of the status quo."[475] The court noted that "in the usual context, following expiration of a collective bargaining agreement, lawful provisions relating to wages, hours and terms and conditions of employment continue in effect only until 'impasse.' 'Impasse' merely signifies a stalemate in negotiations, and is not equivalent to termination of the collective bargaining relationship." According to Judge Doty, the NFL's "proposed standards would lead to the anomalous result that illegal provisions exempted from antitrust scrutiny would continue in force longer than lawful terms and conditions."[476]

> The court thus crafted its own standard, holding that a labor exemption relating to a mandatory bargaining subject survives expiration of the collective bargaining agreement until the parties reach impasse *as to that issue*; thereafter, the term or condition is no longer immune from scrutiny under the antitrust laws, and the employer runs the risk that continued imposition of the condition will subject the employer to liability.[477]

Further, the court explained that to determine whether impasse had been reached, "[t]he test is simply whether, following intense, good faith negotiations, the parties have exhausted the prospects of concluding an agreement."[478] "No impasse can occur until there appears no realistic possibility that continuing discussions concerning the provision at issue would be fruitful."[479] Once impasse is reached with respect to certain provisions, "those provisions will lose their immunity and further imposition of those conditions may result in antitrust liability."[480]

As to the instant dispute, it was unclear whether impasse had been reached, and the court thus stayed determination of the parties' competing motions for summary judgment.[481]

The players immediately took the position that the parties were already at impasse, a position supported by the National Labor Relations Board.[482] The players then renewed their motion for summary judgment on that issue, which the court granted in June 1988.[483] The court, however, declined to

---

[475] *Id.*
[476] *Id.* at 788.
[477] *Id.*
[478] *Id.*
[479] *Id.*
[480] *Id.* at 789.
[481] *Id.*
[482] Powell v. NFL, 930 F.2d 1293, 1296 (8th Cir. 1989).
[483] *See* Powell v. NFL, 690 F.Supp. 812, 814 (D. Minn. 1988); Brief of Defendants-Appellants National Football League and Twenty-Eight NFL Member Clubs at

grant the players' request for injunctive relief, finding that the Norris-LaGuardia Act deprived the court of that ability.[484]

The NFL, represented by Tagliabue and future NFL General Counsel Jeff Pash,[485] both then of Covington & Burling, appealed. Its argument was bold:

> the Federal labor laws exclusively control where, as here, the challenged "restraint" relates to a mandatory subject of collective bargaining, the "restraint" has been developed and implemented through the lawful observance of the collective bargaining process, the employees are represented by a union vested with collective bargaining authority, and the "restraint" affects only a labor market involving the parties to the collective bargaining relationship. In these circumstances, recourse to the Sherman Act by one of the bargaining parties is inherently incompatible with the purposes and operation of the Federal labor laws, and the Sherman Act therefore has no application to this dispute.[486]

While the NFL acknowledged that it is subject to the antitrust laws in the labor market, where there was a collective bargaining relationship, the NFL argued that labor law was the exclusive standard by which the parties' conduct should be evaluated.[487] Of note, the NFL cited to the Jacobs and Winter article four times in its appeal brief,[488] which was all the more relevant since Winter had since become a judge on the Second Circuit and had recently written an opinion denying a recent NBA draftee's antitrust attacks on the draft and salary cap in *Wood v. National Basketball Ass'n*.[489]

Finally, the NFL attacked Judge Doty's impasse standard, arguing that it was "destructive of collective bargaining."[490] In support, the NFL claimed that "[e]ver since [the NFLPA] learned the litigation advantages of

---

4, Powell v. NFL, 930 F.2d 1293 (8th Cir. Apr. 3, 1989) (No. 89-5091) ("In June 1988, Judge Doty found that the parties had by then reached an impasse in their bargaining on the 'free agency' issue.").

[484] Powell v. NFL, 690 F. Supp. 812, 815–17 (D. Minn. 1988).

[485] *See Jeffrey Pash, Exec VP/General Counsel, Natl Football League*, BLOOMBERG,https://www.bloomberg.com/profile/person/1844864 [https://perma.cc/5EF6-QCFS].

[486] Brief of Defendants-Appellants National Football League and Twenty-Eight NFL Member Clubs at 5, Powell v. NFL, 930 F.2d 1293 (8th Cir. Apr. 3, 1989) (No. 89-5091).

[487] *Id.* at 16–42.

[488] *See id.* at 25, 27, 32, 40.

[489] Wood v. NBA, 809 F.2d 954 (2d Cir. 1987).

[490] Brief of Defendants-Appellants National Football League and Twenty-Eight NFL Member Clubs at 43, Powell v. NFL, 930 F.2d 1293 (8th Cir. Apr. 3, 1989) (No. 89-5091).

'impasse' on the present free agency issue, it has resolutely refused to bargaining meaningfully."[491] Instead of setting a point at which the non-statutory labor exemption expired, the NFL argued again that "[i]f employers exceed their labor law rights in implementing terms at impasse, the full range of labor law rights and remedies is available to unions."[492]

In response, the players argued that the NFL was effectively asking the Eighth Circuit to overrule its decision 12 years earlier in *Mackey*, despite its now widespread acceptance in analyzing the non-statutory labor exemption in sports.[493] Whereas the NFL was arguing for a broad exemption indefinite in duration, the players argued that the *Mackey* "decision makes it clear that the question is *when* the labor exemption ends, *not whether* it ends."[494] The players asserted that if the NFL's position were to prevail, "no independent union would ever enter into a collective bargaining agreement because management would be free, upon expiration of that agreement, to unilaterally implement onerous terms in perpetuity."[495]

