In 1994, after a trying wait of 54 years, the New York Rangers won hockey's Stanley Cup championship. The hometown fans' jubilation and dreams of a repeat performance were short-lived, however, when an owners' lockout delayed the start of the 1994-95 season. The season finally started sixteen weeks late, and the Rangers never recovered from the delay, as they stumbled into the playoffs and failed to defend their title.1

In 1996, after an eighteen year absence from the fall classic, the New York Yankees returned to the World Series in dramatic fashion, coming back from a 2-0 deficit to beat the Atlanta Braves in six games. For the first time in months, the game of baseball preempted the sport's labor problems. By mid-December, the owners and players finally agreed on a new collective bargaining agreement, and baseball started down the road to repairing the damage done by the 1994 strike.2

† B.S.B.A., cum laude, 1991, Georgetown University; J.D. Candidate 1998, University of Pennsylvania Law School. I owe a debt of gratitude to Buck Briggs, Ken Shropshire, Craig Tartasky and Magistrate Judge Andrew Peck for their generous assistance and guidance in my studies. Thanks to Elaine Divelbliss, Jennifer Kim and Saily Avelenda for their efforts in bringing this article to print. This comment is dedicated to my parents and my fiancee Lori for unconditionally supporting me in my most recent academic endeavors.

1. See The Champions: Rangers Excited About Long-Awaited Ring Ceremony, SAN FRANCISCO CHRON., Jan. 12, 1995, at B2 (describing the Rangers' reaction to a long-awaited agreement between the NHL Players' Association and the team owners). The hockey season, which usually starts during the first week of October, was shortened from 82 games to 48, with the first games delayed until the third week in January.

The Rangers eventually lost to the Philadelphia Flyers in four straight games in the second round of the Stanley Cup playoffs. See Terry Egan, Flyers End Rangers' Reign, 4-1, DALLAS MORNING NEWS, May 27, 1995, at 8B.

In its July 1996 decision, *Brown v. Pro Football, Inc.*, the Supreme Court held that when parties reach an impasse during collective bargaining, management may unilaterally implement its "last offer" to the union without exposing itself to any antitrust liability. This non-statutory labor exemption from antitrust laws has provided management with a seemingly inequitable advantage over the players' union in the process of collective bargaining.

The court in *Brown III* held that the non-statutory exemption from antitrust laws continues as long as the parties are involved in a collective bargaining relationship. However, the Supreme Court was not asked to define an endpoint for this relationship, and, accordingly, did not address the question of whether the non-statutory exemption from antitrust liability would survive a collapse of the collective bargaining relationship, nor define such a collapse (e.g., an extremely long impasse accompanied by management instability, or union decertification).

This comment argues that *Brown III* provides players and owners with adequate advice regarding what collective bargaining strategies to adopt and when the owners might be subject to antitrust liability. Part I addresses the development of antitrust law and its application to sports, including the development of baseball's enigmatic antitrust exemption. Part II details the exemptions to antitrust liability and tracks the development of a standard of expiration for the non-statutory exemption. Part III discusses the impact of union decertification on the players' ability to gain access to antitrust remedies. Part IV analyzes the Supreme Court's *Brown III* holding, and argues that the holding does not change the previously developed expiration standard. Part V provides suggestions for the owners and players once impasse has been reached in negotiations, and Part VI describes why some judicial venues are more favorable to the parties than others. Finally, Part VII contains a brief summary of the
current status of collective bargaining agreements between the leagues and their respective players.\textsuperscript{12}

I. THE HISTORY OF ANTITRUST LAW AND ITS APPLICATION TO SPORTS\textsuperscript{13}

In the sports industry, most of the friction between players and owners stems from disagreements over compensation and free agency.\textsuperscript{14} Generally, antitrust suits involving sports leagues are player-instituted challenges that assail a specific management practice as an unfair restraint on competition among teams for player services, in violation of the Sherman Antitrust Act.\textsuperscript{15} Although other industries lend themselves to straightforward antitrust evaluation in terms of pro-competitive and anti-competitive effects, the nature of a self-regulated, cooperative, and yet competitive, sports league raises the question of whether sports leagues should be subject to antitrust law at all.\textsuperscript{16}

A. The Sherman Antitrust Act

After the Civil War, American industry was dominated by monopolies.\textsuperscript{17} In response to strong anti-business sentiment in his home state of Ohio, Senator John Sherman led the charge against these trusts. In his impassioned remarks supporting his antitrust legislation, Sherman filibustered about the importance of free trade and the production of goods and commodities, claiming that dangerous business combinations existed in all reaches of the country, and "if we will not endure a king as a political

\textsuperscript{12} See infra notes 243-54 and accompanying text.
\textsuperscript{13} For purposes of this comment, the major professional sports leagues are abbreviated as follows: Major League Baseball—MLB; Major League Soccer—MLS; National Basketball Association—NBA; National Football League—NFL; and National Hockey League—NHL.
\textsuperscript{14} Courts have heard many cases where players assailed a management practice that restricted their ability to move freely between teams. See, e.g., Flood v. Kuhn, 407 U.S. 258 (1972), aff'g 443 F.2d 264 (2d Cir. 1971) (challenging baseball's reserve clause); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953), aff'g per curiam 200 F.2d 198 (9th Cir. 1952), aff'g 101 F. Supp. 93 (S.D. Cal. 1951) (same); Federal Baseball Club of Baltimore v. National League of Prof'1 Baseball Clubs, 259 U.S. 200 (1922), aff'g 269 F. 681 (D.C. Cir. 1920) (same); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977) (challenging football's Plan B free agency restrictions).
\textsuperscript{15} There have also been many challenges to league-imposed compensation restrictions. See, e.g., Brown III, 116 S. Ct. at 2116 (challenging football's practice squad salary cap).
power we should not endure a king over the production, transportation, and sale of any of the [necessities] of life."\(^8\)

The final text of the Sherman Antitrust Act, enacted on July 2, 1890, provided:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal. . . . Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . .\(^9\)

To this day, the Sherman Act remains one of the most dangerous obstacles to monopolies and their business activities.

Over the last century, courts have constructed an elaborate framework to determine whether a monopoly's actions violate the Sherman Act. Initially, courts evaluated antitrust challenges facially, declaring the assailed practices per se violations when the conduct was so unjust that it was a "naked restraint" with no other purpose than to stifle competition.\(^20\) Examples of such naked restraints include price fixing to eliminate competitors,\(^21\) territorial exclusion/division of markets,\(^22\) group boycotts,\(^23\) tie-in arrangements\(^24\) (such as pre-season ticket purchasing requirements), and vertical territorial restrictions.\(^25\)

In 1911, the Supreme Court determined that some combinations and conspiracies in restraint of trade were not illegal restrictions of interstate commerce.\(^26\) Presented with the question of whether certain petroleum price fixing and collusive production and shipping practices were illegal restraints of trade, the Court held that only unreasonable restraints of trade were illegal under the Sherman Act.\(^27\) Thereafter, two standards of analysis for antitrust liability developed: (1) whether the conduct was per se illegal, or (2) whether the conduct violated the Rule of Reason (as articulated in Standard Oil):

\[\text{[J]udgment must in every case be called into play in order to}\]

\[\text{---}\]

\(^{18}\) 21 CONG. REC. 2455, 2457 (1890).


\(^{26}\) See Standard Oil Co. v. United States, 221 U.S. 1, 32-43 (1911).

\(^{27}\) See id. at 55, 59-70.
determine whether a particular act is embraced within the statutory classes [of conduct prohibited by the Sherman Act], and whether, if the act is within such classes, its nature or effect causes it to be a restraint of trade within the intendment of the act.28

With the advent of these two theories of analysis, the courts gradually shifted to across the board application of the Rule of Reason.29 Thus, many practices initially deemed per se illegal have been readdressed by modern courts under Rule of Reason scrutiny.30

The Supreme Court in National Society of Professional Engineers v. United States31 articulated the most current version of the Rule of Reason standard: an imposed restraint is unlawful if the anti-competitive injury it causes outweighs the pro-competitive benefits that it generates.32 The Sherman Act does not require a competitive bidding process; rather, the Act merely prohibits unreasonable restraints on competition. Accordingly, the proper test for the courts to use is one that balances the equity of the pro-competitive and anti-competitive effects.33 This equitable approach seems more appropriate when analyzing antitrust challenges to sports leagues, due to the symbiotic interaction of teams required within any league.34

28. Id. at 63.

29. The Rule of Reason analysis has been bifurcated into a “quick look” application and a “full” application. Courts often will employ the “quick look” analysis when the practice involved is a “naked restraint of trade with no purpose except stifling of competition,” and the court may declare the practice illegal without considering any competitive justifications for it; however, the court should not apply the “quick look” analysis where “the economic impact of the restraint is not immediately obvious.” Chicago Prof’l Sports Ltd. Partnership v. NBA, 754 F. Supp. 1336, 1357 (N.D. Ill. 1991) (citation omitted), aff’d, 961 F.2d 667 (7th Cir. 1992). When a “quick look” analysis is employed, the court need not make any “inquiry into market power.” Chicago Prof’l Sports Ltd. Partnership v. NBA, 874 F. Supp. 844, 859 (N.D. Ill. 1995), vacated on other grounds, 95 F.3d 593 (7th Cir. 1996).

30. In Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc., 441 U.S. 1, 9, 19-20 & n.33 (1979), the Supreme Court set aside the premise that price fixing is per se illegal, holding that the implementation of such practices must be analyzed under a Rule of Reason approach, because circumstances may show that there are pro-competitive effects to be gained through certain price fixing practices. See also Mackey, 543 F.2d at 620 (finding that a practice operating contrary to the Rule of Reason violates the Sherman Act).


32. See id. at 691.

33. See id. at 695-96.

34. Collegiate drafts, player movement restrictions, salary caps, and mandated revenue sharing would fail most per se analyses. See supra notes 105-07 and accompanying text.
B. Antitrust and Baseball

Although enacted to protect "the production, transportation, and sale of any of the [necessities] of life," the Sherman Act did not make all restraints on trade illegal—only those dealing with matters of interstate commerce. This distinction between interstate and intrastate commerce gave courts the leeway needed to grant baseball its first "exemption" from antitrust scrutiny. However, in the intervening decades, both the interstate and the commerce aspects of sports increased dramatically.

However, a league is destined for problems when its member teams cannot compete on the playing field with one another.

The NFL sits on very secure ground because teams can experience a quick turnaround in on-field performance due to revenue sharing, the salary cap, free agency, and the collegiate draft. These mechanisms have allowed small-market teams, such as Green Bay, winner of the 1997 Super Bowl, to compete with big-market teams, such as New York and Chicago. These "restrictive practices" also enabled expansion franchises in Carolina and Jacksonville to field playoff teams in their second year in the league, and have allowed other teams to drastically reverse their on-field misfortunes within a few short years (for example, Dallas had a 1-15 record in 1991 and won the Super Bowl in 1994).

Meanwhile, MLB has experienced continuing problems with the financial and competitive security of small-market teams such as those in Pittsburgh, Montreal, and Kansas City. This is best evidenced by comparing the payrolls of the four finalists in the 1996 playoffs (World Series champion New York Yankees, first in MLB; American League ("AL") runner-up Baltimore Orioles, second; National League ("NL") champion Atlanta Braves, fourth; and NL runner-up St. Louis Cardinals, fifth) with the payrolls of two of the last-place teams during the 1996 season (Detroit, last in the AL East, had the fourth lowest payroll; and Pittsburgh, last in the NL Central, had the second lowest payroll). See Mike Dodd, Can A Pennant Be Bought? Revenue Disparity Leaves Some Teams in Left Field, USA TODAY, Oct. 8, 1996, at 1A (reporting that teams with higher payrolls are more successful); 1996 Major League Baseball Salary Survey, USA TODAY, Nov. 15, 1996, at 15C. See also What they Paid them to Play, (visited Mar. 19, 1997) <http:ll www.usatoday.com/sports/baseball/bbw/sbbw3506.htm>; Final Standings, (visited Mar. 19, 1997) <http://espnet.sportszone.com/mlb/standings/1996>.

