The N.F.L.'s Final Victory over Smith v. Pro-Football, Inc.: Single Entity - Interleague Economic Analysis

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THE N.F.L.'S FINAL VICTORY OVER Smith v. Pro-Football, Inc.: SINGLE ENTITY—INTERLEAGUE ECONOMIC ANALYSIS

The National Football League (N.F.L.) was established in July, 1919, in Canton, Ohio. Before its organization, there had been dozens of professional teams in the midwest and in upper New York state. The League, in its embryonic stage, was called the American Professional Football Association, and the price of a franchise in the new league was only twenty-five dollars. These early years were hectic. There were no schedules for fifteen years. Games were arranged whenever there was a possibility of a good gate, and players continually jumped teams for an extra payday.¹

Professional football has since expanded into a multi-million dollar business. In 1978 the N.F.L. got off to its best start in history. Its first round of fourteen games in early September drew a record opening attendance totaling 822,000, an average of about 58,700 per game.² The average player's salary was $55,000.00.³ The average annual gross revenue of an N.F.L. team was 8.9 million dollars, and the N.F.L. has negotiated a four year, 656 million dollar contract with the three national networks that will bring each of the twenty-eight teams more than five million dollars per year.⁴

As could be expected, the financial expansion of the N.F.L. has been accompanied by the promulgation of league rules to ensure league stability. These rules include several player service market restraints, which have been adopted by the N.F.L. to ensure competitive equality between the franchises. This note analyzes the validity of these restraints under the Sherman Antitrust Act in light of the recent decision of the District of Columbia Circuit Court of Appeals in Smith v. Pro Football, Inc.⁵ and presents a new approach to the economic structure of the N.F.L. which may validate the current restraints.

The first restrictive process is the "player draft,"⁶ which entitles the drafting team to the exclusive right to negotiate for the services of each player drafted by it. No other team is permitted to negotiate with the selected player without the consent of the drafting team. This prevents competitive bidding for the services of a drafted player.

Second, each player must sign a Standard Player Contract⁷ before a team

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³ Sports Illustrated, July 17, 1978, at 34.
⁵ 593 F.2d 1173 (D.C. Cir. 1978).
⁶ The N.F.L. draft, which has been in effect since 1935, is a procedure under which the negotiating rights to graduating college football players are allocated each season among the N.F.L. franchises, in inverse order of the club's standing, unless a club has traded away draft choices. The team with the poorest record during the preceding season has the first pick, the team with the next poorest record has the next choice, and so on until the past season's Super Bowl winner has picked last. At this point, the first round of the draft is completed. The procedure lasts seventeen rounds in all. N.F.L. Constitution and By-Laws §§ 14.3 and 14.5.
⁷ The Standard Player Contract is a preprinted contract issued by the league. In antitrust suits
may employ him.\textsuperscript{8} Under the contract, which extends to May 1 of the next year, the player agrees to comply with the N.F.L. Constitution and By-laws.

The third player service market restraint is the "tampering rule,"\textsuperscript{9} which prohibits a team from negotiating with any player under contract to any other team. The tampering rule and standard player contract restraints, taken together, effectively limit a player's time for negotiation to three months, since the contract extends to May 1 and most teams prefer to have player negotiations completed by the time summer camp begins.

Fourth, the "Rozelle Rule"\textsuperscript{10} essentially requires the club which signs a player from another team to compensate the player's former team. If the two clubs are unable to conclude mutually satisfactory arrangements, the commissioner will award compensation in the form of current players, future draft choices, or both, as he in his sole discretion deems fair and equitable. The Rozelle Rule restrains player mobility primarily because of its effect on prospective signing teams, which are reluctant to risk losing key players and valuable draft choices at the commissioner's discretion.

the rules which require a player to sign the contract, and not the contract itself, normally come under attack. \textit{But see} note 11 \textit{infra}.

N.F.L. Constitution and By-Laws §§ 15.1 and 15.4 provide:

15.1 All contracts between clubs and players shall be executed in triplicate and be in the form adopted by the member clubs of the League; such contract shall be known as the "Standard Player Contract." Subject to the provisions of section 9.1(C)(8) hereof, a club may delete portions of or otherwise amend the Standard Players Contract subject to the right of the Commissioner to disapprove the same, as provided by section 15.4 hereof.

15.4 The Commissioner shall have the power to disapprove any contract between a player and a club executed in violation of or contrary to the Constitution and By-Laws of the League, or if either contracting party is or has been guilty of conduct detrimental to the League or to professional football. Any such disapproval of a player contract must be exercised by the Commissioner within ten (10) days after such contract is filed with the Commissioner.

\textsuperscript{8} See Kapp v. National League, 390 F. Supp. 73, 81 (N.D. Colo.), \textit{aff'd in part and dismissed in part as moot}, 586 F.2d 644 (9th Cir. 1978).

