NOTES

Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap*

INTRODUCTION

The primary objective of the antitrust statutes is to promote competition.[1] The overriding goal of national labor legislation is to encourage the collective bargaining process,[2] an inherently anticompetitive practice.[3] Labor and antitrust concerns therefore are in frequent collision. Accommodating these conflicting national policies has provided a fertile source of judicial and scholarly confusion.[4] In giving effect to one congressional policy, encouraging

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1. Allen Bradley Co. v. Local Union No.3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 809-10 (1945).

2. 29 U.S.C. § 151 (1982) provides in part:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of the differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.
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> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedures of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

3. Labor unions are designed to reduce competition among employees concerning wages and conditions of employment and to eliminate price competition between employers based on those factors. As Justice Powell explained in Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975), "Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws." *Id.* at 622.

4. A representative cross-sampling includes the following pieces: McCormick & McKinnon, *Professional Football's Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws,* 33 EMORY L.J. 375 (1984); Roberts and Powers, *Defining the Relationship Between Antitrust Laws and Labor Law: Professional Sports and the Current Legal Battleground,* 19 WM. &

collective bargaining, courts must concomitantly subordinate the interests of an equally forceful congressional mandate, preserving competitive markets.[5] Resolving this national policy dilemma requires according limited antitrust immunity to certain union-employer agreements.[6] The availability of this "labor exemption" turns on a balancing of competing national policy considerations.

Ascribing weights to these respective interests is a delicate task. Despite this fact, courts often proceed clumsily in their analysis, ignoring the unique circumstances of certain labor-management arrangements. The professional sports industry presents the paradigm. In this setting, judicial application of the labor exemption has involved a tortured exercise of restraint and good intention. This attitude is reflected by the number of successful challenges to long accepted, yet undeniably anticompetitive, player restraint mechanisms.[7]

In determining whether the product of collective bargaining will be held accountable to antitrust standards, the Eighth Circuit has attempted to reduce the appropriate balancing of interests to a contrived, three prong inquiry.[8] The most recent application of this test involved the National Basketball Association's highly publicized, seldom understood and frequently maligned provision for maximum team salaries: the salary cap.[9] The salary cap, as its

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MARY L. REV. 395 (1978); Note, *Application of the Labor Exemption After the Expiration of Collective Bargaining Agreements in Professional Sports,* 57 N.Y.U. L. REV. 164 (1982); Note, *The Battle of the Superstars: Player Restraints in Professional Sports,* 32 U. FLA. L. REV. 669 (1980); Note, *The Eighth Circuit Suggest a Labor Exemption from Antitrust Laws for Collectively Bargained Labor Agreements in Professional Sports,* 21 ST. LOUIS U.L.J. 565 (1977); Comment, *The National Hockey League's Faceoff with Antitrust:* McCourt v. California Sports, Inc., 42 OHIO ST. L.J. 603 (1981); Casenote, *Labor Exemption to the Antitrust Laws, Shielding An Anticompetitive Provision Devised by an Employer Group in its Own Interest:* McCourt v. California Sports, Inc., 21 B.C.L. REV. 680 (1980).

5. In *Allen Bradley Co.* Justice Frankfurter succinctly characterized this national policy dilemma:

> [t]he result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.

Id. at 806.

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

7. *See* Smith v. Pro-Football, 420 F. Supp. 738 (D.D.C. 1976) (successful challenge to existing NFL draft), *aff'd in part,* 593 F.2d 1173 (D.C. Cir. 1978); Mackey v. NFL, 407 F. Supp. 1000 (D. Minn. 1975) (successful player challenge to NFL's "Rozelle Rule"), *aff'd in part, rev'd in part,* 543 F.2d 606 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977); Kapp v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974) (invalidating NFL draft, standard contract rules and tampering provisions), *cert. denied,* 441 U.S. 907 (1979); Denver Rockets v. All Pro Management, Inc. 325 F. Supp. 1049 (C.D. Cal. 1971) (striking down NBA hardship rule); *But see* Flood v. Kuhn, 407 U.S. 258 (1972) (upholding baseball's antitrust exemption).

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

9. In Wood v. NBA, 602 F. Supp. 525 (S.D.N.Y. 1984), plaintiff, a top round draft choice, brought an antitrust action to enjoin the NBA and the National Basketball Players

name implies, is the latest in a long line of employer-devised market restraints which suppress competitive bidding for player services. The salary cap is embodied in the 1983 Memorandum of Understanding between the National Basketball Association ("NBA") and the National Basketball Players Association ("Players Association").[10] This memorandum modified and supplemented the existing collective bargaining agreement between the parties.

This Note examines the application of the labor exemption to the salary cap agreement. The discussion focuses specifically on the cap's impact on the top draft choices selected in the annual player draft and on the unduly anticompetitive character of that impact. Under the salary cap agreement, whenever a team equals or exceeds its maximum allowable salary cap, it may sign a first round draft pick only to a one year, $75,000 contract.[11] Although the cap is replete with exceptions for veteran NBA players, no such loopholes exist to benefit entering players drafted by teams in excess of cap limits. In these instances, the cap's anticompetitive repercussions are greatly exaggerated.

The ensuing discussion consumes four interrelated issues. Part I traces the evolution and scope of labor's antitrust exemption. In part II, the relevant details of the salary cap are canvassed. Part III applies the labor exemption framework to the salary cap agreement. Finally, in part IV, the salary cap agreement is tested under section one of the Sherman Act.[12]

This Note argues that, in the context of professional basketball, a proper accommodation of labor and antitrust policy militates against extending antitrust shelter to the salary cap agreement. Stripped of this protection, the salary cap stands as a direct, unmitigated market restraint that restricts competitive bidding for top round draft picks. It clearly is contrary to the pro-competitive thrust of the Sherman Act. The salary cap, accordingly, should be struck down as violative of the antitrust laws.

Association from enforcing several provisions of the existing collective bargaining agreement between the parties. These included the salary cap, the player draft and the ban on player corporations. The United States District Court for the Southern District of New York denied plaintiff's preliminary injunction motion and affirmed the validity of the existing collective bargaining agreement. *Id.* at 529-30. Judge Carter emphasized that plaintiff's allegations did not support a finding of irreparable harm. *Id.* at 530. On a cursory examination of the facts, the court also accepted defendant's contention that the labor exemption barred plaintiff's challenge. In reviewing that issue, Judge Carter engaged in the mechanical inquiry announced in *Mackey,* 543 F.2d at 614 and endorsed in McCourt v. California Sports, Inc. 600 F.2d 1193, 1197-98 (6th Cir. 1979). *Id.* at 528-29. The dispute currently is pending in the Second Circuit Court of Appeals. *See infra* note 136 and accompanying text.

10. Memorandum of Understanding Between National Basketball Association and National Basketball Players Association, § III C(1) and (2)(b) (April 18, 1983) [hereinafter Memorandum of Understanding].

11. The Memorandum of Understanding provides that "a Team with a Team Salary at or over the Maximum Team Salary may enter into a one-year Player Contract, *without* an option clause, with a player selected in the College Draft at the *minimum player salary* then applicable in the NBA." Memorandum of Understanding, *supra* note 10, § III (C)(2)(f) (emphasis added).

12. 15 U.S.C. § 1 (1982).

I. THE LABOR EXEMPTION: AN OVERVIEW

A. *The* Mackey[13] *Framework*

Sections six[14] and twenty[15] of the Clayton Act and the Norris-LaGuardia Act[16] are the basic sources of organized labor's antitrust immunity. A line

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13. Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *aff'g in part, rev'g in part,* 407 F. Supp. 1000 (D. Minn. 1975), *cert. dismissed,* 434 U.S. 801 (1977).

14. Section 6 provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations . . . be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17 (1982).

15. Section 20, in pertinent part, provides:

> No restraining order or injunction shall be granted by any court of the United States . . . in any case . . . growing out of . . . a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property . . . for which injury there is no adequate remedy at law . . . .
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> And no such restraining order or 'injunction shall prohibit any person or persons . . . from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; . . . or from peacefully persuading any person to work or to abstain from working; . . . nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

29 U.S.C. § 52 (1982).

16. Sections 4 and 5 of the Norris-LaGuardia Act in relevant part provide:

> [4.] No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
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> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
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> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertakings or promise as is described in section [3] of this title;
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> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
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> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
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> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
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> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
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> [5.] No court of the United; States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section [4] of this title.

29 U.S.C. §§ 104 to 105 (1982).

of five Supreme Court[17] cases has adumbrated the vague and imprecise contours of labor's special exemption from antitrust prosecution. Extrapolating from this precedent, the Eighth Circuit in *Mackey v. National Football League,*[18] fashioned a three pronged inquiry to determine whether certain labor-management agreements are to be extended limited non-statutory immunity from antitrust review. As stated by Judge Lay:

> [w]e find the proper accommodation to be: First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy as implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject to collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.[19]

The degree to which *Mackey* accurately reflects the case law is somewhat suspect. Fleshing out relevant legal analysis from self-serving dictum and applying it to an industry as unique as professional sports is fraught with dangers of overgeneralization. The Eighth Circuit, predictably, has fallen prey to this temptation. The *Mackey* test represents a shorthand balance of divergent policy considerations. To that extent, it is a useful analytical tool in discussing market restraints imposed by the collective bargaining process. Given the peculiarities of professional basketball and the imprecise nature of the exemption, however, rote application of the *Mackey* indicia is prima facie improper. An examination of the leading United States Supreme Court decisions in this area is helpful in understanding the specific mechanics and precise policy considerations underlying the *Mackey* inquiry. Contrasting the principles laid down in *Mackey* with those addressed by the Supreme Court and those embodied in relevant lower court precedent provides a comprehensive analytical framework in which to view the salary cap agreement.

B. The Statutory Exemption

United States v. Hutcheson,[20] was the United States Supreme Court's first opportunity to apply the combined labor and antitrust statutory framework to union activities. *Hutcheson* involved a jurisdictional dispute between competing unions. Defendant union, frustrated in its efforts to obtain desired work, precipitated strike activities against several employers and boycotted the product of one employer. Defendant was accused of violating section one of the Sherman Act.[21] Justice Frankfurter's majority opinion defined

17. *See infra* notes 20-61 and accompanying text.
18. 543 F.2d 606.
19. *Id.* at 614-15.
20. 312 U.S. 219 (1941).
21. *Id.* at 220-22.

the permissible boundaries of union conduct. Reviewing the ongoing judicial-legislative tug of war,[22] Justice Frankfurter emphasized that the Sherman Act together with sections six and twenty of the Clayton Act and the Norris-LaGuardia Act were to be read as "a harmonizing text of outlawry of labor conduct."[23] Interlacing these conflicting congressional messages, Justice Frankfurter observed that:

> [s]o long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.[24]

The precise limits of *Hutcheson*'s statutory exemption were clarified three years later in *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers.*[25] There, defendant union was charged with violating sections one and two of the Sherman Act. It was asserted that defendant had conspired with local manufacturers and contractors to eliminate competition in the New York City electrical equipment market.[26]

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22. Application of the antitrust laws to union activities first was considered in Loewe v. Lawlor, 208 U.S. 274 (1908). The United States Supreme Court, in *Loewe,* held that a secondary boycott instigated by the union violated the Sherman Act. *Id.* at 278. The impact of *Loewe* was not lost on the nascent labor movement. Their viability threatened, the unions turned to the political process for relief. In response to an intensive lobbying campaign, Congress passed the Clayton Act in 1914. The Clayton Act was designed to immunize labor unions from the sweep of antitrust legislation. Section 6 of the Clayton Act, 15 U.S.C. § 17 (1982), declared that the labor of a human being was not an article of commerce and that nothing in the antitrust statutes forbid the existence of labor unions. Section 20 of the Clayton Act, 29 U.S.C. § 52 (1982), constrained federal courts from enjoining labor-management controversies concerning terms and conditions of employment. Ignoring this clear congressional mandate, the United States Supreme Court in Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), severely narrowed the broad language embodied in the Clayton Act.