Other sports leagues have folded in the last twenty years due to the leagues' inability to maintain a competitive balance both on the field and on the books. The North American Soccer League folded in 1985 because only a few of its fourteen teams were financially viable. The failed teams could not compete with certain teams' financial abilities to stockpile players with the talent level of Pele and Franz Beckenbauer, as the New York Cosmos did. See Ridge Mahoney, Lessons Were Learned from Outdoor Soccer's Demise, SAN DIEGO UNION-TRIB., Aug. 24, 1985, at D14; Brian Trusdell, Cosmos Weren't Enough for NASL, L.A. TIMES, Aug. 4, 1985, at 9. The United States Football League folded in 1986 for similar reasons. See United States Football League v. NFL, 842 F.2d 1335, 1341-42 (2d Cir. 1988).

35. 21 CONG. REC. at 2457.

36. See Federal Baseball, 259 U.S. at 200. The Supreme Court held that MLB was exempt from liability under the Sherman Act because it was not involved in interstate commerce. See infra notes 51-55 and accompanying text.

37. See Toolson, 346 U.S. at 359 (Burton, J., dissenting) (arguing that baseball clubs qualify as interstate trade and commerce); Gardella v. Chandler, 172 F.2d 402, 407-08 (2d Cir. 1949) (holding that baseball is interstate commerce), rev'g summary judgment, 79
Nonetheless, in 1972, the Supreme Court upheld baseball’s enigmatic exemption.\(^3\)

1. The Reserve Clause and Baseball’s Antitrust Exemption/Exclusion\(^9\)

The first antitrust challenges to sports league practices involved baseball’s reserve clause.\(^4\) Whenever a rival league was created, such as the American League in 1899,\(^41\) the Federal League in 1913,\(^42\) and the Mexican League in 1925,\(^43\) some players would “jump” their contracts with Major League teams in favor of promises of higher salaries.\(^44\) However, a player who did so violated his Major League contract’s reserve clause, which granted a team the exclusive right to “reserve” that player’s services.

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\(^3\) See Flood, 407 U.S. at 258.


\(^4\) After the Civil War, baseball club teams would recruit “ringers” and outbid other teams for more talented players. See Harold Seymour, Baseball: The Early Years 47-48 (1960) [hereinafter Seymour, EARLY YEARS]; Joseph A. Kohm, Jr., Baseball’s Antitrust Exemption: It’s Going, Going . . . Gone!, 20 NOVA L. REV. 1231, 1233 (1996). In 1879, in response to this practice, the owners devised the reserve system, whereby a team could reserve five of its players for the team’s exclusive control. See James B. Dworkin, Owners Versus Players: Baseball and Collective Bargaining 44 (1981); Seymour, EARLY YEARS, supra, at 82. The reserve system evolved to include full roster protection. Ultimately, the players were unable to receive salaries commensurate with their true market values. See Dworkin, supra, at 46.

\(^41\) Ban Johnson took over the struggling Western League in 1893, and in 1899, changed its name to the American League. After the 1900 season, Johnson “established new clubs in Boston, Philadelphia, Baltimore, and Washington, snapped up newly unemployed players, then [raided] active National League rosters . . . . Lured by offers of an average of $500 more per season, 111 National Leaguers jumped to [the] American League.” Ward & Burns, supra note 2, at 65.

\(^42\) The Federal League started in 1913 as a minor league. See id. at 121. After one season, the Federal League began “offering big money to big-league stars . . . . Eighty-one former major leaguers . . . [and] eighteen men actually under contract” were lured to the new league. Id.

\(^43\) The Mexican League was founded as a semi-professional league in 1925. See Gerald F. Vaughn, Jorge Pasquel and the Evolution of the Mexican League, 12 NATIONAL PASTIME 9, 9 (1992). In 1946, the Mexican League “wooed top U.S. players to come to Mexico, drawing the wrath of major league club owners. During 1946 and 1947 about one-fifth of the Mexican League’s 150 or more players had served in the U.S. major leagues or high minors.” Id. at 12. Of these thirty or so players, eighteen were under contract to major league clubs. See Ward & Burns, supra note 2, at 353.

\(^44\) The reserve clause gave a player’s club perpetual rights to his services. Players would “jump,” or violate, these contracts when they signed with another team.
for the ensuing season.\footnote{45. See Kohm, supra note 40, at 1234 n.19 (quoting LIONEL S. SOBEL, PROFESSIONAL SPORTS & THE LAW § 2.1 (1977)).}

In 1914, Hal Chase\footnote{46. Although Hal Chase was an elite player during his career, he holds a special place in baseball history for other reasons. Chase was better known for his jump to the Federal League, and, upon his return to MLB, for his role in the Chicago "Black Sox" scandal. Chase participated in fixing the 1919 World Series, which earned eight other players lifetime bans from the sport. See generally ELIOT ASINOF, EIGHT MEN OUT 14-15, 28 (1963); HAROLD SEYMOUR, BASEBALL: THE GOLDEN AGE 288-93 (1971) [hereinafter SEYMOUR, GOLDEN AGE].} jumped from the Chicago White Sox of the American League to the Buffalofeds of the Federal League. The White Sox sued to enjoin Chase from playing for another team and to compel him to honor his White Sox contract.\footnote{47. See American League Baseball Club of Chicago v. Chase, 149 N.Y.S. 6 (1914).} Chase unsuccessfully argued that the reserve clause in his contract violated the Sherman Act because of the commodifying effect that the clause had on players. The New York Supreme Court disagreed with Chase's "novel" argument, stating that although baseball was an "ingeniously devised" monopoly, it was not "interstate trade or commerce . . . subject to the provisions of the Sherman Act."\footnote{48. Id. at 16.} Baseball was "an amusement, a sport . . . not a commodity . . . subject to the regulation of Congress on the theory that it is interstate commerce."\footnote{49. Id. at 17.} Although the decision freed Chase from his White Sox contract under New York contract law,\footnote{50. "The court will not assist in enforcing an agreement which is a part of a general plan . . . of monopoly." Id. at 20.} the court's holding and analysis with respect to antitrust law became the foundation for baseball's subsequent antitrust exemption.

In 1916, the Baltimore Terrapins of the Federal League sued the Major League clubs, hoping to have the reserve clause declared illegal and all existing standard player contracts declared null and void.\footnote{51. The clubs in the Federal League brought such an action before future MLB commissioner Judge Kenesaw Mountain Landis in 1915, but they settled with the Major League clubs while Landis delayed returning a verdict. See SEYMOUR, GOLDEN AGE, supra note 46, at 212. Baltimore did not join in the settlement and subsequently sued MLB on its own. See Federal Baseball, 259 U.S. at 200.} The D.C. Court of Appeals overturned the trial court's finding that baseball was interstate commerce, and that Major League Baseball was involved in an illegal monopoly,\footnote{52. See Federal Baseball, 269 F. at 684.} holding instead that baseball was not trade or commerce, but sport. Since baseball was local in its beginning and in its end, it could not be "transferred in interstate commerce."\footnote{53. Id. at 685.} Justice Holmes affirmed the appellate court, holding that the "business is giving
exhibitions of [baseball], which are purely state affairs... the transport is a mere incident, not the essential thing... [P]ersonal effort, not related to production, is not a subject of commerce." Further, in 1953, the Supreme Court in the Toolson case construed their 1922 Federal Baseball decision as exempting baseball from the Sherman Act, although Federal Baseball had only stated that baseball was not interstate commerce.

The next antitrust challenge to baseball's "exemption" involved several players whom MLB blacklisted when they jumped their Major League contracts to play in the Mexican League in 1946. When the Mexican League collapsed, the players sued the Commissioner on antitrust grounds over his decision to blacklist them. The trial court granted the Commissioner summary judgment on the basis of Federal Baseball. A divided Second Circuit overturned the decision. Judge Learned Hand wrote that the interstate character of baseball was so prevalent, it was akin to "a 'ball park' where a state line ran between the diamond and the grandstand." Concurring, Judge Frank wrote that Federal Baseball was not fatal to the plaintiff ballplayers since subsequent courts' expansion of the Commerce Clause had rendered Federal Baseball an "impotent zombi [sic]," and the Supreme Court had overruled many of the cases used as precedent to support Federal Baseball. Therefore, the courts should consider baseball an interstate activity, and commerce could include a laborer's services—"only the totalitarian-minded will believe that [the players' high salaries] excuse[] virtual slavery."

The case was remanded for trial, but it settled before the court could explicitly overrule Federal Baseball. However, a few years later, "perhaps encouraged by... Gardella," George Toolson filed an antitrust

55. See Toolson, 346 U.S. at 356-57.

There has been much speculation regarding the propriety of the Federal Baseball decision. Justice Taft's family owned a baseball team when the Court heard the case, and Taft himself had been considered as a candidate for the Commissioner of baseball. See Lee Lowenfish, The Imperfect Diamond: A History of Baseball's Labor Wars 98 (rev. ed. 1991). Contemporaneous notes surfaced that implied that Taft should have recused himself from the case, and that without his presence and coalition building, the Federal Baseball verdict could have been 4-4 instead of 9-0. W. Buckley Briggs, Remarks at the University of Pennsylvania Law School (Oct. 9, 1996).
56. See Gardella, 79 F. Supp. at 263.
57. See Gardella, 172 F.2d at 404.
58. Id. at 407.
59. Id. at 408-09.
60. See id. at 409 n.1.
61. Id. at 410, 412.
62. See Kohm, supra note 40, at 1237-38.
63. Id. at 1238.
suit against the New York Yankees, challenging the reserve clause. In one of the most ferociously disputed per curiam affirmations ever, the Supreme Court affirmed summary judgment for the Yankees, by a 7-2 vote, "on the authority of Federal Baseball, so far as that decision determine[d] that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." This was the first time that the Supreme Court mentioned an actual antitrust "exemption" for baseball. Furthermore, the Court thus implied that result stare decisis should govern, and if the precedential value of Federal Baseball was incorrect, Congress should legislate any necessary changes. This often has been viewed as an overreaching interpretation of Federal Baseball because Federal Baseball does not grant baseball a per se exemption from the Sherman Act; it merely states that because baseball was not interstate commerce in 1922, it did not fall within the purview of the Act. Two justices dissented in Toolson on the grounds that Federal Baseball only stood for the proposition that if baseball is not interstate, then it is not subject to the Sherman Act. The dissent suggested that if Congress had intended specifically to exempt baseball from the purview of the Sherman Act, it should have done so explicitly.

Baseball's antitrust "exemption" remained unchallenged until 1972 when Curt Flood, an outfielder for the St. Louis Cardinals, objected to being traded to the Philadelphia Phillies. Flood sued the Commissioner, claiming that the reserve clause violated the Sherman Act and that MLB should grant him free agency—the ability to negotiate a contract with any

64. Toolson was playing for the Yankees' Class AAA minor league team in Newark when his contract was assigned to Binghamton (the Yankees' Class AA minor league team). Toolson failed to report to Binghamton, but, under the reserve clause, he was vertically locked into the Yankees' minor league system, such that he could not play elsewhere. He filed an antitrust challenge to the minor league reserve system, claiming that it violated the Sherman Act. Toolson argued unsuccessfully at the trial and appellate levels that Gardella required the reserve clause to be analyzed under the Rule of Reason for antitrust liability.

See Toolson, 101 F. Supp. at 94.

65. Toolson, 346 U.S. at 357.

66. The American courts' system of precedent or stare decisis is based on:

adherence to both the reasoning and result of a case, and not simply to the result alone. This distinguishes the American system of precedent, sometimes called "rule stare decisis," from the English system, which historically has been limited to following the results or disposition based on the facts of a case and thus referred to as "result stare decisis."