\textsuperscript{9} N.F.L. Constitution and By-Laws § 9.2 provides:

If a member club or any officer, shareholder, director, partner, employee, agent or representative thereof, or any person holding an interest in said club shall tamper, negotiate with, or make an offer to a player on the Active Reserve or Selection List of another member club, then unless the offending club shall clearly prove to the Commissioner that such action was unintentional, the offending club, in addition to being subject to all other penalties provided in the Constitution and By-Laws, shall lose its selection choice in the next succeeding Selection Meeting in the same round in which the affected player was originally selected in the Selection Meeting in which he was originally chosen. If such affected player was never selected in any Selection Meeting, the Commissioner shall determine the round in which the offending club shall lose its selection choice. Additionally, if the Commissioner decided such offense was intentional, the Commissioner shall have the power to fine the offending club and may award the offended club 50 percent of the amount of the fine imposed by the Commissioner. In all cases the offended club must first certify to the Commissioner that such an offense has been committed.

\textsuperscript{10} The "Rozelle Rule" is embodied in N.F.L. Constitution and By-Laws § 12.1(H), which states:

Any player, whose contract with a League club has expired shall thereupon become a free agent and shall no longer be considered a member of the team of that club following the expiration date of such contract. Whenever a player, becoming a free agent in such manner, thereafter signed a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the Commissioner may name and then award to the former club one or more players, from the Active Reserve, or Selection List (including future selection choices) of the acquiring club as the Commissioner in his sole discretion deems fair and equitable; any such decision by the Commissioner shall be final and conclusive.
The final restrictive measure is the "option clause,"\textsuperscript{11} which grants a club the right to unilaterally renew the player's contract for a second year in the event that it and the player cannot reach an agreement. During this option year, the player risks a poor performance or an injury which would seriously restrict his negotiability in the future.

I. Basic Antitrust Doctrines: The Rule of Reason and Per Se Illegality

Professional football, unlike professional baseball, has not been granted an exemption from the antitrust laws.\textsuperscript{12} As a result, the restrictive rules of professional sports have become frequently litigated issues.\textsuperscript{13} Considering the number of player service market restraints, it is not surprising that players have instituted suits against the N.F.L. for violations of the Sherman Antitrust Act.\textsuperscript{14}

Section 1 of the Sherman Act prohibits "[e]very contract, combina-

\textsuperscript{11} The "option clause" is embodied in § 17 of the Standard Player Contract: RENEWAL. Unless this contract specifically provides otherwise, Club may, by sending written notice to Player on or before the April 1 expiration date referred to in Paragraph 1, renew this contract for a period of one year. The terms and conditions for the renewal year will be the same as those provided in this contract for the last preceding year, except that there will be no further right of renewal in Club and, unless this contract specifically provides otherwise, the rate of compensation for the renewal year will be 90 percent of the rate of compensation provided in this contract for the last preceding year. The phrase "rate of compensation" as used above means yearly salary, including deferred compensation, and any performance bonus. In order for Player to receive 90 percent of any performance bonus under this contract he must meet the previously established conditions of that bonus during the renewal year.

\textsuperscript{12} The Supreme Court cases dealing with the application of the antitrust laws to sports evolved from Federal Baseball Club v. National League, 259 U.S. 200 (1922). In an era long before baseball reached its present proportions, a unanimous Court, per Mr. Justice Holmes, held that the business of giving baseball exhibitions was not trade or commerce in the common usage of the words and that interstate travel was merely incidental to the game. Thus, the Court concluded that professional baseball was not subject to the Sherman Act. The Court was asked to reconsider this ruling in Toolson v. New York Yankees, 348 U.S. 356 (1953), but without examining the changes that had occurred in baseball since 1922, it affirmed its decision to exempt baseball from the antitrust laws. The Court gave four reasons for the exemption: (1) congressional awareness and inaction with respect to Federal Baseball; (2) baseball's development in reliance upon its exemption from the antitrust laws; (3) a reluctance to overrule Federal Baseball due to retroactive effect; and (4) a professed desire that the remedy should be supplied by Congress rather than by the courts. \textit{Id.} at 357. Over the years, baseball has been challenged for antitrust violations, but the doctrine of Federal Baseball has prevailed. See Flood v. Kuhn, 407 U.S. 258, 272 (1972).