Like *Loewe, Duplex* involved the legality of secondary boycott tactics. Rejecting the union argument that §§ 6 and 20 prohibited judicial intervention in these matters, the Supreme Court held that "there is nothing in [§ 6 of the Clayton Act] to exempt such an organization [a union] or its members from accountability where it or they depart from its normal and legitimate object and engage in an actual combination or conspiracy in restraint of trade." *Id.* at 469. Justice Pitney interpreted § 20 of the Clayton Act to apply only to labor disputes concerning the immediate employer-employee relationship. *Id.* at 472-74.

Its express intentions frustrated, Congress again spelled out its pro-labor bent in the passage of the Norris-LaGuardia Act, 29 U.S.C § 101 (1982). Enacted in 1932, the Norris-LaGuardia Act broadened the meaning of the term labor dispute to include "any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c) (1982). The Act also specifically enumerated several practices which were not subject to restraining orders or injunctions. *See supra* note 16. Three years later, Congress again expressed its pro-labor sentiments in the passage of the National Labor Relations Act, Ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151-68 (1982)). The Wagner Act explicitly enunciated the strong national policy in favor of collective bargaining and the corresponding aversion to judicial intervention in labor controversies. *See supra* note 2.

23. *Hutcheson,* 312 U.S. at 231.

24. *Id.* at 232.

25. 325 U.S. 797 (1945).

26. Plaintiff was an electrical equipment manufacturer located outside of New York City. Defendant had waged an aggressive campaign to obtain closed shop agreements with local New

The United States Supreme Court held that the statutory exemption recognized in *Hutcheson* was unavailable where the union had combined with a group of employers to eliminate competition from the product market.[27] This was true even though the union was pursuing legitimate objectives: higher wages, shorter hours and expanded membership opportunities.[28] Justice Black stressed that unions were not vehicles to assist employers in violating the Sherman Act.[29]

Allen Bradley is the logical corollary of *Hutcheson.* These cases demonstrate that union activities are statutorily immune from antitrust review where the union has acted alone and pursued legitimate objectives. These decisions did not reach the question of whether the product of the collective bargaining process would be held accountable to antitrust standards. Twenty years later, the companion cases of *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*[30] and *UMW v. Pennington,*[31] squarely faced that issue.

C. *The Evolution of the Non-Statutory Exemption: Justice White's Framework*

In *Jewel Tea,* plaintiff, a meat retailer, challenged a marketing hours restriction incorporated in an industry wide collective bargaining agreement.[32] Plaintiff claimed the restriction violated sections one and two of the Sherman Act by impeding its ability to compete freely and effectively in the product market. The United States Supreme Court held that the marketing hours provision obtained by the union "through bona fide, arm's-length bargaining in pursuit of their own labor union policies and not at the behest of or in combination with non-labor groups"[33] was entitled to non-statutory exemption from the Sherman Act.[34]

Justice White explained the grant of immunity in terms of competing policy considerations. He emphasized that "[t]he crucial determinant is not

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York City electrical equipment manufacturers and contractors. The resulting union-manufacturer-contractor combination "achieved 'a complete monopoly which they used to boycott equipment manufactured by plaintiffs.' " *Id.* at 800 (quoting *Allen Bradley,* 145 F.2d 215, 220 (2d Cir. 1944)). This arrangement was highly successful from all standpoints. Local business experienced phenomenal growth. The number of available jobs for union members increased. Eleetrical equipment prices skyrocketed, union wages rose and worker's hours were shortened. *Allen Bradley,* 325 U.S. at 800.

27. *Id.* at 809.

28. *Id.* at 807-11.

29. *Id.* at 810.

30. 381 U.S. 676 (1965).

31. 381 U.S. 657 (1965).

32. *Jewel Tea,* 381 U.S. at 681. *Jewel Tea* concerned the legality of a provision restricting night meat market operations. Plaintiff was a member of a multi-employer bargaining unit of meat retailers. Defendant union represented virtually all butchers in the Chicago area. During contract negotiations between the two groups, defendant insisted on including the marketing hours restriction in the collective bargaining agreement. Plaintiff objected but ultimately signed the agreement under threat of strike. *Id.* at 680-81.

33. *Id.* at 690.

34. *Id. See infra* note 43, for a discussion of the nonstatutory exemption.

the form of agreement . . . but its relative impact on the product market and the interests of union members."[35] In this context, the "interests of union members" subsumed two overlapping national labor policies: 1) encouraging the collective bargaining process on subjects of union-employer concern[36] and 2) advancing the vital interests of union members.[37] Where, as in the instant setting, the challenged agreement furthered both national labor policies,[38] Justice White was willing to tolerate the corresponding product market impact.[39] Justice White carefully distinguished that situation from one where the vital interests of union members were left unaffected by the challenged agreement. In the latter instance, labor policy clearly did not require shielding the agreement from antitrust scrutiny.[40] This point was illustrated in *Pennington.*

In *Pennington,* defendant United Mine Workers was accused of conspiring with several large coal operators to restrain competition in the product market.[41] As part of an industry-wide plan to combat overproduction, defendant entered into a collective bargaining agreement with a handful of industry giants. In exchange for substantial wage increases, defendant agreed to limit the sale of nonunion coal, to impose the terms of the agreement on all industry members, irrespective of size or ability to pay, and not to oppose rapid industry mechanization.[42] Defendant contended that the challenged agreement was entitled to limited non-statutory immunity since it related to wages, a mandatory subject of collective bargaining.[43]

Rejecting that argument, Justice White applied the very same balancing considerations announced in *Jewel Tea.*[44] The fact that the agreement related to a mandatory subject of collective bargaining was not dispositive.[45] A

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35. *Jewel Tea,* 381 U.S. at 690 n.5.

36. *Id.* at 689.

37. *Id.* at 690-92. For a comprehensive discussion on this interpretation see Casenote, *supra* note 4, at 680.

38. *Jewel Tea,* 381 U.S. at 689-97. The marketing hours restriction was "intimately related" to wages, hours and other terms and conditions of employment. *Id.* at 689-90. Section 8(d) of the National Labor Relations Act ("NLRA") requires employers and unions to bargain on these matters. *Id.* at 690; 29 U.S.C. § 158(d) (1982). Upholding the agreement therefore promoted the collective bargaining policy underlying the Act. See *supra* note 2 for an overview of policy concerns embodied in the NLRA. The marketing hours restriction also advanced the vital interests of union butchers. *Jewel Tea,* 381 U.S. at 692. Justice White stressed that the provision was obtained "not as a result of a bargain between the unions and some employers directed against other employers, but pursuant to what the unions deemed to be in their own labor union interests." *Id.* at 688. *Cf. infra* notes 42-50. and accompanying text.

39. *Jewel Tea,* 381 U.S. at 689-97.

40. *Id.* at 692-93.

41. *Pennington,* 381 U.S. at 659.

42. *Id.* at 660.

43. *Id.* at 664. Justice White, writing for a plurality, initially noted that neither the Clayton Act nor the Norris-Laguardia Act specifically dealt with union-employer agreements. Antitrust immunity, if available, therefore was to be distinguished from the statutory type conferred in *Hutcheson* and denied in *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers,* 325 U.S. 797 (1945). *Id.* at 661-64.

44. *See supra* notes 35-40 and accompanying text.

45. *Pennington,* 381 U.S. at 664-65.

mandatory subject classification merely fulfilled the collective bargaining concern underlying the labor half of the balance.[46] The self-interest element clearly was lacking.[47] Justice White stressed that the agreement ran counter to the interests of defendant's members. By agreeing to impose industry-wide wage standards, defendant had surrendered its freedom of action with respect to its bargaining policy.[48] Union concerns therefore were short-changed. Unlike *Jewel Tea,* the product market impact stood alone, unmitigated and unjustified by the vital interests of defendant's members.[49] The non-statutory exemption consequently was denied.[50]

Ten years later, the United States Supreme Court in *Connell Construction Co. v. Plumbers & Steamfitters Local 100,*[51] endorsed Justice White's balancing approach.[52] In *Connell,* plaintiff contractor filed Sherman Act claims against defendant union seeking to invalidate the terms of an existing hot cargo agreement.[53] Defendant claimed the labor exemption shielded the agreement from Sherman Act prosecution.[54] Justice Powell rejected defendant's contentions, proclaiming that "[l]abor policy clearly does not require . . . that a union have freedom to impose direct restraints on competition among those who employ its members."[55] In so doing, he noted that the effect of the hot cargo agreement was to exclude nonunion subcontractors from the product market.[56] This direct market restraint was not the result of any activity embraced by national labor policy. Justice Powell pointed out that defendant had no interest in representing plaintiff's employees.[57] Neither national labor policy, promoting the collective bargaining process or advancing legitimate union concerns therefore was forwarded by defendant's coercive tactics.[58] The labor side of the balance clearly was lacking. The elimination of competition in the product market stood alone as an unmitigated market restraint.

In determining whether union-employer agreements are to receive limited non-statutory immunity, Justice White's framework balances labor policies

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46. *Id.*
47. *Id.* at 668.
48. *Id.* at 666-68.
49. *Id.* at 665-66; *Jewel Tea,* 381 U.S. at 692.
50. *Pennington,* 381 U.S. at 669.
51. 421 U.S. 616 (1975).
52. *Id.* at 622.
53. *Id.* at 620-21. Defendant union staged an organizational campaign designed to bring in local subcontractors. As part of it strategy, defendant compelled reluctant contractors, including plaintiff, to enter into a series of "hot cargo" agreements. These agreements obligated local contractors to employ only those subcontractors party to defendant's current collective bargaining agreement. Defendant induced plaintiff and other contractors to sign the agreements by picketing their major construction sights. Plaintiff sued to invalidate the hot cargo clauses and to enjoin defendant from further picketing. *Id.* at 618-21.
54. *Id.* at 619.
55. *Id.* at 622.
56. *Id.* at 623.
57. *Id.* at 625-26.
58. *Id.*

against antitrust concerns. Labor policies are twofold: encouraging collective bargaining and advancing union interests. Antitrust concerns are singular: preserving competitive markets. *Jewel Tea* demonstrates that where both labor policies are advanced, market interferences will be tolerated.[59] *Connell* teaches that where neither labor policy is promoted and market impact is substantial, antitrust immunity will not be forthcoming.[60] *Pennington* implies that where only one labor policy is furthered and market competition is eliminated, the non-statutory exemption will be denied.[61] These principles embody the critical interests underlying the *Mackey* balance.[62] Applied alongside the *Mackey* criteria,[63] they provide a powerful analytical device with which to examine the salary cap agreement.