The players identified the Jacobs and Winter article as the introduction of the argument that the labor laws should be the exclusive method by which disputes between leagues and unions should be resolved, and that the leagues should, where there is such a collective bargaining relationship, be exempt from antitrust laws.[496] However, the players argued that "not one" court had "adopted Judge Winter's point of view," not even Winter himself in *Wood.*[497]

Finally, the players defended Judge Doty's holding that the non-statutory labor exemption expired at impasse, arguing that it provided

> both parties to the bargaining relationship. . . strong incentives to avoid impasse. On the one hand, the employees and their union will seek to avoid unilateral implementation of undesirable terms and conditions of employment. On the other hand, the impasse standard gives employers strong incentive to avoid impasse, which subjects them to antitrust liability.[498]

In reply, the NFL clarified that its argument was

---

[491] *Id.* at 47–48.
[492] *Id.* at 44–45.
[493] Brief of Appellees at 20, Powell v. NFL, 930 F.2d 1293 (8th Cir. Apr. 24, 1989) (No. 89-5091).
[494] *Id.*
[495] *Id.* at 21.
[496] *Id.* at 43–44.
[497] *Id.*
[498] *Id.* at 33.

> That the Federal labor laws exclusively control and that the Sherman Act has no application where, as here, (1) a challenged "restraint" relates to a mandatory subject of collective bargaining, (2) the "restraint" has been developed and implemented through the lawful observance of an on-going collective bargaining process, (3) the affected employees are represented by a union vested with collective bargaining authority under the labor laws, and (4) the "restraint" affects only a labor market involving the parties to the collective bargaining relationship.[499]

In a November 1, 1989 decision, a panel of the Eighth Circuit, by a 2-1 vote, reversed Judge Doty's decisions establishing (1) impasse as the point at which the non-statutory labor exemption applied and (2) that the exemption no longer applied to the instant case.[500] In so doing, the Eighth Circuit substantially adopted the NFL's position, reasoning that "the collective bargaining process, under the supervision of the National Labor Relations Board," is the proper "method for resolution of labor disputes."[501] The court noted that "labor law provides a comprehensive array of remedies to management and union, even after impasse," including "economic force," *i.e.*, strikes and lockouts, and bringing claims to the National Labor Relations Board.[502] Citing Jacobs and Winter, the Eighth Circuit held that to permit the players' claims would "be inconsistent with federal labor policy."[503]

Limiting its opinion to the "present lawsuit," the court declined to "look into the future and pick a termination point for the labor exemption."[504] The closest the court came to identifying a standard was its explanation that "the nonstatutory labor exemption protects agreements conceived in an ongoing collective bargaining relationship from challenges under the antitrust laws."[505]

This ambiguity was attacked by judges in dissent. First, Judge Gerald Heaney, the lone dissenting vote on the panel, stated that he agreed with Judge Doty's determination "that the exemption ends when the parties have reached an impasse in negotiations."[506] Judge Heaney further argued that the "practical effect of the majority's opinion," is that the non-statutory

---

[499] Reply Brief of Defendants-Appellants National Football League and Twenty-Eight NFL Member Clubs at 3, Powell v. NFL, 930 F.2d 1293 (8th Cir. May 3, 1989) (No. 89-5091).

[500] Powell v. NFL, 930 F.2d 1293, 1302–04 (8th Cir. 1989).

[501] *Id.* at 1302.

[502] *Id.* at 1302–03.

[503] *Id.* at 1303.

[504] *Id.*

[505] *Id.*

[506] *Id.* at 1305.

labor exemption would continue "indefinitely," or "until the bargaining relationship is terminated either by an NLRB decertification proceeding or by abandonment of bargaining rights by the union."[507]

Chief Judge Donald Lay, the author of *Mackey,* writing in dissent from the Court's decision not to rehear the case en banc, supported Judge Heaney's analysis.[508] According to Judge Lay, the court's 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."[509]

Heaney's and Lay's dissents thus provided the players with the necessary roadmap to continue their legal challenges. On November 6, 1989, five days after the Eighth Circuit's ruling, the NFLPA notified the NFL that it was no longer authorized to bargain on behalf of NFL players.[510] That decision led to the next stage of litigation, discussed further below. That same week, Tagliabue replaced the retired Pete Rozelle as NFL Commissioner.[511]

At the same time, the players sought review of the Eighth Circuit's decision from the Supreme Court.[512] According to the players, the court's decision "presents a direct conflict with the principles enunciated by [the Supreme] Court in creating and interpreting the non-statutory labor exemption."[513] They argued that the Eighth Circuit's decision "permitted the non-statutory labor exemption to be used as a sword for unilaterally imposed employer restraints, without union agreement."[514] In so doing, the court failed to heed the Supreme Court's guidance that antitrust exemptions should be narrowly construed, the players argued.[515]

Representing the players in their petition were Jim Quinn, Jeffrey Kessler, and Bruce Meyer of Weil Gotshal. Kessler went on to become the leading attorney for athletes, professional and amateur, and their unions.[516]

---

[507] *Id.*

[508] *Id.* at 1308–10.

[509] *Id.* at 1309–10.

[510] Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit at 9, Powell v. NFL, 498 U.S. 1040 (1991) (Mar. 12, 1990) (No. 89-1421).

[511] *See* Quinn, *supra* note 1 at 176.

[512] *See id.* at 169-70.

[513] Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit at 10, *Powell*, 498 U.S. 1040 (Mar. 12, 1990) (No. 89-1421).

[514] *Id.* at 15.

[515] *Id.* at 17–21.

