

CALL UPON CONGRESS TO ABOLISH THE NFL DRAFT

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INTRODUCTION.....	205
I. BACKGROUND OF THE NFL DRAFT.....	209
II. ANTITRUST AND LABOR LAW PRIMER.....	213
A. <i>The Sherman Antitrust Act</i>	213
B. <i>Labor Exemptions on Federal Antitrust Laws</i>	218
III. NON-STATUTORY LABOR EXEMPTION: ISSUES IN THE NFL APPLICATION	226
IV. SOLUTION: ABOLISHMENT OF THE NFL DRAFT	229
A. <i>Ability to Negotiate Fair Market Value</i>	231
B. <i>Trend of Player Autonomy</i>	235
C. <i>The NFL Draft fails to meet its Original Objective</i>	241
CONCLUSION	248

INTRODUCTION

Consider this hypothetical in comparison to the National Football League (“NFL”) Draft policy and procedure. Kim Wexler¹ is a rising third-year law student at the University of Mississippi. She is ranked at the top of her class with a 4.0 GPA. Kim is a member of the school’s law review, moot court team, and negotiation board. Recently, the school voted her in as president of

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¹ Kim Wexler, portrayed by actress Rhea Seehorn, is a character in the AMC TV series “Better Call Saul.” For purposes of this article, Kim is a hypothetical law student at the University of Mississippi. For more information on the TV series, see *Better Call Saul*, IMDB, https://www.imdb.com/title/tt3032476/?ref_=nm_knf_t1 [<https://perma.cc/QS5B-SV79>] (last visited Oct. 5, 2022).

the Student Bar Association. She spent the summer after her first year working for a large, national firm in New York. She has letters of recommendation from two federal judges, the dean of the law school, and the Governor of Mississippi. Moreover, the Mississippi Bar Magazine featured her on the cover of their annual law school edition. In the issue, the magazine labeled Kim a “generational”² talent and “the best law student to come out of Mississippi in 50 years.” Kim believes she is well on her way to a successful law career. She aspires to work for a large firm in Chicago, New York, or Los Angeles—a firm that has the leadership, platform, and resources to support her promising future.

There is one obstacle to her aspirations: the American Bar Association’s (“ABA”) Collective Bargaining Agreement (“CBA”) conditions employment based on a national draft.³ The purpose of such a draft is to promote parity among all employers around the country and give the less successful employers a competitive advantage. As a result, a small firm in Aberdeen, Mississippi selects Kim with the number one pick in the 2023 ABA Draft. Meanwhile, the large firms in Chicago, New York, and Los Angeles select students who finished in the bottom third of Kim’s class.

Because the Aberdeen law firm has Kim’s draft rights, Kim is only allowed to negotiate employment terms with the Aberdeen firm if she wishes to practice law.⁴ Kim can negotiate a higher salary due to her draft status, but she is still limited to a “rookie salary cap” that prevents her from negotiating her fair market

² Media outlets labeled Trevor Lawrence, a college quarterback and eventual number one pick in the 2021 NFL Draft, a “generational talent.” See Chase Goodbread, *Once in a Generation: Is Trevor Lawrence NFL’s Next Big Thing?*, NFL (Apr. 13, 2021), <https://www.nfl.com/news/back-2-campus/once-in-a-generation-is-trevor-lawrence-nfl-s-next-big-thing> [<https://perma.cc/RC4P-ZUU7>].

³ The NFL, among other professional sports leagues in North America, conditions entry into the league upon a draft. See *The History of the NFL Draft*, NFL, <https://operations.nfl.com/journey-to-the-nfl/the-nfl-draft/the-history-of-the-draft/> [<https://perma.cc/HJ98-8WJR>] (last visited Sept. 22, 2022); see also NAT’L FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT art. 6, § 2(d) (2011) [hereinafter NFL CBA] (“No player shall be eligible to be employed by an NFL club until he has been eligible for selection in an NFL Draft.”).

⁴ See NFL CBA, *supra* note 3, art. 6, § 4(b)(ii); see also NFL CBA, *supra* note 3, art. 6, § 4(e).

value.⁵ The Aberdeen firm, simply by virtue of the draft, owns her employment rights for at least the next four years.⁶ Under the terms of the ABA CBA, Kim may not renegotiate the terms of her rookie contract until three years have passed.⁷ If Kim is unhappy with the Aberdeen firm and wishes to work for another firm, she will only be allowed to do so if the Aberdeen firm decides to move her to another firm on the Aberdeen firm's own terms, and Kim will not have the luxury of choosing the firm to which she transfers.⁸

Now, Kim may be so talented that she will succeed at the Aberdeen firm and move onto a larger firm with more resources after her contract with Aberdeen expires. But for every "generational" lawyer prospect, there are other promising number

⁵ NFL CBA art. 7, § 3(b) provides that rookies drafted in the NFL are restricted to certain types of compensation during contract negotiations with the team that drafts them. These restrictions include a signing bonus, roster bonus, reporting bonus, workout bonus, base salary, and certain incentives. NFL CBA, *supra* note 3, art. 7, § 3(b). *See also* Joel Corry, *Agent's Take: 2022 NFL rookie contract projections for key Round 1 picks, with a rookie wage scale explainer*, CBS (May 5, 2022, 2:49 AM), <https://www.cbssports.com/nfl/news/agents-take-2022-nfl-rookie-contract-projections-for-keyround-1-picks-with-a-rookie-wage-scale-explainer/#:~:text=The%20first%20year%20cap%20number,which%20is%20%24705%2C000%20in%202022> [<https://perma.cc/G93T-TSVP>] ("The type of salary escalators and incentives that used to be responsible for salaries skyrocketing at the top of draft are prohibited under the rookie wage scale. A majority of picks only have signing bonus and base salaries in their deals.")

⁶ *See* NFL CBA, *supra* note 3, art. 7, § 3(a) ("Every Rookie Contract shall have a fixed and unalterable contract length: (i) four years for Rookies selected in the first round of the Draft, with a Club option for a fifth year as described in Section 7 below; (ii) four years for Rookies selected in rounds two through seven of the Draft (including any compensatory draft selections); and (iii) three years for Undrafted Rookies.")

⁷ *See* Andrew Brandt, *Rookie Pay is a Major Sacrifice in the Current CBA, But Some Terms Are Negotiable*, SPORTS ILLUSTRATED (May 14, 2019), <https://www.si.com/nfl/2019/05/14/nfl-rookie-contracts-sacrifice-pay-negotiable-terms> [<https://perma.cc/YF4A-QYD4>].

⁸ *The Rules of the Draft*, NFL, <https://operations.nfl.com/journey-to-the-nfl/the-nfl-draft/the-rules-of-the-draft/> [<https://perma.cc/8KA2-Z54K>] (last visited Oct. 5, 2022).

one picks who failed to live up to expectations.⁹ Furthermore, the larger firms may not be willing to hire lawyers like Kim if she fails to live up to her hype in Aberdeen.¹⁰

This absurd scenario would be ridiculed in nearly all modes of entry-level employment in the country. While the purpose of this regulation is to promote fairness and parity among all employers in the industry, this obviously hurts the prospective employees because they are unable to negotiate with preferred employers on their fair market value. This also hurts the employers because the smaller firms with limited resources hire new employees that have no intention of staying beyond the initial contract length, and the employees available to the larger firms do not necessarily meet the standard the larger firms would expect.

This comment argues that the Draft Entry requirement for NFL employment infringes upon a willing athlete's freedom to contract with a willing employer. Challenges have been brought against NFL rules, and courts have found that some rules violate federal antitrust laws,¹¹ but the courts have held similar rules are exempt if the parties have collectively bargained for the rule.¹² This decision to favor one federal policy over another has created great tension by concluding that unreasonable restraints on trade are permitted if the conduct is, or could have been, collectively

⁹ Peyton Manning is generally regarded as one of the greatest quarterbacks in the NFL, while Jamarcus Russell played only three short seasons in the league and is widely regarded as a "bust." Compare Andrew Moore, *Colts' QB Peyton Manning Enshrined into Pro Football Hall of Fame*, SPORTS ILLUSTRATED (Aug. 9, 2021, 8:30 AM), <https://www.si.com/nfl/colts/news/indianapolis-colts-qb-peyton-manning-enshrine-d-pro-football-hall-of-fame> [<https://perma.cc/P659-CKEK>], with Doug Farrar, *Jamarcus Russell, 2007 No. 1 overall pick, reflects on his failed NFL career*, USA TODAY (July 12, 2022, 11:05 PM), <https://www.usatoday.com/story/sports/nfl/2022/07/12/jamarcus-russell-reflects-on-his-failed-nfl-career/50481861/> [<https://perma.cc/7TEY-5MXL>].

¹⁰ See Carter Cox, *What if Sam Bradford had been able to Stay Healthy?*, ZONE COVERAGE (July 3, 2021), <https://zonecoverage.com/2021/minnesota-vikings-news/what-if-sam-bradford-had-been-able-to-stay-healthy/> [<https://perma.cc/NGU3-P8GA>].

¹¹ See *Radovich v. Nat'l Football League*, 352 U.S. 445, 451-52 (1957) (holding football is subject to federal antitrust laws); see also *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) (holding that the NFL Draft, as it existed in 1968, unreasonably restrained trade in violation of federal antitrust laws).

¹² See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 240-41 (1996) (holding that mandatory subjects of collective bargaining should be protected from antitrust scrutiny).

bargained for.¹³ This tension harms the individual athletes because the entry requirement only affects the athletes who are complete strangers to the bargaining relationship. Because the courts have failed to protect the interests of incoming NFL players, this article calls upon Congress to legislate this issue and abolish the NFL Draft in the interest of a public policy favoring a former collegiate athlete's right to contract for employment under a free market model.

Part I provides background of the NFL Draft, including the draft's history and the entry rules enshrined in the NFL Constitution and Bylaws and the current Collective Bargaining Agreement ("NFL CBA"). Part II analyzes how courts have reviewed antitrust and labor issues surrounding the NFL CBA. Part III illustrates the issues that arise from the bargaining relationship between the NFL and the NFL players' union ("NFLPA"). Part IV introduces this article's proposal to Congress to abolish the NFL Draft. Part IV next examines the public policy reasons that favor the proposal, which include (1) the benefits of negotiating on fair market value, (2) the growing trend of player autonomy, and (3) the NFL Draft's detrimental effects on competitiveness in the NFL.

I. BACKGROUND OF THE NFL DRAFT

In 1934, the NFL introduced its waiver rule, which was a free agency rule that allowed its member teams to pick up available players.¹⁴ Under the waiver rule, a player who is cut by his NFL team prior to completing four seasons in the league must pass through the league's waiver system.¹⁵ The other thirty-one teams may file a claim to sign the cut player or waive the opportunity to do so.¹⁶ If the player goes through the waiver process unclaimed, he may proceed as a free agent.¹⁷ Players who accrue four more

¹³ *Clarett v. Nat'l Football League*, 369 F.3d 124, 139 (2d Cir. 2004) (holding that the three-year eligibility rule fell within the scope of the non-statutory labor exemption to antitrust analysis).

¹⁴ See NFL CBA, *supra* note 3.

¹⁵ *NFL Waiver System Overview*, Updates, NFL, (May 20, 2015), <https://operations.nfl.com/updates/the-players/nfl-waiver-system-overview/> [<https://perma.cc/7Q8G-Y4SP>] [hereinafter *NFL Waiver*].

¹⁶ *Id.*

¹⁷ *Id.*

seasons in the NFL – “vested veterans” – are free to negotiate and sign with any teams if the player is cut any time before the trade deadline.¹⁸ “From the trading deadline through the end of the regular season, vested veterans are subject to the waiver process.”¹⁹

Still, Philadelphia Eagles co-owner Bert Bell believed his team did not have the financial advantages or prestige that other clubs had to sign talented free agents.²⁰ At the league’s next meeting in 1935, Bell introduced a rule that would forever change the scope of player entry into the NFL.²¹ This rule, which received a unanimous vote by all present at the meeting, would become the annual NFL Draft.²² The league’s rationale for the NFL Draft was an interest in promoting competitive parity on the playing field among NFL teams by giving less fortunate teams a competitive advantage.²³ At the first NFL Draft, the Eagles selected Heisman Trophy winner Jay Berwanger from the University of Chicago.²⁴ Berwanger would end up choosing a career as a foam rubber salesman rather than a life as an NFL running back.²⁵

Since then, the annual NFL Draft has become a spectacle celebrated by players, teams, administrative officials, and fans alike. The draft became a tool to build a successful franchise.²⁶ Teams began investing more resources into scouting departments, the NFL added an annual combine to the offseason schedule in the 1980s, and the NFL televised the annual draft live for the first time in 1980.²⁷

The pre-draft process begins with college football athletes declaring for the NFL Draft. Following the end of the 2021-2022 college football season, underclassmen and seniors who had not used all of their collegiate football eligibility had until January 17,

¹⁸ *NFL Waiver*, supra note 15.