II. THE SALARY CAP

On April 18, 1983, the NBA and the Players Association entered into a Memorandum of Understanding that modified and supplemented the existing collective bargaining agreement between the parties.[64] As part of that agreement, maximum and minimum team salaries were established.[65] These limits apply to certain teams and are computed on the players' share of defined gross revenues.[66]

Since its implementation, the salary cap has received mixed reviews. Most often, the cap has been lambasted as an artificial market constraint that frustrates would-be trades[67] and generates unprecedented league confus-

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59. *See supra* notes 32-40 and accompanying text.
60. *See supra* notes 51-58 and accompanying text.
61. *See supra* notes 41-50 and accompanying text.
62. *See supra* text accompanying notes 18-19.
63. *Id.*
64. Memorandum of Understanding, *supra* note 10.
65. *Id.* at 111.
66. *Id.* at 111 C(3)-(4). Because the salary pool is linked to a percentage of revenue, the salary cap functions as a primitive form of revenue sharing between labor and management. Calculation of the cap is cumbersome but relatively straightforward. Projected defined league revenues are totalled, multiplied by 53% and apportioned evenly among the twenty-three member clubs. Welling, Tasini & Cook, *Basketball: Business is Booming*, BUS. WK., Oct. 28, 1985, at 78.
67. Trades foregone and acquisitions frustrated due to cap intrusions are too numerous to document. For an extensive account of the cap's chill on player mobility, see Note, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157 (1985). This aspect of cap operations most recently impeded the Seattle Supersonics' efforts at peddling perennial All-Pro center Jack Sikma to the Dallas Mavericks.

As the 1986 NBA draft deadline neared, the Sonics desperately sought to unload Sikma and his hefty $1.6 million salary. In exchange for Sikma, Dallas reportedly offered power forward Bill Wennington ($220,000 in salary next year), swingman Jay Vincent ($315,000 annual salary) and the number seven pick in the NBA draft; which became the University of Michigan's 6'11" All-American center, Roy Tarpley. But Dallas, which also had hoped to trade All-Pro forward Mark Aguirre ($715,000 per year), checked the relevant salary figures and was forced to withdraw from negotiations. Richardson, *Salary Cap Keeps Sikma from Mavs*, Seattle Post Intelligencer, June 19, 1986, sec. B, at 1, col. 1.

ion.[68] Neither party to the modified collective bargaining agreement appears genuinely satisfied with the cap's operation. Player support for the cap is wavering.[69] In response to accusations of owner-inspired collusion, union officials have pledged to fight the cap at the next round of labor-management negotiations.[70] Management's endorsement of the cap also has been less than

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Unable to accommodate Aguirre's trade demands, the Mavericks were catapulted $900,000 over their current cap of $4,067,000. Dallas' inability to squeeze Sikma's salary under cap requirements sent Seattle scurrying for an alternative suitor. *Id.* Following two weeks of intensive trade talks, the Sonics reached an agreement with the Milwaukee Bucks. In exchange for Sikma and the Sonics' 1987 and 1989 second round draft picks, Seattle received Milwaukee's inconsistent reserve center, Alton Lister, and the Bucks' first round draft choices in 1987 and 1989. Grady, *Sonics, Bucks Satisfied with Sikma Trade,* The Journal-American, July 2, 1986, sec. B, at 1, col. 1. [hereinafter *Sonics, Bucks Satisfied*].

Sonic officials justified the lopsided swap primarily in salary cap terms. By unloading Sikma's $1.6 million annual salary and replacing it with Lister's reported $300,000 paycheck, the Sonics gained needed flexibility under the salary cap. This flexibility, the Sonics maintained, allowed them to pursue available free-agents and also eliminated the cap as a potential impediment in future dealings. Nelson, *A Move for the Future,* Seattle Times, July 2, 1986, sec. B, at 2, col. 1. Defending the trade, Sonic General Manager, Lenny Wilkins, emphasized that

> [n]ow we have a lot of flexibility. We're not saying we're going to run out and make a deal tomorrow, but we've got all summer to look at what we want to do and talk to teams.
>
> Now we'll start to evaluate the; free-agent list and who is on other teams that we can get.

Sonics, Bucks Satisfied, supra at 1, col. 1.

Despite this guarded optimism, response to the Lister acquisition proved hostile. The Sonic's unabashed willingness to achieve financial flexibility at the expense of personnel instability bewildered both league officials and commentators. *See, e.g.*, Koivastic, *Trade Leaves Sonics with Carcass Instead of Nucleus,* The Journal-American, July 2, 1986, sec. B, at 1, col. 2. The Sonics essentially justified a bad trade by reference to cap compliance. This point illustrates the folly of the present system. The salary cap purportedly was designed to maximize players' free agency options. *See infra* notes 167-174 and accompanying text. The Sikma affair demonstrates that the cap, instead, is acting as an unwieldy product market restraint. Apart from chilling rookie paychecks, the cap is precluding veteran players from moving freely between teams. One of the primary justifications underlying cap implementation therefore is being completely frustrated.

68. "[T]he salary cap; it's tougher than the block-charge call or the criteria for a zone defense." Boswell, *Implausibilities Made It a Feast,* Wash. Post, Dec. 26, 1984, (Sports), at 1 (elec. ed.). "In real life there are salary caps that make trades and free-agent acquisition so difficult they provide a cottage industry for lawyers who are asked to help teams fathom the cap's fine print." N.Y. Times, Oct. 21, 1985, at C1,12, col. 1. A recent example of this misunderstanding involved a trade between the Los Angeles Clippers and the Dallas Mavericks. The Mavericks acquired James Donaldson (who earns $515,000 this year and $560,000 next season) from the Clippers in exchange for Kurt Nimphius (who has a two year contract at $225,000 *per annum).* The Mavericks requested league assistance in interpreting the relevant salary cap provision. The league provided the information, assuring the Mavericks that the salary discrepancy between the traded players would not place the Mavericks in excess of cap limits. After the trade had been completed, the league changed its ruling. The Mavericks were forced to reduce their roster by one player to conform to cap requirements. The Mavericks subsequently released previous starting center Wallace Bryant. Hubbard, *Believe It or Not, Salary Cap Works,* The Sporting News, Jan. 6, 1986, at 39.

69. Welling & Tasini, *supra* note 66, at 78.

70. "You really can't call it collusion but in effect it is," says Larry Fleischer, general counsel for the NBA Players Association. "Given the available talent

whole-hearted. A begrudging acceptance characterizes the majority attitude.[71]

At a more fundamental level, the twin objectives of the cap, limiting player salaries and improving the ability of weaker teams to compete for talent,[72] are not being realized. First, innovative salary structures have enabled the more clever franchises to effectively circumvent the spirit, if not the letter, of the cap.[73] Such maneuvers have resulted in average player salary increases of over fifty percent since the signing of the collective bargaining

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there should be 10-12 more offer sheets presented than at the present. It's ridiculous to think that none of these last-place teams haven't made offers, that a Cedric Maxwell isn't more attractive to Indiana than he is to Boston."

Cotton, *NBA: The Boredom Is Over,* Wash. Post, Oct. 25, 1984, Sports, at 1 (elec. ed.). Fleischer's sentiments are echoed by Washington Bullet star forward Greg Ballard, "They say the new agreement will benefit all the players, but so far, it's really benefitted only the super, super stars." Dupree, 60 Slated to Become Free Agents in NBA, Wash. Post, April 22, 1984, Sports, at 8 (elec. ed.)

Even the so-called superstars, however, vigorously object to cap operation. Maurice Lucas, Los Angeles Laker power forward, five time NBA all-star and active participant in the salary cap negotiations insists that "[t]he system is not working . . . . You either have to be firm and wait it out or sign for whatever they give you. I'd like to sign for my market value." Goldpaper, *Salary Cap Can Reshape NBA; Commissioner Optimistic,* N.Y. Times, Oct. 26, 1984, at A25, col.1. *See infra* note 173 and accompanying text.

71. Jan Volk, General Manager of the Boston Celtics, opined that "[t]he cap has been good for the league. At any one time I might curse it. It's limiting in the opportunities it presents you. You have to be very crcative." Welling & Tasini, *supra* note 66, at 78.

72. National Basketball Association's Memorandum in Support of Its Objection to the Special Master's Ruling and Report at 7, *In re* National Basketball Association, 70 Civ. 1526 (RLC) (S.D.N.Y. Feb. 6, 1986) [hereinafter Brief for NBA].

73. Illustrative of this point is the recent contract signed by Georgetown University's All-American center, Patrick Ewing, with the New York Knickerbockers. Ewing's pact calls for a $31.2 million payoff over ten years, the first six being fully guaranteed. A creative combination of backloaded salary payments, deferred compensation and interest free loans enabled the Knicks, backed by Gulf & Western's deep pocket, to meet Ewing's demands. The precise terms of Ewing's contract are as follows:

Year	Salary	Deferred	Interest Free Loan	Total
1985	$ 750,000	$ —	$ 500,000	$ 1,250,000
1986	1,000,000	—	500,000	1,500,000
1987	1,500,000	750,000	500,000	2,750,000
1988	2,000,000	750,000	500,000	3,250,000
1989	2,750,000	750,000	500,000	4,000,000
1990	3,000,000	750,000	500,000	4,250,000
1991	3,000,000	—	300,000	3,300,000
1992	3,000,000	—	300,000	3,300,000
1993	3,250,000	—	300,000	3,550,000
1994	3,750,000	—	300,000	4,050,000
Totals	$24,000,000	$3,000,000	$4,200,000	$31,200,000

Vescey, *The Fine Print of Ewing's Pact,* N.Y. Post, Nov. 5, 1985, at 74, col. 1.