67. See Toolson, 346 U.S. at 357.

68. See id. at 360 (Burton, J., dissenting).

69. See id. at 364-65 (Burton, J., dissenting).
Both the district court and the court of appeals entered judgments against Flood on the basis of Federal Baseball and Toolson. Writing for a divided Supreme Court, Justice Blackmun affirmed the lower courts, although he admitted that "baseball is a business and it is engaged in interstate commerce." However, Blackmun then stated that the "established aberration" of baseball's antitrust exemption, though "unrealistic, inconsistent, or illogical," had been present for fifty years, and Congress' inaction supported the Court's decision to keep it intact. Justice Marshall wrote a scathing dissent, wherein he scolded the Court for its mechanical application of stare decisis to the Federal Baseball and Toolson decisions. Both Marshall's and Douglas' dissenting opinions argued that the Court gave too much weight to the purported congressional inaction with respect to baseball's exemption. Justice Marshall stated that baseball "should be covered by the antitrust laws beginning with this case and henceforth, unless Congress decides otherwise."

70. See Flood, 407 U.S. at 264-66. Flood had the support of at least one Supreme Court justice, retired Justice Arthur Goldberg, who represented him in his reserve clause challenge. See id. at 258.
72. The Supreme Court voted 5-3 to affirm the appellate court's decision. See Flood, 407 U.S. at 259, 285, 288.
73. Id. at 282. Based on a literal reading of Federal Baseball, baseball was not subject to the Sherman Act because it was not interstate commerce. Here, Blackmun admits that baseball is interstate commerce, so arguably, the reserve clause should be subject to a Rule of Reason analysis. See supra note 54 and accompanying text.
74. Flood, 407 U.S. at 282-83. The Court states that under these circumstances, "there is merit in consistency even though...beneath that consistency is a layer of inconsistency." Id. at 284.
75. See id. at 292-93 (Marshall, J., dissenting). Marshall noted that the Court has a history of changing its view as to the definition of interstate commerce. See id. at 293 n.4; see also supra note 66.
76. Although Congress has not legislated regarding baseball's exemption, it has not been for a lack of effort. Since 1949, baseball's exemption has been the subject of numerous Congressional investigations and hearings, but unfortunately, legislative action has been derailed by predominantly partisan testimony on behalf of both sides. See generally Stephen R. Lowe, The Kid on the Sandlot: Congress and Professional Sports, 1910-1992, 15-60 (1995); McMahon, supra note 39, at 248-49. This inaction will likely change in the near future, since one of the terms of the new MLB collective bargaining agreement is a required bipartisan effort to overturn baseball's exemption. See Jim Litke, Baseball Owners on Losing End, DAYTON DAILY NEWS, Nov. 27, 1996, at 6D.

Inferring Congressional intent from any Congressional inaction generally is problematic. See Helvering v. Hallock, 309 U.S. 106, 119-20 (1940) (arguing that attempting to explain the cause of Congressional inaction without any evidence is unjustified); McMahon, supra note 39, at 249 (same); William D. Neary, Note, Legislation, 32 TEX. L. REV. 890, 891-92 (1954) (discussing possible reasons for Congressional inaction in Toolson).
77. Flood, 407 U.S. at 293 (Marshall, J., dissenting); see also id. at 285-88 (Douglas,
2. Other Applications of Baseball’s Exemption

Although the Court never overruled Federal Baseball, the players finally obtained free agency in 1976. However, the narrowing of the exemption in Flood, combined with subsequent lower court decisions

Justice Holmes, though responsible for the Federal Baseball opinion that the Supreme Court has arguably misconstrued to grant baseball an exemption from antitrust law, once wrote about the dangers of the blind application of result stare decisis:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 469 (1897). This quotation makes the Flood outcome even more ironic, because the Flood Court rejected every premise on which Federal Baseball was based. See Flood, 407 U.S. at 282-85.

Until the 1973 collective bargaining agreement, the Commissioner was the final arbiter of disputes. In the 1973 collective bargaining agreement, the players gained the right to go to binding, impartial arbitration.

Andy Messersmith and Dave McNally were pitchers for the Los Angeles Dodgers and Montreal Expos, respectively, who played out their contracts in 1974. They played under their respective option years in 1975, pursuant to clause 10A in the Major League Agreement:

If prior to March 1, the Player and the Club have not agreed upon the terms of the Contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player to renew this contract for the period of one year.

BILL JAMES, HISTORICAL BASEBALL ABSTRACT 263 (1988). The clubs attempted to renew the pitchers’ contracts for a second option year, but the players balked, claiming that the option clause was only for one year, and not in perpetuity. Because the issue was not the clause’s legality (which had been upheld in Flood), but its interpretation, the players’ claims were submitted to an arbitrator.

Arbitrator Peter Seitz held that the option year clause does not create a perpetual reserve system. A contract must explicitly give the owner the unlimited right to renew. Seitz held that the option year was for one year only, and Messersmith and McNally were free agents. See National & American League Prof’l Baseball Clubs v. Major League Baseball Players Ass’n (Messersmith and McNally Grievances), 66 Lab. Arb. 101 (1976), aff’d sub nom. Kansas City Royals v. Major League Baseball Players’ Ass’n, 532 F.2d 615 (8th Cir. 1976).

In the 1976 collective bargaining agreement, the players and owners agreed to full free agency after six years of service time. This provision was still unchanged as of the 1996 collective bargaining agreement. See Litke, supra note 76, at 6D (the only change in free agency was the elimination of the restriction against filing for free agency twice within a five-year span if a team offers the player arbitration).

The question posed to the Flood Court, as articulated at the beginning of the Court’s opinion, was whether “baseball’s reserve system is within the reach of the federal antitrust laws.” Flood, 407 U.S. at 259 (emphasis added). Scholars decrying baseball’s judicially created exemption from the Sherman Act point to this language for the proposition that the only exemption that baseball enjoys is one for its reserve system.
and advances made by the players through collective bargaining, may have severely restricted the baseball owners' antitrust immunity.

In another challenge to MLB's antitrust exception, two lower court cases addressed the proposed purchase of the San Francisco Giants team and its potential relocation to St. Petersburg. Plaintiffs in the two suits asserted that MLB unreasonably restricted trade in denying the franchise move, by "unlawfully [restraining and impeding the investors'] opportunities to engage in the business of Major League Baseball." Both trial courts held that the precedential value of Federal Baseball, Toolson, and Flood should be restricted to the proposition that only baseball's reserve system is exempt from the Sherman Act. This interpretation contradicts that espoused by the Seventh Circuit in Finley v. Kuhn, which held Flood to extend baseball's reserve exemption to the entire business of baseball. The Supreme Court has not yet addressed this circuit split, as the two cases involving the Giants were settled before the interpretation of the exemption could be appealed.


80. See Piazza, 831 F. Supp. at 420 (denying summary judgment on the authority of Flood, because the exemption guaranteed to baseball therein is restricted to the reserve clause); Butterworth v. National League of Prof'l Baseball Clubs, 644 So.2d 1021 (Fla. 1994) (affirming Piazza).


82. See Piazza, 831 F. Supp. at 421; Butterworth, 644 So.2d at 1022.


84. See id. at 436; Butterworth, 644 So.2d at 1022. A Texas district court also adopted this interpretation in Henderson Broadcasting Corp. v. Houston Sports Ass'n, 541 F. Supp. 263, 271-72 (S.D. Tex. 1982), by refusing to extend baseball's antitrust exemption to radio broadcasting contracts.

85. 569 F.2d 527 (7th Cir.), cert. denied, 439 U.S. 876 (1978).

86. See id. at 541.

87. In Piazza, the group offering to purchase the Giants had its ownership application denied. Two Italian-American investors in that group were angered by what they felt were the League's insinuations that their "Mafia ties" caused the application to be denied. The
C. Antitrust Law and Other Entertainment

Although baseball has enjoyed some degree of exemption from Sherman Act liability, courts have not provided a similar luxury to other forms of entertainment or even to other sports.

The first case suggesting a distinction between baseball and other forms of entertainment involved a vaudeville theater owner who claimed to be exempt from the antitrust laws under the Federal Baseball analysis.88 Although the argument that the defendants presented mirrored the reasoning employed by the Court in Federal Baseball, Justice Holmes (again writing for the Court) held that vaudeville was, in fact, subject to the Sherman Act, because the interstate component was more than "incidental."89 Similar results were handed down following challenges by the motion picture industry.90

Based on the Toolson court's interpretation of interstate commerce, the Court determined that theatrical productions were not exempt from antitrust laws.91 The defendants in Shubert unsuccessfully argued that theatrical productions were more akin to baseball games, which were "of
course a local affair," than to motion pictures, which were articles "of trade . . . [that move] into interstate commerce like any other manufactured product." The Court held that both Federal Baseball and Toolson only stood for the proposition that baseball was exempt from the antitrust laws, and that to expand that exemption would require legislative action.

Several other sports organizations have attempted to craft arguments that analogize their operations to baseball's in such a manner warranting the antitrust exemption. However, the courts have not accommodated any of these would-be beneficiaries. For example, in International Boxing Club v. United States, boxing promoters attempted to equate championship boxing with baseball to make it fit under the protective canopy of Federal Baseball and, therefore, shield themselves from antitrust prosecution. The Court disagreed with this analogy, holding that antitrust laws apply to boxing just as they apply to theatrical productions. Thus, the Court stated that there was no general "sports" exemption from the Sherman Act.

Attempts to analogize football to baseball, as a team sport (and not an individual sport like boxing), also met with unfavorable results. In 1957, a NFL player who had jumped to the rival All-American Football Conference [AAFC] sued the NFL under the Clayton Act for antitrust violations in the League's action in blacklisting him. The appellate court followed the reasoning behind Toolson and Federal Baseball, and held it appropriate to afford all team sports the same antitrust exemption as

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92. Shubert, 348 U.S. at 227 (citation omitted).
93. Id. at 227 n.9.
94. See id. at 230. But see supra notes 66-81 and infra note 174 and accompanying text (noting that continued judicial reliance on Congressional inaction as the cornerstone for decisions that arguably are inconsistent and illogical should be considered with skepticism).
96. See id. at 240-44. In his dissent, Justice Minton considered the Court's reasoning an example of the "tail wagging the dog," as he found no tangible distinction between the production of baseball games and the production of championship boxing matches. See id. at 251 (Minton, J., dissenting). Minton's analysis is logical and consistent with the objective theory that Justices Marshall and Douglas espoused in their Flood dissent. See supra notes 75-77 and accompanying text.
97. See Radovich v. NFL, 352 U.S. 445 (1957), rev'd 231 F.2d 620 (9th Cir. 1956). William Radovich was an all-pro guard with the NFL's Detroit Lions who wanted to play in Los Angeles. When his trade requests were not answered by the Lions, he signed with the Los Angeles Dons of the AAFC. This contract did not violate the NFL's reserve system, because the AAFC was not subject to NFL policies. However, the NFL blacklisted all players who jumped their contracts to go to other teams. A NFL farm team had offered Radovich a contract, but when they learned of the blacklisting, they withdrew the offer. See id. at 446-47.

The NFL had a reserve system similar in structure to MLB's. Radovich sued to overturn the reserve system based on the Sherman Act, posing arguments similar to those proffered by Curt Flood, fifteen years later. See supra notes 70-78 and accompanying text.
baseball. A divided Supreme Court, however, disagreed. The Court noted that while football employed several of the same restraints as baseball, which were shielded from Sherman Act liability, Toolson only exempted baseball from the antitrust laws. Accordingly, the courts have denied subsequent requests for antitrust exemptions for other sports, including basketball, hockey, golf, soccer, and even amateur softball.

D. Applying Antitrust Law to League Practices

In non-exempt sports, three general league practices, other than the reserve system, have been subjected to antitrust challenges over the years: veteran free agency, the rookie draft, and the salary cap.