¹⁹ *Id.*

²⁰ *See NFL CBA*, supra note 3.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

2022 to officially declare for the NFL Draft.²⁸ The NFL clubs rely on their scouting department to initially gather information on the players during the college football season.²⁹ After the season, the clubs gather at a handful of events to watch the top collegiate prospects, including the invite-only NFL Scouting Combine.³⁰ “According to Jeff Foster, president of the National Football Scouting Inc. [] and head of the NFL Combine, ‘Most evaluators agree that the National Combine is to validate what they’ve seen on film.’”³¹ The Combine provides teams with opportunities to watch invitees participate in physical and mental tests, assess medical evaluations, and interview the invitees.³² It is interesting to note that each NFL club is limited to sixty 15-minute interviews with each invitee.³³

NFL clubs also have opportunities to evaluate prospects beyond the Combine through school pro-days and private visits. During pro-days, NFL clubs can send team scouts and officials to the host school to watch top prospects perform in similar Combine-testing drills in a more private session.³⁴ These are not always the best evaluations of talent, however, as prospects will select coaches with whom they are most comfortable in non-pressurized sessions.³⁵ The interview sessions are limited further as NFL clubs are competing with each other to talk with the handful of prospects in informal settings.³⁶ NFL clubs have more control during private workouts as they can schedule the workouts, pick the players to invite, and conduct more in-depth

²⁸ *College football underclassmen entering 2022 NFL draft*, USA TODAY (Jan. 25, 2022, 12:03 AM), <https://www.usatoday.com/story/sports/nfl/draft/2022/01/04/nfl-draft-2022-underclassmen-who-intend-leave-college-early/9098716002/> [<https://perma.cc/MN7C-JE6S>].

²⁹ Kerry Flynn, *NFL Draft: Everything you need to know*, CNN (Apr. 27, 2022, 7:39 AM), <https://www.cnn.com/2022/04/27/sport/nfl-draft-explainer-2022-spt-intl>. [<https://perma.cc/83AW-VC54>].

³⁰ *Id.* Approximately 300 of the top prospects are invited to the NFL Scouting Combine every year.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Matt Bowen, *Private Workouts Are Crucial to the NFL’s Predraft Process*, BLEACHER REP., (Apr. 11, 2015), <https://bleacherreport.com/articles/2423000-private-workouts-are-crucial-to-the-nfls-pre-draft-process> [<https://perma.cc/F5K5-V32A>].

³⁵ *Id.*

³⁶ *Id.*

interviews.³⁷ Still, these private invites are limited to thirty prospects.³⁸

There are seven rounds of an NFL Draft.³⁹ Each round contains the same number of picks as current teams.⁴⁰ Since its inception in 1934, the draft order “is determined by a purely inverse-standings basis.”⁴¹ Eligibility for the NFL Draft is determined by the NFL’s Eligibility Rule codified in the NFL CBA.⁴² This Eligibility Rule prohibits a collegiate football athlete from entering the league until completion of his junior season.⁴³

Today, the NFL Draft is just as much a marketing ploy for the NFL as it is a chance for less fortunate teams to select potential superstars.⁴⁴ The NFL Draft takes place over three days every spring and is aired during prime time over the first two days.⁴⁵ The NFL rolls out the red carpet and invites the players

³⁷ Bowen, *supra* note 34.

³⁸ Kyle Stackpole, *2022 NFL Draft top-30 visits tracker: Patriots host some top DBs while Buccaneers welcome several RBs*, CBS SPORTS (Apr. 13, 2022, 8:12 AM), <https://www.cbssports.com/nfl/news/2022-nfl-draft-top-30-visits-tracker-patriots-host-some-top-dbs-while-buccaneers-welcome-severalrbs/#:~:text=With%20the%202022%20NFL%20Draft,for%20interviews%2C%20meetings%20and%20physicals> [<https://perma.cc/WHN6-3B49>].

³⁹ See NFL CBA, *supra* note 3, art. 6, § 2(a).

⁴⁰ *Id.*

⁴¹ Zach Leach, *Dump and Chase: Why the NFL, NBA, and MLB Should Abandon Their Problematic Amateur Draft Age Limits and Rookie Wage Structures and Adopt the Current NHL Model*, 29 MARQ. SPORTS L. REV. 177, 195 (2018).

⁴² A player may apply for eligibility in the draft once “three NFL regular seasons have begun and ended following either his graduation from high school or graduation of the class with which he entered high school, whichever is earlier.” See NFL CBA, *supra* note 3, art. 6, § 2(b).

⁴³ There are some instances where a collegiate football player is eligible to enter the draft following his sophomore season, provided that same player redshirts for one full season during his collegiate year. See Leach, *supra* note 41, at 196. For a definition of “redshirt,” see *redshirt*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/redshirt> [<https://perma.cc/HFT4-KKVN>] (last visited Oct. 6, 2022) (“a college athlete who is kept out of varsity competition for a year in order to extend eligibility”).

⁴⁴ City News Service, *NFL draft is TV Viewers’ No. 1 pick*, L.A. TIMES (May 3, 2022, 6:17 PM), <https://www.latimes.com/entertainment-arts/tv/story/2022-05-03/tv-ratings-story-for-the-week-of-april-25-may-1-wed-may-4-2022> [<https://perma.cc/ZLH5-92LG>] (“Even in April, NFL programming topped the prime-time ratings. The combined average viewership of Thursday’s first round of the NFL draft simulcast on ESPN, ABC and NFL Network averaged 10.031 million viewers . . . according to live-plus-same-day figures released by Nielsen on Tuesday.”).

⁴⁵ See Leach, *supra* note 41, at 195.

who are most likely to get selected early.⁴⁶ Rabid NFL fans can purchase special packages that include seating, gifts, and upgraded food and beverage service.⁴⁷ “It’s become so popular that the NFL Draft has major brand sponsors that support each year’s event, including Dannon and Frito-Lay.”⁴⁸ The popularity of the NFL Draft is furthered by the tremendous national interest in the college game because the draft features the most talented collegiate football athletes from the prior season.⁴⁹ Every year, football fans are on the edge of their seats as they dream of the next young and exciting rookie that will be added to their favorite team’s roster.

The NFL is not the only entity that benefits from the financial windfall that comes with the event. From 1965 to 2014, New York City was the host city of the NFL Draft, but the NFL has selected a different host city every year since 2015, with 2020 being the lone exception due to the COVID-19 Pandemic.⁵⁰ Each city since 2015 has seen no less than \$44 million in economic impact as hundreds of thousands of fans visit the host cities during the draft.⁵¹

II. ANTITRUST AND LABOR LAW PRIMER

A. *The Sherman Antitrust Act*

In response to the anticompetitive conduct of large firms squeezing out smaller firms, Congress passed the Sherman

⁴⁶ See NFL Draft Kickoff Live, *Michael Irvin and Melissa Stark break down great draft red carpet moments*, NFL, <https://www.nfl.com/videos/michael-irvin-and-melissa-stark-break-down-great-draft-red-carpet-moments> [<https://perma.cc/K3EQ-5LEW>] (last visited Nov. 18, 2022).

⁴⁷ See Mick Akers, *Here’s how to attend the NFL draft in Las Vegas*, LAS VEGAS REV.-J. (Mar. 19, 2022, 8:24 AM), <https://www.reviewjournal.com/sports/nfl-draft/heres-how-to-attend-the-nfl-draft-in-las-vegas-2548228/> [<https://perma.cc/27GH-2UHT>].

⁴⁸ Steve Olenski, *The NFL Draft: The Brand Within a Brand*, FORBES (May 30, 2017, 9:00 AM), <https://www.forbes.com/sites/steveolenski/2017/05/30/the-nfl-draft-the-brand-within-a-brand/?sh=49a57a024875> [<https://perma.cc/K7Q7-LS5W>].

⁴⁹ See Leach, *supra* note 41, at 195.

⁵⁰ Adam Staten, *Host Cities Hauled in \$500 Million on the NFL Draft Since Event Has Moved*, NEWSWEEK (Apr. 28, 2022, 12:27 PM), <https://www.newsweek.com/cities-make-500-million-nfl-draft-since-event-has-moved-new-york-1701790> [<https://perma.cc/3WYX-AKCF>].

⁵¹ *Id.*

Antitrust Act.⁵² There are three elements to a federal antitrust challenge under Section 1 of the Sherman Act: “(1) a contract, combination, or conspiracy; (2) the contract, combination, or conspiracy produced a restraint of trade; and (3) the restraint affected trade or commerce among the several states.”⁵³ The United States Supreme Court has interpreted the statute to prohibit unreasonable restraints on trade.⁵⁴ Generally, restraints that promote competition are reasonable, and restraints that restrict competition are unreasonable.⁵⁵

There are two basic types of restraints under the Sherman Act: horizontal and vertical restraints.⁵⁶ Under the federal antitrust laws, horizontal restraints are “imposed by agreement between competitors,” while vertical restraints are “imposed by agreement between firms at different levels of distribution.”⁵⁷ Horizontal restraints typically concern “agreements between competitors at the same level of the market structure.”⁵⁸ Conversely, vertical restraints typically concern “agreement[s] between firms at different levels of distribution.”⁵⁹

When determining whether a defendant violated Section 1 of the Sherman Act, the courts will consider three legal standards: per se, rule of reason, and quick look.⁶⁰ Per se means that a restraint is facially illegal and will be “deemed per se illegal without any inquiry into its justifications, effects, or motive.”⁶¹

⁵² See 15 U.S.C. §§ 1-38.

⁵³ See Michael A. McCann & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731, 734 (2006) (citing 15 U.S.C. § 1). See also 15 U.S.C. § 1 (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”).

⁵⁴ See *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

⁵⁵ See Stephen F. Ross, *Player Restraints and Competition Law throughout the World*, 15 MARQ. SPORTS L. REV. 49, 49 (2004).

⁵⁶ *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988).

⁵⁷ *Id.* at 730-31.

⁵⁸ *United States v. Am. Express Co.*, 838 F.3d 179, 194 (2d Cir. 2016) (quoting *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 182 (2d Cir. 2012)).

⁵⁹ *Id.*

⁶⁰ Steve E. Cavezza, “*Can I See Some Id?*”: *An Antitrust Analysis of NBA and NFL Draft Eligibility Rules*, 9 U. DEN. SPORTS & ENT. L.J. 22, 27 (2010).

⁶¹ *Id.* (“This typically occurs with practices such as group boycotts, price-fixing schemes, and horizontal market divisions.”).

Horizontal restraints are typically scrutinized under this standard.⁶²

Under the rule of reason standard, courts will determine, under a case-by-case analysis, whether restrictive conduct imposes an unreasonable restraint on trade.⁶³ Under this standard, the complaining party must show that the restraint creates anticompetitive effects.⁶⁴ Upon such a showing, the defending party must show that the anticompetitive effects create pro-competitive benefits.⁶⁵ The burden then shifts back to the complaining party to show that the restraint is not necessary to accomplish the stated goal.⁶⁶ Vertical restraints are typically scrutinized under this standard.⁶⁷

Some courts evaluate restraints under a third form of scrutiny – quick look – that blends the per se rule and the rule of reason standard.⁶⁸ Quick look is an intermediate approach that asks whether “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect.”⁶⁹

In *International Boxing Club of New York, Inc. v. United States*, the United States Supreme Court held that professional sports leagues – with Major League Baseball as the lone exception – are not exempt from antitrust laws.⁷⁰ In *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, the Court held that baseball is exempt from antitrust laws because baseball games are “purely state affairs.”⁷¹ The Court has since found this justification to no longer be valid but has failed to

⁶² AT & T Corp. v. JMC Telecom, LLC, 470 F.3d 525, 531 (3d Cir. 2006).

⁶³ See *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

⁶⁴ *Id.*

⁶⁵ Mackey v. Nat'l Football League, 543 F.2d 606, 620-21 (8th Cir. 1976).

⁶⁶ *Id.*

⁶⁷ See *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 183 (2d Cir. 2012); *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977).

⁶⁸ Cavezza, *supra* note 60, at 28.

⁶⁹ *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 770 (1999).

⁷⁰ *Int'l Boxing Club of N.Y. v. United States*, 358 U.S. 242, 245 (1955).