[516] *See* Daniel Kaplan, *Jeffrey Kessler, maybe the most prominent sports labor lawyer ever, finally argues before the Supreme Court*, The Athletic (Mar. 29, 2021), https://theathletic.com/2479522/2021/03/29/jeffrey-kessler-maybe-the-most-prominent-

Meyer, after a distinguished career at Weil Gotshal, eventually worked in-house for both the NHLPA and MLBPA.[517] Quinn, who had been counsel to the NBA players in *Bridgeman*, had also served as an expert in the *Powell* case at the trial level.[518]

The United States and nine states filed separate amicus briefs in support of the players.[519] The federal government argued that the Eighth Circuit's "formulation of the nonstatutory labor exemption was. . . overly expansive."[520] According to the government, "[n]either the text nor the history of the NLRA fairly suggests that Congress implicitly intended broadly to deprive unionized workers of the antitrust laws' protection from employer-imposed restraints on competition in the labor market."[521] Moreover, the Eighth Circuit had crafted an exemption which was more appropriately the province of Congress.[522] The states agreed, and added their concerns that the decision would negatively affect their "interest in stable labor-management relations and in collective bargaining."[523]

The amicus briefs present interesting politics. The United States' brief was principally authored by Kenneth W. Starr, the then-Solicitor General in the Reagan administration and renowned conservative attorney.[524] Similarly, among the states supporting the players were Louisiana, Mississippi,

---

sports-labor-lawyer-ever-finally-argues-before-the-supreme-court/?redirected=1 [https://perma.cc/Q3BT-TF7C].

[517] *Bruce Meyer promoted to deputy executive director of Major League Baseball Players Association*, ESPN (July 6, 2022), https://www.espn.com/mlb/story/_/id/34201917/bruce-meyer-promoted-deputy-executive-director-major-league-baseball-players-association [https://perma.cc/T9W6-VB2L].

[518] Quinn, *supra* note 1 at 168.

[519] *See* Brief for the United States as Amicus Curiae, Powell v. NFL, 498 U.S. 1040 (1991) (Dec. 10, 1990) (No. 89-1421); Brief of New York, Arizona, Hawaii, Louisiana, Michigan, Mississippi, Texas, Utah, and Wyoming as Amici Curiae on Behalf of Petitioners for a Writ of Certiorari, Powell v. NFL, 498 U.S. 1040 (1991) (May 8, 1990) (No. 89-1421).

[520] Brief for the United States as Amicus Curiae at 10, Powell v. NFL, 498 U.S. 1040 (1991) (Dec. 10, 1990) (No. 89-1421).

[521] *Id.* at 13.

[522] *Id.* at 13–14.

[523] Brief of New York, Arizona, Hawaii, Louisiana, Michigan, Mississippi, Texas, Utah, and Wyoming as Amici Curiae on Behalf of Petitioners for a Writ of Certiorari at 15, Powell v. NFL, 498 U.S. 1040 (1991) (May 8, 1990) (No. 89-1421).

[524] Peter Baker, *Ken Starr, Independent Counsel in Clinton Investigation, Dies at 76*, N.Y. Times, Sept. 13, 2022, https://www.nytimes.com/2022/09/13/us/politics/ken-starr-dead.html; *See also* Quinn, *supra* note 1 at 174 (discussing persuading Starr to support the players' petition).

Texas, Utah, and Wyoming, none of which today would be considered progressive defenders of employee rights.[525]

The NFL argued that the petition was premature, as "substantial issues" remained to be decided by the lower courts.[526] Moreover, by forcing the parties to the negotiating table, the NFL asserted that the Eighth Circuit's decision "implements. . . labor law policy."[527]

Despite the weighty issues at play, in January 1991, the Supreme Court denied certiorari without explanation, with Justices White and Blackmun disagreeing.[528]

While the *Powell* appeal pended, the parties continued to litigate and maneuver. As mentioned above, after the Eighth Circuit's decision, the NFLPA, by a majority vote of its player members, abandoned its status as the collective bargaining representative of the players, including by changing its constitution to prohibit collective bargaining and filing appropriate documentation with the Department of Labor and Internal Revenue Service.[529] The NFLPA morphed into a "voluntary professional association."[530] Based on those actions, the players sought partial summary judgment declaring that the non-statutory labor exemption no longer protected the NFL.[531]

In a May 1991 decision, Judge Doty agreed.[532] While the NFL argued that the NFLPA was required to seek decertification from the NLRB, the court held that since "a majority of players ha[d] voted to end collective bargaining. . . [t]he NFLPA. . . may no longer bargain on the players' behalf [and] [t]hus, there is no need for the NLRB to decertify the NFLPA."[533] Quoting from the Eighth Circuit's decision, Judge Doty found that there was "no 'ongoing collective bargaining relationship,'" and the non-statutory labor exemption therefore had ended.[534]

---

[525] *See* Brad Dress, *Here are the 50 legislatures ranked from most to least conservative*, THE HILL (Dec. 6, 2022), https://thehill.com/homenews/state-watch/3763498-here-are-the-50-legislatures-ranked-from-most-to-least-conservative/ [https://perma.cc/9LKT-2UN7].

[526] Brief for Respondents in Opposition at 8–11, Powell v. NFL, 498 U.S. 1040 (1991) (May 8, 1990) (No. 89-1421).

[527] *Id.* at 17–19.

[528] Powell v. NFL, 498 U.S. 1040 (1991).

[529] Powell v. NFL, 764 F. Supp. 1351, 1354 (D. Minn. 1991).

[530] *Id.*

[531] *Id.*

[532] *Id.* at 1358–59.

[533] *Id.* at 1358.