1. Veteran Free Agency

In 1974, two years after the NFL's 1970 collective bargaining agreement had expired, no new agreement had been reached, and the players struck. After the strike, the League continued to unilaterally implement the "Rozelle Rule," a player-compensation scheme for free agency. A group of players challenged this practice as an "illegal

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98. See Radovich, 231 F.2d at 622.
99. See Radovich, 352 U.S. at 449-52 (acknowledging that exempting baseball and not other team sports was, perhaps, "unrealistic, inconsistent, [and] illogical."). However, the Court admitted that were a Federal Baseball challenge presented as a case of first impression, baseball would not receive such an anomalistic exemption. See id.
100. See, e.g., Haywood v. NBA, 401 U.S. 1204, 1205 (1971) (Douglas, Circuit Justice) ("Basketball, however, does not enjoy exemption from the antitrust laws."); Robertson v. NBA, 389 F. Supp. 867, 880 (S.D.N.Y. 1975) ("[P]rofessional basketball is subject to federal antitrust regulation.").
102. See Deesen v. Professional Golfers' Ass'n of Am., 358 F.2d 165 (9th Cir. 1966).
104. See Amateur Softball Ass'n of Am. v. United States, 467 F.2d 312, 314 (10th Cir. 1972) ("We can only conclude that amateur softball is not presently entitled to rely on the same unique exemption that organized professional baseball has claimed and achieved for so many years.").
105. See, e.g., Mackey, 543 F.2d at 606.
108. See Mike Kiley, Rozelle Won't Intervene—Yet, CHI. TRIB., Sep. 9, 1987, at C3.
109. The "Rozelle Rule" operated as follows:
   * Team A loses a free agent to Team B.
combination and conspiracy in restraint of trade denying professional football players the right to freely contract for their services.\textsuperscript{110}
The trial court found the Rozelle Rule illegal under both a per se analysis and a Rule of Reason analysis.\textsuperscript{111} The Eighth Circuit reversed the trial court’s finding that the Rozelle Rule was a group boycott and therefore per se illegal, but affirmed the court’s alternate finding that the Rozelle Rule violated the Rule of Reason.\textsuperscript{112} Because of the non-conventional nature of the parties involved, the circuit court felt that Rule of Reason scrutiny was the more appropriate method of analysis.\textsuperscript{113} Thus, the court held the Rozelle Rule subject to the Sherman Act because it benefited from neither the baseball exemption (under \textit{Radovich}) nor the non-statutory labor exemption.\textsuperscript{114} However, since the Rozelle Rule did not receive the benefit of the non-statutory labor exemption (as it was not the product of good faith bargaining) and because it failed Rule of Reason scrutiny, the court declared it illegal.\textsuperscript{115}

\begin{itemize}
  \item Team B owes compensation to Team A.
  \item Team A and Team B agree to the compensation, which takes the form of a player or players.
  \item If no agreement is reached, the Commissioner sets the compensation.
\end{itemize}

\textit{See Mackey}, 543 F.2d at 609, n.1.
\textsuperscript{110} \textit{Id.} at 609.
\textsuperscript{111} \textit{See id.} at 618-20, 621-22.
\textsuperscript{112} \textit{See id.} at 609, 622.
\textsuperscript{113} Rather than applying a per se analysis, the court felt that the distinctive nature of the NFL and the competition among its participants required an evaluation of the “purported justifications for the rule.” \textit{Id.} at 619.
\textsuperscript{114} \textit{See infra} notes 134-46 and accompanying text. The Eighth Circuit set forth the test for the non-statutory labor exemption from antitrust liability as a tripartite inquiry:

1) Does the restrictive practice being challenged affect only the parties to the agreement?

2) Is the restrictive practice a mandatory subject of collective bargaining (under § 8(d) of the NLRA, mandatory subjects of bargaining pertain to “wages, hours, and other terms and conditions of employment . . . “)?

3) Is the restrictive practice the result of good faith, arm’s length bargaining?

If all of the foregoing questions are answered in the affirmative, the practice is exempt from antitrust scrutiny. \textit{See Mackey}, 543 F.2d at 615.
\textsuperscript{115} The Rozelle Rule failed the Rule of Reason analysis because the court could find no pro-competitive benefits from the practice. \textit{See id.} at 620-22.

Although the Rozelle Rule was declared a violation of the Sherman Act, it proved less restrictive to player movement than the subsequent collective bargaining agreement (CBA) that the NFL and the Players’ Association negotiated (under Rozelle, four players moved in twelve years; under the new CBA, two players moved in thirteen years).

The free agency market in the NFL did not explode until the 1990s, more than fifteen years after the Eighth Circuit granted it to the players.
2. The Rookie Draft

In 1976, a NFL player who had suffered a career-ending injury during his rookie year sued his team and the NFL, claiming that the rookie draft was a "group boycott" that had operated to deny him the opportunity to sell his services for their fair value in a truly "free market." The D.C. Circuit reversed the trial court's finding that the rookie draft was a true group boycott and therefore per se illegal, but affirmed the court's alternate finding that the rookie draft violated the Rule of Reason because it was "more restrictive than necessary." The court found the rookie draft to be anti-competitive with respect to the market for players' services, and pro-competitive with respect to league parity; however, comparing these two effects is similar to comparing proverbial "apples and oranges." Accordingly, the court held that the pro-competitive effects did not outweigh the anti-competitive effects; therefore, the draft was illegal. Ultimately, the NFL reinstated the draft through collective bargaining.

3. The Salary Cap

Players challenged the salary cap in the recent Brown v. Pro Football, Inc. litigation. The cap was adjudged an illegal restraint of trade by the trial court, but the Supreme Court ultimately upheld the cap, declaring it protected by the non-statutory labor exemption.

116. James "Yazoo" Smith, an All-American cornerback from the University of Oregon, was the Redskins' first round pick (twelfth overall) in the 1968 draft. He signed a one-year contract for $50,000, but suffered a career-ending neck injury in the final game of the 1968 season. See Smith, 593 F.2d at 1176.

117. Id. at 1175. The NFL rookie draft was not considered a true group boycott subject to per se nullification because the NFL did not try to stop Smith from competing with them, as would be the case in a true boycott. See id. at 1179.

118. See id. at 1186-87. Judge MacKinnon dissented from the three-member panel's decision, claiming that the court's "apples and oranges" analysis was improper because the competitors in Smith did not fit into the normal antitrust framework, and the draft should be evaluated globally, not solely from the players' perspective. See id. at 1191-1223 (MacKinnon, J., dissenting). Similar to how it instituted the Rozelle Rule, the league initially implemented the draft without negotiating it through collective bargaining.

119. The Court appears to say in Smith that if the union acts in its own self-interest and enters into a collective bargaining agreement, no part of that agreement can violate the Sherman Act (because under the non-statutory labor exemption, the substance of a collective bargaining agreement cannot be challenged under the Sherman Act). Having a draft seems to be in the owners' best interest only, but once the players agree to it, they have no recourse through the antitrust laws.

120. See supra note 3 and infra notes 189-212 and accompanying text.

121. See infra note 201.

122. See infra notes 134-46 and notes 210-12 and accompanying text.
II. COLLECTIVE BARGAINING THEORY—BEFORE THE BROWN III DECISION

If a collectively bargained labor practice can satisfy the Mackey test and qualify for the non-statutory labor exemption, it remains exempt from antitrust scrutiny, provided the collective bargaining agreement remains in effect.\textsuperscript{123} There has been much judicial and scholarly disagreement on when this exemption expires and the practice again becomes subject to antitrust scrutiny. It is informative to follow the development of the statutory and non-statutory labor exemptions up to the Brown case to understand fully the differing schools of thought.

Because the aim of antitrust law is to promote competition and discourage collective behavior, while the aim of labor law is to use collective activity to protect the workers’ rights, there is a fundamental tension between antitrust and labor law. In order to reconcile these differing doctrines, two exemptions to antitrust law were developed: the statutory labor exemption and the non-statutory labor exemption.

A. The Statutory Labor Exemption

The statutory labor exemption, grounded in the Clayton Act\textsuperscript{124} and in

\begin{itemize}
\item \textsuperscript{123} See Mackey, 543 F.2d at 615. See also supra note 114.
\item \textsuperscript{124} Section 6 provides:
\begin{quote}
The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor... organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.
\end{quote}
\end{itemize}

\begin{itemize}
\item Section 20 provides:
\begin{quote}
No restraining order or injunction shall be granted... in any case between an employer and employees... involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property.... And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do... or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.
\end{quote}
\end{itemize}

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\end{itemize}
the Norris-LaGuardia Act,\(^\text{125}\) was established in the wake of public protest over the applicability of the Sherman Act to union activities in the "Danbury Hat" case.\(^\text{126}\) Enacted in 1914, the Clayton Act prescribed that human labor was not interstate commerce, and therefore, was not within the purview of the Sherman Act.\(^\text{127}\) Even after the Clayton Act, however, many unions lost antitrust cases brought against them due to the courts' interpretation of certain ambiguous language in the Act.\(^\text{128}\) In 1932, Congress reacted to this line of judicial interpretation by enacting the Norris-LaGuardia Act, which limited the jurisdiction of courts in labor cases by denying courts the power to issue restraining orders and injunctions in cases arising out of labor disputes.\(^\text{129}\) Congress further


126. \textit{See} Loewe v. Lawlor, 208 U.S. 274, 308-09 (1908). In \textit{Loewe} (popularly known as the "Danbury Hat" case) an employer sued a hat makers' union, claiming that their group boycott of non-union goods was a § 1 Sherman Act violation. The Court agreed, finding that the group boycott was a conspiracy in violation of the antitrust laws, and awarded damages of $240,000. \textit{See id.}

127. Interestingly, this rationale is quite similar to Justice Holmes' opinion in \textit{Federal Baseball}, where the Court found that baseball was not interstate commerce. However, Holmes chose to focus on the interstate character of baseball, rather than the labor aspect. \textit{See supra} notes 52-54 and accompanying text.

128. \textit{See}, e.g., Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921). In \textit{Duplex Printing}, the Court held that a union's boycott for organizational purposes was a Sherman Act violation. \textit{See id.} at 478. The Court stated that § 6 of the Clayton Act does not grant unions immunity from antitrust liability when unions depart from "normal and legitimate objects." \textit{Id.} at 469. The Court further held that § 20 of the Clayton Act applied only to controversies between employers and their employees, not to strangers' picketing activities. \textit{See id.} at 472-73.

129. Section 4 of the Act enumerates the following protected union activities, for which courts are denied injunctive jurisdiction:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in [29 U.S.C. § 103];

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their
buttressed these union protections by enacting the National Labor Relations Act [NLRA], which provides that the legal protection of employees' rights to unionize and to bargain collectively promotes commerce in the country.

Courts gave substance to the protections that Congress afforded workers in these legislative pronouncements by upholding their underlying principles. In United States v. Hutcheson, the Supreme Court construed the Clayton Act to grant an antitrust exemption to employees who were participating in union-related activities. However, the courts were

interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as described in [29 U.S.C. § 103].


131. See id. § 151. Section 1 of the NLRA further provides the following endorsement of collective activity:

It is declared hereby to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.


132. 312 U.S. 219 (1941).

133. The court in Hutcheson stated:

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

Id. at 232.

Hutcheson was a criminal prosecution that charged members of a carpenters' union with illegal strikes, picketing, and consumer leafleting in a jurisdictional dispute with a machinists' union. See id. at 228. Justice Frankfurter held that the exemption of specific union activities from the court's equitable powers must imply a similar exemption from criminal liability. See id. at 234-35.

However, in subsequent cases, the Supreme Court held that the NLRA does not grant unions immunity against unfair labor practice charges. See, e.g., National Licorice Co. v.
unwilling to grant collective bargaining agreements the same blanket antitrust exemption that the Norris-LaGuardia Act guarantees to strikes and lockouts.