In 1957, a private antitrust action was brought for damages suffered by a player who was blacklisted by the N.F.L. for signing with another professional football league in violation of his standard player contract. Radovich v. National Football League, 352 U.S. 445 (1957). The League relied upon Federal Baseball, but the Court limited the reach of that case to baseball alone, holding that football was subject to the antitrust laws. This view was similarly stated in Flood, with the Court reaffirming the antitrust exemption for baseball but stating that "professional sports operating interstate — football, boxing, basketball, and presumably, hockey and golf — are not so exempt." 407 U.S. at 282-83.


tion . . . or conspiracy, in restraint of trade or commerce." 15 While this language is broad enough to render nearly all business transactions illegal, the United States Supreme Court, in Standard Oil Co. v. United States, 16 established a judicial gloss on the statute which mitigates its potential effects, making the rule of reason the prevailing mode of analysis. Under the rule of reason, the trier of fact considers the activity's alleged anticompetitive effects on the relevant market and the business reasons presented for the activity. Short term restrictions in competition may have beneficial long term consequences. 17 Some agreements, although they eliminate competition between the parties, may strengthen competition in the market place. 18 In sum, if it can be shown that the alleged anticompetitive conduct is not anticompetitive in intent or overall effect, the conduct does not violate the rule of reason and is therefore not an illegal restraint of trade. 19 However, once anticompetitive effect has been shown, the standard of proof required to validate a challenged practice is whether its primary effect is to foster and promote competition in the market place, with the anticompetitive effects being merely incidental.

While no single test allows certain determination of when an activity is unreasonable under the rule of reason, the Supreme Court has offered factors which are relevant. Chicago Board of Trade v. United States 20 is instructive in this regard:

[t]he true test of legality is whether the restraint imposed is such as

15 Id. § 1. Also relevant to our inquiry is section 2 of the Act, which states:
Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Id. § 2.

16 221 U.S. 1 (1911).

17 The Supreme Court in National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 688-89 (1978), noted the English case of Mitchell v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711), in which the seller of a bakery, as a part of the sale, promised not to compete with the purchaser. The Supreme Court noted that although the promise restricted competition, its overall effect was to enhance competition within the industry by facilitating sales of businesses.

18 See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). Continental was a franchised dealer of Sylvania. Sylvania's franchise plan limited the number of franchises granted for any given area, and required each franchisee to sell his Sylvania products only from the location or locations at which he was franchised. Dissatisfied with its treatment under the plan, Continental claimed the franchise plan restricted competition between retailers of Sylvania products and therefore was a per se illegal vertical restriction. The Supreme Court held that while vertical restraints hinder intrabrand competition, they have the potential to promote interbrand competition and therefore may be reasonable. See notes 106-12 infra and accompanying text for a discussion of Continental T.V.

19 The Supreme Court in United States v. American Tobacco, 221 U.S. 106 (1911), held that the acquisition and perpetuation of control over the tobacco trade by the defendant and its accessory and subsidiary corporations, through purchasing or obtaining majority interests in numerous competitors and in concerns manufacturing the elements necessary for tobacco products, contravened both sections 1 and 2 of the Sherman Act. In examining the reasonableness of the restraints employed, Chief Justice White stated that "the words 'restraint of trade' only embraced acts or contracts or agreements or combinations . . . which either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrain trade. . . ." Id. at 179 (citing Standard Oil Co. v. United States, 221 U.S. 1 (1911), which had been decided only two weeks earlier).

20 246 U.S. 231 (1918). The Court upheld the adoption of a "call" rule by a giant grain market, under which members were prohibited from purchasing or offering to purchase grain at a price
merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual and probably. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, and the purpose or end sought to be attained, all are relevant facts.\(^{21}\)

Essentially, then, the rule of reason is an analysis of the effect the restraint has on the economic area within which it operates and whether its use can be justified in that context.

The judicial inquiry mandated by the rule of reason is often laborious and burdensome. As antitrust law evolved, the courts discovered certain restraints to be so consistently unreasonable that they were deemed illegal per se, without investigation into their intent or effects. A per se rule is a judicial shortcut; it represents the judgment of the courts that after considerable experience with on particular restraint, the normal mode of analysis, the rule of reason, can be omitted. The Supreme Court, in *Northern Pacific Ry. v. United States*\(^{22}\) explained the per se rule stating that there are certain restraints so pernicious in nature and so lacking in any redeeming virtue that there could be no valid justification for their existence.\(^ {23}\) Therefore, proof of the existence of such a restraint constitutes a violation of the antitrust laws, and a reviewing court need look no further. Among the practices which have been deemed so pernicious as to be per se illegal are certain group boycotts.\(^ {24}\)

Applying these principles in the context of the N.F.L.'s player service market restraints has proven difficult, largely due to the unique economics of "league sports," wherein teams compete athletically but cooperate for economic reasons. Because the player service market restraints *ostensibly* benefit only the athletic competition, while adversely affecting economic competition by restraining player mobility, decreasing negotiability, and holding down player salaries, the N.F.L. has been unable to justify them economically.

II. *Kapp and Mackey: The Player Service Market Restraints Before Smith v. Pro-Football, Inc.*

Both *Kapp v. National Football League*\(^{25}\) and *Mackey v. National Football League* other than the bid at the close of business (the "call") until the opening of the next session. The rule was intended for the convenience of market members and to break a monopoly controlled by a few warehousemen. Due to the short duration of the "call" rule, its legitimate purpose and the fact that no effect on prices had been proved, the rule was reasonable.