⁷¹ *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208 (1922).

overturn the exemption.⁷² In *Radovich v. NFL*, the Supreme Court held that football is subject to federal antitrust laws and does not enjoy such protections.⁷³

When evaluating a Section 1 claim in a professional sports league setting, the courts typically analyze the merits of the claim under a rule of reason analysis.⁷⁴ In *NCAA v. Board of Regents of University of Oklahoma*, the United States Supreme Court noted the unique nature of sports leagues, finding that “what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.”⁷⁵

The District of Columbia Circuit Court of Appeals tackled the NFL Draft’s player entry requirement in *Smith v. Pro-Football, Inc.*⁷⁶ In *Smith*, the plaintiff filed a private antitrust action challenging the player draft rule as it existed in 1968.⁷⁷ The D.C. Circuit considered two issues in particular: (1) whether to determine the legality of the player draft rule under a per se standard or a rule of reason standard, and (2) if the player draft rule is to be determined under the rule of reason, whether the rule is an unreasonable restraint on trade.⁷⁸ Upon review, the D.C. Circuit held that the per se standard is inapplicable to the player draft rule because the rule is not characterized as a traditional

⁷² See *Toolson v. N.Y. Yankees*, 346 U.S. 356, 357 (1953); see also *Flood v. Kuhn*, 407 U.S. 258, 272 (1972).

⁷³ *Radovich v. Nat’l Football League*, 352 U.S. 445, 445 (1957).

⁷⁴ See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984) (quoting R. Bork, *The Antitrust Paradox* 278 (1978) (“[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams.”)); see also Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 GA. L. REV. 137, 146-47 (1999).

⁷⁵ *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 101.

⁷⁶ See *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978).

⁷⁷ *Id.* at 1174.

⁷⁸ *Id.* at 1177. The circuit court also deliberated on whether “the measure of damages adopted by the District Judge was proper” *id.*, but for this Comment focuses on the first two issues.

group boycott under the per se standard.⁷⁹ Under the rule of reason standard, the court found that the player draft rule had severe anticompetitive effects on its face, and the defendants failed to justify the anticompetitive nature of the rule.⁸⁰

The NFL argued that the aim of the NFL Draft was to allow weaker teams the opportunity to select the most talented rookies in the interest of parity on the football field.⁸¹ But the federal antitrust laws were enacted to protect competition in an economic sense. The D.C. Circuit best distinguished this relationship between procompetitive effects under antitrust analysis and procompetitive effects on the playing field as follows:

The draft is anticompetitive in its effect on the market for players' services, because it virtually eliminates economic competition among buyers for the services of sellers. The draft is allegedly "procompetitive" in its effect on the playing field; but the NFL teams are not economic competitors on the playing field, and the draft, while it may heighten athletic competition and thus improve the entertainment product offered to the public, does not increase competition in the economic sense of encouraging others to enter the market and to offer the product at lower cost.⁸²

Still, the D.C. Circuit found that a player draft could survive the rule of reason standard, but "only if it is demonstrated to have

⁷⁹ *Smith*, 593 F.2d at 1181. In its analysis, the D.C. Circuit pointed to previous decisions of courts in deciding that the antitrust analysis in professional sports is best governed by the rule of reason standard. *Id.*; see also Terrance Ahern, *The N.F.L.'s Final Victory over Smith v. Pro-Football, Inc.: Single Entity – Interleague Economic Analysis*, 27 CLEV. ST. L. REV. 541, 549 (1978) (discussing that the player draft rule is different from a group boycott because the NFL clubs' conduct did not attempt to drive out each other from the professional sports market and the NFL clubs did not act in conjunction to exclude other competitors or potential competitors of similar standing to enter the market).

⁸⁰ *Smith*, 593 F.2d at 1187. The defendants' defense rested "on the assertion that competition for players' services would harm both the football industry and society," but "there is nothing of procompetitive virtue to balance, because the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id.* (citing *Nat'l Soc. of Pro. Engineers v. United States*, 435 U.S. 679, 696 (1978)).

⁸¹ *Id.* at 1175-76.

⁸² *Id.* at 1186.

positive, economically procompetitive benefits that offset its anticompetitive effects, or at the least, if it is demonstrated to accomplish legitimate business purposes and to have a net anticompetitive effect that is insubstantial.”⁸³

But this reasoning does not address the fact that there are other reasonable alternatives available to the NFL in their player entry rules. The *Smith* court suggested allowing players to negotiate with preferred teams if the player was dissatisfied with the offer from the team that initially selected him.⁸⁴ The *Smith* court also suggested the NFL could hold a second draft in the same year if the player failed to reach an agreement with the team that selected him.⁸⁵ The *Smith* court’s suggestions still restrict the entering players to initially negotiate with the first team that selects the player. If the NFL were to accept one of the alternatives above, the players who decide to walk away from the first team must participate in an accelerated process to interview other employers or go through the draft process again while their peers are building chemistry with teammates, coaches, and team personnel and training for the upcoming season.

Instead, the most reasonable alternative would be to abandon the NFL Draft altogether and allow the prospective players to freely negotiate with NFL teams based upon fair market value. This alternative would give prospective players the ability to spend the pre-draft process working out for teams, interviewing with team personnel, and fielding offers from the teams, and find a suitable employer by the time training camp rolls around.

B. Labor Exemptions on Federal Antitrust Laws

“In most settings, restraints of trade concern the product market.”⁸⁶ Professional sports are different, however, because antitrust challenges in professional sports settings typically

⁸³ *Smith*, 593 F.2d at 1188-89 (emphasis omitted). For an analysis on whether this was the correct holding, see Ahern, *supra* note 79, at 550-52 (“The draft may be very procompetitive on the playing field, but this does not increase competition, in the economic sense, by encouraging others to enter the market or by offering the product at a lower cost. In strict economic terms, the draft’s demonstrated procompetitive effects are ‘nil.’”) (citation omitted).

⁸⁴ *Smith*, 593 F.2d at 1188.

⁸⁵ *Id.*

⁸⁶ See McCann & Rosen, *supra* note 53, at 734.

involve the labor market.⁸⁷ While the aim of the Sherman Act is to promote economic competition,⁸⁸ national labor policy tends to create tension with the interests of the Sherman Act.⁸⁹ In the interest of promoting the collective bargaining process, the courts have applied two exemptions to the federal antitrust laws: statutory and non-statutory exemptions.⁹⁰

The statutory exemptions are codified under the Clayton Act and the Norris-LaGuardia Act.⁹¹ Under these statutes, conduct such as boycotts and picketing are exempt from federal antitrust law.⁹² Further, the National Labor Relations Act (“NLRA”) and the Labor Management Relations Act were enacted to “establish [] a federal policy promoting the collective bargaining process.”⁹³

The non-statutory labor exemption arose from the courts realizing that collectively bargained terms negotiated between management and employee unions were still restraints on trade.⁹⁴ The United States Supreme Court first applied the non-statutory labor exemption in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Co.*⁹⁵ Under the NLRA, employers and unions are obligated to negotiate “in good faith *with respect to wages, hours, and other terms and*

⁸⁷ See McCann & Rosen, *supra* note 53, at 734.

⁸⁸ See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) (quoting *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826 (2d Cir. 1968) (“The Sherman Act is designed to promote the national interest in a competitive economy”)).

⁸⁹ Barry S. Roberts & Brian A. Powers, *Defining the Relationship between Antitrust Law and Labor Law: Professional Sports and the Current Legal Battleground*, 19 WM. & MARY L. REV. 395, 395 (1978). As noted by Roberts and Powers, national labor policy, which favors good faith collective bargaining among unions and employers, conflicts with the purpose of federal antitrust law, which aims to limit the restraints on trade and promote economic competition. *Id.*

⁹⁰ Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1048-53 (1994).

⁹¹ See 15 U.S.C. § 17, et. seq.; see also 29 U.S.C. § 52, et. seq.; and 29 U.S.C. § 101, et. seq.

⁹² See Corcoran, *supra* note 90, at 1048.

⁹³ *Id.* at 1050. See also 29 U.S.C. §151, et. seq. & 29 U.S.C. §141, et. seq.

⁹⁴ See Corcoran, *supra* note 90, at 1051.

⁹⁵ *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 679 (1965).

*conditions of employment.*⁹⁶ In *Jewel Tea Co.*, the Court created the non-statutory labor exemption to shield these mandatory bargaining subjects from federal antitrust laws:

Weighing the respective interests involved, we think the national labor policy expressed in the National Labor Relations Act [encouraging collective bargaining] places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work. An agreement on these subjects between the union and the employers in a bargaining unit is not illegal under the Sherman Act.⁹⁷

The non-statutory labor exemption is obviously in direct conflict with the federal antitrust laws. Congress enacted the Sherman Act to prohibit unreasonable restraints on trade which, in turn, would promote economic competition. But Congress turned around and enacted the labor statutes to encourage national labor policy, like unionization and collective bargaining. The courts created the non-statutory exemption because of public policy to protect the labor movement, but commentators have noted that there has been a shift in focus from the initial interest in protecting employees in the labor movement to an interest in protecting both sides of the bargaining table.⁹⁸

This tension is further evidenced by the nature of professional sports leagues. In the context of sports, the courts have applied the non-statutory exemption because “player restraints are not imposed unilaterally by owners, but are instead a part of a collective bargaining agreement between owners and players.”⁹⁹ But the restraints “have generally been inserted by team owners, not the players’ union.”¹⁰⁰

⁹⁶ 29 U.S.C. § 158(d) (emphasis added); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). These categories have been determined to be the mandatory subjects of the collective bargaining process. See *Cavezza*, *supra* note 60, at 30; see also *McCann & Rosen*, *supra* note 53, at 738.

⁹⁷ *Corcoran*, *supra* note 90, at 1051 (quoting *Jewel Tea Co.*, 381 U.S. at 691).

⁹⁸ *Id.* at 1052-53.

⁹⁹ *Corcoran*, *supra* note 90, at 1056.

¹⁰⁰ *Id.*

One case that applied the exemption in a professional sports setting was *Mackey v. NFL*.¹⁰¹ In *Mackey*, the plaintiffs challenged a rule, known as the Rozelle Rule, that conferred power upon the NFL Commissioner to force a resolution if a team who lost a player to free agency could not agree to some compensation in return from the team receiving said player.¹⁰²

The Eighth Circuit established a three-pronged test to determine whether the non-statutory labor exemption applied: “(1) the restraint must primarily affect only parties to the collective bargaining relationship; (2) the agreement considered for exemption must concern a mandatory subject of collective bargaining; and (3) the agreement must be a product of bona fide arm’s length bargaining.”¹⁰³ In applying the test to the Rozelle Rule, the court found the rule satisfied the first two prongs but failed to satisfy the third prong because the NFLPA “was too weak to effectively negotiate any changes in the Rozelle Rule.”¹⁰⁴

The *Mackey* test essentially set the boundaries of the non-statutory labor exemption “delineating where the antitrust laws can override the labor laws.”¹⁰⁵ The third prong is relevant to the application of the exemption in sports because it is not enough for a provision to be in the collective bargaining agreement to satisfy the labor exemption. Instead, it must be the subject of “bona fide arms-length bargaining.” This is especially important in a setting where team owners unilaterally impose restraints on the NFLPA because the NFLPA represents players that vary on a wide spectrum, from talent to financial goals.

For years, the *Mackey* test was the non-statutory labor exemption standard applied by the courts,¹⁰⁶ but the United States Supreme Court abandoned the *Mackey* test in *Brown v. Pro*

¹⁰¹ See 543 F.2d 606, 622 (8th Cir. 1976).

¹⁰² See Ahern, *supra* note 79, at 546 n.31.

¹⁰³ See Corcoran, *supra* note 90, at 1058 (citing *Mackey*, 543 F.2d at 614). The Eighth Circuit cited several cases when establishing the three-pronged test, including *Jewel Tea Co.*, 381 U.S. 676 (1965).

¹⁰⁴ See Corcoran, *supra* note 90, at 1058.

¹⁰⁵ Jocelyn Sum, *Clarett v. National Football League*, 20 BERKELEY TECH. L.J. 807, 813 (2005).

¹⁰⁶ Sum *supra* note 110, at 811.