[534] *Id.* at 1359 (quoting Powell v. NFL, 888 F.2d 559, 568 (8th Cir. 1989)).

c. McNeil (1992)

After disclaiming the NFLPA as their bargaining representative, in April 1990, eight NFL players, led by the aptly named Freeman McNeil,[535] filed a lawsuit seeking an injunction and related damages arising out of the NFL's recently implemented "Plan B" free agency system and wage scale, alleging they violated the antitrust laws.[536] Plan B free agency permitted clubs to designate 36 players who would be subject to the right of first refusal/compensation system after each season.[537] Undesignated players became unrestricted free agents.[538]

On the back of Judge Doty's determination that the non-statutory labor exemption no longer applied, the players sought summary judgment, which the NFL opposed with its own motion for summary judgment.[539]

Perhaps as evidence of the scorched earth nature of the litigation, the parties made arguments which appear unreasonable today, and likely did at the time as well.

First, the players asserted that "there is now sufficient judicial experience to warrant the application of the *per se* rule" to the NFL's regulations.[540] However, as discussed in Part II, by the end of the 1970s, the courts had definitively established that the *per se* analysis was inappropriate in the sports context. Judge Doty reminded the players of this fact, supported by the Supreme Court's refusal, in 1984, to apply *per se* analysis in *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma* ("*Board of Regents*").[541]

Second, the NFL argued that its "twenty-eight member clubs. . . function as a single economic entity" and are therefore "incapable of conspiring" in violation of Section 1 of the Sherman Act.[542] The NFL's argument was based on the Supreme Court's 1984 decision in *Copperweld Corp. v. Independence Tube Corp.* ("*Copperweld*"), in which the Court held that a parent corporation and its wholly owned subsidiary were not legally capable of

---

[535] *See* Quinn, *supra* note 1, at 168 (discussing decision to name McNeil as the lead plaintiff).

[536] McNeil v. NFL, 790 F.Supp. 871, 875–76 (D. Minn. 1992).

[537] Chris Deubert, Glenn M. Wong, & John Howe, *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League,* 19 UCLA ENT. L. REV. 1, 11 (2012).

[538] *Id.*

[539] *McNeil*,790 F.Supp. at 875–76. .

[540] *Id.* at 896.

[541] *See id.* at 897 (citing NCAA v. Board of Regents of Univ. of Ok., 468 U.S. 85, 101 (1984)).

[542] *McNeil*,790 F.Supp. at 878 .

conspiring for purposes of Section 1.[543] The NFL had first made this argument earlier that year concerning a challenge to its team relocation rules, but the Ninth Circuit was unpersuaded.[544] Yet, with the intervening Supreme Court decision, Judge Doty described the NFL as "contend[ing] that *Copperweld* overrules a vast body of Supreme Court and lower court decisions that have held that arrangements between separate economic entities engaged in a joint venture, including teams in professional sports leagues, are subject to scrutiny under the Sherman Act."[545] The court rejected the NFL's argument as "irreconcilable" with *Board of Regents*.[546] Nevertheless, the single-entity defense would linger over sports antitrust analysis until the Supreme Court's unanimous decision against the NFL in 2010 on that issue.[547]

Aside from these failed arguments, in an April 1992 decision, the court found sufficient "evidence of a threat of antitrust injury" to deny the NFL's motion for summary judgment.[548] Thus, the players had the chance at trial to seek antitrust damages arising out the NFL's player movement restrictions.[549]

Only two weeks prior to the court's decision, Judge Doty dismissed a separate case brought by the NFL and its clubs against the NFLPA, alleging that it had violated antitrust law by conspiring with NFL player agents to "fix, raise and/or maintain compensation paid to NFL players."[550] Ordinarily, the NFLPA would have been immune from such allegations pursuant to the statutory labor exemption. However, such protection was not available since the NFLPA had disclaimed its status as the bargaining representative of NFL players. Nevertheless, the court found the NFL's allegations insufficiently vague to sustain a claim.[551]

---

[543] 467 U.S. 752, 771 (1984).

[544] *See* L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1387–90 (9th Cir. 1984).

[545] *McNeil*, 790 F.Supp. at 880.

[546] *Id.*

[547] *See* Gabriel Feldman, *The Puzzling Persistence of the Single-Entity Argument for Sports Leagues: American Needle and the Supreme Court's Opportunity to Reject a Flawed Defense*, 2009 WIS. L. REV. 835 (2009) (analyzing history and flaws of single-entity argument); Am. Needle, Inc. v. NFL, 560 U.S. 183 (2010) (unanimously holding that NFL could not avail itself of single-entity defense in licensing of intellectual property).

[548] *McNeil*, 790 F.Supp. at 878.

[549] *See id.* at 884 (discussing scope of damages claim).

[550] Five Smiths, Inc. v. NFL Players Ass'n, 788 F. Supp. 1042, 1044 (D. Minn. 1992).

[551] *Id.* at 1048.

The parties engaged in an extensive trial during the summer of 1992.[552] In his closing presentation to the jury, the NFL's counsel brought out the doomsday argument: "If you find the rules don't fit, you might be taking a decision which is going to affect a whole lot of people, including these players. You might be bringing my words to truth, which is that you will destroy professional sports."[553]

The jury was apparently unmoved, issuing a verdict in the players' favor.[554] The jury found that the NFL's Plan B system had a "substantially harmful effect on competition in the relevant market for the services of professional football players," and that Plan B "significantly contribute[d] to 'competitive balance' in the NFL, but also that Plan B was "more restrictive than necessary to achieve the objective of establishing or maintaining competitive balance in the NFL."[555] Having failed to satisfy that final prong, the NFL could not prevail under a rule of reason analysis.[556] The jury awarded damages ranging between $50,000 and $240,000 for four players and declined to award damages to the other four players.[557] These amounts were then trebled pursuant to antitrust law.[558]

d. Jackson (1992)