B. The Non-Statutory Labor Exemption

Although the statutory labor exemption only applies to specific union activities, as enumerated under the Clayton and Norris-LaGuardia Acts, the courts have developed a non-statutory labor exemption to insulate certain employer-employee agreements. Courts determine the scope of this exemption by balancing the competing policies behind labor laws and antitrust laws.\(^4\) Because the exemption requires a balancing of the equities, there has been much dispute over the term of the exemption: whether the mere presence of a collective bargaining relationship perpetually protects all of the employer's activities from antitrust scrutiny, or whether there is a point in time (after the parties reach an impasse in the collective bargaining process) when the non-statutory exemption ends.

1. History of the Non-Statutory Exemption

The non-statutory exemption has applied only to union activity undertaken alone, or activity that affects only those involved in the collective bargaining process. The Supreme Court has denied the applicability of the non-statutory labor exemption to collectively bargained agreements that involve or impact groups that are not a party to the specific agreement,\(^5\) yet has applied the exemption when the agreement affects only the parties to it and is the result of good-faith, arm's length


135. See, e.g., Connell Constr. Co. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 626 (1975) ("The federal policy favoring collective bargaining therefore can offer no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firms from the subcontracting market."); United Mine Workers of America v. Pennington, 381 U.S. 657, 665-66 (1965) ("But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy."); Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 808 (1945) ("Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services.").
bargaining.\footnote{136}

2. Applying the Mackey Test and the Non-Statutory Exemption -
McCourt v. Los Angeles Kings

In the Mackey case,\footnote{137} the court developed a three part test to
determine whether a restrictive labor practice is exempt from antitrust
liability under the non-statutory labor exemption. The court held that three
elements were required for the exemption to apply: the restrictive practice
(a) must affect only the parties to the agreement, (b) must be a mandatory
subject of collective bargaining, and (c) must be the result of good-faith,
arm's length bargaining.\footnote{138}

One of the first sports cases to apply the non-statutory labor
exemption and the Mackey test involved the NHL's player compensation
rule, By-Law 9A.\footnote{139} The NHL and the National Hockey League Players' Association [NHLPA] discussed the rule briefly during collective
bargaining in 1973-1975.\footnote{140} Although the two sides did not agree on the
rule, the adoption of the 1976 collective bargaining agreement purported to
ratify the NHL By-Laws, including By-Law 9A.

In 1978, a player who had been awarded to another team as
"compensation" under By-Law 9A sued the NHL, claiming that this
"reserve system" violated the Sherman Act.\footnote{141} The trial court agreed,
refusing to afford By-Law 9A the benefit of the non-statutory labor exemption from the antitrust laws because the NHL initially did not
implement the rule as the result of a good-faith, arm's length collective
bargaining agreement.\footnote{142} The court further found By-Law 9A to be an

\footnotesize{\textsuperscript{136}} See Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689-90 (1965). Local 189 insisted on a provision in the collective bargaining agreement that restricted butchers' daytime hours. The clause was held to be protected from antitrust scrutiny by the labor exemption because it was the subject of good-faith, arm's length bargaining that did not involve non-union groups. See id.

See also Goldman, \textit{supra} note 134, at 650-53 (describing the origin of the non-statutory exemption in \textit{Jewel Tea} and \textit{Pennington}).

\footnotesize{\textsuperscript{137}} 543 F.2d 606 (8th Cir. 1976), \textit{cert. dismissed}, 434 U.S. 801 (1977).

\footnotesize{\textsuperscript{138}} \textit{See id.}, 543 F.2d at 615; see also \textit{supra} note 114.

\footnotesize{\textsuperscript{139}} By-Law 9A, which the NHL unilaterally implemented in 1973, was similar to the NFL's Rozelle Rule—if an unsigned player transferred to a new team, the old team was entitled to compensation, in the form of players, from his new team. If the teams involved could not agree to the compensation, it would be determined by an impartial arbitrator selected by the NHL Board of Governors. \textit{See McCourt v. California Sports, Inc.}, 600 F.2d 1193, 1195 (6th Cir. 1979), \textit{vacating} 460 F. Supp. 904 (E.D. Mich. 1978).

\footnotesize{\textsuperscript{140}} \textit{See McCourt}, 460 F. Supp. at 910-11.

\footnotesize{\textsuperscript{141}} \textit{See McCourt}, 600 F.2d at 1195. In 1978, Detroit signed the Los Angeles Kings' free agent goaltender, Rogatien Vachon, and the league's arbitrator awarded Los Angeles an "equalization payment" in the form of Detroit's forward Dale McCourt. \textit{See id.} at 1196.

\footnotesize{\textsuperscript{142}} \textit{See McCourt}, 460 F. Supp. at 909-12.
unreasonable restraint of trade, and thus illegal under the Sherman Act. The Sixth Circuit, however, overturned the trial court, holding that By-Law 9A was a fair and reasonable condition of employment, and, as it was part of the collective bargaining agreement, it enjoyed the protection of the non-statutory labor exemption. The court also noted that although the reserve clause was not an advantageous practice from the players' perspective, the players and owners had ratified it through a collectively-bargained agreement. Therefore, the reserve clause qualified for the non-statutory exemption. The Sixth Circuit distinguished between the unilateral imposition of a restrictive practice and the superior negotiating talent of a bargaining party, stating 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." McCourt was a landmark case for the non-statutory exemption, because it expanded Mackey to cover all components of a collective bargaining agreement, even clearly one-sided terms. Collectively bargained terms cannot be viewed in a vacuum, but must be evaluated in the larger context of the entire agreement. In McCourt, the NHLPA had to concede to By-Law 9A, but in exchange, the union received many concessions from the owners. The continuing value of McCourt is the negotiating tenet that hard-line bargaining will not expose the terms of a collectively bargained agreement to antitrust liability, even if the assailed terms do not benefit the employees.

C. The Evolution of the Expiration Standard for the Non-Statutory Labor Exemption

The non-statutory exemption was not implicated heavily in the sports industry until the late 1980s. However, between 1987 and 1989, five major district and circuit court decisions began to shape the standard for the expiration of the non-statutory exemption. The path towards Brown was initiated by a basketball player named Leon Wood. Wood was the Philadelphia 76ers' first round draft pick in 1984, but under the NBA's collectively-bargained salary cap, the team could only offer him a salary of $75,000. Wood sued the league, claiming that subjecting a non-union

143. See id. at 912.
144. See McCourt, 600 F.2d at 1200.
145. See id.
146. Id.
147. One such concession that the players received was the dissolution of the collective bargaining agreement in the event that the NHL and the World Hockey Association merged. See id. at 1202.
member to the terms of a collective bargaining agreement was a violation of the Sherman Act. 148

Judge Winter, 149 writing for the Second Circuit, rejected Wood's antitrust arguments as a "wholesale subversion of [federal labor] policy." The court held that Wood and other players entering the NBA were subject to the NBA's collective bargaining agreement. Rookie players are subject to the NBA's labor agreement, just as an apprentice electrician is subject to the terms of the International Brotherhood of Electrical Workers union's collectively bargained agreements upon admission to that union. Unions involved in collective bargaining properly negotiate on behalf of all present and future members to ensure that all union members who work under the terms of such agreements are treated fairly. 151

During 1987, the NBA collective bargaining agreement expired. Once the owners and players had negotiated to an impasse, 152 the National Basketball Players' Association (NBPA) brought an antitrust suit in federal court, 153 claiming that the rookie draft, the right of first refusal, and the

148. See Wood v. NBA, 809 F.2d 954, 960 (2d Cir. 1987). Wood argued that the NBA salary cap, similar to the NFL salary cap that the Smith court declared an antitrust violation, unfairly prevented him from receiving the true market value for his services. See id. at 959.

149. See id. at 956. Judge Winter, widely viewed as one of the country's more pro-management jurists, is a strong proponent of the theory that once a group of professionals unionizes, they perpetually waive their right to antitrust recourse. See, e.g., Michael Jacobs & Ralph Winter, Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage, 81 YALE L.J. 1 (1971). Judge Winter also subscribes to the belief that labor law is always superior to antitrust law. See Wood, 809 F.2d at 959 ("[N]o one seriously contends that the antitrust laws may be used to subvert fundamental principles of our federal labor policy.").

150. Id.

151. Wood does not involve an expired collective bargaining agreement, but it is instructive in that it shows the court's attitude toward persons outside an effective collective bargaining agreement. Scholars often view Wood as the starting point from which the current Brown III standard evolved. See PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 181 (1993).

152. "Impasse" occurs when the parties to collective bargaining "have exhausted the prospects of concluding an agreement and further discussions would be fruitless." Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc., 484 U.S. 539, 544 n.5 (1988). In applying the standard, courts and the NLRB look to:

such factors as the number of meetings between the parties, the length of those meetings, "the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations" and the period of time that has transpired between the start and breaking off of negotiations. Impasse, "in almost all cases, is eventually broken through either a change of mind or the application of economic force."

Goldman, supra note 134, at 663 n.232 (citations omitted).

153. See Bridgeman v. NBA, 675 F. Supp. 960, 961 (D.N.J. 1987). When the NBA was in bad financial shape in the late 1970s and early 1980s, the players agreed to a salary cap that was set at a specified percentage of total league revenues. When the league recovered,
salary cap all violated the Sherman Act. The players and the owners both presented proposals to the court for the expiration of the non-statutory labor exemption. The players argued that at the instant that the agreement expires, the exemption should expire [hereinafter Instant], or in the alternative, that once "impasse" has been reached in the negotiations, the exemption should expire [hereinafter Impasse]. The court rejected both of these expiration points as improper. The court, however, also rejected the owners' suggestion that there should be a perpetual exemption for parties involved in a collective bargaining relationship, as long as the employer maintains the "status quo by not imposing any new restraints" [hereinafter Perpetual].

Instead, the court constructed the "employer's reasonable belief" standard [hereinafter ERB], holding that the exemption continues with respect to a specific restraint "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 through the success of star players such as Magic Johnson, Larry Bird, and the young Michael Jordan, the players wanted the salary cap lifted in order to increase the level of player salaries.

The NBPA was aware of Judge Winter's attitudes against antitrust as a proper remedy for labor participants. See supra note 149 and accompanying text. Accordingly, the NBPA filed suit in New Jersey (part of the Third Circuit), thereby ensuring that the case could not be appealed to Judge Winter of the Second Circuit.

154. Although Smith and Mackey had invalidated the NFL's rookie draft and right of first refusal, respectively, those cases did not control here. Both of those cases involved restrictive practices that were unilaterally imposed by the league, while in Bridgeman, the assailed practices were included as part of a collectively bargained agreement. Accordingly, the NBA's practices were exempt from the purview of the antitrust laws by the non-statutory labor exemption.

Because the collective bargaining agreement between the NBA and the NBPA had expired, however, the NBPA effectively was challenging the length of time that the non-statutory labor exemption continued to apply beyond the expiration of the underlying collective bargaining agreement.

155. See supra note 152 and accompanying text.

156. The court rejected the Instant standard on the grounds that it would be a disincentive to further collective bargaining, which would undermine the federal labor policy of full and good faith bargaining. There are many instances in the bargaining history of the NBA and the NBPA where collective bargaining negotiations stopped and restarted, although both sides continued to implement the terms of the recently expired agreement. See Bridgeman, 675 F. Supp. at 965.

The court also rejected the Impasse standard, explaining that "an impasse is not equivalent to the end of negotiations, or the loss of hope that any of the practices subject to negotiation will be incorporated in a new agreement." Id. at 966.

157. Id. The "once a union, always a union" mentality that the NBA supported was not adopted by the court because such reasoning has the potential to discourage collective activity. The court feared that adopting such a doctrine would push the union to refrain from collective activity in order to save their ability to benefit from the antitrust laws. See id.
agreement. The ERB test became the expiration standard until Marvin Powell brought the first of a series of actions against the NFL in 1987.