*Football, Inc.*¹⁰⁷ In *Brown*, the NFL presented a plan to create a “developmental squad” for players who “failed to secure a position on a regular player roster.”¹⁰⁸ During collective bargaining, the NFLPA requested benefits and protections be given to the “developmental squad” players that were similar to those provided to regular players.¹⁰⁹ The NFL and NFLPA failed to reach an agreement on the proposed plan, and the NFL unilaterally implemented the proposal and threatened disciplinary action against member clubs if they negotiated salaries outside the range of the proposal.¹¹⁰ The plaintiffs filed an antitrust action in federal court challenging the proposed plan as an illegal restraint on trade.¹¹¹

The Court faced the question of whether the non-statutory labor exemption applied after collective bargaining reached an impasse.¹¹² After providing a historical analysis concerning the non-statutory labor exemption after bargaining has reached an impasse,¹¹³ the Court decided not to adopt a test that would determine the boundaries of the non-statutory labor exemption.¹¹⁴ The Court noted the conflict of laws between antitrust and labor law, providing that “antitrust law forbids all agreements among competitors . . . that unreasonably lessen competition among or between them in virtually any respect whatsoever,” and labor law “welcomes anticompetitive agreements conducive to industrial harmony.”¹¹⁵ Because of this conflict, the Court determined that allowing antitrust scrutiny would create “instability and

¹⁰⁷ See 518 U.S. 231, 238 (1996). The Eighth Circuit eventually recognized the overruling. See *Eller v. Nat'l Football League Players Ass'n*, 731 F.3d 752, 755 (8th Cir. 2013) (“The rules of the collective bargaining game changed significantly when a nearly unanimous Supreme Court held, overruling *Mackey* and subsequent lower federal court decision, that the nonstatutory labor/antitrust exemption applies “to an agreement among several employers bargaining together to implement after [bargaining to an] impasse the terms of their last best good-faith wage offer.”).

¹⁰⁸ *Brown*, 518 U.S. at 234.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 235.

¹¹¹ *Id.*

¹¹² *Id.* at 235-36. See also Denise K. Bryant, *Brown v. Pro Football, Inc.: You Make the Call!*, 4 VILL. SPORTS & ENT. L.J. 87, 106 (1997).

¹¹³ See Bryant, *supra* note 112, at 107.

¹¹⁴ *Brown*, 518 U.S. at 250.

¹¹⁵ *Id.* at 241.

uncertainty [in] the collective bargaining process.”¹¹⁶ The Court concluded that the exemption “applied to the employers’ conduct which had taken place during and immediately following collective bargaining.”¹¹⁷

By siding with the labor law statutes, the United States Supreme Court ignored the fact that NFL eligibility rules are anticompetitive in nature and are subject to antitrust laws. The NFL “already enjoy[s] unequal bargaining power over the [NFLPA].”¹¹⁸ The non-statutory labor exemption further broadens this inequality by giving the league a defense against any anticompetitive rules collectively bargained. The result is restraints on players’ ability to negotiate freely with preferred teams and instead be limited to employment with the one team that selected the player in the NFL Draft. This also punishes the stronger teams because the players available to them at the end of each round are not viewed on the same performance level as the players made available to weaker teams.

The Second Circuit took the non-statutory labor exemption a step further under *Clarett v. NFL*.¹¹⁹ In *Clarett*, the plaintiff sought to enter the 2004 NFL Draft before satisfying the requisite three-year age eligibility rule.¹²⁰ He challenged the age eligibility rule in federal court, alleging the rule failed the *Mackey* test and would not survive antitrust scrutiny.¹²¹

The Second Circuit faced the issue of whether the draft age eligibility rule could survive antitrust scrutiny under the non-statutory labor exemption and determined that the *Mackey* test

¹¹⁶ *Brown*, 518 U.S. at 242. *Contra* Cavezza, *supra* note 55, at 30 (“This conflict of laws, combined with the lack of a specific test to follow, makes determining when the non-statutory labor exemption should be applied a rather speculative task.”)

¹¹⁷ See Bryant, *supra* note 112, at 109 (quoting *Brown*, 518 U.S. at 250) (“The employers’ conduct was directly related to the ‘lawful operation of the bargaining process, [i]t involved a matter that the parties were required to negotiate and it concerned only the parties to the collective bargaining relationship.’”).

¹¹⁸ Sum, *supra* note 105, at 821.

¹¹⁹ See generally 369 F.3d 124 (2d Cir. 2004).

¹²⁰ *Id.* at 126.

¹²¹ *Id.* at 129.

was inapplicable in the Second Circuit.¹²² Instead, the court held that the draft age eligibility rule was exempt from antitrust liability under the labor exemptions because the rule was a mandatory bargaining subject.¹²³ The court found that the draft age eligibility rule concerns initial employment in the NFL, “and for that reason alone might constitute a mandatory bargaining subject,”¹²⁴ and the draft age eligibility rule has “tangible effects on wages and working conditions of current NFL players.”¹²⁵ Further, while the NFL clubs agree among themselves to impose the three-year eligibility requirement, the Second Circuit allowed multi-employer bargaining units to set conditions for employment.¹²⁶ Finally, the court found that national labor policies “are not limited to protecting only terms contained in collective bargaining agreements.”¹²⁷ The Second Circuit concluded that the draft age eligibility rule is exempt from antitrust liability because the rule arises from terms that were collectively bargained or could have been collectively bargained.¹²⁸

With this decision, the Second Circuit extended the non-statutory labor exemption to any employment terms that are subjects of collective bargaining. This decision further complicates antitrust laws that were enacted to protect against unreasonable restraints on trade. The Second Circuit essentially favored collusion over competition. The broad application of the exemption

¹²² *Clarett*, 369 F.3d at 134. The court noted that the *Mackey* test neither properly set out the boundaries of the non-statutory exemption nor applied to the facts in *Clarett*. *Id.* (“[W]e need not decide whether the *Mackey* factors aptly characterize the limits of the exemption in cases in which employers use agreements with their unions to disadvantage their competitors in the product or business market, because our cases have counseled a decidedly different approach where . . . the plaintiff complains of a restraint upon a unionized labor market characterized by a collective bargaining relationship with a multi-employer bargaining unit.”).

¹²³ *Id.* at 139. For a detailed analysis on the *Clarett* decision, see McCann & Rosen, *supra* note 53, at 740-44.

¹²⁴ *Clarett*, 369 F.3d at 139.

¹²⁵ *Id.* at 140. The Second Circuit recognized that many of the rules laid out in collective bargaining agreements are mandatory bargaining subjects “[b]ecause the unusual economic imperatives of professional sports raise ‘numerous problems with little or no precedent in standard industrial relations.’” *Id.* (quoting *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954, 961 (2d Cir. 1987)).

¹²⁶ *Id.* at 141.

¹²⁷ *Id.* at 142.

¹²⁸ *Id.* at 143.

“allows the NFL to impose its terms on players unilaterally.”¹²⁹ The NFL could bring any provisions to the bargaining table that are undoubtedly anticompetitive, knowing full well that once the terms are agreed to, they are protected from any antitrust attacks.¹³⁰

Some commentators argue that the decision deters collective bargaining by promoting union decertification.¹³¹ This problem is illustrated by the Eighth Circuit’s decision in *Powell v. National Football League*.¹³² In *Powell*, the court held that the non-statutory labor exemption survives the expiration of the collective bargaining agreement so long as the employer and union maintain an ongoing collective bargaining relationship.¹³³ With its decision, the Eight Circuit presented several options to the parties: “They may bargain further, which we would strongly urge that they do. They may resort to economic force. And finally, if appropriate issues arise, they may present claims to the National Labor Relations Board.”¹³⁴

As one commentator points out, the *Powell* decision essentially left the players with two options: “to accept the NFL’s anticompetitive league practices to which they never agreed, or to decertify the players union to allow players to invalidate the NFL’s labor exemption defense and pursue their antitrust rights.”¹³⁵ The players chose the second option and filed an antitrust lawsuit against the NFL after leaving the collective bargaining relationship.¹³⁶ Since the NFL could not rely on the labor exemption as a defense to the antitrust claims, “the court concluded that the NFL’s system violated the antitrust laws and awarded the players damages of \$1.63 million.”¹³⁷

¹²⁹ Sum, *supra* note 105, at 824.

¹³⁰ *Id.* at 824-25.

¹³¹ *Id.* at 823.

¹³² See generally 930 F.2d 1293 (8th Cir. 1989).

¹³³ *Id.* at 1303-04.

¹³⁴ *Id.* at 1303.

¹³⁵ Sum, *supra* note 105, at 825-26.

¹³⁶ *Id.* at 826; see also *McNeil v. National Football League*, 790 F. Supp. 871 (D. Minn. 1992).

¹³⁷ Sum, *supra* note 105, at 826.

III. NON-STATUTORY LABOR EXEMPTION: ISSUES IN THE NFL APPLICATION

There are three issues surrounding antitrust and labor law in the NFL. First, the nature of the NFL and NFLPA is different compared to other industries.¹³⁸ As noted earlier in this article, “horizontal restraints on competition are essential if the product is to be available at all.”¹³⁹ This nature is illuminated in *Smith v. Pro-Football, Inc.*¹⁴⁰ In *Smith*, the District of Columbia Circuit Court of Appeals determined that restraints on trade in professional football could not be per se violations because “NFL teams represent joint ventures in a ‘shared pursuit’ (i.e., the success of the NFL),”¹⁴¹ and the NFL needs to promote competition on the field in order to produce a viable product.¹⁴²

Additionally, the makeup of the players the NFL employs vary on a wide spectrum. There are several factors that illustrate the identity of NFL players, including the gap in talent and skill, the employment relationship between player and management, and average career of players.¹⁴³ The gap in talent and skill are substantially greater in professional sports leagues than most industries.¹⁴⁴ This gap creates employees who seek different goals in the bargaining process.¹⁴⁵ Further, the job security that employees in most industries enjoy are dissimilar to the standard in professional sports because teams will base the employment

¹³⁸ See Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 354 (1989).

¹³⁹ NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984).

¹⁴⁰ See McCann & Rosen, *supra* note 53, at 736.

¹⁴¹ *Id.*

¹⁴² *Id.* at 736-37 (“NFL teams ostensibly employ a draft to ensure competition, much like a salary cap or tampering rules ostensibly promote competition. . . . [T]he NFL draft superficially appears to promote parity: it prevents franchises with the greatest resources from attracting the best amateur talent year-after-year.”).

¹⁴³ See Lock, *supra* note 138, at 354-59.

¹⁴⁴ *Id.* at 354.

¹⁴⁵ *Id.* Goals sought by the less talented players would include salaries and job security whereas the more talented players would seek less restrictions in free agency. *Id.* These differences among the members of the NFLPA create an environment that “lacks the cohesiveness enjoyed by industrial unions.” *Id.*; see also Corcoran, *supra* note 90, at 1057 (“[S]uperstars and the more marginal players will desire different things from the bargaining process.”).

relationship with the NFL player beyond the player's skill level.¹⁴⁶ Finally, the average career life of players has a significant impact on the cohesivity of the NFLPA because the NFLPA continually experiences turnover in its bargaining unit.¹⁴⁷

Second, national labor policies encouraging collective bargaining in good faith favor protection from federal antitrust labor law but at the expense of prospective employees. Newcomers to the NFL are bound by the terms of the collective bargaining agreement, but the newcomers were never given a seat at the table during the negotiation process.¹⁴⁸ In *Clarett*, the Second Circuit found that the interests of current players trump the interests of prospective players.¹⁴⁹ But the current players are not subject to the NFL Draft rules because they are already employed by the NFL. The only individuals that are truly subject to the NFL Draft rules are the prospective players athletes. "The labor laws cannot be used to shield anticompetitive agreements between employers and unions that affect only those outside of the bargaining unit."¹⁵⁰

Moreover, the prospective players do not have another path to professional football at their disposal. The NFL has little competition with other professional football leagues in the United States because no other football league can match the revenue, marketability, and competition.¹⁵¹ Essentially, this gives prospective players only two options: NFL or another career.¹⁵² The NFL is king.¹⁵³ This scenario can best be described as a

¹⁴⁶ See Lock, *supra* note 138, at 354. Teams will balance a player's skill level, the player's attitude, conduct, age, and relationship with teammates in determining "necessary personnel changes in search of the right combination of talent, attitude, and leadership to produce a winning team." *Id.*

¹⁴⁷ *Id.* at 355. In 1989, the turnover rate in the NFLPA was twenty-five percent, "a rate unheard of in industrial unions." *Id.*

¹⁴⁸ See Jason Abeln, et al., *Lingering Questions After Clarett v. NFL: A Hypothetical Consideration of Antitrust and Sports*, 73 U. CIN. L. REV. 1767, 1773 (2005).

¹⁴⁹ See *Clarett v. Nat'l Football League*, 369 F.3d 124, 140-41 (2d Cir. 2004).

¹⁵⁰ *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 395 (S.D.N.Y. 2004), *rev'd in part, vacated in part*, 369 F.3d 124 (2d Cir. 2004).

¹⁵¹ See generally Thomas Barrabi, *XFL, USFL, other pro football leagues that took on the NFL*, FOX (Feb. 8, 2020), <https://www.foxbusiness.com/sports/xfl-usfl-aaf-nfl-pro-football-startups> [<https://perma.cc/3CQH-PR9Y>].

¹⁵² See Lock, *supra* note 138, at 356-57 ("Consequently, the NFL is the only buyer of the skills possessed by its employees.").