On September 14, 1992, four days after the jury's verdict in *McNeil*, the Miami Dolphins' Keith Jackson and nine other players filed a lawsuit seeking injunctive relief preventing the implementation of the Plan B free agency system.[559] In a September 24 decision, Judge Duty granted the players' request for a temporary restraining order.[560] The court determined that the issue raised in the case was "identical to that raised in the *McNeil* litigation" and that the NFL was therefore "collaterally estopped from relitigating the legality of the Plan B rules."[561]

---

[552] *See* QUINN, *supra* note 1 (discussing the history and events of the trial); Jackson v. NFL, 802 F. Supp. 226, 228 n.2 (D. Minn. 1992) (providing trial timeline).
[553] *Id.* at 203.
[554] McNeil v. NFL, 90-cv-476, 1992 WL 315292 (D. Minn. Sept. 10, 1992).
[555] *Id.* at *1.
[556] *See infra* Section I.a (discussing elements of the rule of reason analysis).
[557] McNeil v. NFL, 90-cv-476, 1992 WL 315292, at *1 (D. Minn. Sept. 10, 1992).
[558] Quinn, *supra* note 1 at 207.
[559] Jackson v. NFL, 802 F. Supp. 226, 228 (D. Minn. 1992).
[560] *Id.*
[561] *Id.* at 230.

e. White (1993)

Next, on September 21, 1992, eleven days after the jury's verdict in *McNeil*, NFL players filed a class action lawsuit against the NFL seeking injunctive relief and antitrust damages for the NFL's Plan B free agency system, the NFL Draft, and the NFL player contract.[562] The lead plaintiff in the lawsuit was the well-respected and future Hall of Fame defensive end Reggie White.[563] After the *McNeil* loss, the *White* case presented the NFL and its clubs with the possibility of hundreds of millions of dollars in damages, after trebling, due to the restrictive policies it had imposed since the expiration of the 1982 collective bargaining agreement in 1987.[564]

Finally, more than five years after the initiation of the *Powell* litigation, the parties agreed to end the litigation. On January 6, 1993, the parties reached a Stipulation and Settlement Agreement (SSA), approved in final form by Judge Doty in August 1993, resolving the *White* case.[565] The SSA included a $195 million payout to the players.[566] The NFLPA recertified as the official bargaining representative of the players as part of the SSA[567] and the SSA became, in sum and substance, the new collective bargaining agreement between the NFL and players.[568] Judge Doty retained jurisdiction over the SSA and the collective bargaining agreement—an arrangement that would prove controversial in future years.[569]

The SSA was a monumental and long-overdue resolution to years of litigation and labor strife. Furthermore, the 1993 collective bargaining agreement was a groundbreaking agreement that set the framework for every subsequent NFL-NFLPA agreement.[570] The players gained the right to unrestricted free agency for the first time in exchange for a hard salary cap.[571] Players could become unrestricted free agents after five years of experience

---

[562] White v. NFL, 822 F. Supp. 1389, 1394 (D. Minn. 1993).

[563] *Reggie White*, Pro Football Hall of Fame, https://www.profootballhof.com/players/reggie-white/ (last visited Jan. 5, 2023).

[564] Chris Deubert, Glenn M. Wong, & John Howe, *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League,* 19 UCLA Ent. L. Rev. 1, 11 (2012); *See also* Quinn, *supra* note 1, at 209–11 (discussing damages prospects for NFL clubs after the *McNeil* verdict).

[565] White v. NFL, 836 F. Supp. 1458, 1462, 1468 (D. Minn. 1993).

[566] Quinn, 1 at 220.

[567] *Id.* at 225.

[568] Deubert, Wong, & Howe, *supra* note 564, at 12.

[569] *See id.* at 12 (discussing the NFL's efforts to remove Judge Doty's oversight).

[570] *Id.*

[571] *Id.*

and clubs' payrolls were limited to a range of 62 percent to 64 percent of certain revenues depending on the year.[572]

f. Williams (1995)

Although the NFL and NFLPA were finally able to reach a new collective bargaining agreement, the parties in each of the other major sports leagues were not. The 1994 MLB season was cut short in August due to a player strike[573] and the NHL imposed a lockout on its players, threatening the 1994-95 season.[574] In the NBA, the league and union were unable to reach a new agreement after the 1993-94 season.[575] The NBA players, likely emboldened by the recent success of NFL players, demanded the elimination of the draft, right-of-first-refusal system, and salary cap, all of which had been agreed to in prior collective bargaining agreements.[576]

This time, the league struck first.[577] The NBA filed a lawsuit seeking a declaration that its continued implementation of those practices would not violate antitrust laws.[578] The Southern District of New York framed the issue at hand as whether the non-statutory labor exemption continued after the expiration of the collective bargaining agreement, and, if so, "for what length of time."[579] The court noted that courts had reached different opinions on this issue in *Bridgeman*, *Powell,* and *Brown* (discussed below).[580]

Using the Jacobs and Winter article as a guide in evaluating how to account for the different policies underlying labor and antitrust laws, the court determined that the *Powell* standard was the right one: "[a]ntitrust immunity exists as long as a collective bargaining relationship exists."[581] The court consequently granted the NBA the declaration it sought and noted that the players, like those in the NFL post-*Powell*, are free to decertify the NBPA as its collective bargaining agent if it wishes to pursue antitrust relief.[582]

---

[572] *Id.*

[573] *See, e.g.,* William B. Gould IV, *Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law*, 15 STAN. L. & POL'Y REV. 61, 73-74 (2004).

[574] Jordan I. Kobritz & Jeffrey F. Levine, *Don Fehr Leads the NHLPA: Does the NHL Have Anything to Fear?* 11 VA. SPORTS & ENT. L. J. 178, 191 (2011).

[575] NBA v. Williams, 857 F. Supp. 1069, 1072 (S.D.N.Y. 1994).