Other attempts at skirting salary cap requirements, however, have proven less than successful. In *In re* National Basketball Association, No. 70 Civ. 1526 (S.D.N.Y. Feb 6, 1986), District Judge Carter held that the Knicks' free agent offer sheet to New York Net forward Albert King constituted a "stark case of intentional circumvention" of the salary cap and therefore violated Article III C (9) of the existing Modification Agreement. *Id.* slip op. at 5.

agreement.[74] Second, league interpretation of the salary floor provision effectively has frustrated the egalitarian bidding process envisioned by the cap's framers. The salary cap was designed to insure competitive bidding parity;[75] low-salaried teams were to increase their numbers to established cap levels[76] while clubs with bloated payrolls were to be constrained from further spending. The players also were to receive at least 53% of projected league revenues in salaries and benefits—*apportioned evenly among member franchises.*[77] Clubs beneath these minimum limits were to either raise salaries or increase pension benefits, two points now disputed by the NBA. The league claims that teams below the cap need not increase their payrolls to comply with minimum cap requirements and that teams with overinflated payrolls may cover benefit payments for those clubs beneath the minimum level.[78] This newly announced policy creates a disincentive for low-salaried teams to spend more by going after available talent. These franchises instead simply may look to the deep pockets of the league's money barons to satisfy cap dictates.[79]

The salary cap's economic underpinnings therefore are completely removed. Low-salaried teams no longer are forced to choose between spending money on player salaries or spending money on pension benefits. League interpretation has created a much more attractive alternative: indefinite postponement of dollar increases. Satisfying the cap's minimum floor feature has been translated from an individual to an aggregate concept. This means that combined league payments, rather than individual club payments, must meet the minimum floor target of 53% of projected league revenues. This shift in emphasis plainly defeats a central purpose of the salary cap: forcing low-salaried clubs into a competitive bidding posture.

League Commissioner David L. Stern, chief architect of the salary cap, adopts a paternalistic viewpoint when discussing its impact. "We still need the cap to protect owners from themselves," claims Stern.[80] Stern recognizes that harsh consequences flow from the cap's operation[81] and acknowledges

74. Brief for NBA, *supra* note 72, at 6.

75. *Id.* at 7.

76. *See* Cotton, *supra* note 70, at 1. The salary cap was designed to present low-salaried NBA franchises with a Hobson's choice. These clubs could satisfy the cap's minimum floor requirement either by increasing team payrolls or by contributing to the union pension fund. Given these possibilities, a club beneath eap limits necessarily should opt for the former alternative. Forced to spend money, a going concern will do so in a manner that optimizes self-interests. In the NBA this is accomplished by acquiring and maintaining top player talent, not through intangible pension contributions. The salary cap therefore dictates that low-salaried clubs pursue a more generous payroll strategy.

77. *Id.* at 1; Affidavit of Russell T. Granik, Executive Vice-President of NBA, at 14, Wood v. NBA, 84 Civ. 6582 (RLC) (S.D.N.Y. Sept. 21, 1984).

78. Cotton, *supra* note 70, at 1. *See also infra* note 170 and accompanying text.

79. *See infra* note 170 and accompanying text.

80. Welling & Tasini, *supra* note 66, at 78.

81. "Rules always are [harsh]. There are always cases where a particular team feels it is being unfairly restrained, but that's life under the cap." Brenner, *Stern Visualizes No Problems for NBA,* Indianapolis Star, Nov. 10, 1985, at 8, col. 1.

that support for the cap is far from uniform.[82] Despite these shortcomings, the Commissioner insists that the cap is working, as evidenced by the league's newly discovered financial stability.[83]

Paragraph IIIC (2)(f) of the existing collective bargaining agreement provides that where a team equals or exceeds its salary cap, it may sign a first round draft choice only to a one year, $75,000 contract.[84] The effect of this provision is exacerbated by collective bargaining agreement Article XXII governing the annual player draft.[85] These sections combine to artificially restrain competitive bidding among member NBA clubs and prevent prospective NBA players from realizing their free market value. As one veteran NBA general manager blithely observed, "[t]eams over the salary cap have a problem signing . . . top rookie[s] . . . ."[86] The salary cap, therefore, deprives this elite group of their most treasured resource: a competitive market. This impact on top draft choices will be the focal point of subsequent discussion.[87]

III. The Labor Exemption and the Salary Cap Agreement

A. *Special Considerations*

Certain preliminary matters need to be addressed before applying the labor exemption framework to the salary cap agreement. It should be clear that

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82. "Whether it's [the cap] working depends on who you're asking." *Id.*

83. "To a person, *the teams who understand it,* recognize that it has brought a stability that is wonderful. It has begun to blaze a trail, for how you can accommodate a star system and individual contraet negotiations with a need to keep 23 or more functioning, successful entities." *Id.* (emphasis added). Stern also has commented that:

> I think that the adoption of the salary cap, together with the drug program, will some day be looked at historically as the turning point in the history of the NBA . . . . There may be other reasons for success. But I think that when you look at a system which has taken teams and League itself to a point where perhaps as many as 15 teams will be profitable, where in the year before [it was] II and the year before that eight and the year before that six at a time when . . . the average salary has gone from $270,000 to $330,000, you have to scratch your head and say, "How is it possible that you had a system where it seems that everything got better and both management and labor prospered but not at each other's expense?" I think that the salary cap, together with the profit sharing, is responsible for that, both in fact and generally, in that they allowed the sport to proceed.

Cotton, *David Stern with NBA Ratings, Revenues Up, Commissioner Sees Resurgence,* Wash. Post, June 23, 1985, Sports, at 1 (elec. ed.).

84. Memorandum of Understanding, *supra* note 10, at § III C(2)(f).

85. Collective Bargaining Agreement Between the National Basketball Association and the National Basketball Players Association, art. XXII (Apr. 29, 1976). This article reserves the exclusive negotiating rights to the drafted player to the drafting tcam for a period extending up to the following year's draft. Where a player remains unsigned, he may re-enter the following year's draft. The player conceivably could be re-selected by the original drafting team or by another club at the defined cap limit. A potential draftee therefore may face the identical predicament for two consecutive years. *See infra* note 142 and accompanying text.

86. Welling & Tasini, *supra* note 66, at 78.

87. *See infra* notes 88-234 and accompanying text.

the statutory exemption was enacted to protect labor unions and their activities.[88] The realities of the collective bargaining process, however, dictate that the exemption's protective shield extend derivative non-statutory immunity to employer groups. As the Eighth Circuit noted in *Mackey v. National Football League,*[89]

> [s]ince the basis of the non-statutory exemption is the national policy favoring collective bargaining, and since the exemption extends to agreements, the benefits of the exemption logically extend to both parties to the agreement. Accordingly, under appropriate circumstances, we find that a non-labor group may avail itself of the labor exemption.[90]

Unlike the challenged agreements in *United States v. Hutcheson*[91] and its progeny,[92] the salary cap works to the disadvantage of a labor group: prospective first round draft choices. The prior cases primarily were concerned with union-employer agreements that worked to the detriment of management's competitors, the product market.[93] In the unique professional sports industry, the labor-product market distinction noticeably is absent. It is well established that for antitrust purposes, the product market in professional sports consists of individual player services.[94] The entertainment package consumed by the public cannot be limited to the generic sporting event. Unlike the typical industry, consumer interest in professional sports is inextricably linked to the employee market. The athletes themselves are the main attraction—the true product market.[95] Dwight Gooden's blazing fastball, Julius Erving's aerial acrobatics and Patrick Ewing's menacing elbows and vicious slam dunks are the ultimate objects of fan enjoyment.[96] Attempts at line drawing between product and labor markets therefore are meaningless. In professional athletics, these markets virtually are synonymous.

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88. *See supra* note 22.

89. 543 F.2d 606 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977).

90. *Id.* at 612.

91. 312 U.S. 219 (1941).

92. *See supra* notes 25-61 and accompanying text.

93. *Id.*

94. *Mackey,* 543 F.2d at 616-18. *See also* Robertson v. NBA, 389 F. Supp. 867, 883-84 (collecting cases).

95. For articles and notes supporting this proposition, see Roberts & Powers, *supra* note 4, at 460; Note, *supra* note 4, at 698-700.

96. This point cannot be overemphasized. In Dwight Gooden's eighteen 1985 Shea Stadium starts, for example, the New York Mets drew 6,236 more fans per game than they averaged in the other sixty-three home contests. The Mets estimated that the typical fan spends $13.50 per game. Apart from endorsement value, Gooden's mound presence therefore accounted for an additional $1.5 million in club revenues. The Orlando Sentinal, Dec. 22, 1985, at C12, col. 3.

A more dramatic example is the impact of Patrick Ewing on ticket sales in the NBA. When the New York Knickerbockers won the right to draft Ewing in the 1985 NBA lottery, officials at Madison Square Garden (homecourt for the Knicks) were deluged with ticket orders. Sources expect the Knicks to sell twice as many season tickets as last ycar. This would add at lcast three million in team revenues. Lancaster, *Mr. Ewing Goes to New York City: Who Owes How Much to Whom—and Why,* Wall St. J. May 24, 1985, at 1 [hereinafter *Ewing Goes to New York].* The Knicks already have sold out their most expensive season tickets—at $688

The prospective superstar of the 1980's similarly bears little resemblance to the industrial laborer envisioned by the framers of the National Labor Relations Act.[97] The advent of the athlete-agent corporate bargaining entity[98] has rendered such comparisons obsolete. Traditional labor and antitrust policy concerns consequently take on a new and different twist in the professional sports setting.[99]

The task of unraveling these unique policy considerations will fall on the United States District Court for the Southern District of New York. That court has retained exclusive jurisdiction for all disputes arising out of the Oscar Robertson settlement agreement.[100] The existing NBA-Players Association collective bargaining agreement is a modification of that proceeding.[101] Insofar as judicial pronouncements are to be weighed, it should be recognized that this court will be the ultimate trier of fact in any future salary cap litigation.[102]

B. The Mackey *Criteria Applied to the Salary Cap Agreement*

In immunizing certain union-employer agreements, *Mackey* strikes a shorthand balance of competing policy considerations.[103] *Mackey's* requirements are cumulative: each prong must be satisfied before antitrust immunity will

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apiece. Welling & Tasini, *supra* note 66, at 73. "In dollars and cents, he's one of the . . . impact players" who will sell tickets and generate (other) revenue before he blocks a shot or gets a rebound," says Carl Sheer, General Manager of the San Diego (now Los Angeles) Clippers. Wash. Post, May 12, 1985, (Sports), at 1 (elec. ed.). NBA officials expect Ewing to pump league interest, make franchises more valuable and further glamorize the league in the eyes of advertisers, investors and the media. *Ewing Goes to New York, supra;* Welling & Tasini, *supra* note 66, at 74.

Ewing's worth to Georgetown University, his alma mater, recently was documented at over twelve million dollars. During Ewing's four year stay at Georgetown, attendance and television revenues tripled, admissions soared, fund raising rose dramatically and sales of Georgetown T-shirts and other university paraphernalia skyrocketed. Louisville Courier-Journal, Dec. 27, 1985, at D-4, col. 1. The combined effect of these increases vividly demonstrates the product market qualities of today's superstar athlete.

97. 29 U.S.C. §§ 151-68 (1982).

98. For a brief overview of this topic, see Shulruff, *The Football Lawyers,* 71 A.B.A.J., Sept. 1985, at 45-47; Ward, *Managing the Sports Stars,* SKY, Aug. 1985, at 32-39.