¹⁵³ *Clarett*, 369 F.3d at 126.

monopsony, or a market situation in which there is only one buyer of a product, because the NFL is the single buyer in the professional football market, and the prospective players are left to accept a limited pay rate in order to avoid unemployment.¹⁵⁴ The district court in *Clarett* agreed, providing that:

Employees who are hired after the collective bargaining agreement is negotiated are nonetheless bound by its terms because they step into the shoes of the players who did engage in collective bargaining. But those who are categorically denied eligibility for employment, even temporarily, cannot be bound by the terms of employment they cannot obtain.¹⁵⁵

Finally, the non-statutory labor exemption is typically raised as a defense by the employee union to avoid antitrust liability.¹⁵⁶ In such an instance, the employer usually “opposes a collective bargaining agreement restriction that was inserted at the insistence of the union.”¹⁵⁷ In a professional sports league setting, the question surrounding collective bargaining agreements instead is usually “whether the owners can use the [non-statutory] exemption to immunize restraints that are opposed to the interests of the players, but arguably necessary for the success of the industry.”¹⁵⁸ This question goes entirely against what the non-statutory labor exemption was aimed at: the protection of employee interests.¹⁵⁹

The United States Supreme Court “implied [the non-statutory] exemption from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining, . . . which require good-faith bargaining over wages, hours, and working conditions”¹⁶⁰ The Second Circuit in *Clarett* found that the age eligibility rule concerned initial

¹⁵⁴ John J. Siegfried, *Sports Player Drafts and Reserve Systems*, 14 CATO J. 443, 444 (1995).

¹⁵⁵ *Clarett*, 306 F. Supp. 2d at 395-96.

¹⁵⁶ See Corcoran, *supra* note 90, at 1056.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236 (1996).

employment and had tangible effects on wages and hours.¹⁶¹ But the age eligibility rule “precludes players from entering the labor market altogether, and thus affects wages only in the sense that a player subject to the [age eligibility rule] will earn none.”¹⁶² Similarly, the draft entry rule precludes players from entering the labor market altogether because the NFL is essentially the only viable option of employment in professional football. Shielding clear anticompetitive restraints from antitrust review by allowing a blanket labor exemption if the terms are collectively bargained only encourages the exemption to be used against the individuals who are most vulnerable: the prospective players who only wish to make their NFL dreams come true.

IV. SOLUTION: ABOLISHMENT OF THE NFL DRAFT

These issues create an inherently unequal bargaining relationship between team owners and players, both current and prospective. National labor policies favor good faith collective bargaining because they promote negotiation on behalf of both the employers and employee unions to come to an agreement that both groups believe is fair and equitable. On its face, the NFL Draft requirement was facially equitable. Its original aim was to promote parity among the weaker and stronger teams. But the draft has always unreasonably restrained the prospective players’ ability to negotiate with preferred teams.

Furthermore, the courts have gone so far as to permit a blanket exemption on any provisions that are collectively bargained. Some of these provisions, such as the NFL Draft requirement, put a restraint on trade by limiting entry to the NFL and disallowing players the ability to negotiate their fair market value. This tension between federal antitrust and labor laws has reached a point where clear unreasonable restraints on trade are exempted if the employer can show the terms were collectively bargained.

At the end of the day, these unreasonable restraints harm the individuals who did not have a seat at the bargaining table.

¹⁶¹ Clarett v. Nat’l Football League, 369 F.3d 124, 139-40 (2d Cir. 2004).

¹⁶² Clarett v. Nat’l Football League, 306 F. Supp. 2d 379, 395 (S.D.N.Y. 2004), *rev’d in part, vacated in part*, 369 F.3d 124 (2d Cir. 2004).

Most college football players dream about becoming an NFL player but are left with only two options when given the opportunity: enter the NFL Draft and, upon selection, negotiate only with the team that selected you, or abandon your dream of becoming an NFL player. Because the courts refuse to come up with an equitable solution that protects the interests of current or prospective NFL players, Congress must act to resolve the issue.

The Commerce Clause of the United States Constitution provides Congress with the “[p]ower . . . [t]o regulate Commerce with foreign Nations, and among the several States”¹⁶³ Under the Commerce Clause, Congress has the authority to regulate (1) the use of channels of commerce; (2) the instrumentalities of commerce and persons or things in interstate commerce; and (3) intrastate activity that Congress rationally believes substantially effects interstate commerce.¹⁶⁴

The NFL is the most profitable sports league in the world.¹⁶⁵ The league has thirty-two teams in multiple states from New York to Los Angeles,¹⁶⁶ broadcasting contracts with national brands,¹⁶⁷ and advertises its product around the world.¹⁶⁸ Since the business of the NFL uses the channels and instrumentalities of interstate commerce, it is clear that Congress has the authority to regulate the NFL.

Once Congress intervenes, the legislature must balance the scales of bargaining power between the team owners and players. This starts with abolishing the NFL Draft and allowing players to negotiate freely with preferred teams. The justifications for this proposal include the freedom to negotiate in a fair market

¹⁶³ U.S. CONST. art. 1, § 8, cl. 3.

¹⁶⁴ *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

¹⁶⁵ *Clarett*, 369 F.3d at 126.

¹⁶⁶ *Id.*

¹⁶⁷ Grant Gordon, *NFL announces new broadcast deals running through 2033 season*, NFL, (Mar. 18, 2021, 4:07 PM), <https://www.nfl.com/news/nfl-announces-new-broadcast-deals-running-through-2033-season> [<https://perma.cc/C6A4-NQKW>].

¹⁶⁸ Liana B. Baker, *Super Bowl viewer ratings down from a year ago*, REUTERS, (Feb. 4, 2013, 10:55 AM), <https://www.reuters.com/article/us-superbowl-cbs-ratings/super-bowl-viewer-ratings-down-from-a-year-ago-idUSBRE9130P720130204> [<https://perma.cc/4J7R-5QTA>] (“The Super Bowl, which determines the NFL champion for the 2012 season, is broadcast live in more than 180 countries and in more than 30 different languages.”).

economy, an interest in player autonomy, and ending a draft system that has failed to meet its original objective.

A. Ability to Negotiate Fair Market Value

Fair market value is defined as “the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.”¹⁶⁹ For employment purposes, this is determined by an employee’s “job title, years of experience, skills and location.”¹⁷⁰

As mentioned previously, the NFL can be described as a monopsony, or a situation in which there is only one buyer.¹⁷¹ Furthermore:

To maximize profits a monopsonist restricts the amount of jobs offered so that job seekers, out of fear of unemployment, become more willing to accept a lower rate of compensation. No player works for less than he could obtain in his best alternative job. Many, however, earn less of a ‘bonus’ (or economic rent) over and above the minimum acceptable wage because they fear they will be the ones cut from the team.¹⁷²

The NFL Draft’s rules defeat the purpose of a free market. “In a draft system, there’s no way of knowing what a player is actually worth on the open market.”¹⁷³ Peyton Manning, the first overall pick in 1998, ended up winning multiple Most Valuable Player awards, a Super Bowl, and an invitation to the NFL Hall of Fame.¹⁷⁴ Tim Couch, the first overall pick the following year,

¹⁶⁹ United States v. Cartwright, 411 U.S. 546, 551 (1973).

¹⁷⁰ Samantha Cooney, *What Salary Should You Ask For? Here’s How to Figure Out What You’re Worth*, TIME (Sept. 10, 2018, 12:10 PM), <https://time.com/5383303/salary-ask-for-market-worth/> [<https://perma.cc/U62A-JRDQ>].

¹⁷¹ See Siegfried, *supra* note 154, at 444.

¹⁷² *Id.*

¹⁷³ Reed Albergotti, *Why the NFL Draft Drives Economists Crazy*, WALL ST. J., (Apr. 22, 2010, 12:01 AM), <https://www.wsj.com/articles/SB10001424052748704133804575198154038855396> [<https://perma.cc/XD82-JKVG>]. The article notes the comparison between Peyton Manning and Tim Couch. *Id.* Peyton Manning would go on to win multiple Most Valuable Player awards, a Super Bowl, and an invitation to the NFL Hall of Fame. *Id.* Tim Couch did not find the same success and ended up leaving the league after a few seasons. *Id.*

¹⁷⁴ *Id.*; see also Moore, *supra* note 9.

never reached the awards and accolades of Manning.¹⁷⁵ But, because both players were the number one picks in their respective drafts, they both received “nearly identical” rookie contracts.¹⁷⁶

Incoming rookies encounter further limits to their earning potential by the required rookie scale. “The rookie wage scale is essentially a salary cap within the overall salary cap.”¹⁷⁷ The players drafted at the top of the order receive the lucrative contracts, but the value of the rookie contract diminishes through each round.¹⁷⁸ The contracts for drafted rookies, lasting four years, have a limit on total compensation “with specific salary parameters for each draft slot.”¹⁷⁹ In fact, “[a] majority of picks only have signing bonus[es] and base salaries in their deals.”¹⁸⁰

Team owners and NFL executives obviously like the idea of a rookie wage scale because it allows teams to sign highly talented rookies on cheap deals that cannot be negotiated until after the rookie’s third year.¹⁸¹ The player’s union, on the other hand, would rather negotiate higher rookie salaries because “they help to drive up salaries in general.”¹⁸² For example, defensive lineman Travon Walker, the 2022 number one overall pick, signed a rookie contract worth \$37.4 million.¹⁸³ By comparison, defensive lineman Aaron Donald, arguably the best defensive player in the NFL, restructured his contract during the 2022 offseason to \$65 million

¹⁷⁵ Albergotti, *supra* note 173.

¹⁷⁶ *Id.*

¹⁷⁷ Joel Corry, *Agent’s Take: 2022 NFL rookie contract projections for key Round 1 picks, with a rookie wage scale explainer*, CBS (May 5, 2022, 2:49 AM), <https://www.cbssports.com/nfl/news/agents-take-2022-nfl-rookie-contract-projections-for-key-round-1-picks-with-a-rookie-wage-scale-explainer/#:~:text=The%20rookie%20wage%20scale%20is,increase%20in%20the%20salary%20cap> [https://perma.cc/UR9X-6EKZ].

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *See* Albergotti *supra*, note 173.

¹⁸² *Id.*

¹⁸³ Michael Baca, *Jaguars signing No. 1 overall pick Travon Walker to \$37.4M rookie contract*, NFL (May 12, 2022, 10:23 AM), <https://www.nfl.com/news/travon-walker-jaguars-signing-no-1-overall-pick-37-million-rookie-contract> [https://perma.cc/VMF9-3WJJ].

guaranteed over the next two seasons and \$95 million through 2024.¹⁸⁴

Now, let's assume there is no NFL Draft. Walker interviews with several NFL teams and negotiates a contract that makes him one of the highest paid defensive linemen in the league. Donald could use the contract as proof that there are teams willing to sign an inexperienced but talented rookie to a massive deal as leverage for a larger deal with his current team or other potential suitors. Donald would not be the only defensive player to do this too. Many talented defensive players could point to Walker's contract and ask, "If a rookie can get that kind of deal, why can't I?" Allowing rookies to negotiate fair market value on their contracts would only raise the salaries of talented veteran players.

Professional football is a unique occupation because playing careers are typically short.¹⁸⁵ This statistic further impedes a player's earning potential because it inhibits a talented player's ability to maximize income from his work product.

For example, Chris Johnson was a talented running back out of East Carolina University. Johnson was a first-round pick to the Tennessee Titans in 2008 and found immediate success on the football field, earning a first-team All-Pro selection and breaking 2,000 rushing yards in 2009.¹⁸⁶ He was the leading NFL rusher between 2008 and 2010, but because of his initial rookie contract, he was only due \$1.065 million in 2011.¹⁸⁷ Johnson signed a \$30

¹⁸⁴ Nick Shook, *Rams restructure Aaron Donald contract to make him highest-paid non-QB in NFL history*, NFL (June 6, 2022, 4:48 PM), <https://www.nfl.com/news/rams-restructure-aaron-donald-contract-to-make-him-highest-paid-non-qb-in-nfl-hi> [<https://perma.cc/G3M8-Y6YX>].

¹⁸⁵ Christina Gough, *Average length of player careers in the NFL*, STATISTA (Jan. 31, 2023), <https://www.statista.com/statistics/240102/average-player-career-length-in-the-national-football-league/#:~:text=The%20statistic%20depicts%20the%20average,for%20players%20across%20the%20NFL> [<https://perma.cc/5R35-5YAT>] ("The average length of a player's career in the National Football League (NFL) is relatively short, with the average career lasting around 3.3 years.")

¹⁸⁶ Ty Schalter, *Chris Johnson Reminds NFL Teams That Draft Prospects Are People, Not Power Tools*, BLEACHER REP. (Mar. 21, 2014), <https://bleacherreport.com/articles/2000235-chris-johnson-reminds-nfl-teams-draft-prospects-are-people-not-power-tools> [<https://perma.cc/V32E-N62X>].