\(^{21}\) *Id.* at 234.

\(^{22}\) 356 U.S. 1 (1958).

\(^{23}\) *Id.* at 5. In *Northern Pacific* the Court designated tying arrangements as a per se violation of section 1 of the Sherman Act, holding illegal Northern Pacific's practice of requiring grantees or lessees of Northern Pacific's land adjoining the railroad right-of-way to ship their products over the Northern Pacific, provided its rates were equal to those of competing carriers.

\(^{24}\) *See* United States v. General Motors Corp., 384 U.S. 127, 145-46 (1966); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212-13 (1959); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941); *see also* notes 44-46 infra and accompanying text.

\(^{25}\) *Kapp* v. *National Football League* (9th Cir. 1978), *aff'd in part and dismissed in part as moot*, 586 F.2d 644 (9th Cir. 1978).
League\textsuperscript{26} stressed the unique economic status of professional football in finding that the player service market restraints were not per se illegal group boycotts. Both found the restraints clearly unreasonable under the rule of reason, while stating that sufficient tailoring to meet the goals sought would validate the restraints.

The plaintiff in \textit{Kapp}, after playing out his option with the Minnesota Vikings, contracted with the New England Patriots for the 1970 season and for the following two years. He played in 1970, but when he refused to sign the Standard Player Contract in 1971, he was told to leave the team prior to the start of that season.\textsuperscript{27} The plaintiff alleged that the player draft, the tampering rule, the option clause, the Rozelle Rule, the Standard Player Contract, and the commissioner's overall interpretive powers amounted to a group boycott, and as such a per se violation of section 1 of the Sherman Act. He also claimed that they were illegal under the rule of reason.\textsuperscript{28}

The court decided that the rule of reason was the appropriate test for determining the legality of the challenged rules. The per se rule was inapplicable due in part to the unique nature and purpose of sports league activities.\textsuperscript{29} In applying the rule of reason test to the player service market restraints, the court found "league enforcement of most of the rules . . . so patently unreasonable that no genuine issue for trial existed"\textsuperscript{30} and granted summary judgment for the plaintiff.

In \textit{Mackey} a group of present and former N.F.L. players, including such well-known stars as Kermit Alexander, John Mackey, Alan Page, Clint Jones, Gene Washington, and Nate Wright, alleged that the defendant's enforcement of the Rozelle Rule\textsuperscript{31} constituted an illegal combination and conspiracy in restraint of trade, denying professional football players the right to freely contract for their services.\textsuperscript{32} The district court held that the defendant's enforcement of the Rozelle Rule constituted a group boycott and was therefore a per se violation of the Sherman Act. Alternatively, the court held the enforcement invalid under the rule of reason standard.\textsuperscript{33} The N.F.L. appealed, raising two issues: whether the so-called labor exemption to the antitrust laws immunized the N.F.L.'s enforcement of the Rozelle Rule from antitrust liability,\textsuperscript{34} and if not, whether the enforcement of the Rozelle Rule was in fact unreasonable under the antitrust laws.

\begin{itemize}
  \item \textsuperscript{26} 543 F.2d 606 (8th Cir. 1976), \textit{cert. dismissed}, 434 U.S. 801 (1977).
  \item \textsuperscript{27} 390 F. Supp. at 76-78.
  \item \textsuperscript{28} \textit{Id.} at 78-79.
  \item \textsuperscript{29} \textit{Id.} at 81; \textit{see} notes 80-92 \textit{infra} and accompanying text.
  \item \textsuperscript{30} 390 F. Supp. at 82.
  \item \textsuperscript{31} The Rozelle Rule gives the Commissioner power to require a team which signs a player from another team to give draft choices, players, etc., to the team losing the player, if the two teams cannot mutually agree on compensation therefor. \textit{See} note 10 \textit{supra}.
  \item \textsuperscript{32} 543 F.2d 606, 609 (8th Cir. 1976).
  \item \textsuperscript{34} The Eighth Circuit Court of Appeals listed three requirements of the labor exemption: (1) the restraint must only affect the two bargaining parties; (2) the restraining rule must be a mandatory subject of collective bargaining; and (3) the agreements must be the product of bona fide arm's length bargaining. The player agreements in which the Rozelle Rule was embodied met the first two requirements, but not the last, because in the most recent union-management
\end{itemize}
In determining the second issue, the court held the per se standard inapplicable due to the unique and novel business under consideration and also because the basic purpose in applying the per se standard, the avoidance of lengthy and burdensome inquiries, had already been frustrated. Applying the rule of reason standard, the court stated that the Rozelle Rule must be no more restrictive than necessary to serve its legitimate purpose in order to be reasonable, held the Rozelle Rule to be more restrictive than necessary, and therefore did not decide if the Rule was essential to maintaining the competitive balance in the N.F.L. Thus, the Rozelle Rule standing alone was held to be an unreasonable restraint of trade.  