[576] *Id.*

[577] *See* Quinn, *supra* note 1 at 259-60 (discussing NBA's decision to file first).

[578] NBA v. Williams, 857 F. Supp. 1069, 1071 (S.D.N.Y. 1994).

[579] *Id.* at 1074.

[580] *Id.*

[581] *Id.* at 1078 (citing Powell v. NFL, 930 F.2d 1293, 1303-04 (8th Cir. 1989)).

[582] *Id.*

While the parties agreed to begin the 1994-95 season without a collective bargaining agreement, the players appealed.[583] The case was assigned to a panel including Judge Winter. Contrary to popular belief, the panel assignments on Courts of Appeals are not random,[584] and thus it is possible that he was purposefully assigned to this case. In a January 1995 opinion authored by Judge Winter, the Second Circuit affirmed the district court's decision.[585] The opinion, perhaps not surprisingly, tracked the article Judge Winter co-authored 24 years earlier arguing that labor law — and not antitrust law — should be the framework through which collective bargaining disputes are resolved.[586] The Second Circuit "agree[d]" with the Eighth Circuit's decision in *Powell* "that the nonstatutory labor exemption precluded an antitrust challenge to various terms and conditions of employment implemented after impasse[.]"[587] More specifically, in the court's view, employers can "maintain the *status quo* after expiration of the agreement. . . without fear of antitrust sanctions."[588]

On June 24, 1996, the Supreme Court denied the players' petition for review,[589] four days after issuing its decision in *Brown v. Pro Football, Inc.*,[590] which addressed the same issues raised in *Williams*, as discussed below.

g. Brown (1996)

The Supreme Court's decision not to review the Eighth Circuit's decision in *Powell* left open for final determination when the non-statutory labor exemption expired. While the *Williams* petition was pending, the Supreme Court received a similar petition from NFL players, led by Antony Brown, concerning the same issue.[591] In December 1995, the Court granted Brown's petition.[592]

---

[583] Quinn, *supra* note 1 at 260.

[584] *See* Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65 (2017).

[585] NBA v. Williams, 45 F.3d 684 (2d Cir. 1995).

[586] *See id.* at 688–93.

[587] *Id.* at 692–93.

[588] *Id.* at 693.

[589] Williams v. NBA, 518 U.S. 1016, 1016 (1996).

[590] 518 U.S. 231 (1996).

[591] *See* Brief for Petitioners at 12, 45, Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (Jan. 19, 1996) (No. 95-388) 1996 WL 19034 (stating that *Brown* petition for certiorari had been filed on September 11, 1995 and that *Williams* petition was pending).

[592] *Id.*

The case had an extensive factual and procedural history. In 1989, NFL clubs passed a resolution creating six player-developmental or practice squads.[593] The clubs agreed that these players would be paid a fixed salary of $1,000 per week.[594] The players sued, alleging that the uniform wage provision violated Section 1 of the Sherman Act.[595]

In defense, the NFL argued that "the antitrust laws do not apply to wage-fixing restraints imposed by employer groups on employees."[596] In support of its claim, the NFL cited Section 6 of the Clayton Act, which states: "[t]he labor of a human being is not a commodity or article of commerce."[597]

In a March 1992 decision, the District Court for the District of Columbia disagreed with the NFL's "selective[ ] reading" of the provision, noting that

> [i]t is readily apparent that Congress, in enacting § 6, was concerned with the right of labor and similar organizations to continue engaging in [activities which otherwise would be considered antitrust violations], including the right to strike, not with the right of employers to band together for joint action in fixing the wages to be paid by each employer.[598]

The players also argued that the restraint was a *per se* violation.[599] Citing *Smith* and *Board of Regents*, the court noted that "the NFL is a joint venture in which the individual clubs are not competitors in an economic sense" and that there are "procompetitive purposes" for the NFL's rule. Consequently, the *per se* analysis was inappropriate.[600]

Under the rule of reason, the NFL argued that the wage restrictions were necessary to "promote[ ] competitive balance in the league."[601] Nevertheless, the court found this argument substantially the same as that rejected by the District of Columbia Court of Appeals in *Smith*.[602] Consequently, the court granted the players summary judgment.[603]

---

[593] Brown v. Pro Football, Inc., 90-cv-1071, 1992 WL 88039, at *1 (D.D.C. Mar. 10, 1992).
[594] *Id.*
[595] *Id.* at *4.
[596] *Id.* at *4.
[597] *Id.* (citing 15 U.S.C. § 17)
[598] *Brown.*, 90-cv-1071, 1992 WL 88039, at *5.
[599] *Id.* at *6.
[600] *Id.* at *6-8.
[601] *Id.* at *8.
[602] *Id.*
[603] *Id.* at *1.

At a subsequent trial, the court awarded the players $30,349,642 in damages and enjoined the NFL from setting a uniform salary for any class of players.[604]

On appeal, the Court of Appeals expanded on the facts and issues at hand. Per the court's telling, the practice squad salaries were imposed unilaterally only after the NFL had bargained to impasse on the issue with the NFLPA.[605] The court then proceeded through an extensive history of the non-statutory labor exemption.[606] Citing *Powell, Bridgeman,* and various law review articles, the court noted that "judges and commentators. . . cannot agree on any point at which the exemption must expire in order to properly accommodate federal labor policy."[607] Nevertheless, citing *Powell* and *Williams* (issued only two months earlier), the court found "a clear trend in favor of shielding the collective bargaining process in its entirety."[608]

The Circuit Court thus reversed the district court's decision and held that the non-statutory labor exemption protected the NFL's wage structure.[609] Citing Jacobs and Winter, the court concluded that "when federal labor policy collides with federal antitrust policy in a labor market organized around a collective bargaining relationship, antitrust policy must give way."[610]