¹⁸⁷ Matt Brooks, *Tennessee Titans are ready to pay Chris Johnson – as soon as he shows up to camp*, WASH. POST (Aug. 12, 2011), https://www.washingtonpost.com/blogs/early-lead/post/tennessee-titans-are-ready-to-pay-chris-johnson—as-soon-as-he-shows-up-to-camp/2011/08/12/gIQAUOx1AJ_blog.html [<https://perma.cc/P4FS-X9QV>].

million guaranteed contract through 2016 with the Titans but found himself “shopping to other teams, even offering to take a pay cut in the process,” only four years after his outstanding 2009 season.¹⁸⁸ After the Titans cut Johnson, he signed a \$9 million per year deal with the New York Jets in 2014.¹⁸⁹ How does a player like Johnson see a pay cut so short in his career? He was one of the best running backs in the NFL during his first three years but found himself taking a massive pay cut to stay in the NFL.

For many players, careers are inhibited by injuries, team playing styles, inadequate coaching, or poor management, many of which are beyond the control of the player themselves. Imagine if your pay raises or pay cuts were determined on factors beyond your control, like poor supervision, workplace injuries, or colleague chemistry. When you add in the fact the career lifespan of an NFL player is so short, the unreasonable restraints placed upon the players by the NFL Draft and rookie wage scale only further decrease the player’s ability to maximize his earning potential.

Negotiations based on fair market value would give players more bargaining power because they would be negotiating based on what they believe their true value to be. At the same time, the team salary cap would still be in place to prevent teams from loading up star players on large contracts.¹⁹⁰ Instead, the team would have to balance their salary space to meet the cap limits.¹⁹¹ “Small-market teams, a concept that mostly exists to weaken the negotiating and earning power of the players, would be able to afford plenty of players, be they amateurs or otherwise. They’d

¹⁸⁸ See Schalter *supra*, note 186.

¹⁸⁹ Ben Eagle, *Chris Johnson signs deal with Jets*, SPORTS ILLUSTRATED (Apr. 16, 2014), <https://www.si.com/nfl/2014/04/16/chris-johnson-deal-new-york-jets> [https://perma.cc/SLEG-5RC6].

¹⁹⁰ Cf. Marc Normandin, *Drafts are indefensible, unless you’re a team owner*, MARC NORMANDIN IS CREATING BASEBALL COVERAGE, FEATURING LEFTISM (May 17, 2019), <https://www.marcnormandin.com/2019/05/17/drafts-are-indefensible-unless-youre-a-team-owner/#more-136> [https://perma.cc/3VCG-AW5J] [hereinafter Normandin]. While Normandin references the NBA salary cap in his article, NFL teams are still required to stay within the salary cap when signing players. Tyler Brooke, *How does the salary cap work in the NFL?*, BLEACHER REPORT (June 10, 2013), <https://bleacherreport.com/articles/1665623-how-does-the-salary-cap-work-in-the-nfl> [https://perma.cc/JML2-MPTW].

¹⁹¹ Normandin, *supra* note 190.

just have to sign them while working in a leveled negotiating field.”¹⁹²

Employees are not just persuaded by economic factors in choosing their employment. It is probable that incoming rookies would balance non-economic preferences if they were given the option to negotiate with multiple teams based on fair market value.¹⁹³ When given the opportunity to negotiate with multiple teams, an athlete will likely consider alternative preferences, such as team location, proximity to familial surroundings, and opportunities to play.¹⁹⁴ These non-economic alternatives could encourage some prospective players to be willing to accept diminished contracts with teams if given the opportunity to negotiate directly with NFL clubs.

B. Trend of Player Autonomy

There is a growing trend of player autonomy in collegiate and professional sports leagues. For college football, two trends show the rise in player autonomy: the high school football recruiting landscape and the collegiate athletics free market model.

Historically, college football recruits have had the power to choose a school to attend and play football. Recruiting as defined by the NCAA is “any solicitation of prospective student-athletes or their parents by an institutional staff member or by a representative of the institution’s athletics interests for the purpose of securing a prospective student-athlete’s enrollment and ultimate participation in the institution’s intercollegiate athletics program.”¹⁹⁵ There are certain elements of the recruiting period that restrict when recruiting may occur, when a prospective athlete may officially or unofficially visit the school, and the binding agreement the athlete signs once he or she has selected a school.¹⁹⁶ Still, this is similar to a free market employment

¹⁹² Normandin, *supra* note 190.

¹⁹³ See generally Michael A. McCann, *It’s Not About the Money: The Role of Preferences, Cognitive Biases and Heuristics Among Professional Athletes*, 71 BROOK. L. REV. 1459 (2006).

¹⁹⁴ *Id.* at 1501-05.

¹⁹⁵ Compliance, *Recruiting*, NCAA, <https://www.ncaa.org/sports/2021/2/10/recruiting-calendars-faq.aspx> [<https://perma.cc/QXL6-TWZW>] (last visited Oct. 12, 2022).

¹⁹⁶ *Id.*

scenario because recruitment to a specific school is determined by the supply of high school football players available and the school's demand of such players.

Moreover, there is no college football draft that designates where high school football players go to college in the name of fairness and competitive equity. High school football players are given the freedom to receive scholarship offers from a variety of schools, visit the schools for campus tours, and select a school at the high school athlete's discretion. High school athletes may pick a school based on a school's prestige, relationship with the coaching staff, proximity to family or friends, playing style, available playing time, and/or likelihood of professional development.

This is different from NFL Draft rules that put restraints on a prospect's ability to choose a preferable employer.¹⁹⁷ Incoming rookies are not able to interview with team personnel, develop relationships with coaching staff, or select a team based on playing style or available playing time. Instead, they are selected by one team and compelled to negotiate with that team if the player wishes to play in the NFL.

The collegiate athletics free market model can be traced back to the United States Supreme Court's decision in *Board of Regents*.¹⁹⁸ For decades, the NCAA was able to maintain its amateurism model, which provides "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."¹⁹⁹ The NCAA adopted the amateurism model to ensure the students' priority remains obtaining a quality educational experience and that all student-athletes are

¹⁹⁷ See Nat'l Football League, *supra* note 8.

¹⁹⁸ See Samuel Taylor Rayburn, *The NCAA's Perpetual Fumble: Conference Realignment, NIL, and Alston are Precursors to the NCAA's Inevitable Death*, 30 THE SPORTS LAWYERS J., (forthcoming Spring 2023) (manuscript at 3) (on file with author).

¹⁹⁹ NCAA, LEGIS. SERV. DATABASE, Bylaw 2.9, *The Principle of Amateurism*, <https://web3.ncaa.org/lstdbi/bylaw?bylawId=2470&division=1&adopted=0> [https://perma.cc/QN9L-2FLD] (last visited Nov. 16, 2022).

competing equitably. “Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.”²⁰⁰

In collegiate athletics, players receive scholarships from member schools. The value of the scholarship was originally limited to tuition, fees, board, books, and cost of attendance.²⁰¹ This all changed in *O’Bannon v. NCAA* and *NCAA v. Alston*.²⁰² In *O’Bannon*, the Ninth Circuit held that the NCAA is subject to antitrust review, but “[t]he Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more.”²⁰³ As such, *O’Bannon* upheld the importance of amateurism and found that offering “cash sums untethered to educational expenses” could lead to a slippery slope.²⁰⁴

It is worth noting that state legislatures began tackling the issue of name, image, and likeness in response to decisions such as *O’Bannon*. The first such laws passed in California, which permitted collegiate athletes to hire agents and receive payments based on the athlete’s name, image, and likeness.²⁰⁵ This legislation ignited a dramatic shift in NCAA compensation as twelve additional states enacted similar name, image, and likeness laws.²⁰⁶ This hit the NCAA hard because it forced the NCAA to change their compensation policies to match the coming legislation.²⁰⁷ Otherwise, the NCAA would be subject to liability.

In *Alston*, one of the issues the United States Supreme Court focused on concerned the *Board of Regents* dicta.²⁰⁸ For decades, the NCAA had relied upon the dicta because it provided a basis for the NCAA’s amateurism justification.²⁰⁹ The Court struck down

²⁰⁰ NCAA, 2022-23 NCAA DIVISION 1 MANUAL art. 12.01.1 (2022).

²⁰¹ *Id.* at art. 15.02.2.

²⁰² See generally *O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015); see also *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

²⁰³ *O’Bannon*, 802 F.3d at 1079.

²⁰⁴ *Id.* at 1078.

²⁰⁵ See Rayburn, *supra* note 198, at 28-29 (noting that the new state law essentially overrules Section 12 of the NCAA bylaws).

²⁰⁶ Emily Gaimbalvo, *What to know about name, image and likeness and how it will affect the NCAA*, WASH. POST (June 29, 2021, 10:30 PM), <https://www.washingtonpost.com/sports/2021/06/15/nil-ncaa-paying-college-athletes/> [https://perma.cc/2FWZ-KTEM].

²⁰⁷ See Rayburn, *supra* note 198, at 29.

²⁰⁸ See *NCAA v. Alston*, 141 S. Ct. 2141, 2157 (2021).

²⁰⁹ See Rayburn, *supra* note 198, at 35.

the justifications from the dicta, holding “there is no reason to ‘treat an aside in *Board of Regents* as more than that.’”²¹⁰ After striking down the justifications from the dicta, the Court went on to hold that the NCAA’s policies cannot survive antitrust scrutiny.²¹¹ The Court upheld the district court order, which added education-related benefits to the permissible financial aid given to collegiate athletes.²¹²

But the biggest indicator of what is to come in collegiate sports concerning player autonomy is found in Justice Kavanaugh’s concurrence.²¹³ Justice Kavanaugh points to the circular reasoning surrounding the NCAA’s justifications for amateurism. “[T]he NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid.”²¹⁴ In the NCAA, the schools generate billions in sports revenue while the collegiate athletes receive nothing, all in the name of amateurism.²¹⁵ “Anti-trust laws are designed to eliminate price fixing behavior.”²¹⁶ Some commentators argue that removing the *Board of Regents* dicta will open any NCAA anti-trust violations to more litigation.²¹⁷

These court decisions and policy shifts have opened the collegiate athletics landscape to a free market model. While this model still has caps to compensation, such as tuition, room, board, books, cost of attendance, and other education-related expenses, there is writing on the wall that the current trend may shift collegiate athletes from student-athletes to school employees.

“[M]any who oppose paying college athletes” were concerned with the original notion of amateurism.²¹⁸ If college athletes were paid money to compete, then team support and viewership would

²¹⁰ See Rayburn, *supra* note 198, at 35 (quoting *Alston*, 141 S. Ct. at 2158).

²¹¹ *Id.*

²¹² *Alston*, 141 S. Ct. at 2166.

²¹³ See Rayburn, *supra* note 198, at 37 (“While not law, the concurrence illustrated many of the reasons the NCAA is due for structural change.”).

²¹⁴ *Id.* at 38 (quoting *Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring)).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ William W. Berry, *Superstars, Superteams, and the Future of Player Movement*, 13 HARV. J. SPORTS & ENT. L. 199, 207 n.28 (2022).

decrease.²¹⁹ It would taint the image of a collegiate athlete. It would encourage shopping by the teams, and only the teams with the largest budget would get the best players.

This is just not the case. College athletics has never been bigger than it is right now. The SEC signed a \$3 billion media rights deal with Disney-owned ABC and ESPN.²²⁰ The Big Ten signed a \$7 billion media rights deal with Fox, CBS, and NBC.²²¹ The College Football Playoff recently announced an expansion to its playoff format.²²² The NCAA typically earns nearly \$1 billion every year in media deals, ticket sales, corporate sponsorships, and television advertisements during the NCAA Men's Basketball Tournament.²²³

In the National Basketball Association, player autonomy has altered the makeup of team organizations. For years, the team owners and management had usurped player autonomy through a rookie wage scale, required dress codes, and the draft age eligibility rule.²²⁴ More recently, however, the scales have tipped in favor of the players. Because of the rising popularity of the sport, player engagement on social media, and guaranteed salaries, players who become dissatisfied with the direction of the team are more likely to force trades, influence an owner to fire the head coach, or leave the team during free agency.²²⁵ Recent

²¹⁹ Berry, *supra* note 218, at 207 n.28.

²²⁰ Kevin Draper & Alan Blinder, *SEC Reaches \$3 Billion Deal with Disney, Drawing CBS Ties Toward an End*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/sports/ncaafotball/sec-disney-deal.html> [<https://perma.cc/7KF5-YFRD>].

²²¹ Adam Rittenberg, *Big Ten completes 7-year, \$7 billion media rights agreement with Fox, CBS, NBC, ESPN* (Aug. 18, 2022), https://www.espn.com/college-football/story/_/id/34417911/big-ten-completes-7-year-7-billion-media-rights-agreement-fox-cbs-nbc [<https://perma.cc/HD9V-76N2>].