After the 1987 National Football League Players' Association (NFLPA) strike ended and the players returned to work without a contract, Marvin Powell, the union president, sued the league, claiming that the NFL's right of first refusal and standard player contract violated the Sherman Act. The court found that the right of first refusal, based on the Rozelle Rule that the Mackey court declared illegal, was legal because the players and owners collectively bargained for it in the 1982 collective bargaining agreement. The court then needed to determine when the non-statutory exemption would expire.

The players proposed that the exemption should expire when the union makes it "unequivocally clear" that it no longer consents to the terms of the expired agreement [hereinafter UC]. The owners reiterated their Bridgeman arguments that the terms of a collectively bargained agreement should receive perpetual protection as long as no one alters the terms. The court rejected both arguments, holding that conceptually, the UC standard was too close to the Instant standard, and that both were undesirable because they provided disincentives to negotiation. The court also held that the Perpetual standard could give too much protection to illegal provisions that owners gained through the collective bargaining process. The court eschewed the ERB standard that the Bridgeman court

158. *Id.* at 967. The court noted that this test should be applied to each assailed practice individually, not to the negotiating process as a whole. *See id.* The court also noted, however, that ERB was a question of fact, and its resolution "may not be possible until after the parties have resolved their differences and entered into a new collective bargaining agreement." *Id.*

The ERB standard can also be viewed as a disincentive to collective bargaining because under the test, anything that the union says at the bargaining table could be used against them should the circumstances and substance of negotiations come under scrutiny. The union would have to stop bargaining completely before antitrust remedies were available.


The action challenged the right of first refusal/compensation system and the NFL Player Contract. The complaint alleged that the NFL unilaterally implemented language in the standard contract regarding the "waiver system," and that this waiver system violated antitrust laws. *See Powell I*, 678 F. Supp. at 779.

160. *See id.* at 780-81 (outlining execution of the 1982 collective bargaining agreement).

161. *See id.* at 786. The union contended that they manifested their intention to withdraw their consent to be bound by the agreement in various ways, including public statements and a twenty-seven day strike. *See id.* at 786 & n.17.

162. *See id.* at 786-87.

163. *See id.*
had concocted in favor of the Impasse standard rejected by the Bridgeman court. After the NLRB dismissed an outstanding unfair bargaining claim that the NFL had filed against the NFLPA, the court declared that the parties were at impasse, and accordingly, that the non-statutory exemption had expired. However, the NFLPA failed to meet the equity balancing test required for the issuance of an injunction under the Norris-LaGuardia Act, and the judge sent the parties back to the bargaining table.

The NFL appealed the district court's adoption of the Impasse standard to the Eighth Circuit. A divided court rejected the Impasse standard because "the League and the Players [had] not yet reached the point in negotiations where it would be appropriate to permit an action under the Sherman Act." Instead, the court fashioned a new test that held that the non-statutory exemption expired only at the end of the collective bargaining relationship [hereinafter CBR].

D. The Threat of NBPA Decertification

In 1994, immediately before the NBA-NBPA collective bargaining agreement expired, the NBA pursued a declaratory judgment that its renewal of the terms of the expiring agreement would not violate antitrust laws. The district court granted the NBA the declaratory judgment and held that the NBA was entitled to employ a non-statutory exemption defense. Judge Duffy, though censuring the NBA for jumping the gun,

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164. See id. at 787-88. The court articulated the Impasse test as whether, "following intense, good faith negotiations, the parties have exhausted the prospects of concluding an agreement. Impasse is generally synonymous with deadlock: it occurs when the parties have discussed the matter and, despite their best efforts to achieve agreement, neither is willing to move from its position." Id. at 788 (citation omitted).

165. See Powell v. NFL, 690 F. Supp. 812, 814 (D. Minn. 1988) [hereinafter "Powell II"].

166. "It would be highly destructive to collective bargaining if major issues could be removed from the bargaining table and preliminarily resolved in isolated antitrust litigation," because it would produce disincentives to engage in good-faith bargaining. Id. at 817.

167. See Powell III, 930 F.2d at 1293.

168. See id. at 1301-02.

169. See id. at 1303. The court stated that as long as an "ongoing collective bargaining relationship" existed between the players and owners, there should not be a daunting threat of antitrust liability that drives the parties away from the bargaining table. The dissent feared that this new standard would require the NFLPA to decertify in order to retain the "leverage" of the antitrust laws, which the players soon undertook. See id. at 1309-10.


171. See Williams, 857 F. Supp. at 1078.
found that the Eighth Circuit's CBR standard was the "only rational course" to follow when determining the proper expiration point for the exemption.\textsuperscript{172} Cognizant of Judge Winter's pro-management views on this topic, and fully aware that he might be involved in any appeal to the Second Circuit, the NBPA nonetheless appealed the judgment.\textsuperscript{173} Not surprisingly, Judge Winter agreed with the lower court's interpretation of the standard and affirmed the judgment.\textsuperscript{174}

In response to the court's ruling, several notable players, including superstars Michael Jordan and Patrick Ewing, pushed for union decertification in order to pursue antitrust remedies against the NBA.\textsuperscript{175} Collective bargaining produced a new labor agreement, and the NBPA chose to ratify the agreement rather than to decertify.\textsuperscript{176}

III. NFLPA DECERTIFICATION

In 1989, in response to the opinions in Powell III, the NFLPA renounced its status as the collective bargaining agent for the NFL players.\textsuperscript{177} The union adopted "trade association" status without an official NLRB decertification, but, accordingly, was unable to handle collective bargaining or grievance matters on behalf of the players.\textsuperscript{178} Although this "decertification" movement allowed a small number of players to recover for the league's violation of antitrust laws, the players and owners

\textsuperscript{172} See id.

\textsuperscript{173} It should not be inferred that the NBPA had any choice but to appeal the judgment against them to the Second Circuit. However, as Judge Winter had been so outspoken on the topic, it comes as no surprise that he affirmed the lower court.

\textsuperscript{174} See Williams, 45 F.3d at 693. Judge Winter affirmed Judge Duffy's use of the CBR standard, but further analyzed the issue in terms of multi-employer bargaining conduct. Noting that Congress has indicated its approval of multi-employer bargaining in the past, the court failed to find evidence of multi-employer bargaining being adjudged illegal merely because a collectively bargained agreement expired and the multi-employer unit continued to act accordingly. See id. at 690. The court held that absent Congressional action to the contrary, multi-employer bargaining must be presumed to be legal. See id. at 691-93.

\textsuperscript{175} See Blythe A. Holden, Tilting the Table: Collective Bargaining After National Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995), 19 HARV. J.L. & PUB. POL'Y 228, 233 n.30 (1995); Greg Boeck, Jordan and Others Want 'Fair Share', USA TODAY, Jun. 29, 1995, at 4. The group of seven players filed suit in federal court in Minnesota, alleging several antitrust violations. See Boeck, supra at 10C. Ironically, Ewing was later elected president of the NBPA.


\textsuperscript{177} See Len Pasquarelli, Falcons Notebook, ATLANTA CONST., Dec. 7, 1989, at H3.

\textsuperscript{178} See WEILER & ROBERTS, supra note 151, at 199.
continued to push for courts to change their interpretations of the expiration standard.\footnote{179}

A. Powell III's Certiorari Petition

The players in Powell III petitioned the Supreme Court for certiorari, and the Court solicited briefs from, among others, the NLRB (for a labor law perspective) and the Solicitor General (for an antitrust law perspective). The Solicitor General proposed a new standard for expiration:\footnote{180} that the non-statutory exemption continues until the employer can determine the existence of "real impasse" through the advice of counsel [hereinafter Impasse Plus], at which point the employer may implement new conditions, which must satisfy a Rule of Reason analysis.\footnote{181} The Court, however, never ruled on this proposal, as it denied certiorari.\footnote{182}

B. Plan B Free Agency and NFLPA Decertification

Aware after Powell I and Powell II that any unilaterally implemented free agency plan would be subject to Rule of Reason antitrust scrutiny, the NFL implemented Plan B free agency, which provided that each team could freeze seventy-five percent of its roster, leaving the remaining players as unrestricted free agents, whom other teams could sign without owing any compensation.\footnote{183}

Having "decertified" as a union (implied in Powell III as the manner through which the NFLPA could obtain access to the antitrust laws) and having terminated the collective bargaining relationship with the NFL,\footnote{184} a group of players sued the League, challenging the antitrust validity of Plan B free agency.\footnote{185} The League claimed that this form of decertification was

\footnote{179. See infra notes 189-203 and accompanying text.}

\footnote{180. "Recommendations of the Solicitor General usually are given substantial weight by the Supreme Court, especially when they are requested by the court, as they were in [this] case." Dave Mackall, NFL Free Agency to Supreme Court?, WASH. TIMES, Dec. 11, 1990, at D2.}

\footnote{181. See Brief for the United States as Amicus Curiae at 17, Powell v. National Football League, 498 U.S. 1040 (1991) (No. 89-1421).}

\footnote{182. See Powell, 498 U.S. at 1040 (1991).}

\footnote{183. Plan B allowed each team to reserve thirty-seven players. Many of the unfrozen players had high salaries or marginal or declining talent. However, the system did expand free agency—in the twenty-four years prior to Plan B, six players had changed teams, in the first three years of the system, over 550 players moved.}


\footnote{185. See Powell v. NFL, 764 F. Supp. 1351 (D. Minn. 1991) [hereinafter "Powell IV"].}
ineffective, because the NFLPA did not have a vote en masse; accordingly, the League argued, the collective bargaining relationship still existed, and the non-statutory exemption still applied. The court refused to fault the union for the form of its decertification, but rather looked to its substance, holding that the NFLPA's informal decertification was an effective termination of the collective bargaining relationship between the parties. In a subsequent case, the court held that Plan B failed Rule of Reason scrutiny, and returned a verdict of $540,000 for four affected players.

C. The Practice Squad Player Salary Cap - Brown v. Pro Football, Inc.

Before the NFLPA’s decertification, the NFL’s Long Range Planning/Finance Committee adopted a resolution that provided that each team carry a practice squad of six players, and that a weekly salary cap for these

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Freeman McNeil initially brought the suit in New Jersey (attempting to escape the appellate courts of Judge Winter and Judge Gibson), but Powell moved to have the actions joined and heard in Minnesota federal court.

186. See id. at 1354-55.

187. See id. at 1358.

188. Although eight players were named plaintiffs, the court found that only four of them had suffered harm from Plan B. See McNeil v. NFL, 1992 WL 315292 (D. Minn. 1992); Mitch True洛克, Free Agency in the NFL: Evolution or Revolution?, 47 SMU L. Rev. 1917, 1944 (1994). When the next year’s class of free agents brought a similar class action suit that had the potential to expose the NFL to over $200 million in damages, the NFL and the players reached a settlement. See White v. NFL, 822 F. Supp. 1389, 1394 (D. Minn. 1993), aff’d, 41 F.3d 402 (8th Cir. 1994); True洛克, supra at 1944-45. Once the NFLPA re-certified as the players' collective bargaining agent, the settlement served as the new collective bargaining agreement. Some of the terms of that agreement that deal with free agency include the following:

(a) Players are entitled to free agency after five years of service, but the club can designate a player as a “franchise player.” If a franchise player is offered a contract by a second team, the player’s prior team may match the offer;

(b) The rookie draft is reduced to seven rounds;

(c) A salary cap will be imposed if overall salaries reach a set level of league revenues;

(d) If a salary cap is imposed, free agency is effective after a player has four years of service;

(e) Teams losing free agents receive compensation in the form of extra draft picks; and

(f) The parties do not waive their respective rights to bring antitrust suits when the collective bargaining agreement expires, and the parties agree that the non-statutory labor exemption to antitrust liability applies until the settlement ends (cannot sue for antitrust violations after impasse only, etc.).

See Weiler & Roberts, supra note 151, at 204.
players be fixed at $1,000 per player. NFLPA Executive Chief Gene Upshaw informed NFL Management Council member Jack Donlan that the owners and players should collectively bargain that issue. Donlan declared that the parties were at "impasse" over the issue, and the NFL implemented the proposal. Antony Brown and the other practice squad players brought a class action suit against the NFL, claiming that the practice player salary cap violated the Sherman Act.