99. Top draft choices, in some sports, are accustomed to receiving upwards of forty million dollars in compensation. Shulruff, *supra* note 98, at 45-47; Ward, *supra* note 98, at 36. *See also supra* note 73. Considered alongside endorsement revenues, these figures suggest that today's top round draft picks are themselves commercial entities deserving of Sherman Act protection. For an interesting discussion on this point, see Note, *supra* note 4, at 699.

100. Robertson v. NBA, 72 F.R.D. 64, 69 (S.D.N.Y. 1976) (Carter, J.), *aff'd,* 556 F.2d 682 (2d Cir. 1977).

101. Memorandum of Understanding, *supra* note 10.

102. This fact takes on critical significance because Judge Carter already has resolved several of the key issues involved in a labor exemption analysis. *Robertson,* 389 F.Supp. at 881-90. The importance of *Mackey,* and McCourt v. California Sports, Inc. 600 F.2d 1193 (6th Cir. 1979), the only circuit court treatment of the subject, correspondingly is narrowed.

103. *Mackey,* 543 F.2d at 614-15.

attach.[104] As will be demonstrated, the salary cap is unable to pass muster under two of the three prongs of the standard. The remaining criterion, the mandatory subject requirement, is an irrelevance, unsupported by case law and inapplicable to the salary cap analysis.

1. The Mandatory Subject Criterion[105]

Mandatory subjects of collective bargaining include wages, hours and other terms and conditions of employment.[106] Section 8(d) of the NLRA[107] imposes a good faith duty on employers and unions to bargain collectively with respect to these matters.[108] Section 8(d) does not, however, compel either party to alter its initial stance on an issue.[109] These conflicting commands often provide statutory impetus for industrial stalemate. Incorporating the mandatory subject standard into the balancing equation therefore leads to somewhat anomalous results. This is especially true considering the industry involved and the subject matter under review. Wage negotiation in professional sports traditionally has been removed from the collective bargaining process.[110] Player's salaries are negotiated individually, not through union efforts.[111] It seems absurd to condition a grant of immunity on a subject in which labor interests clearly are lacking: individual salary negotiation. Yet this is precisely what *Mackey's* mandatory subject indicia attempt to accomplish.

More importantly, however, the mandatory subject criterion runs counter to existing case law. In support of this requirement, the Eighth Circuit, in *Mackey,*[112] provides two non-specific citations to *UMW v. Pennington*[113] and *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*[114] These holdings, however, contain scant authority for exempting mandatory subjects. Justice White, in fact, explicitly rejected that suggestion, stating that "an agreement resulting from union-employer negotiations is [not] auto-

104. *Id.* at 614.
105. *Id.*; *see supra* text accompanying note 19.
106. 29 U.S.C. § 158(d) (1980).
107. *Id.* at §§ 151-69.
108. *Id.* at § 158(d), in relevant part, provides:
> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation *does not compel either party to agree to a proposal or require the making of a concession* . . . . (emphasis added).

109. *Id. See also McCourt,* 600 F.2d at 1200, for an interpretation of this provision.
110. *See* L. SOBEL, PROFESSIONAL SPORTS AND THE LAW 303, 324 (1977).
111. *Id.*
112. *Mackey,* 543 F.2d at 614.
113. 381 U.S. 657 (1965).
114. 381 U.S. 676 (1965).

matically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless of the subject or the form and content of the agreement."[115]

Judge Carter, in *Robertson v. National Basketball Association,*[116] also ridiculed the importance of a mandatory subject classification.[117] Echoing Justice White's sentiments, Judge Carter stated that "there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws."[118] Dismissing the league's labor exemption argument, Judge Carter stressed that "'[m]andatory subjects of collective bargaining' do not carry talismanic immunity from the antitrust laws."[119] He concluded by labeling the mandatory subject inquiry an irrelevance, emphasizing that its use obscured the critical interests at stake.[120]

McCourt v. California Sports, Inc.[121] represents the only appellate court application of the *Mackey* criteria outside the Eighth Circnit.[122] The Sixth Circuit, in *McCourt,* reversed the lower court's denial of the labor exemption by a two to one margin.[123] In a powerful dissent, Chief Judge Edwards denigrated the siguificance of a mandatory subject classification. Like Judge Carter in *Robertson,* Chief Judge Edwards characterized the mandatory subject inquiry as wholly illusory.[124] Explicitly rejecting *Mackey's* mandatory subject criterion, Chief Judge Edwards pointed out the reliance on that

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115. *Pennington,* 381 U.S. at 664-65. Justice Goldberg, in a separate opinion which served as a dissent in *Pennington* and a concurrence in *Jewel Tea,* argued for blanket exemption of all negotiations concerning mandatory subjects of bargaining. 381 U.S. at 697. His reasoning, however, never has been adopted by a majority of the United States Supreme Court. Even Justice Goldberg recognized that:

> [t]he direct and overriding interest of unions in such subjects as wages, hours, and other working conditions, which Congress has recognized in making them subjects of mandatory bargaining, is clearly lacking where the subject of the agreement is *price-fixing* and market allocation. Moreover, such activities are at the core of the type of anticompetitive commercial restraint at which the antitrust laws are directed.

Jewel Tea, 381 U.S. at 732-33 (emphasis added).

116. *Robertson* challenged an alleged merger between the NBA and the ABA, and attacked as illegal under the Sherman Act various NBA practices including the player draft, the option clause in the uniform player contract and the NBA's compensation rule. 389 F.Supp. at 873-76.

117. *Id.* at 886-89.

118. *Id.* at 888 (quoting *Pennington,* 381 U.S. at 664-65) (emphasis omitted).

119. *Robertson,* 389 F. Supp. at 888.

120. *Id.* at 889.

121. 600 F.2d 1193 (6th Cir. 1979).

122. This excludes, of course, the cursory review in Wood v. NBA, 602 F. Supp. 525 (S.D.N.Y. 1984). *McCourt* involved an unsuccessful player challenge to the inter-team compensation scheme embodied in the National Hockey Lcague's reserve system. 600 F.2d at 1195-97.

123. McCourt v, California Sports, Inc. 460 F. Supp. 904 (E.D. Mich. 1978).

124. *McCourt,* 600 F.2d at 1215-16 (Edwards, C. J. dissenting).

subject ignores the crucial policy concerns underlying organized labor's special exemption from antitrust prosecution.[125]

The mandatory subject inquiry is an improvident one. In the context of professional basketball and the salary cap, labor interests are not sufficiently implicated to warrant the inclusion of the mandatory subject criterion in the balancing framework. Common sense, statutory construction, industry practice and pertinent case law all dictate against its application. The mandatory subject requirement, therefore, should be omitted from the analysis.

2. The Third Party Effect Criterion

The salary cap primarily affects parties outside the immediate bargaining unit:[126] potential first round draft choices who are not yet members of the NBA and are not parties to the NBA-Players Association collective bargaining agreement.[127] The prospective employee-future bargaining unit relationship most frequently is encountered in the operation of the annual player draft.[128] By rough analogy, the draft typically is likened to its distant industrial cousin, the hiring hall,[129] a device traditionally favored by courts.[130] In the hiring hall context, the interests of prospective employees are considered legitimate subjects of union concern.[131] Unions, as exclusive bargaining representatives, thus may bargain away these prospective employees' rights.

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125. *Id.* Chief Judge Edwards explained that:

> [i]t is easy to postulate situations where the profit interests of capital and the wage-hour interests of labor could be mutually served by introducing into collective bargaining agreements restrictions upon competition which are greatly contrary to the public interest and have nothing to do with the labor interests protected by the Clayton and Norris-LaGuardia Acts. In two instances where there was labor-management agreement . . . the Supreme Court struck down the restrictive practices. *Allen Bradley Co. v. Local 3, IBEW,* 325 U.S. 797 (1945); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965).

Id.

126. *See supra* text accompanying note 19.

127. *See infra* text accompanying note 146.

128. Player draft systems have sparked considerable academic debate. The legality of the annual player draft is beyond the scope of this Note. For an interesting discussion of that topic, see J. WEISTART & C. LOWELL, THE LAW OF SPORTS 553-54 (1979); McCormick & McKinnon, *supra* note 4; Roberts & Powers, *supra* note 4, at 455-64.

129. Hiring hall arrangements sometimes are incorporated in union-employer collective bargaining agreements. They provide the employer with an exclusive pool of skilled labor. The union-operated hiring hall refers job applicants to employers on the basis of several factors including work experience, seniority and residency status. Hiring halls often have been attacked as discriminatory employment mechanisms. The Supreme Court generally has been unreceptive to these challenges. *See, e.g.* Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961); Houston Chapter Assoc. Gen. Contractors v. NLRB, 143 N.L.R.B. 409 (1963), *enforced* 349 F.2d 449 (5th Cir. 1965), *cert. denied,* 382 U.S. 1026 (1966). *See also* J. WEISTART & C. LOWELL, *supra* note 128, at 562-63.

130. *See Teamsters,* 365 U.S. 667; *Houston Chapter,* 143 N.L.R.B. 409; Mountain Pacific Chapter, Assoc. Gen. Contractors, 119 N.L.R.B. 883 (1957).

131. *Houston Chapter,* 143 N.L.R.B. at 412.

Commentators have seized upon this rationale to condone the obvious third party repercussions of the player draft.[132] An identical argument would be forthcoming with respect to the salary cap's impact on top draft choices.

Whether top draft choices should be analogized to prospective employees in the hiring hall sense is an issue of uncertain dimension. From an antitrust perspective, this argument ignores reality and overlooks the unique product characteristics of today's superstar athletes.[133] The product market in professional basketball is individual player services.[134] The salary cap represents a significant intrusion on the marketing of those services.[135] Competition in the product market is restrained, thereby inviting antitrust scrutiny. The hiring hall decisions are completely inapposite. They are not concerned with competition in the product market, but instead involve labor market disputes and labor law principles. Applying these concepts to the NBA would constitute an unwarranted extension of the industry-specific labor practice.

From a labor law perspective, the hiring hall analogy is deceptively appealing. In that context, the market in professional basketball consists of active and prospective employees. The Players Association is the exclusive bargaining representative for these employees. The interests of top round draft choices correspondingly are subsumed within this classification. The salary cap consequently does not affect parties outside the collective bargaining relationship. Under this logic, *Mackey's* second indicium therefore would be satisfied.[136]

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132. J. WEISTART & C. LOWELL, *supra* note 128, at 553-54; Hobel, *The Expiration of Collective Bargaining Agreements in Professional Sports,* 57 N.Y.U.L. REV. 164, 181 n.65 (1982).

133. *See supra* notes 94-99 and accompanying text.

134. *See supra* note 94 and accompanying text.

135. *See infra* text accompanying note 202.