As to the duration of the exemption, the court held that "the nonstatutory labor exemption waives antitrust liability for restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining."[611] This standard substantially matched the *Powell* court's determination that the exemption survives so long as there was "an ongoing collective bargaining relationship."[612] Consequently, as the dissent noted in *Powell* and the district court in *Williams*, the Circuit Court in *Brown* noted that "[i]f employees wish to seek the protections of the Sherman Act, they may forego unionization or even decertify their unions."[613]

In their brief to the Supreme Court, the players noted that the "case present[ed] a much-anticipated opportunity for the Court to clarify the limi-

---

[604] Brown v. Pro Football, Inc., 50 F.3d 1041, 1044 (D.C. Cir. 1995).
[605] *Id.* at1044.
[606] *See id.* at 1048-53.
[607] *Id.* at 1052.
[608] *Id.* at 1053.
[609] *Id.* at 1056–58.
[610] *Id.* at 1056.
[611] *Id.*
[612] Powell v. NFL, 930 F.2d 1293, 1303 (8th Cir. 1989).
[613] Brown v. Pro Football, Inc., 50 F.3d 1041, 1057 (D.C. Cir. 1995).

tations of the so-called 'nonstatutory labor exemption' to the antitrust laws."[614] In the players' view, the Circuit Court's opinion "represent[ed] a bold and unrestrained expansion of what was once a carefully limited judge-made exemption from the antitrust laws."[615] Further, the players argued that the court's decision, combined with those in *Powell* and *Williams* "cut the judge-made exemption loose from its required mooring in employer-employee agreement."[616] In so doing, the players claimed that the courts had failed to give the Sherman Act its required effect[617] and threatened to provide all sports leagues with the same type of "aberrational" antitrust immunity enjoyed by MLB.[618] Instead, the players argued, the nonstatutory labor exemption should end with the expiration of a collective bargaining agreement.[619]

The NFLPA, NHLPA, MLBPA, and NBPA filed an amicus brief in support of the players.[620] The unions argued that

> The real life experience of amici and their members demonstrates the severe and adverse consequences to antitrust and labor law policies which directly flow from such an overbroad antitrust exemption. When employers in professional team sports have claimed to be shielded from antitrust scrutiny for their unilateral imposition of labor market restraints, the result has been lockouts, strikes, and union decertifications. . .. By contrast, when the antitrust laws have been properly applied to unionized labor markets in professional team sports, history shows that collective bargaining has been successful and resulted in compromises of employer and employee interests which resulted in labor peace.[621]

---

[614] Brief for Petitioners at 9, Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (Jan. 19, 1996) (No. 95-388).

[615] *Id.* at 30.

[616] *Id.* at 44.

[617] *Id.* at 45-51.

[618] *Id.* at 80 (citing *Flood v. Kuhn*, 407 U.S. 258, 282 (1982)).

[619] Brief for Petitioners at 81–86, Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (No. 95-388).

[620] Motion of the National Hockey League Players Association, National Football League Players Association, Major League Baseball Players Association and National Basketball Players Association for Leave to File Brief as Amici Curiae and Brief Amici Curiae in Support of Petitioners, Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (Jan. 19, 1996) (No. 95-388).

[621] *Id.* at 8-9.

The players were also supported by the federal government.[622] The government argued that the Court of Appeals had extended the non-statutory labor exemption "far beyond its proper scope."[623] Further, the government asserted, "[b]ecause of the fundamental importance to national economic policy of the Sherman Act, antitrust exemptions must be narrowly construed."[624] The government said the exemption should expire at impasse.[625] Finally, "[i]n rejecting an impasse standard and holding that employees must decertify their union to pursue remedies under the Sherman Act, the court of appeals has inappropriately required employees to choose between two sets of statutory rights afforded to them by Congress."[626]

The NFL responded by again asserting the preeminence of the labor laws:

> Congress has created a comprehensive system of collective bargaining as the exclusive means of determining terms and conditions of employment in unionized industries. That system, which affords employees and employers a balanced array of economic weapons, has as its cornerstone the complete exclusion of the government, including antitrust courts, from any substantive role in the bargaining process.[627]

To the NFL, the government's sole role should be "to the extent necessary to ensure compliance with the parties' obligation to negotiate in good faith."[628] The NFL pointed to the history of litigation in the NFL and NBA as evidence of the government's involvement in "the collective bargaining process in a manner inconsistent" with the goals of the NLRA.[629]

The NFL further argued that the players' position that the exemption expired with the collective bargaining agreement would make multi-employer bargaining "unworkable."[630] The clubs would, by virtue of their obligation to bargain in good faith, be "in an untenable position—required to continue joint discussions, yet facing potential allegations, from employees eager to seek a bargaining advantage, that each joint meeting is evidence

---

[622] *See* Brief for the United States and Federal Trade Commission as Amici Curiae Supporting Petitioners, Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (Jan. 19, 1996) (No. 95-388).

[623] *Id.* at 11.

[624] *Id.*

[625] *Id.* at 12.

[626] *Id.*

[627] Brief for Respondents at 18, Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (Feb. 16, 1996) (No. 95-388).

[628] *Id.* at 21.

[629] *Id.* at 51–52.