The NFL answered the suit by arguing that the non-statutory labor exemption shielded the League's actions from antitrust liability. Judge Lamberth offered three alternate expiration points for the non-statutory exemption. Initially, the court suggested adoption of the Instant standard that the Wood court rejected. For four years, "by continuing to hold [the] parties to the terms of the expired collective bargaining agreement, courts [were] treating the parties as if they had a current agreement.... Unfortunately, the nonstatutory labor exemption actually provide[d] a disincentive for the NFL to sign a new collective bargaining agreement." The court felt that this was contrary to the purpose of the exemption, which is to foster a "non-coercive environment that is conducive to serious negotiations on a new contract." Accordingly, the NFL's exemption defense failed.

Next, the court suggested that the exemption did not extend beyond Impasse as defined in Powell I. As Donlan had declared impasse on the practice player salary cap issue, this theory also denied the NFL access to the non-statutory exemption defense.

The court raised a final concern. The non-statutory labor exemption should be read only to protect terms of employment that were "part of the expired collective bargaining agreement," because to hold otherwise would frustrate "the normal operation of the collective bargaining process and [would give] employers an unfair advantage over unions by enabling employers to implement, without risk of antitrust liability, restraints to which the union has never agreed or no longer agrees." The court read the non-statutory exemption as providing protection for the terms of an expired agreement, not for terms that were never in the agreement, since

189. See Brown I, 782 F. Supp. at 127.
190. See id. at 128.
191. See id.
192. See id.
193. See id.
194. See id. at 130-34.
195. Id. at 131.
196. Id. at 130 (quoting Laborers Health & Welfare Trust Fund, 484 U.S. at 544 n.5).
197. See Brown I, 782 F. Supp. at 134.
198. See supra notes 190-91 and accompanying text.
doing so would be a disincentive for either side to bargain in good faith. Accordingly, under all three of the court’s analyses, the NFL could not use the non-statutory labor exemption as a defense to the antitrust challenge.

On appeal, the D.C. Circuit Court discarded the *Brown I* court’s three exemption expiration suggestions. Judge Edwards, writing for a divided court, agreed with the Second and Eighth Circuits’ recent opinions adopting the CBR standard for the expiration of the non-statutory exemption. The players appealed to the Supreme Court and, although the circuits seemed to agree that the proper expiration standard was the CBR test, the Court granted certiorari.

IV. THE SUPREME COURT DID NOT MATERIALLY CHANGE THE EXPIRATION STANDARD IN *BROWN III*

By granting certiorari, the Supreme Court committed itself to addressing the expiration of the non-statutory labor exemption as it applied to the sports industry for the first time. This landmark case presented a hot topic for legal commentators.

Some scholars argued that the non-statutory labor exemption should not apply to the facts of *Brown III* because “that immunity is premised on a labor market/product market distinction” that did not apply to the Brown plaintiffs’ claim. As long as the players represented in the *Brown* case chose to have union protection, they should have foregone the protection of the antitrust laws because the interests that the plaintiffs were attempting to protect (their interests in the labor market) are the same interests that the non-statutory exemption was designed to shield from antitrust liability. Additionally, some commentators suggested that a ruling for the union would have disastrous effects on multi-employer

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200. *See id.* at 129-30. Employers would be hesitant to bargain because it would impede implementation of their proposals. If no bargaining occurred, the employers would be able to implement new terms without the specter of impending antitrust liability.

Unions also would be hesitant to bargain because the existence of a collective bargaining relationship would insulate the employer from liability. The only way around this would be to not enter into collective bargaining from the inception of the relationship. Surely, these results contradict federal labor policy.

201. At trial, the jury returned a verdict for the plaintiffs, awarding them damages of $10,000,000, which were trebled under the Sherman Act.

202. *See Brown II*, 50 F.3d at 1057-58. The dissent correctly argued that the majority’s finding was overbroad, as it utilized labor law to immunize a restraint implemented outside of the collective bargaining process. *Id.* at 1058-59.


205. *See id.* at 639-41.
bargaining outside the sports context.  

Other commentators raised several issues for the Supreme Court to consider, including whether courts should afford multi-employer bargaining any preferential treatment under the labor laws, whether employers with monopsony power should be treated differently than those without it, and whether the Brown III holding should be limited to the sports industry.  

Ultimately, the Court answered these concerns by promulgating a new expiration standard, commonly called the “Sufficiently Distant” standard [hereinafter SD]. However, analysis of the Court’s opinion suggests that this new standard is materially similar to the CBR standard adopted in Powell III, Williams, and Brown II.

A. The Supreme Court’s Holding in Brown III

The Court in Brown III rejected the players’ request for a sports-related exemption from the non-statutory labor exemption, as the majority could find no legitimate manner in which to distinguish the sports collective bargaining relationship from any other industry collective bargaining relationship. In addition, the Court established the SD

206. Effectively, a ruling for the union would deny multi-employer bargaining units the ability, under the NLRA, to implement terms after impasse was reached. See id. at 645; see also Williams, 45 F.3d at 684.

207. Monopsony is defined as a market condition in which there is a single buyer for a particular commodity. See BLACK’S LAW DICTIONARY 1007 (6th ed. 1990). A single multi-employer bargaining unit as is present in professional sports thus qualifies as a monopsony. For a good analysis of monopsony theory and its interaction with the antitrust laws, see generally ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY 36-44 (1993); RICHARD A. POSNER & FRANK H. EASTERTROOK, ANTITRUST 150 (1981).


209. See Brown III, 116 S. Ct. at 2127.

210. The players argued that unlike other labor-management relationships, the sports and entertainment industries deserve different treatment because they are “characterized by competitive bidding ... for talented employees whose skills are highly differentiated.” Pet’r Br., 1996 WL 19034, at *26, Brown III, 116 S.Ct. 2116 (1996). Collective bargaining in the sports industry also is unique in that “players’ associations have always acted to preserve the players’ ability to negotiate their own individual salaries in a competitive market.” Id. at *33. As well, in more traditional collective bargaining, “post-impasse implementation of employment terms by employer associations has not elicited significant antitrust challenges to date ... [because] the employees as well as the employers in those industries accept the legitimacy of common employment terms for all employees.” Id. at *39. However, in the sports industry, “the availability of antitrust remedies has fostered constructive bargaining settlements between the two sides.” Id.

211. See Brown III, 116 S. Ct. at 2126. The Court, rather sarcastically, did concede that the sports industry is special when compared to other labor-intensive industries “in terms of, say, interest, excitement, or concern,” but rejected out of hand any attempts to distinguish
standard by further defining the expiration standard adopted in *Brown II*, stating that a court could find that the non-statutory exemption had expired if “an agreement among employers [was] sufficiently distant in time and in circumstances from the collective-bargaining process [such] that a rule permitting antitrust intervention would not significantly interfere with that process.”

**B. Interpretation of the Court's Holding**

Deferring to the expert judgment of the NLRB, and without committing to a definitive articulation of the SD standard, the Court alluded to a few examples of the standard that would help the parties better understand the new exemption expiration. Assuredly, the examples provided in dicta by the Court are instructive for a trial court considering whether the collective bargaining relationship has deteriorated sufficiently distant in time and in circumstances such that imposition of antitrust liability would not interfere with the collective bargaining process.

The Court cited *Brown II* for the proposition that the exemption expires upon the “collapse of the collective-bargaining relationship, as evidenced by decertification of the union.” Arguably, this adds no new criteria to the analysis provided by the D.C. Circuit in *Brown II*. There, the circuit court held that in order for employees “to seek the protections of the Sherman Act, they may forego unionization or even decertify their unions.” Also, certain facts surrounding union activities may provide probative evidence that the strength of a formerly secure union has eroded, such as the presence of a significant drop in support for the union “whether manifested by a decrease in membership or the advent of significant internal political factions.”

The Court also implied that an “‘extremely long’ impasse, accompanied by ‘instability’ or ‘defunctness’ of [the] multi-employer unit, might justify union withdrawal from group bargaining.” The NLRB had occasion to address union withdrawal from multi-employer bargaining in the *El Cerrito Mill* case. In that case, the Board held that a union or employer may withdraw from multi-employer bargaining “for any reason before the date set for negotiations of a successor contract . . . .”
negotiations for a new contract have begun, a party may withdraw . . . only if there is mutual consent or ‘unusual circumstances.’ The determination of “unusual circumstances” is usually left to the judgment of the Board; but, as a general rule, they are best characterized as “an impasse of extremely long duration, accompanied by indicia of instability or defunctness” of the multi-employer unit.

The Board’s findings with respect to “unusual circumstances” in El Cerrito Mill is consistent with the Supreme Court’s holding in Gissel Packing. In Gissel Packing, the Supreme Court supported federal labor policy favoring collective bargaining by holding that once parties establish a bargaining relationship, that relationship “must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.” However, after such time, the NLRB may take appropriate action in recognition of any real changes to the relationship. This holding again implies that the termination of the collective bargaining relationship, after legitimate, concerted attempts at good-faith bargaining, is a question of fact, but a question that can be answered to the benefit of either party.

C. Applying the Court’s Holding

Thus, there are two plausible options for players seeking to gain access to antitrust protection: (1) decertify or (2) withdraw from the collective bargaining process before negotiations begin. For example, in a league like MLS, the players are likely to benefit from the lack of a collective bargaining relationship because there is no collective bargaining entity acting on their behalf. Therefore, it seems that MLS players have ready access to antitrust remedies. If the MLS players do establish a “trade association” similar to the 1989 status of the NFLPA, they would qualify under the SD standard articulated in Brown III and still retain access to the antitrust hammer.

V. THE PARTIES’ OPTIONS AT IMPASSE

Once the collective bargaining process reaches impasse, both players and owners have minimal guidance regarding their options. However, the

218. Id. at *2.
219. Id. at *3. In El Cerrito Mill, a union worked under an extended collective bargaining agreement for two years while negotiating. Three months before the extension expired, the parties reached impasse. Six months later, the union attempted to withdraw from the collective bargaining. The Board explicitly stated that these circumstances do not qualify for characterization as “unusual circumstances.” Id. at *2-3.
221. Id. at 612-14 (quoting Franks Bros. Co. v. NLRB, 321 U.S. 702, 705-06 (1944)).
222. See supra Part III.
choice each party makes is contingent on its respective goals.

A. Owners

At impasse, owners have many different options. Generally, the appropriate course of action should reflect the owners' evaluation of short-term and long-term goals. One option is to continue operating under the terms of the expired agreement. This choice seeks to preserve the collective bargaining relationship and is especially desirable where owners are content with the status quo, and players are not. Another option is to negotiate a separate interim agreement with the union, where the parties will agree to be bound only by the terms agreed upon therein. Most likely, this would occur when the parties disagree on few issues and neither side wants a work stoppage.

The League may seek to have impasse declared by a district court. After impasse, an employer's continued adherence to the status quo is authorized. At the same time, once an impasse in bargaining is established, employers become entitled to implement new or different employment terms that are reasonably contemplated within the scope of their pre-impasse proposals. However, the League must analyze the terms that it implements to ensure that any restrictions survive Rule of Reason scrutiny.

Owners could also continue negotiating with the players, thus ensuring that the courts cannot declare impasse. This is an attractive option if the owners have unilaterally implemented a practice that will not survive Rule of Reason scrutiny, such as the practice player salary cap in Brown I, or if the parties have collectively bargained and agreed to a restrictive term that would not survive Rule of Reason analysis. If the parties continue negotiating, the courts will not declare impasse, and accordingly, the League can avoid the antitrust liability that it might deserve. However, the League should not choose this option arbitrarily, as

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223. The terms of an expired collective bargaining agreement are protected from antitrust liability to some extent by the non-statutory labor exemption. See supra notes 134-69 and accompanying text.

224. For example, the NFL's owners are satisfied with the League's "hard" salary cap, while the players would like to repeal it or at the least, increase it.