136. This exact logic implicitly was adopted by the D.C. District Court in Zimmerman v. National Football League, 632 F. Supp. 398 (D.D.C. 1986). *Zimmerman* involved an unsuccessful player challenge to the National Football League's ("NFL") supplemental draft. That draft impacted players under existing contracts with fledgling United States Football League ("USFL") franchises. Plaintiff, a former number one NFL draft selection, contended that the supplemental draft constituted a concerted refusal to deal and a group boycott in violation of section one of the Sherman Act.

Rejecting that claim, Judge Parker held that the labor exemption insulated defendant league from Sherman Act scrutiny. In so doing, Judge Parker summarily dismissed plaintiff's argument that prospective NFL members represent third parties outside the collective bargaining relationship. Relying on enigmatic dictum in Smith v. Pro Football, Inc., 420 F. Supp. 738, 744 (D.D.C. 1976), *aff'd in part, rev'd in part,* 593 F.2d 1173 (D.C. Cir. 1978), and placing heavy emphasis on the *Wood* cursory labor exemption analysis, *supra* note 9, Judge Parker stated that "[n]ot only present but potential future players for a professional sports league are parties to the bargaining relationship. . . . As a potential NFL player, Zimmerman was part of the collective bargaining relationship between the NFLPA and the NFL to the extent necessary for purposes of the labor exemption." *Zimmerman,* 632 F. Supp. at 405.

Judge Parker's comments, while squarely on point, suggest a blatant misunderstanding of relevant market operation. *See infra* notes 137-50 and accompanying text. *See also supra* note 9 and accompanying text.

This reasoning is critically flawed in three respects. First, in the professional basketball industry, the Players Association is not the exclusive bargaining representative for NBA employees. The vast majority of labor-management relations are conducted on an individual level, through the athlete's personal bargaining representative, the player agent.[137] In similar fashion, player associations in professional sports typically are concerned with fringe benefits and side issues, not maximum salary constraints. Individual wage negotiation is withdrawn from the collective bargaining process.[138] This removal constitutes an industry-wide recognition of the unique product market characteristics of the professional athlete.[139] Wage negotiation is considered the exclusive province of the athlete-agent corporate bargaining entity. In these matters, antitrust policy should prevail.

Finally, to follow the hiring hall example and include first round draft choices in the collective bargaining unit seems anomalous. A cross-industry analysis demonstrates the futility of this extension. Hiring halls are designed to "eliminate wasteful, time consuming and repetitive searching for jobs by individual workmen and haphazard uneconomical searches by employees."[140] The player draft and the salary cap serve no analogous purpose. These devices instead create obstacles in an adjacent product market; they *impose employment barriers,* rather than facilitate job scarches.

Hiring hall arrangements also do not bind the potential worker. The prospective employee may or may not accept the job to which he is referred.[141] No such option exists in professional basketball. Top draft choices are presented with a take-it-or-leave-it employment offer. They may not decline proffered employment simply because the drafting team exceeds cap limits.[142] The drafted star is unable to market his talents elsewhere. The NBA has a monopoly on professional basketball; there is but one relevant market.

Hiring halls, moreover, are industry-specific employment mechanisms. Judicial endorsement has been limited to settings where the collective bargaining process cannot await the presence of workers on the jobsite. In these industries employment turnover is frequent, job opportunities fluctuate in response to seasonal demand and the employee is frequently a stranger to the area where the work is to be performed.[143] Active and prospective

137. L. SOBEL, *supra* note 110, at 304.

138. *Id.* at 324. *See supra* note 110 and accompanying text.

139. *See supra* notes 94-99 and accompanying text.

140. *Mountain Pacific,* 119 N.L.R.B. at 896 n.8.

141. Lowell, *Collective Bargaining and the Professional Team Sport Industry,* 38 LAW & CONTEMP. PROBS. 3, 34-35 (1973).

142. Under the existing collective bargaining agreement the draft pick may refuse to negotiate, sit out one year and re-enter the following year's draft. There is, of course, no guarantee that the exact procedure will not be duplicated. In the interim, the top round pick is forced to sit idle while his market value diminishes and his skills erode. These were the precise concerns in *Wood,* 602 F. Supp. 525. Brief for Leon Wood at 5-6, *See supra* note 85 and accompanying text.

employees are one and the same. These workers share a common interest in securing industry-wide wage standards. In stark contrast, employment conditions in the NBA are relatively permanent. Unlike their industrial counterparts, top draft choices frequently remain with one club for the duration of their careers. Long-term contracts are the norm and players typically are identified with particular organizations. In addition, active players and top round draft choices do not share common wage interests. Under cap requirements, salary concerns of active and prospective employees are diametrically opposed. Satisfying demands of top draft picks means relegating interests of active employees to the point of trade, waiver or unconditional release.[144]

For all of the foregoing reasons, acceptance of the hiring hall-prospective employee analogy seems inappropriate. Any resemblance between the first round draft choice and the prospective employee in the hiring hall sense is purely superficial. The question of whether prospective NBA employees are parties to the collective bargaining relationship, furthermore, has been resolved.[145] Judge Carter has explicitly acknowledged that draft choices are third parties outside the collective bargaining relationship.[146]

The salary cap works to the detriment of an adjacent product market: top round draft choices. The impact on that market can be devastating, as the following hypothetical example illustrates. Patrick Ewing, instead of being selected by the New York Knickerbockers (a team with substantial cap flexibility) is picked by the Los Angeles Clippers (a team substantially above cap limits). Ewing, therefore, is forced to sign a one year, $75,000 contract.[147] In the exhibition season Ewing sustains a career-ending injury. Instead of having a guaranteed $31.2 million deal,[148] Ewing is left with $75,000 and a

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143. *Teamsters,* 365 U.S. at 672; *Houston Chapter,* 143 N.L.R.B. at 412.

144. The salary cap undoubtedly creates an incentive for teams at established cap levels to cut high-salaried veterans in favor of blue-chip draft prospects. Note, *The National Basketball Association Salary Cap: An Antitrust Violation?,* 59 S. CAL. L. REV. 157, 177 (1985). As the *Wood* litigation unfolded, this consideration became patently obvious. *See supra* note 9.

In *Wood,* plaintiff sought a four year, $1 million guaranteed contract. The Philadelphia 76ers initially balked at this request. According to Pat Williams, general manager of the club, cap constraints dictated that plaintiff receive only a one year $75,000 contract. Williams, however, suggested that the Sixers would attempt "to move some of its end of the bench people" and thereby "free up more first year money for Leon." Affidavit of Fred L. Slaughter, Counsel for Plaintiff, at 3, September 7, 1984.

An ensuing roster shuffle bore out Williams' suggestion. On September 28, 1984, the Sixers announced that plaintiff had signed a four year guaranteed contract reportedly worth $1.1 million. Wash. Post, Sept. 29, 1984, Sports at 2 (elec. ed.). To meet plaintiff's salary demands and squeeze below cap limits, the Sixers released free-agent guard Franklin Edwards ($126,000 contract) and traded reserve forward Leo Rautins ($165,000 contract) to the Indiana Pacers. McManis, *The NBA is Learning to Live With the Salary Cap,* L.A. Times, Oct. 25, 1984, pt. 3, at 1, col. 4.

145. *Robertson,* 389 F. Supp. at 889.

146. *Id.*

147. *See supra* note 11 and accompanying text.

148. *See supra* note 73.

shattered dream. The union-negotiated salary cap deprives Ewing of his prospective fortune. As a party outside the collective bargaining relationship, Ewing undeniably has been affected by its terms.[149]

The salary cap poses similar problems for every collegiate superstar drafted by a team at or near the defined cap limit.[150] These individuals are denied the opportunity to market their unique services. The third party effect is obvious: the restraint on trade does not primarily affect the parties to the agreement. *Mackey's* second prong, therefore, cannot be met.

3. The Bona Fide, Arm's-Length Bargaining Criterion

The salary cap provision embodied in the 1983 Memorandum of Understanding[151] also cannot satisfy the final requirement of the *Mackey* standard.[152] This criterion presupposes lawful bargaining objectives.[153] The salary cap is a cost-reduction tactic which eliminates competition in the product market; it is analogous to per se pricing.[154] The labor exemption never was intended to immunize such agreements. There clearly are limits to the number of antitrust violations to which unions and employers may agree.[155] The labor exemption may not "be utilized as a cat's paw to pull employer's chestnuts out of the antitrust fires."[156] It is well established that "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units."[157] The language of the case law could not be more exact.

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149. Such a hypothetical is not out of the ordinary. *Smith,* 593 F.2d 1173, involved an identical factual scenario. In that instance, Smith prevailed in his antitrust claims against league officials and the then-existing NFL draft. *Id.* at 1187.

150. These precise considerations recently were obviated by the tragic death of Len Bias, University of Maryland All-American and number two selection in the 1986 NBA draft. Bias was picked by the defending NBA champion Boston Celtics. Saddled with several long term contract obligations, the Celtics admittedly were straitjacketed by cap requirements. These limits would have drastically reduced Bias' earning capacity for the 1986-87 NBA season. *Aftermath of Bias Tragedy: Questions Left by his Death,* USA Today, June 20, 1986, at 8, col. 4.

Cap constraints are wreaking similar havoc on contract negotiations between the New York Knickerbockers and the number six selection in the 1986 NBA draft, University of Kentucky All-American Kenny Walker. Walker's agent, Larry Fleischer, remains adamant in his refusal to accept the Knick's cap-deflated offer. The Indianapolis Star, Sept. 26, 1986, at 41, col. 3. Fleischer, who doubles as general counsel for the Players Association, conceivably may be setting the stage for another round of salary cap litigation. See *supra* note 9. On several prior occasions, Fleischer has voiced stern opposition to the salary cap. New York Times, Feb. 26, 1986, at 24, col. 1.

151. Memorandum of Understanding, *supra* note 10, at § III C(2) and 2(f).

152. *See supra* text accompanying note 19.

153. *See supra* note 115 and text accompanying note 118.

154. *See infra* text accompanying note 202.

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

156. *Id.* (quoting United States v. Women's Sportswear Mfrs. Assn. 336 U.S. 460, 464 (1949)).

157. *Pennington,* 381 U.S. at 665.

In other contexts, moreover, there are specific guidelines which define the permissible scope of collective bargaining. The Fair Labor Standards Act, for example, provides for maximum work weeks and minimum pay scales which no collective bargaining agreement may undermine.[158] The Federal Occupational Health and Safety Act similarly stipulates minimum working standards that may not be bargained away.[159] Employer-union agreements which derogate from these limits are subject to appropriate challenges.

The labor exemption is not a license to impose illegal market restraints.[160] Union-employer agreements may not escape antitrust scrutiny under the guise of national labor policy. The salary cap itself is inconsistent with bona fide arm's-length negotiation; *Mackey's* final requirement thus cannot be satisfied.

Mackey's application undermines the labor exemption defense. *Mackey,* however, simply represents a crude balance of divergent policy considerations. In relation to the salary cap, it is a particularly cumbersome vehicle to strike the policy balance. In that respect, Justice White's *Jewel Tea* framework[161] is far better equipped to handle the peculiar intricacies of the professional basketball industry.