III. Smith v. Professional Football, Inc.: Trapped Between Kapp and Mackey, and Professional Engineers

After Kapp and Mackey, Smith v. Professional Football, Inc., a private antitrust action challenging the N.F.L. draft, reached the District Court of the District of Columbia. Plaintiff James McCoy (Yazoo) Smith was an All-American football player at the University of Oregon in 1968. The Washington Redskins, choosing twelfth, picked Smith as their first round draft choice. After several months of negotiations in which Smith was represented by an agent, Smith signed a one year version of the Standard Player Contract. The contract awarded Smith a $23,000.00 "bonus" for signing, an additional $5,000.00 if he made the team, and a salary of $22,000.00, for a total first year compensation of $50,000.00. Smith made the team and performed excellently until he suffered a serious neck injury in the final game of the 1968 season. His doctors advised him to give up professional football. After his injury the Redskins paid Smith $19,800.00, representing the amount he would have received had he played out the second year of his contract (the option year).

Two years after his injury Smith filed suit in federal district court against Pro-Football, Inc., which operates the Redskins, and against the N.F.L., contending that the draft as it existed in 1968 was an unreasonable restraint of trade in violation of sections 1 and 3 of the Sherman Act and that but for the draft he would have negotiated a far more lucrative contract when he was signed as a player in his first year.

negotiations the player's union had merely accepted the status quo and had not engaged in arm's length bargaining over the Rozelle Rule. Therefore, the labor exemption did not apply. Mackey v. National Football League, 543 F.2d 606, 616 (8th Cir. 1976); cert. dismissed, 424 U.S. 801 (1977); see also Reynolds v. N.F.L., 584 F.2d 280 (8th Cir. 1978).

53 543 F.2d at 619.
56 Id. at 622.
38 See note 11 supra.
39 See text accompanying note 15 supra for section one of the Act. Section three provides in part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in the form of trade or commerce in any territory of the United States or of the District of Columbia . . . . or between any such territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal.

After a trial without a jury, District Judge Bryant held that the N.F.L. draft as it existed in 1968\textsuperscript{40} constituted a group boycott and was therefore a per se violation of the Sherman Act. Alternatively, the court stated that the draft, if tested under the rule of reason, was an unreasonable restraint because it was "significantly more restrictive than necessary" to accomplish whatever legitimate goals the N.F.L. had.\textsuperscript{41}

The \textit{Kapp} and \textit{Mackey} decisions and the district court's decision in \textit{Smith} establish a trend in judicial policy concerning player service market restraints and the antitrust laws. The restraints are too restrictive, and if not tailored to suit the goals sought, are unreasonable and illegal under the rule of reason standard. The unique economic situation of the N.F.L. as a league sport was sufficient to remove the restraints from per se illegality in \textit{Kapp} and \textit{Mackey}, but in all three decisions the restraints were too restrictive to be reasonable. It was against this background that the \textit{Smith} case reached the court of appeals.

The legality of the N.F.L. player draft under antitrust law was essentially a question of first impression before the District of Columbia Circuit Court of Appeals.\textsuperscript{42} Initially the court had to decide whether the legality of the draft was to be governed by a per se rule or by the rule of reason; having determined that the draft was not a group boycott, the court then faced the question of whether the draft, if tested by the rule of reason, was a reasonable restraint.

\section*{A. Which Standard Governs?}

In determining the first issue, the \textit{Smith} court held that the player draft was not a per se illegal group boycott.\textsuperscript{43} The classic group boycott is a concerted attempt by competitors at one level to protect themselves from competition from non-group members who seek to compete at that level. The boycotting group combines to deprive the boycotted group from business relationships which it needs in order to enter or survive at its customary operating level. The boycotting group may accomplish this exclusion through various means: (1) by inducing suppliers not to sell to competitors;\textsuperscript{44} (2) by inducing customers not to buy from them;\textsuperscript{45} or (3) by refusing to deal with would-be competitors

\textsuperscript{40} The present draft is far less restrictive than the 1968 draft. It continues fewer rounds, thus applying to fewer players, it eliminates the selecting team's "perpetual" right of negotiation with its players, it facilitates players becoming "free agents," and it establishes minimum salary levels for "rookies." See 593 F.2d at 1176, n.6.


\textsuperscript{42} Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977), held that the Rozelle Rule violated the antitrust laws. See text accompanying note 34 supra. The district court in Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974), aff'd in part and dismissed in part as moot, 586 F.2d 644 (9th Cir. 1978), held that the discharge of a player because he refused to sign a Standard Player Contract constituted an unreasonable restraint of trade. Although the district court found that the "draft rule" was an unreasonable restraint on trade, it did not examine the draft in detail but dismissed it as invalid because it was "so patently unreasonable." \textit{Id.} at 82.