[630] *Id.* at 73.

of a *per se* antitrust violation."[631] Further, the NFL claimed that this position, "if adopted by the Court, would inevitably cause chaos, if not a complete shutdown of league operations, upon the expiration of every collective bargaining agreement."[632]

In other parts of its brief, the NFL claimed that "the antitrust laws simply do not apply to pure labor-market restraints — those that do not adversely affect competition in any product market,"[633] and was insistent on its right to unilaterally implement its good faith bargaining proposal at impasse.[634] The NBA, MLB, and NHL filed separate briefs supporting the NFL.[635]

The Supreme Court's opinion was a win for the leagues. The court concurred in the leagues' long-standing argument that "[t]he labor laws gives the [National Labor Relations] Board, not antitrust courts, primary responsibility for policing the collective-bargaining process."[636] The court held that the non-statutory labor exemption must survive impasse because "to permit antitrust liability here threatens to introduce instability and uncertainty into the collective-bargaining process, for antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective-bargaining process invites or requires."[637] To adopt an "impasse-related rule," the court said, "creates an exemption that can evaporate in the middle of the bargaining process."[638]

The Supreme Court established a loose four-pronged test, holding that the non-statutory labor exemption applies where the challenged conduct:

1) Took place during and immediately after a collective bargaining negotiation;
2) Grew out of, and was directly related to, the lawful operation of the bargaining process;

---

[631] *Id.* at 74.
[632] *Id.* at 78–79.
[633] *Id.* at 19.
[634] *Id.* at 64–73.
[635] *See* Brief of the National Basketball Association as Amicus Curiae in Support of Respondents, Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (Feb. 16, 1996) (No. 95-388); Brief of Amici Curiae Office of the Commissioner of Baseball and Major League Baseball Players Relations Committee, Inc. in Support of Respondents, Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (Feb. 16, 1996) (No. 95-388); Brief of the National Hockey League as Amicus Curiae in Support of Respondents, Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (Feb. 16, 1996) (No. 95-388).
[636] Brown v. Pro Football, Inc., 518 U.S. 231, 242 (1996).
[637] *Id.*
[638] *Id.* at 246.

3) Involved a matter that the parties were required to negotiate collectively; and
4) Concerned only the parties to the collective bargaining relationship.[639]

The Court characterized this exemption as being narrower than that outlined by the Court of Appeals.[640] Interestingly, the Court never mentioned *Powell, Williams,* or *Mackey*, nor discussed the standards articulated in those cases.

In another loss for the players, the Court declined to decide where the non-statutory exemption ceased to apply,[641] instead limiting its analysis to finding that it did apply to the facts in *Brown.*[642] Further, the Court, unlike prior courts, did not address or implicitly endorse the idea that the exemption ends if a union decertifies. This issue thus remains live.[643]

Perhaps coming full circle, the Supreme Court cited Jacobs and Winter's article in general support of its position that sports should be subject to the same legal "framework in which bargaining is to take place" as any other industry.[644] Moreover, as the lone dissenter, Justice Stevens identified the article as that which "first advanced the expansive view of the nonstatutory labor exemption that the Court appears now to endorse."[645]

Conclusion

Having lost at the Supreme Court in *Brown*, the NFL players were nonetheless substantially right in their prediction as to what would be the result of the broad exemption the league was seeking: "labor relations in football may be relegated to a disruptive pattern of bargaining, impasse, decertification, antitrust litigation and settlement, repeated again and again with each contract cycle."[646] In 2011, amid stalled negotiations on a new collective bargaining agreement, both the NFLPA[647] and NBPA[648] decerti-

---

[639] *Id.* at 250.
[640] *Id.* at 235.
[641] *Id.* at 250.
[642] *Id.* at 235.
[643] *See* Brady v. NFL, 644 F.3d 661, 667 (8th Cir. 2011) (NFL arguing that NFLPA disclaimer prior to antitrust lawsuit was a "sham" that should not be given legal effect).
[644] Brown v. Pro Football, Inc., 518 U.S. 231, 249 (1996).
[645] *Id.* at 262 (Stevens, J., dissenting).
[646] Brief for Petitioners at 77–78, Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (Jan. 19, 1996) (No. 95-388).
[647] *See* Chris Deubert, Glenn M. Wong, & John Howe, *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the Na-*

fied or disclaimed their status as the bargaining representative on behalf of their players and filed antitrust lawsuits. The next year, the NHLPA considered decertifying,[649] before reaching a new collective bargaining agreement with the NHL.[650]

Less successful were the leagues' predictions that altering or eliminating their player-related restrictions would destroy the leagues. Lawyers, in the cause of their clients, are prone to hyperbole. And sports, with its emotional connections, might seem like a natural place to favor the heart over the mind.[651] Nevertheless, after an egregious error in 1922, the courts determined that sports too must comply with antitrust law and have their claims scrutinized.

Once the leagues accepted this reality, they made substantial progress in the courtroom and on their respective fields of play. By accepting (or being forced to accept) the unionization of their players, the leagues eventually gained a durable exemption from the antitrust laws while also making the players partners in the leagues' success. Whether causative or correlative, the leagues have since thrived, continuously breaking revenue and franchise-valuation records. In many respects, it is unfortunate that it took such a volume of litigation to get to the relationship under which the parties operate today. This Article provides the history of that litigation so that perhaps the parties can learn from it in considering future legal battles.

---

tional Football League, 19 UCLA ENT. L. REV. 1, 22, 27 (2012); Brady v. NFL, 644 F.3d 661, 667 (8th Cir. 2011).

[648] Kemper C. Powell, *Beyond Brady and Anthony: The Contemporary Role of Antitrust Law in the Collective Bargaining Process*, 14 TEX. REV. ENT. & SPORTS L. 147, 147 (2013).

[649] *Id.* at 148.

[650] Patrick Rishe, *NHL Owners, Players Score New CBA Saving the 2012-13 Hockey Season*, FORBES (Jan. 6, 2013), https://www.forbes.com/sites/prishe/2013/01/06/nhl-owners-players-score-new-cba-saving-the-2012-13-hockey-season/?sh=3d316fd65385.

[651] *See* Flood v. Kuhn, 407 U.S. 258, 260–64 (1972) (providing nostalgic history of baseball's place in American culture).