C. *The Salary Cap Under Justice White's Balance*

Applying Justice White's framework to the salary cap agreement reinforces the *Mackey* result and highlights the critical policy concerns.[162] The elimination of competition in the market for top round draft choices represents the antitrust side of Justice White's balance. The salary cap is professional basketball's answer to price fixing[163] which, in other industries, has been condemned as per se violative of the Sherman Act.[164] In other sports contexts, moreover, the salary cap has been explicitly rejected as the most blatant form of market intrusion.[165] The anticompetitive repercussions of the cap are plain. The antitrust side of the scale is weighted accordingly.

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158. 29 U.S.C. § 206 (1982).

159. 29 U.S.C. §§ 651-78 (1982).

160. *See supra* note 115 and text accompanying note 118.

161. *See supra* notes 35-61 and accompanying text. It should be noted that a test nearly identical to Justice White's balancing approach implicitly was endorsed by the *Robertson* court. 389 F. Supp. at 889.

162. *See supra* notes 35-61 and accompanying text.

163. *See infra* text accompanying note 202.

164. *See infra* text accompanying note 201.

165. Reacting to an NBA-styled salary cap proposal, Donald Fehr, executive director of the Major League [Baseball] Players Association, stated that:

> [W]hat this [salary cap] proposal does is functionally eliminate the free agent market for players. . . . Basically, what they [the owners] are saying is that they will control salaries and there won't be a market for free agents. What this means is that they will tell baseball players, "You will be denied the right to seek your value on the free market. . . ." It's not ordinarily the way one does business in this country.

Wash. Post, May 21, 1985, Sports, at 1 (elec. ed.).

The labor portion of Justice White's balance incorporates two related national labor policies:[166] encouraging collective bargaining and advancing union interests. Union interests clearly are not being served by the cap's operation. The cap purportedly was designed to maximize players' free agency options.[167] Under the cap each team theoretically is required to pay a minimum amount per year in salaries and benefits. This minimum floor feature was intended to force teams below the cap to bid on free agents and therefore raise salaries across the board.[168] This has not occurred. The league instead unilaterally has interpreted the minimum floor feature to require the teams, as a group, to pay the minimum in salaries and benefits.[169] As a result, any incentive for teams below cap limits to pursue high-priced free agents has been destroyed.[170] As expected, the free agent market is at a standstill.[171] Rumors of collusion abound.[172] Union interest in the cap, consequently, is at a nadir.[173] The anticipated union benefit has not materialized.[174] The cap clearly works to the disadvantage of top rookies *and* free agents.

The second half of the labor scale, encouraging collective bargaining, is lacking in the substance if not in form. The cap obviously relates to wages, a mandatory subject of collective bargaining.[175] In the typical industrial setting this fact would "weigh heavily in favor of antitrust exemption for agreements on those subjects."[176] In the professional basketball context,

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166. *See supra* text accompanying notes 35-37.

167. Affidavit of Lawrence A. Fleischer, General Counsel for National Basketball Players Association, at 6, 81 Civ. 6582 (RLC), Sept. 21, 1984.

168. *See supra* notes 75-79 and accompanying text.

169. *See supra* text accompanying notes 78-80.

170. *Id.* Instead of the Utah Jazz, for example, being forced to add another million dollars to its $1.9 million payroll, the league is saying that the money can be picked up from another team with an already overinflated payroll. Cotton, *NBA: The Boredom Is Over,* Wash. Post, Oct. 25, 1984, Sports, at 1 (elec. ed.). *See supra* text accompanying note 79.

171. Cotton, *supra* note 170, at 1.

172. *Id. See also supra* notes 69-70 and accompanying text.

173. Welling & Tasini, *supra* note 66, at 78.

174. This situation comes remarkably close to a hypothetical posed by Justice White in *Pennington,* 381 U.S. 657. *See supra* notes 41-50 and accompanying text. There, White remarked:

> If the UMW in this case, in order to protect its wage scale by maintaining employer income, had presented a set of prices at which the mine operators would be required to sell their coal, the union and the employers who happened to agree could not successfully defend this contract provision if it were challenged under the antitrust laws by the United States or by some party injured by the arrangement. . . . In such a case, the restraint on the product market is direct and immediate, is of the type characteristically deemed unreasonable under the Sherman Act and the *union gets from the promise nothing more concrete than a hope for better wages to come.*

Pennington, 381 U.S. at 663 (emphasis added). In the instant setting, a *Pennington*-type conspiracy directed against incoming draft choices is well within the realm of possibilities. These were the precise allegations in *Wood,* 602 F. Supp. 525. *See supra* note 9. *See also supra* note 70 and accompanying text.

175. *See supra* notes 105-08 and accompanying text.

176. *Jewel Tea,* 381 U.S. at 689.

however, such a classification is irrelevant.[177] Wage negotiation in professional basketball is removed from the collective bargaining process;[178] collective bargaining concerns correspondingly are limited. As was demonstrated under *Mackey,* conditioning a grant of immunity on a subject traditionally reserved to individual negotiation is highly incongruous.[179]

Serious arm's-length bargaining, moreover, assumes lawful objectives.[180] The salary essentially is a price fixing scheme.[181] The policy of the labor exemption is not served by encouraging collective bargaining on illegal subject matters.[182] As Justice Black noted in *Allen Bradley Co. v. Electrical Workers Local 3:*[183]

> It would be a surprising thing if Congress, in order to prevent a misapplication of that [antitrust] legislation to labor unions, had bestowed upon such unions complete and unreviewable authority to aid business groups to frustrate its primary objective. For if business groups, by combining with labor unions, can fix prices . . . it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves.[184]

These sentiments were echoed in *Kapp v. National Football League.*[185] *Kapp* concerned a successful player challenge to the then-existing NFL draft, standard contract rules and tampering provisions. Kapp asserted that these measures were unreasonable restraints of trade in violation of the Sherman Act.[186] In granting plaintiff's summary judgment motion, Judge Sweigart emphasized there are

> 'limits to the antitrust violations to which labor and management can agree.' We are of the opinion that, however broad may be the exemption from antitrust laws of collective bargaining agreements dealing with wages, hours and other conditions of employment, that exemption does not and should not go so far as to permit immunized combinations to enforce employer-employee agreements which, being unreasonable restrictions on an employee's right to freely seek and choose his employment, have been held illegal on grounds of *public policy* long before and entirely apart from the antitrust laws.[187]

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177. *See supra* text accompanying notes 116-20.
178. *See supra* text accompanying notes 110-11.
179. *See supra* text accompanying notes 110-12 and text accompanying notes 137-40.
180. *See supra* notes 115-18 and accompanying text.
181. *See infra* text accompanying note 202.
182. Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 622 (1975).
183. 325 U.S. 797 (1945).
184. *Id.* at 809-10.
185. 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd,* 586 F.2d 644 (9th Cir. 1978), *cert. denied,* 441 U.S. 907 (1979).
186. *Id.* at 78.
187. *Id.* at 86 (emphasis in original), quoting *Flood,* 407 U.S. at 294 (Marshall, J. dissenting). Judge Sweigart's broad condemnation has been roundly criticized by commentators. It nevertheless is extremely useful in demonstrating that union-employer agreements may not ignore other bodies of law. In that respect, it is the logical extension of policy cautions embodied in the labor exemption line of cases. *See supra* notes 115-18 and accompanying text.

The salary cap clearly falls within this proscription. It is a patently unreasonable restraint of trade. Concluding that the salary cap negotiations were the type of collective bargaining envisioned by the framers of the National Labor Relations Act[188] elevates form over substance. The collective bargaining concern underlying the labor side of Justice White's balance cannot be satisfied.

A situation therefore exists where neither national labor policy is advanced by the 1983 Memorandum of Understanding. The corresponding product market impact is "apparent and real."[189] Under these circumstances the resulting balance tips heavily in favor of antitrust concerns.[190] The labor exemption consequently fails to shield the salary cap agreement from Sherman Act standards.

IV. THE SALARY CAP UNDER SECTION ONE OF THE SHERMAN ACT

Section one of the Sherman Act,[191] in pertinent part, provides that "every contract, combination or conspiracy in restraint of trade or commerce among the several states . . . is declared to be illegal."[192] Attempts at dealing with section one allegations fall into two distinct evaluative schools: per se treatment[193] and rule of reason analysis.[194]

The rule of reason is the standard traditionally applied to the majority of anticompetitive practices challenged under section one.[195] A rule of reason analysis generally entails a detailed factual inquiry into the alleged anticompetitive behavior. Courts look to such factors as the particular industry involved, the history of the restraint and the reasons why it was adopted in applying a rule of reason test.[196]

There exists, in contrast, a limited number of practices "which because of their peruicious effect on competition and lack of redeeming value are conclusively presumed to be unreasonable and therefore illegal"[197] without the necessity for an elaborate factual inquiry into the alleged anticompetitive behavior. These per se categories of proscribed behavior include tying arrangements,[198] group boycotts,[199] market allocations[200] and price fixing.[201]

188. 29 U.S.C.A. §§ 151-69 (West 1973, 1978, Supp. 1981 & 1980 Laws Special Pamphlet). *See also supra* note 2.
189. *Jewel Tea,* 381 U.S. at 691.
190. *See supra* text accompanying notes 59-61.
191. 15 U.S.C. § 1 (1982).
192. *Id.*
193. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).
194. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).
195. Continental T.V. Inc. v. G.T.E. Sylvania, Inc., 433 U.S. 36, 59 (1977).
196. *Chicago Bd.*, 246 U.S. at 238.
197. *Northern Pac. Ry.*, 356 U.S. at 5.
198. Int'l Salt Co. v. United States, 332 U.S. 392 (1947).
199. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).
200. United States v. Topco Assocs., 405 U.S. 596 (1972).
201. United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940).

The business of professional basketball involves the acquisition of talented players. This primarily is accomplished through the player draft system. Within this framework, the salary cap is designed to lower the cost of doing business. It restrains competitive bidding for top round draft choices. League members effectively have eliminated competition *inter se* to reduce expenses. This tactic is analogous to price fixing. A per se analysis ordinarily would be the appropriate evaluative tool.[202]

In the professional sports industry, however, courts consistently have cautioned against application of per se standards.[203] The unique nature of the business militates against rigid adherence to per se rules fashioned in other contexts.[204] There also exists a well established industry exception to per se scrutiny which, if applicable, mandates a rule of reason inquiry.[205] Professional basketball, arguably, fits that exception.[206] These combined considerations render per se treatment inappropriate. The salary cap thus is entitled to a rule of reason analysis.