\textsuperscript{43} 593 F.2d at 1178.

\textsuperscript{44} See, e.g., United States v. General Motors Corp., 384 U.S. 127 (1966).

themselves. The common characteristic of the group boycott is the boycotting group's attempt to restrict competition at its own level.

The Smith court held that the N.F.L. player draft differed from the classic group boycott in two significant respects: (1) the N.F.L. clubs which combined were not competitors in any economic sense, and (2) the N.F.L. clubs had not combined to exclude competitors or potential competitors from their own level of the market. The court noted that while the N.F.L. clubs must compete on the field, they must cooperate economically. In order to maintain spectator interest, the entertainment product must be of high quality. This requires keeping the teams competitively balanced. In short, the N.F.L. is a "league sport." No N.F.L. team is interested in driving another team out of business, whether in the counting house or on the playing field, for if the league fails, no team can survive. The N.F.L. clubs thus do not qualify as competitors in any economic sense.

The court also held that the N.F.L. clubs had not combined to exclude competitors or would-be competitors from their level of the market because the plaintiff Smith had never sought to compete with the N.F.L. clubs; furthermore, their refusal to deal with him had resulted in no decrease in competition in providing football entertainment to the public. In view of these differences, the court concluded that "the N.F.L. player draft cannot be properly described as a group boycott — at least not the type of group boycott that has traditionally elicited invocation of a per se rule." The court was correct in holding that the draft was not a per se illegal group boycott. The United States Supreme Court decisions holding group boycotts illegal per se have involved boycotts aimed at horizontal competitors; the plaintiff Smith was not a horizontal competitor of the N.F.L. clubs. As previously stated, a group boycott is characterized by a refusal to deal with competitors, with third parties who deal with competitors, or by a refusal to deal with competitors except on terms so discriminatory as to exclude them from competition. Since Smith was not a competitor of the N.F.L., the player draft was not a traditional group boycott and was not subject to the rule.  

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47 See pp. 556-57 infra.
48 593 F.2d at 1179.
49 Id. at 1178.
50 Horizontal competitors are business entities which compete at the same level of production or sales. For example, a manufacturer is a horizontal competitor of other manufacturers but not of retail sellers. See Radiant Burners, Inc. v. People's Gas, Light & Coke Co., 384 U.S. 656 (1966); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Associated Press v. United States, 326 U.S. 1 (1945); Fashion Originators Guild of America v. FTC, 312 U.S. 457 (1941).
52 The Smith court's statement that, "the N.F.L. player draft cannot properly be described as a group boycott — at least not the type of group boycott that has traditionally elicited invocation of a per se rule," 593 F.2d at 1179, appears to contradict the traditional per se standard of illegality. Under the per se analysis the plaintiff need only prove that the forbidden activity exists. The court takes no cognizance of the facts peculiar to the case which would provide justification. For example, if price fixing is proved, regardless of the nature of its purpose, the result is a finding of
B. Is the Draft Reasonable?

The second issue before the court was whether the 1968 N.F.L. player draft was an unreasonable restraint of trade under the rule of reason standard. The district court had held that the draft was unreasonable because it was "significantly more restrictive than necessary" to accomplish whatever legitimate goals the N.F.L. had. The Smith court affirmed the district court's holding. However, during the interim, the Supreme Court rendered its decision in National Society of Professional Engineers v. United States, which changed the calculus of the rule of reason. As a result, although the court affirmed the district court's holding of unreasonableness, it based its decision on a legal analysis derived from Professional Engineers.

The Smith court interpreted Professional Engineers as limiting those procompetitive benefits which would offset the draft's anticompetitive effects to strictly economic benefits. The defendants, in justification, had asserted only that the draft had the legitimate purpose of promoting playing field equality, which in turn provided better entertainment to the public, higher player salaries and increased financial security for the clubs. The court refused, or failed, to follow these assertions to their logical conclusion when it indicated that the draft is procompetitive, if at all, in a very different sense from that in which it is anticompetitive. The draft may be very procompetitive on the playing field, but this does not increase competition, in the economic sense, by encouraging others to enter the market or by offering the product at a lower cost. In strict economic terms, the draft's demonstrated procompetitive effects are "nil." Therefore, since the procompetitive aspects of the player draft do not foster or promote economic competition between the teams, the draft is an unreasonable restraint of trade.

per se illegality. Here, however, the Smith court indicated that while group boycotts are per se illegal, certain group boycotts are not per se illegal. According to the Smith court:

When confronted with concerted refusals to deal that do not fit the classic "group boycott" pattern, the courts almost without exception have held the per se [sic] rule inapplicable. In reaching this conclusion, however, they have vacillated between two divergent paths. Some courts have adhered to the traditional canon that all group boycotts are illegal per se, and concluded that the concerted activity at issue was not a group boycott. See, e.g., Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76-79 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970). Other courts have held that the concerted activity at issue was a group boycott, but that there were two types of group boycotts — "per se boycotts" and "rule of reason boycotts" — and that the concerted activity at issue fell into the second category. See, e.g., 11 Von Kalinowski, Antitrust Law and Trade Regulation ¶ 76.02 at 76-11 (1978) (citing cases).