²²² Heather Dinich & Pete Thamel, *College Football Playoff to expand to 12-team format*, ESPN (Sept. 2, 2022), https://www.espn.com/college-football/story/_/id/34509443/board-managers-decide-12-team-college-football-playoff-sources-say [<https://perma.cc/PK39-LGA5>].

²²³ Tim Parker, *How Much Does the NCAA Make Off March Madness?*, INVESTOPEDIA (Apr. 28, 2022), <https://www.investopedia.com/articles/investing/031516/how-much-does-ncaa-make-march-madness.asp> [<https://perma.cc/S267-SLAT>].

²²⁴ For more analysis on the NBA's usurpation of player autonomy, see generally Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819 (2006).

²²⁵ Minh Berger, *We'll Take it From Here: Player Autonomy in the NBA*, THE BULL & BEAR (Oct. 31, 2018), <https://bullandbearmcgill.com/well-take-it-from-here-player-autonomy-in-the-nba/> [<https://perma.cc/G6RB-CTS6>].

collective bargaining negotiations in the league even suggest that the league and players association are considering lowering the draft age eligibility rule back to 18.²²⁶

It is worth noting that the makeup of an NFL team is different from an NBA team. An NFL team will field eleven players at a time (offense, defense, or special teams), and each player has a particular role to help the team win the game. A great quarterback, menacing defensive lineman, or strong blindside tackle is extremely valuable, but the team's success also depends on solid, reliable players to support the superstars. An NBA team, on the other hand, only fields five players at a time, and some of these players will play most of the game. In many instances, the offense and defense depend entirely on one superstar player, and the team's success rises or falls depending on such player.²²⁷

Player autonomy in the NFL is, however, on the rise. Tom Brady signed with the Tampa Bay Buccaneers as a free agent in 2020 and recruited other players to build a super team.²²⁸ Deshaun Watson, Russell Wilson, and Aaron Rodgers unsuccessfully attempted to force moves in 2021, but it is worth noting that Watson and Wilson were in fact traded in 2022.²²⁹

The evidence is small now, but it may point to a shift in power that gives NFL players the freedom to shop teams and open contract talks with preferred team options. With such an interest in player power and control, it only makes sense to get rid of the NFL Draft and allow incoming rookies the freedom to negotiate freely with preferred teams as well.

²²⁶ Joseph Salvador, *NBA, Union Discussing Lowering Draft-Eligibility Age to 18, per Report*, SPORTS ILLUSTRATED (Sept. 19, 2022), <https://www.si.com/nba/2022/09/19/nba-union-discussing-lowering-draft-eligibility-age-to-18-per-report> [<https://perma.cc/R5YK-GFVA>].

²²⁷ The Cleveland Cavaliers have a record of 546-303 with NBA star LeBron James. *See, e.g., The Cleveland Cavaliers are 546-303 with LeBron James all-time*, STATMUSE, <https://www.statmuse.com/nba/ask/cavs-record-with-lebron-james> [<https://perma.cc/K8VQ-72KT>] (last visited Nov. 14, 2022). Meanwhile, from 1998 to 2018, the Cavaliers' worst season with James was still better than the Cavaliers' best season without James. *See, e.g., Dan Feldman, Cavaliers crumbled quickly without LeBron James*, NBC (Nov. 21, 2018, 12:00 PM), <https://nba.nbcsports.com/2018/11/21/cavaliers-crumbled-quickly-without-lebron-james/> [<https://perma.cc/XJC6-U39V>].

²²⁸ *See Berry, supra* note 218, at 217.

²²⁹ *Id.* at 205-06.

C. The NFL Draft fails to meet its Original Objective

In 1935, the NFL unanimously voted on a draft rule whose original objective concerned promoting competitive parity on the field.²³⁰ Like kids on a playground selecting peers to join their team, the team with the worst record would receive the first pick among a slew of talented rookies. Evidence now shows that this objective is no longer viable.

Since 2000, there have been sixteen different teams who held the number one pick in the NFL Draft.²³¹ Of those sixteen teams, thirteen have failed to win a Super Bowl since making their most recent first overall selection.²³² Many of the teams who had a first overall selection in this time span are organizations who have held the honor for multiple occasions, including the Cleveland Browns (thrice), Houston Texans (thrice), and Jacksonville Jaguars (twice).²³³ Meanwhile, three teams who have not had a first overall pick since 2000 have each won ten Super Bowls in that time – the New England Patriots (six), Baltimore Ravens (two), and Pittsburgh Steelers (two).²³⁴ If the original objective of the NFL Draft was to funnel top talents to the worst teams to improve their chance at winning, then why are there perennial number one pick holders who cannot reach the success of the Patriots, Ravens, and Steelers?²³⁵

The answer to this question is that “[b]ad teams are generally bad for long stretches, and good teams find ways to be

²³⁰ See NFL CBA, *supra* note 3.

²³¹ *NFL Draft Results - #1 Overall Picks*, <https://www.eatdrinkandsleepfootball.com/draft/results/number-one.html> [<https://perma.cc/D5LB-JXBZ>] (last visited Sept. 24, 2022) [hereinafter *NFL Draft Results*].

²³² *Super Bowl History*, SPORTS REFERENCE, <https://www.pro-football-reference.com/super-bowl/> [<https://perma.cc/7222-QBXB>] (last visited Sept. 24, 2022) [hereinafter *Super Bowl History*].

²³³ See *NFL Draft Results*, *supra* note 231.

²³⁴ See *Super Bowl History*, *supra* note 232.

²³⁵ It is important to note that the combined record of the Browns, Texans, and Jaguars during this span is 393-692-2. *The Cleveland Browns have a record of 125-244-1 since 2000*, STATMUSE, <https://www.statmuse.com/nfl/ask?q=jacksonville+jaguars%2C+houston+texans%2C+and+cleveland+browns+records+since+2000> [<https://perma.cc/3NJR-S33J>] (last visited Oct. 12, 2022). The combined record of the Patriots, Ravens, and Steelers during the same span is 697-377-3. *The Pittsburgh Steelers are 235-132-3 since 2000*, STATMUSE, <https://www.statmuse.com/nfl/ask?q=new+england+patriots%2C+baltimore+ravens%2C+and+pittsburgh+steelers+records+since+2000> [<https://perma.cc/U6JP-J85K>] (last visited Oct. 12, 2022).

good essentially every year”²³⁶ The New England Patriots were such a good team for the first two decades of the 21st Century because they built a team around one of the greatest quarterbacks of all time²³⁷ (and a sixth-round draft pick)²³⁸ and an NFL head coach who was able to build a winning culture for a franchise that was historically bad for decades.²³⁹

Likewise, the NFL Draft fails to achieve the goal of competitive parity for possibly two reasons. The first reason is that the makeup of the NFL team prevents a singular player from making a substantial impact on the field.²⁴⁰ NFL teams field eleven players at a time during games. Each player is assigned a role that is important to a team’s success. The offensive lineman is charged with protecting the quarterback and opening running lanes.²⁴¹ The free safety is charged with protecting the defense against big gains by the opposing team.²⁴² The punter is charged with kicking the ball downfield to impose difficult field positions upon the opposing team.²⁴³ The “advantage” the worst team in the league receives is insubstantial with these roles in mind, especially if the weaker teams have issues at multiple positions.

Because the championship team and the worst team in the league pick at the end of round one and the beginning of round two consecutively, the only real advantage that the worst team has is the number one overall pick.²⁴⁴ There is evidence to suggest that the first overall pick in an NFL Draft is the least valuable

²³⁶ Will Leitch, *Abolish the Draft*, N.Y. MAG., (May 23, 2019), <https://nymag.com/intelligencer/2019/05/a-case-for-abolishing-sports-drafts.html> [<https://perma.cc/L48V-D9NX>].

²³⁷ *The Athletic Declares Tom Brady as the Greatest NFL Player Ever*, CBS, (Sept. 8, 2021, 11:40 AM), <https://www.cbsnews.com/boston/news/tom-brady-greatest-nfl-player-ever-the-athletic/> [<https://perma.cc/4HPN-6V6C>].

²³⁸ Aaron Tolentino, *‘199:’ Tom Brady releases limited-edition draft day apparel*, KRON 4 SAN FRANCISCO (Apr. 28, 2022, 5:05 PM), <https://www.kron4.com/sports/199-tom-brady-releases-limited-edition-draft-day-apparel/> [<https://perma.cc/Q9SV-5VZM>].

²³⁹ Mike Reiss, *Patriots’ stability part of success*, ESPN, (Jan. 5, 2011), https://www.espn.com/blog/boston/new-england-patriots/post/_id/4691237/patriots-stability-part-of-success [<https://perma.cc/PFC2-4SR2>].

²⁴⁰ See Siegfried, *supra* note 154, at 446.

²⁴¹ *Football Offensive Line*, ROOKIE READ, <https://www.rookieroad.com/football/positions/offensive-line/> [<https://perma.cc/4YX8-KB3H>] (last visited Nov. 27, 2022).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ See Siegfried, *supra* note 154, at 446-47.

pick of the first round.²⁴⁵ If that number one pick ends up busting, the worst team loses any advantage it had. In fact, three of the biggest NFL Draft “busts” of all time arose out of the first overall pick: Steve Emtman, Ki-Jana Carter, and JaMarcus Russell.²⁴⁶

Steve Emtman, the number one overall pick in the 1992 NFL Draft, was a defensive end on the 1991 Washington Huskies national championship team.²⁴⁷ He received many accolades during the year, including a consensus All-American, multiple national defensive player of the year awards, and the Pac-10 Defensive Player of the Year.²⁴⁸ Injuries ended up cutting his NFL career short, however, as he only appeared in 50 games across six seasons with Indianapolis (the team who drafted him), Miami, and Cleveland.²⁴⁹ His rookie deal? Nine million dollars with a four million dollar signing bonus.²⁵⁰

Ki-Jana Carter, the number one overall pick in the 1995 NFL Draft, was the star running back on the undefeated 1994 Penn State Nittany Lions.²⁵¹ Although he finished runner-up for the Heisman Trophy, Carter “was still the most fearsome tailback in college football.”²⁵² NFL scouts compared Carter to Hall of Fame

²⁴⁵ See Cade Massey & R. H. Thaler, *The Loser's Curse: Decision Making and Market Efficiency in the National Football League Draft*, 59 MGMT. SCI. 1479, 1489 (2013). The player taken first has “the highest expected performance,” but “also has the highest salary, and in terms of performance per dollar, is less valuable than most players taken in the second round.” *Id.*

²⁴⁶ Vinnie Iyer, *25 biggest NFL draft busts of all time: Ranking the worst picks ever made, from JaMarcus Russell to Isiah Wilson*, SPORTING NEWS (Apr. 27, 2022), <https://www.sportingnews.com/us/nfl/news/nfl-draft-busts-worst-picks-all-time/co8nrggxpq8huxmds2wsrxfl> [<https://perma.cc/8S4J-J8AZ>].

²⁴⁷ Sam Gardner, *Former No. 1 Overall Pick Steve Emtman Has Only One Regret About His NFL Career*, FOX (Dec. 9, 2016), <https://www.foxsports.com/stories/nfl/former-no-1-overall-pick-steve-emtman-has-only-one-regret-about-his-nfl-career> [<https://perma.cc/MY26-6SJA>].

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ Don Pierson, *1st Pick Won't Hit Paycheck Bonanza*, CHI. TRIB. (Apr. 19, 1993, 12:00 AM), <https://www.chicagotribune.com/news/ct-xpm-1993-04-19-9304190165-story.html> [<https://perma.cc/P2AQ-BHU7>]. The signing bonus was “unprecedented regardless of position.” *Id.*

²⁵¹ Adam Jacobi, *Penn State Football: Whatever Happened to Ki-Jana Carter?*, BLEACHER REP. (Apr. 3, 2012), <https://bleacherreport.com/articles/1130801-penn-state-football-whatever-happened-to-ki-jana-carter> [<https://perma.cc/T4XQ-N44N>].