A. The Rule of Reason Analysis

The critical focus of the rule of reason test is "whether the restraint imposed is justified by legitimate business purposes and is no more restrictive than necessary."[207] The express objectives of the salary cap are to preserve the financial integrity of the NBA and to improve competitive balance by promoting the ability of financially weaker teams to compete on a more equal basis with financially stronger teams.[208]

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202. *Id.*

203. Los Angeles Memorial Coliseum Com'n v. NFL, 726 F.2d 1381, 1387 (9th Cir.), *cert. denied,* 105 S. Ct. 397 (1984); Mackey v. NFL, 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 503 (E.D. Pa. 1972).

204. *Mackey,* 543 F.2d at 619.

205. Silver v. New York Stock Exchange, 373 U.S. 341 (1963). To qualify for the *Silver* exception it must be demonstrated that:

> (1) The industry structure requires self-regulation.
>
> (2) The collective action is intended to (a) accomplish an end consistent with the policy to justify self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary.
>
> (3) The association provides procedural safeguards which assure that the restraint is not arbitrary and which furnish a basis for judicial review.

See United States Trotting Ass'n v. Chicago Downs Ass'n, 487 F. Supp. 1008, 1015-16 (N.D. Ill. 1980), *rev'd on other grounds,* 665 F.2d 781 (7th Cir. 1981); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1321 (D. Conn. 1977).

206. *Id.* The intricacies of the *Silver* exception are beyond the scope of this Note. For discussion purposes it is assumed that *Silver* would render per se treatment inappropriate. For an excellent overview of *Silver's* application in a professional sports context, see McCormick & McKinnon, *supra* note 4, at 421-36.

207. *Mackey,* 543 F.2d at 620.

208. Affidavit of Lawrence A. Fleischer, General Counsel, National Basketball Players Association, at 6, 81 Civ. 6582 (RLC) Sept. 21, 1984.

An examination of these dual policy goals reveals that neither is able to pass the rule of reason muster. The first justification, insuring financial stability, may be dismissed outright. The salary cap agreement cannot be saved by claims that the league would not survive in its absence. As the Supreme Court noted in *United States v. General Motors Corp.*:[209]

> exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators profit margins or their systems. . . .[210]

The NBA, moreover, unsuccessfully presented this identical argument in *Denver Rockets v. All-Pro Management, Inc.*[211] Judge Ferguson, in *Denver Rockets,* summarily rejected the financial necessity contention, stating that "this does not provide a basis for exemption from antitrust laws."[212] This view was reiterated in *Linseman v. World Hockey Association*[213] and impliedly adopted in *Robertson v. National Basketball Association.*[214]

The second justification underlying the salary cap also is deficient. The competitive balance argument previously has been rejected in two similar contexts. In *Mackey v. National Football League,*[215] a group of veteran NFL players successfully challenged the league's "Rozelle Rule."[216] This provision precluded a player from moving freely between teams upon the expiration of his contract. The NFL contended that elimination of the rule would destroy competitive balance throughout the league and "ultimately lead to diminished spectator interest, franchise failures and . . . the demise of the NFL."[217] The Eighth Circuit disposed of this argument, emphasizing that competitive balance could be achieved in some less restrictive manner.[218] The

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209. 384 U.S. 127 (1966).

210. *Id.* at 146.

211. 325 F. Supp. 1049 (C.D. Cal. 1971). In *Denver Rockets,* plaintiff basketball star successfully challenged the NBA's hardship rule. That rule required graduating high school seniors to wait four years before becoming eligible for the NBA draft.

212. *Id.* at 1066.

213. 439 F. Supp. 1315 (D. Conn. 1977). *Linseman* concerned the legality of a World Hockey Association ("WHA") rule prohibiting hockey players under twenty years of age from competing in the WHA. The league argued that the rule was necessary for the financial survival of minor league systems feeding into the WHA. Rejecting that contention, Judge Clarie stated that "the antitrust laws do not admit of exceptions due to economic necessity." *Id.* at 1322.

214. 389 F. Supp. 867 (S.D.N.Y. 1975). Judge Carter emphasized that "because [financial] survival necessitates some restraints . . . does not mean that insulation from the reach of the antitrust laws must follow. Less drastic protective measures may be the solution." *Id.* at 892. For similar holdings in other industries, see Knutson v. Daily Review, Inc., 383 F. Supp. 1346 (N.D. Cal. 1974) (newspaper distribution), *aff'd in part, rev'd in part,* 548 F.2d 795 (9th Cir. 1976), *cert. denied,* 433 U.S. 910 (1977) and United States v. Nat'l Wholesale Druggist, 61 F. Supp. 590 (D.N.J. 1945) (pharmaceuticals).

215. 543 F.2d 606 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977).

216. *Id.* at 623.

217. *Id.* at 621.

218. *Id.* at 622.

Circuit Court for the District of Columbia, in *Smith v. Pro Football,*[219] similarly discarded the competitive balance contention.[220] *Smith* concerned a successful player challenge to the then-existing NFL player draft. The NFL asserted that the draft was necessary for competitive balance on the field.[221] Rejecting this theory, Judge Wilkey permanently laid to rest the competitive balance argument. He stated that:

> the purpose of antitrust analysis . . . is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of members of an industry . . . The NFL defenses, premised on the assertion that competition for player services would harm both the football industry and society are unavailing, there is nothing of procompetitive virtue to balance because the "Rule of Reason" does not support a defense based on the assertion that competition itself is unreasonable.[222]

The competitive balance defense realistically is nothing more than wishful thinking on the part of the NBA. Under the salary cap, pre-cap salaries are grandfathered;[223] teams that were far above present cap limits prior to the 1983 agreement remain in that position. The agreement essentially has locked certain teams into pre-1983 competitive bidding postures. It is not surprising that Los Angeles, Philadelphia and Boston, perennial league powerhouses, stand atop the league payroll charts. The rich are, in fact, getting richer. Aside from this paradox, the primary justification underlying the cap, that of promoting the ability of financially weaker teams to compete in the free agent market[224] is being thwarted by league fiat.[225] These combined considerations further demonstrate the inadequacy of the competitive balance argument.

The salary cap unreasonably restrains competition in the market for top round draft choices. Under a rule of reason analysis, this direct market restraint is not mitigated by legitimate business purposes. The salary cap provision embodied in the 1983 Memorandum of Understanding[226] therefore violates section one of the Sherman Act.[227]

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219. 593 F.2d 1173 (D.C. Cir. 1978), *modifying* 420 F. Supp 738 (1976).

220. *Id.* at 1197.

221. *Smith,* 420 F. Supp. at 745.

222. *Smith,* 593 F.2d at 1186-87 (quoting National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 696 (1978)).

223. Welling, Tasini & Cook, *Basketball: Business is Booming,* Bus. Wk. Oct. 28, 1985, at 78. This fact accounts for the great disparity among current NBA payrolls. The salaries of teams' unsigned free agents also do not count against cap limits. *Id.* This partially explains how the New York Knickerbockers were able to offer Patrick Ewing the bank without violating cap requirements. *See supra* note 73.

224. *See supra* text accompanying note 208.

225. *See supra* text accompanying notes 78-81 and notes 168-71 and accompanying text.

226. Memorandum of Understanding, *supra* note 10.

227. 15 U.S.C. § 1 (1982).

CONCLUSION

The collective bargaining process often yields unwieldy results, as evidenced by the 1983 salary cap agreement. Proponents of the cap claim that it represents a landmark labor triumph unprecedented in the annals of professional sports. Detractors argue that the cap constitutes an indiscriminate market restraint imposing severe hardships on top round draft choices. Reconciling these conflicting attitudes is a matter of balancing antitrust concerns against labor policy objectives. The crucial inquiry becomes to what extent is the product of the collective bargaining process immune from antitrust scrutiny. The professional basketball industry provides an interesting factual backdrop to grapple with this ubiquitous policy balance.

The *Mackey*[228] framework was developed to handle this labor-antitrust tug of war. Despite its limits[229] *Mackey* lays the groundwork for a critical appraisal of the salary cap agreement. Application of the *Mackey* standard renders the labor exemption unavailable.[230] Justice White's balancing framework supplements the *Mackey* analysis, reinforces its result and pinpoints the essential policy considerations.[231]

The salary cap agreement clearly violates section one of the Sherman Act.[232] A rule of reason analysis demonstrates that the cap's anticompetitive market consequences are not justified by legitimate business concerns.[233] At the next union negotiation, the Players Association has indicated that it will fight to end the cap.[234] Until that time, the salary cap will scream for judicial attention.

D. ALBERT DASPIN

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228. Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977).

229. *Mackey*'s attractiveness inheres in its ease of application. *Mackey*'s usefulness, however, is constrained by precisely the same feature. *See supra* text accompanying notes 105-26.

230. *See supra* notes 103-61 and accompanying text.

231. *See supra* notes 162-90 and accompanying text.

232. 15 U.S.C. § 1 (1982).

233. *See supra* notes 208-27 and accompanying text.

234. Welling, Tasini & Cook, *Basketball: Business is Booming,* BUS. WK. Oct. 28, 1985, at 78.

Discrimination in Asylum Law: The Implications of *Jean v. Nelson*

INTRODUCTION

U.S. immigration law grants the Attorney General discretionary authority to admit (parole) otherwise inadmissible aliens into the country in cases of emergency.[1] This parole statute does not explicitly prohibit the Attorney General from using race or national origin as a basis for denying parole to an alien. On June 26, 1985, the Supreme Court decided *Jean v. Nelson*,[2] a case that challenged the Attorney General's use of his parole discretion.

The Haitian petitioners, who were part of a large influx of undocumented and unadmitted aliens seeking asylum in the United States, were incarcerated by the Immigration and Naturalization Service ("INS") at various federal detention facilities pending disposition of their asylum applications. The Haitians claimed that, in denying them parole, the INS violated their rights under the equal protection clause of the fifth amendment by discriminating against them on the basis of race and national origin.[3] The case reached the Court after an appellate court ruled that the Haitians could not challenge the government's detention policy, since they had no constitutional rights with respect to admission and parole in the United States.[4]

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1. Immigration and Nationality Act § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A) (1982):
   > The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.
2. Jean v. Nelson, 105 S. Ct. 2992 (1985).
3. *Id.* at 2994.
4. The petitioners claimed that the INS violated the notice-and-comment rulemaking procedures of the Administrative Procedure Act (APA) by changing the policy of general parole for undocumented aliens seeking admission to a policy of general detention without parole for aliens who could not present a prima facie case for admission. They further alleged that this restrictive policy violated the equal protection guarantee of the fifth amendment. The district court held for the petitioners on the APA claim, thus invalidating the new policy and releasing over one thousand Haitians held in detention. However, the district court found that the petitioners had failed to prove discrimination based on race or national origin and therefore denied the equal protection claim. Louis v. Nelson, 544 F. Supp. 973 (S.D. Fla. 1982), *aff'd in part, rev'd in part sub nom.*, Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983), *vacated as moot in part on reh'g, rev'd in part on reh'g*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd*, 105 S. Ct. 2992 (1985).

   The Appellate Court Panel, in a strongly-worded opinion, affirmed the district court on the APA claim, and reversed on the equal protection claim finding that there had been