Id. at 1179 n.22.

Note that under either approach, the rule of reason is subsequently applied to determine the activity's legality.


55 593 F.2d at 1173.

56 Id. at 1188.

57 Because the draft's "anticompetitive" and "procompetitive" effects are not comparable, it is impossible to "net them out" in the usual rule-of-reason balancing. The draft's "anticompetitive evils," in other words, cannot be balanced against its "procompetitive virtues," and the draft cannot be upheld if the latter outweighs the former. In strict economic terms, the draft's demonstrated procompetitive effects are "nil."
It is critical to note, however, that the N.F.L. player draft does result in positive, economic procompetitive benefits. The Smith court failed to pursue the benefits of competitive balance to their logical end because it took a limited view of the N.F.L.'s economic status in the national market. Having discovered no offsetting economic benefits for the draft, and realizing the potential impact of its decision on the N.F.L. and other league sports, the Smith court attempted to mitigate these effects by misinterpreting the rule of reason.

The court correctly interpreted Professional Engineers as limiting to economic benefits those procompetitive effects which would offset the anticompetitive restraints of the player draft. In Professional Engineers, the United States brought a civil antitrust suit against the National Society of Professional Engineers, alleging that its canon of ethics, which prohibited its members from submitting competitive bids for engineering services, suppressed competition in violation of section 1 of the Sherman Act. The Society defended on the ground, inter alia, that the canon was justified under the rule of reason because it was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work, endangering public safety.

The Supreme Court held that a professional society's ban on competitive bidding violated section 1 of the Sherman Act, rejecting the "public safety" defense and calling it "nothing less than a frontal assault on the basic policy of the Sherman Act." Although the rule of reason gives the Sherman Act both "flexibility and definition," it "does not open the field of antitrust inquiry to any argument . . . within the realm of reason . . . [but requires the trier of fact to focus] impact on competitive conditions." Because the professional society could assert only public safety as justification for its restriction on competitive bidding, there was clearly no economic benefit which could be balanced against the economic anticompetitive effects of the restriction. With somewhat limited vision, due in part to the N.F.L.'s failure to clearly assert an expanded view of the N.F.L.'s economic status in the national market, the Smith court drew the analogy between the noneconomic benefits of public safety and those of the draft.

Therefore, the Smith court correctly interpreted Professional Engineers as requiring the alleged restraint to have positive, economic procompetitive benefits in order to be found reasonable under the rule of reason standard. However, the court contradicted this interpretation in its conclusion by stating that:

[r]ather, a player draft can survive scrutiny under the rule of reason only if it is demonstrated to have positive economically procompetitive benefits that offset its anticompetitive effects, or, at the least,

55 See notes 93-97 infra and accompanying text.
56 435 U.S. at 695.
60 Id. at 1363. The purpose of antitrust analysis, the court concluded, "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. Subject to exceptions defined by statute, that policy decision has been made by Congress." Id. at 1365.
61 See text accompanying note 56 supra for the N.F.L.'s asserted justifications. See notes 93-99 infra and accompanying text for a more appropriate view of the N.F.L.'s economic status.
if it is demonstrated to accomplish legitimate business purposes and
to have a net anticompetitive effect that is insubstantial.62

There is only one test under the rule of reason. The Smith court apparently
misconstrued two descriptions of the same standard, the rule of reason, as
being two separate tests. In order to understand the court’s error it is necessary
to examine the early judicial development of the rule of reason.

C. The Necessity of Procompetitive Benefits —
Foundations of the Rule of Reason

Section 1 of the Sherman Act prohibits “every contract, combina-
tion . . . or conspiracy in restraint of trade.”63 But as Mr. Justice Brandeis
noted, restraint is the essence of every trade regulation and contract.64 As
a result, when the Supreme Court was presented with the first alleged anti-
trust violations, it was in a “sea of doubt” as to the practical limits of section 1
of the Sherman Act.65 In response to the necessity for practical limits on the
Sherman Act, the rule of reason standard was formulated.