225. If the League unilaterally implements a practice that is a mandatory subject of collective bargaining without having impasse declared, it is an unfair labor practice, which could subject the owners to enormous fines. See Christopher J. Fisher, The 1994-1995 Baseball Strike: A Case Study in Myopic Subconscious Macrocosmic Response to Conflict, 6 SETON HALL J. SPORT L. 367, 393 (1996). During MLB's 1994 labor problems, the owners were threatened with fines of up to $5,000,000 per day in the event that they committed any unfair labor practices. See id.

226. Powell III, 930 F.2d at 1301, (citing Laborers Health & Welfare Trust Fund, 484 U.S. at 544 n.5).
the "manipulation of impasse in order to avoid antitrust liability is unsound as a matter of labor and antitrust policy." 227

Finally, owners may lock out the players. 228 This choice involves economics and business integrity: to utilize replacement players or to shut down operations. In order to make such a decision, the League will need to balance the short-term financial impact resulting from a lack of games with the potential long-term effects of producing an inferior product for the fans and passing it off as the same quality of entertainment and competition. Hiring replacement players also raises important issues, such as the potential presence of local labor laws prohibiting the use of replacement workers when the normal workforce is being locked out, 229 and the long-term effects on the game's fan base from passing off such games as "major league."

B. Players

At impasse, the players' options are somewhat restricted. When antitrust remedies are not available, such as when owners have use of the non-statutory labor exemption as a defense, the players may strike, consent to play under the expired agreement, or, if they are not under contract to a team, start their own league or jump to another league. 230 Often, a players' union will establish a strike fund or purchase strike insurance in order to protect against lost wages. However, for players who truly "want to play," the process of creating a new league leaves few options. Depending upon the sport, other leagues may be operating that are in the market for the


228. In a lockout, management is responsible for the work stoppage. When management has locked out the workers, it may either shut down operations or hire replacement workers and continue operations. See generally David M. Szuchman, Step Up to the Bargaining Table: A Call for the Unionization of Minor League Baseball, 14 Hofstra Lab. L.J. 265, 266 & n.3 (1996).


230. See, e.g., Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472 (9th Cir. 1969) (enjoining Rick Barry from signing a contract to play with the NBA's San Francisco Warriors while he was under contract with the American Basketball Association's Washington Capitols).
However, once a work stoppage occurs and the players have no antitrust recourse, the players seem to lose on all fronts.

When antitrust remedies are available, however, the players’ best option is to stop the collective bargaining process as soon as possible, or decertify, so that they satisfy the SD expiration test, thereby gaining access to the antitrust laws. The players should undertake this course of action only if the League’s practice fails a Rule of Reason analysis.

VI. WHERE TO GO TO COURT

To date, none of the players’ associations have challenged the SD standard, nor has the Supreme Court articulated further guidelines for its application. Once the parties realize that court action is inevitable, they should plan accordingly. Because of the differing attitudes of this country’s jurists and differing precedent among the circuits, parties may

231. Baseball is played in over seventy countries in the world. Currently, there are professional baseball leagues in Cuba, Italy, and Japan, although the Japanese leagues have restrictions on the number of foreign players that each team may use. See Bob Rybarczyk, The IBA and the World Amateur Baseball Movement, 12 NATIONAL PASTIME 64, 65 (1992). Professional soccer and basketball leagues exist in most European and South American countries. Many European countries have professional hockey leagues. Some, along with Canada, also have professional football leagues. See Kenneth L. Shropshire, Thoughts on International Professional Sports Leagues and the Application of United States Antitrust Laws, 67 DENY. U. L. REV. 193, 194-96 (1990).

232. See supra notes 213-22 and accompanying text.

find certain jurisdictions more advantageous than others. For example, some venues adopt a middle-of-the-road stance in sports law disputes, while some courts are likely to be hostile to both parties.

A. Where Players Should Bring an Action

Obviously, players should seek a jurisdiction with a history of pro-labor decisions. There are a few circuits where judicial precedent seems to favor players instead of owners. For example, the D.C. Circuit has ruled in the players' favor before, as have the Eighth and Ninth Circuits. Because the district and circuit courts will interpret whether the SD standard has been met, an evaluation of prior judicial interpretation is quite important to the players.

B. Where Owners Should Bring an Action

All is not lost for the owners as long as Judge Winter is still on the bench. All of the major sports leagues are headquartered in the New York area, and accordingly, bringing suit in the Second Circuit would be most convenient. The Second Circuit has consistently held in the owners' favor, based on Judge Winter's premise that unionized workers perpetually waive their rights to antitrust recourse.

C. Venues Favoring the Collective Bargaining Relationship

Many circuits adopted the CBR standard prior to the Brown III
decision. These courts seem to follow labor policy strongly in favor of collective bargaining. Because of this apparent pro-bargaining stance, it is likely that the players' association would have to decertify before bringing any antitrust action in such circuits.

D. Venues Reluctant to Aid Either Party

Several judges in the Seventh Circuit take a different approach to antitrust issues. These judges, including Judge Easterbrook and Judge Posner, subscribe to neo-Classical (also known as "Chicago school") economic antitrust theory. The Chicago school of economic thought is based on the theory of self-correcting markets. Judges Easterbrook and Posner have claimed that restrictive market practices can be "presumed to produce efficiencies rather than anticompetitive effects." This "laissez-faire" approach would likely result in a holding similar to that in Bridgeman, namely that the court would refuse to get involved if any collective bargaining relationship could be imputed.

VII. THE FORESEEABLE FUTURE OF THE LEAGUES' COLLECTIVE BARGAINING RELATIONSHIPS AND PLANNING FOR THE FUTURE

The following is a brief summary of the major current issues in each league's labor relationship and the status of the most recently signed collective bargaining agreement for that league.

A. Major League Baseball

Baseball's owners and players signed a four-year agreement in December 1996. One of the major sticking points in the negotiations was whether players who struck in 1994 should be granted credit for working during that period. Granting those players this "service time" would have had a direct impact on fourteen players' free agency rights. Some of the major terms of the agreement are as follows:

240. The D.C. Circuit, Second Circuit, and Eighth Circuit all adopted the CBR test. See supra note 203 and accompanying text. As well, in Bridgeman, the Third Circuit adopted the ERB test, noting that the resolution of whether the standard was satisfied "may not be possible until all the parties have resolved their differences and entered a new agreement." Bridgeman, 675 F. Supp. at 967. In McCourt, the Sixth Circuit refused to invalidate a unilaterally imposed restriction on player movement because it was ratified through a subsequent collective bargaining agreement. See McCourt, 600 F.2d at 1193.


242. Id. (citing Easterbrook, The Limits of Antitrust, 63 TEX. L. REV. 1 (1984)).

243. See Baseball Gets Peace Until 2000, FLA. TODAY, Dec. 6, 1996, at 1C.
The players have the option to extend the deal for a fifth year.

Any team with a payroll in excess of a preset threshold is taxed, and the profits go to the league’s revenue-sharing program (in 1997, the tax is 35% on amounts over $51 million; in 1998, 35%, $55 million; in 1999, 34%, $58.9 million; there is no luxury tax in 2000 or 2001).

Minimum salary levels were raised.

Players and owners agreed jointly to ask Congress to repeal baseball’s antitrust exemption.244

B. National Basketball Association

After the looming threat of a strike and decertification in the 1995 offseason, the NBA players and owners signed a six-year agreement in September 1995.245 Some of the major terms of the agreement are as follows:

- A rookie salary cap fixed salaries at the average salary paid to the player drafted in that position over the last seven years, with an allowance for a 20% raise.
- Rookie contracts are limited to three years, after which the player becomes an unrestricted free agent.
- The salary cap rose from $15.9 million in 1994-95 to $23 million in 1995-96, with an expected cap of $32.5 million in 2000-01.
- Minimum salaries were increased.
- The “Larry Bird” rule was retained, whereby teams may resign their own free agent without increasing the salary cap “slot” for that player, as long as the player has completed a three-year contract.
- A team may replace an injured player for 50% of that player’s salary.
- Players may extend their current contracts for raises not in excess of 20%, but large balloon payments are prohibited.
- Teams may not renegotiate a player’s contract for a lower

244. See Litke, supra note 76, at 6D.
245. See Chris Sheridan, NBA, Players Union Sign Labor Agreement; Moratorium Lifted, DALLAS MORNING NEWS, July 12, 1996, at 1B.
salary.

• After the 1997-98 season, the rookie draft will be dropped from two rounds to one.246

C. National Football League

After six years without a labor agreement, the NFL and the NFLPA signed a seven-year labor agreement in 1993.247 Some of the major terms of the agreement, which was approved by Judge Doty of the Minnesota District Court, are as follows:

• Players with five years of experience may become unrestricted free agents.

• Total salaries were guaranteed to equal at least 58% of the league’s gross revenues for each salary cap year.

• The draft was reduced from twelve rounds to seven (plus an additional round for teams losing free agents).

• Drafted rookies’ salaries were capped at approximately $2 million per club.

• Each team is allowed to designate a “franchise player.” Such players must be offered a contract for the average of the top five players at that position.248

• The salary cap only runs through the 1999 season, but the league and the players have the option of extending the deal for an extra year, making 2001 the first year without the cap.249

D. National Hockey League

The NHL signed a six-year deal in January 1995. The players escaped the imposition of a salary cap or a luxury tax, but were forced to accept certain restrictions on free agency and the imposition of a rookie


248. See id.

249. See Larry Weisman, Meeting Targets the Usual, USA TODAY, Mar. 10, 1997, at 8C (discussing the main focus of the NFL’s winter meeting: labor agreements and ownership policies).
salary cap.\textsuperscript{250} As well, the owners retained the right to walk away from three arbitration awards over a certain dollar amount within each two-year period.\textsuperscript{251} The players had the right to reopen the agreement to new negotiations in 1998, but the players and owners have waived that right until 2000.\textsuperscript{252}

\textbf{E. Major League Soccer}

Major League Soccer was incorporated as a single corporation, which arguably could shield it from certain antitrust liability. As of the start of the 1997 season, there was no players’ union, but the league anticipates that one will be organized soon.\textsuperscript{253} Even with the lack of a collective bargaining relationship, MLS has implemented a salary cap, which was increased from $1.19 million in 1996 to $1.3 million for 1997.\textsuperscript{254}

\textbf{VIII. CONCLUSION}

Sports leagues and team owners pay athletes enormous salaries for playing a kids’ game. Although this scenario sounds like a no-lose situation for the athletes, the leagues often implement policies that severely restrict the labor market for the athletes through compensation limits, constraints on player movement, and restrictive player drafts.

Such practices should be subject to challenge under the antitrust laws; however, the leagues have made use of a judicially constructed labor exemption to antitrust law to avoid liability. The query that arises most often in evaluating this labor exemption is how much time passes between the end of a collective bargaining agreement and the expiration of this exemption. Many federal trial and appellate courts have addressed this issue, with no definitive solution in sight.

The \textit{Brown v. Pro Football, Inc.} decision that the Supreme Court handed down in 1996 did little to definitively answer the question. Although the Court’s opinion purported to develop a new standard for expiration of the exemption, an analysis of the opinion shows that \textit{Brown} effectively reverted to earlier appellate court precedent, and allowed the leagues to escape antitrust liability as long as they were involved in

\textsuperscript{250} See Mike Lupica, \textit{Mad as Hell} 162-63 (1996).
\textsuperscript{253} See Jerry Langdon, \textit{Coaches Have Beef, But Training Program Response is Positive}, USA Today, Oct. 10, 1996, at 20C.
\textsuperscript{254} See id.
ongoing collective bargaining relationships with the players. Accordingly, players are faced with two unappealing choices: to decertify, as the NFLPA did in 1989, or to refuse to enter into a collective bargaining relationship at all, as the MLS players did in their first year. Clearly, these unappealing options seem to leave the deck stacked in the owners’ favor.