²⁵² *Id.* Carter scored twenty-three rushing touchdowns and rushed for 1,539 yards, and that number could have been higher had Penn State not blown out opponents. *Id.*

members Emmitt Smith and Barry Sanders. Unfortunately, Carter suffered an ACL injury during his first preseason game and never met the expectations laid upon him.²⁵³ His rookie deal? The Cincinnati Bengals signed him to a seven-year, nineteen-million-dollar deal.²⁵⁴

Finally, the Oakland Raiders selected JaMarcus Russell with the first overall pick in 2007.²⁵⁵ College programs like LSU, Florida State, and Alabama recruited Russell out of high school,²⁵⁶ but it was his arm that left NFL scouts salivating.²⁵⁷ After two seasons with the Raiders, Russell returned to Raiders' training camp in 2009 out of shape.²⁵⁸ The Raiders released Russell after the season, and Russell ran into more trouble following an arrest and charges in 2010 for possession of a controlled substance.²⁵⁹ His rookie deal? “[T]he biggest guarantee of payment [for a rookie] in NFL history at that time—\$31.5 million”²⁶⁰

The second reason the NFL monopsony fails to achieve the goal of competitive parity is the Coase Theorem.²⁶¹ The Coase Theorem provides that “if property rights are well defined and the costs of buying and selling those rights are not prohibitive, resources will eventually gravitate to their most valuable use no matter who is given the rights initially.”²⁶² Under this theory, if a championship team in a large market values a talented player selected first overall by a small-market team, “the weak team might be better off selling its rights to acquire its new player to

²⁵³ See Jacobi, *supra* note 251.

²⁵⁴ *Id.* This deal set a rookie record in 1995. *Id.*

²⁵⁵ Zach Kruse, *Breaking Down the Upside Currently Fueling JaMarcus Russell's Comeback Attempt*, BLEACHER REP. (June 11, 2013), <https://bleacherreport.com/articles/1669022-breaking-down-the-upside-currently-fueling-jamarcus-russells-comeback-attempt> [<https://perma.cc/93F3-NJ5G>].

²⁵⁶ See JaMarcus Russell, *Y'all Don't Know a Damn Thing About JaMarcus Russell*, PLAYERS' TRIB. (June 8, 2022), <https://signature.theplayertribune.com/jamarcus-russell-nfl-football/p/1> [<https://perma.cc/7PKL-MSAU>].

²⁵⁷ Russell was famed for throwing a football 70 yards while on his knees. Mark Inabinett, *Tearful JaMarcus Russell tells his story in ESPN report*, AL.COM (Apr. 22, 2013, 12:25 PM), https://www.al.com/sports/2013/04/tearful_jamarcus_russell_tells.html [<https://perma.cc/5LF9-WFHF>].

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ See Siegfried, *supra* note 154, at 447.

²⁶² *Id.*

last year's champions," or the player will eventually find his way to the championship team through trades or free agency.²⁶³

Take Matthew Stafford as an example. Stafford, the 2009 first overall pick to the Detroit Lions, † is considered by some as a future Hall of Famer.²⁶⁴ As of early 2022, Stafford threw for 49,995 passing yards since 2009 – good for twelfth-most all time – and 323 passing touchdowns.²⁶⁵ But some have pointed to his dismal record as a Lions quarterback and his lack of All-Pro finishes to rebut the Hall of Fame presumption.²⁶⁶ The Los Angeles Rams, who reached the Super Bowl in 2018, traded for Stafford in 2021, and the Rams won the Super Bowl in Stafford's first year in Los Angeles.²⁶⁷ The Lions, meanwhile, ended with the second overall pick in the same season.²⁶⁸

But the first overall pick is not the only selection suspect to "busting." A study highlighted the surplus value of each pick in its analysis of decision-making in the NFL.²⁶⁹ One surprising note from the study is that the surplus value hits its peak not in the first round but "near the beginning of the second round before declining through the rest of the draft."²⁷⁰ As noted earlier in this article, the evidence reveals that the first overall pick in the NFL

²⁶³ See Siegfried, *supra* note 154, at 447.

²⁶⁴ *Has Matthew Stafford Clinched His Hall Of Fame Case?*, FOX (Feb. 14, 2022), <https://www.foxsports.com/stories/nfl/has-matthew-stafford-clinched-his-hall-of-fame-case> [<https://perma.cc/VA2Z-MDK2>].

²⁶⁵ *Id.*

²⁶⁶ *Id.* Stafford could only lead Detroit to four winning seasons and a 74-90-1 record in twelve seasons. *Id.*

²⁶⁷ *Id.*

²⁶⁸ Kevin Patra, *Lions select Michigan DE Aidan Hutchinson with No. 2 pick of 2022 NFL Draft*, NFL (Apr. 28, 2022, 8:21 PM), <https://www.nfl.com/news/lions-select-michigan-de-aidan-hutchinson-with-no-2-pick-of-2022-nfl-draft> [<https://perma.cc/24GC-ZQAV>].

²⁶⁹ See Massey & Thaler, *supra* note 245, at 1479. The surplus value is defined as "the player's *performance value*—estimated from the labor market for NFL veterans—less his compensation." *Id.* (emphasis in original). The article provides an example whereby a team trades a high draft pick (4th) and receives two later picks (12th and 31st) in return. *Id.* Teams typically trade draft picks, and will use a graph, known as "the Chart," to determine the trade value of draft picks. *Id.* ("[I]f the market for draft picks is rational, then the surplus value of the player taken with the 4th pick should equal (on average) the combined surplus value of the players taken with picks 12 and 31.") *Id.*

²⁷⁰ *Id.* at 1489.

Draft is the least valuable pick in the draft.²⁷¹ Further, after estimating the fair market value of draft picks, the study finds that the “drop in value from the first pick to the tenth is roughly fifty percent, and values fall another fifty percent from there to the end of the first round.”²⁷² The authors of the study concluded that teams consistently overvalue the top picks in the first round because the task of selecting young players in a player draft setting is difficult.²⁷³

One reason why the player draft process is so difficult is the premium NFL clubs are willing to pay for certain positions.²⁷⁴ One study attempted to find a link between a quarterback’s draft position and his NFL performance.²⁷⁵ The persons conducting the study found that success at the collegiate level and tantalizing combine numbers do not equal NFL success.²⁷⁶ Quarterbacks drafted in the first round were typically based upon strong college numbers, fast forty-yard dash times, favorable height and weight measurements, and high standardized test scores.²⁷⁷ Quarterbacks drafted in the later rounds generally were less talented and performed poorly at the combine, but had stronger per play performance numbers and quarterback rating measures than their high draft pick counterparts.²⁷⁸ The study concluded

²⁷¹ See Massey & Thaler, *supra* note 245. While it is true the first overall selection has “the highest expected performance . . . in terms of performance per dollar, [the first overall pick] is less valuable than players taken in the second round.” *Id.*

²⁷² *Id.* at 1483.

²⁷³ *Id.* at 1493.

²⁷⁴ See David J. Berri & Rob Simmons, *Catching a draft: on the process of selecting quarterbacks in the National Football League amateur draft*, 35 J. PROD. ANAL. 37, 39 (2011). The quarterback position is consistently rated as the most important position in the NFL. *Id.* The quarterback is typically the face of the franchise, a leader on the field, the position that starts the offense, and is one of the few positions that fans either credit for wins or blame for losses. *Id.*; see also Bucky Brooks, *Ranking each position’s importance, from quarterback to returner*, NFL (July 27, 2015, 5:11 AM), <https://www.nfl.com/news/ranking-each-position-s-importance-from-quarterback-to-returner-0ap3000000503855> [<https://perma.cc/LLP5-6PU3>]. What is interesting to note is that the next two most important positions in this ranking list, a designated pass rusher and left tackle, receive such significance because of their relation to either applying pressure to the quarterback or protecting the quarterback’s blind side. *Id.*

²⁷⁵ See Berri & Simmons, *supra* note 274, at 39.

²⁷⁶ *Id.* at 48.

²⁷⁷ *Id.* at 42-46.

²⁷⁸ See Berri & Simmons, *supra* note 274, at 41. The study notes this disparity could be the result of the top picks “going to relatively poor teams.” *Id.*

that overall draft position did not indicate better performance on the football field.²⁷⁹

Moreover, abolishing the NFL Draft would disincentivize “tanking.” Tanking has become a concerning issue for the NFL, where teams intentionally lose football games to gain high draft status.²⁸⁰ In a world with no NFL Draft, teams would have to try to win games to persuade top rookie talents to sign with their organizations.²⁸¹

Abolishing the NFL Draft would help solve the issue surrounding teams making the valuable draft pick. NFL rules require eleven players during game action. Each position plays a specific role that contributes to team success or failure. A player draft setting that places a high value on a few players and incentivizes teams to continue losing for a chance to grab such players will not change the fortunes of those teams instantly. It takes savvy decision-making, strong coaching hires, key players, and sometimes dumb luck to field a successful football team.

Teams who still wish to pay a premium for rookie quarterbacks would retain the luxury of attempting to sign such quarterbacks in a non-draft setting. The teams could sign as many quarterbacks as they wish if they stay within the salary cap. But the teams will not have to give up draft picks to move up in the player draft to select a player, which will allow the teams to sign a rookie quarterback while maintaining the ability to sign other talented rookies as well.

Some may still argue that the procompetitive justifications in parity on the football field outweigh the anticompetitive effects of the NFL Draft because fan engagement will decrease if only the richest teams with the most resources are title contenders annually. But there is evidence of sports leagues domestically and

²⁷⁹ See Berri & Simmons, *supra* note 274, at 48.

²⁸⁰ See Mark Maske, *NFL plans to investigate Brian Flores’s tanking, tampering allegations against Dolphins*, WASH. POST (Feb. 3, 2022, 12:25 AM), <https://www.washingtonpost.com/sports/2022/02/02/nfl-brian-flores-tanking-tampering-dolphins/> [<https://perma.cc/VD6W-54BS>]; see also Amanda Rabinowitz, *Behind the NFL’s tanking investigation into the Browns, and what the league should do about it*, WKSU PUB. RADIO NEWS FOR NORTHEAST OHIO, (Apr. 20, 2022, 5:00 AM), <https://www.wksu.org/sports/2022-04-20/behind-the-nfls-tanking-investigation-into-the-browns-and-what-the-league-should-do-about-it> [<https://perma.cc/G7WF-QJW6>].

²⁸¹ See Normandin, *supra* note 190.

internationally that have no rookie player draft, no rookie salary cap, and typically have the same handful of teams that can contend for a championship, and yet these same leagues are some of the most popular sports leagues domestically and internationally.²⁸²

CONCLUSION

It is obvious that the NFL Draft places a restraint on trade. The NFL limits economic competition by restricting a player's ability to negotiate in good faith with preferred employers. But the courts apply a blanket exemption to antitrust violations if the alleged conduct is collectively bargained or could have been collectively bargained. This blanket exemption only further divides the bargaining relationship between employers and employees. Since the courts have failed to resolve this inequitable balance of bargaining power between team owners and players, Congress must act under its Commerce Clause to legislate the issue. A player's ability to negotiate his fair market value, the

²⁸² See *The Numbers Associated with American College Football are Staggering*, LEGACY COMM'NS (Aug. 22, 2022), <https://legacycommunications.com/college-football-more-than-just-a-game/#:~:text=College%20football%20itself%20ranks%20as,for%20the%202021%20fiscal%20year> [<https://perma.cc/X4JC-HSYQ>]. College football is the second most popular sport in the United States, behind only the NFL in attendance and viewership, and generates more than \$1 billion in revenues, despite no player draft, no salary cap, and no parity at all. *Id.*; see also Ross Dellenger, *In College Football, Parity is Dead. Is There Any Hope for Change?*, SPORTS ILLUSTRATED (Aug. 31, 2021), <https://www.si.com/college/2021/08/31/ncaa-football-parity-alabama-clemson-daily-cover> [<https://perma.cc/FVP4-5UAX>]. On an international scale, there is no player draft in international soccer, no salary cap (although, there are some financial restrictions), and no parity in the English Premier League. See Michael Sakr, *Which European Football Leagues Have a Salary Cap? [ANALYSIS]*, SPORTS QUOTES AND FACTS, <https://sqaf.club/football-salary-caps/#:~:text=Does%20Premier%20League%20Have%20a,quality%20of%20the%20Premier%20League> [<https://perma.cc/L9YPCWA5>]. In 2015, an approximate 700 million people watched an English soccer match between Liverpool and Manchester United. *Manchester United v Liverpool: The biggest game in football*, SKY SPORTS (Sept. 12, 2015, 9:44 AM), <https://www.skysports.com/football/news/11662/9985539/manchester-united-v-liverpool-the-biggest-game-in-football> [<https://perma.cc/8Z33-CW5V>]. By comparison, the most watched Super Bowl in history was Super Bowl LVII in 2023, and only 115 million people watched that game. See Julia Stoll, *TV viewership of the Super Bowl in the United States from 1990 to 2023*, STATISTA (May 4, 2023) <https://www.statista.com/statistics/216526/super-bowl-us-tv-viewership/#:~:text=The%20most%20watched%20Super%20Bowl,viewers%20tuned%20into%20the%20game> [<https://perma.cc/S7QT-BKUZ>] (last visited Sept. 30, 2023).

growing trend of player autonomy, and a need to fix the competitive imbalance that the draft incurs on teams justify such an action.