Professor Bork identifies four judicial opinions as forming the cornerstones
of the rule of reason:66 Justice Peckham speaking for the Court in United
States v. Trans-Missouri Freight Assn,67 Chief Justice White speaking for the
Court in Standard Oil Co. v. United States68 and United States v. American
Tobacco;69 and then Judge Taft, in his opinion for the Sixth Circuit in United
States v. Addyston Pipe and Steel Co.70

1. Justice Peckham in Trans-Missouri

It appeared that Justice Peckham in Trans-Missouri71 had called for a
rigid, literal reading of the Sherman Act. Justice White dissented because he
believed that Justice Peckham had failed to provide the Sherman Act with the
flexibility required to make it practical in an economy based upon private
contracts, which necessarily involved restraints. However, contrary to Justice
White, Justice Peckham was not opposed to flexibility in application of the

62 593 F.2d at 1188-89.
64 “[T]he legality of an agreement or regulation cannot be determined by so simple a test, as
whether it restrains competition. Every agreement concerning trade, every regulation of trade,
restrains. To bind, to restrain, is of their very essence.” Chicago Bd. of Trade v. United States, 246
U.S. 231, 238 (1918).
65 Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 74
YALE L.J. 775, 780 (1965).
66 Id. The following analysis draws heavily upon Professor Bork’s authoritative work.
67 166 U.S. 290 (1897).
68 221 U.S. 1 (1911).
69 221 U.S. 106 (1911).
70 85 F. 271 (6th Cir. 1898).
71 166 U.S. 290 (1897). Trans-Missouri involved an agreement among a number of competing
railroads engaged in interstate traffic for the purpose of mutual protection. The agreement called
for the establishment of reasonable rates and rules and regulations on all freight traffic, both
through and local, and the formation of an association to prescribe rates, which when agreed
upon were to govern all the companies, and which subjected a defaulting company to a pecuniary
penalty. The agreement was held to be in restraint of trade and therefore invalid.
Sherman Act, for he introduced a sophisticated power of discrimination into the law in his definition of the term "restraint of trade."\(^72\)

2. Judge Taft in Addyston Pipe and Steel

After *Trans-Missouri*, but before clarification of its meaning by the Supreme Court, Judge Taft attempted to provide the Sherman Act with a workable formula in *Addyston Pipe and Steel*.\(^73\) Judge Taft based his formulation upon the common law notion of "ancillary restraints." For a restraint to be legal it must be ancillary to, *i.e.*, commensurate with and necessary to, a legal transaction.\(^74\) This formulation does not eliminate the requirement that for a restraint to be legal, its overall effect must be to promote or foster competition. By a restraint being ancillary to a legal transaction, Judge Taft meant that while the restraint restricts competition, it is necessary, to a transaction which promotes competition, to a greater degree than the restraint itself restricts competition.

3. Chief Justice White in *Standard Oil* and *American Tobacco*

Finally, Chief Justice White in *Standard Oil* and *American Tobacco* developed the modern rule of reason. The Chief Justice stated the principle of the rule of reason in *Standard Oil*\(^75\) and restated it in *American Tobacco*: "the words 'restraint of trade' . . . only embraced acts or contracts or agreements or combinations . . . which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrain trade. . . ."\(^76\) White's rule of reason consisted of a three-pronged test. The restraints must not be inherently anticompetitive in nature, purpose or intent. If the restraints are in their inherent nature anticompetitive, they are per se illegal. If the restraints are not in their inherent nature anticompetitive, then they must be shown not to be anticompetitive in their effect or intent. To satisfy these two prongs of White's test, one must prove that the overall result of the restraints is procompetitive.

Regardless of the formulation of the proper test, the restraint must foster or promote competition. "White's acceptances of *Trans-Missouri* and . . . his own three-part test result in a rule of reason, largely, if not completely, convertible either to Peckham's test of direct and indirect restraints or

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\(^72\) Justice Peckham stated "[a] contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included within the letter or spirit of the statute in question." *Id.* at 329.

\(^73\) 85 F. 271 (6th Cir. 1898).

\(^74\) *Id.* at 290-91.

\(^75\) The rule of reason prohibits "all contracts or acts which are unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion [that they had not the] legitimate purpose of reasonably forwarding personal interest and developing trade." *221* U.S. at 58.

Taft's test of ancillary and non-ancillary restraints.\textsuperscript{77} For example, if a restraint is anticompetitive in its inherent nature — \textit{i.e.}, per se illegal under the White test — it would be non-ancillary under the Taft formulation because its anticompetitive effects would be so great that it could never be commensurate with, and therefore ancillary to, a legal transaction. Thus the determination whether a restraint is anticompetitive in its inherent effect or intent, under White's test, is the same determination made under the Taft formulation, \textit{i.e.}, is its overall effect anticompetitive?\textsuperscript{78}

Under the rule of reason there is one test. The \textit{Smith} court may have misconstrued Judge Taft's theory of ancillary restraints as permitting restraints which do not promote competition. Regardless of the analysis used, however, procompetitive benefits are necessary for a restrictive practice to be valid under the rule of reason. Further, the Supreme Court in \textit{Professional Engineers} required that the procompetitive benefits be economic in nature. The public safety justification asserted there clearly produced no economic benefits, but the N.F.L. player service market restraints, when viewed properly as concerns the N.F.L.'s economic status, just as clearly provide economic procompetitive benefits. In order to understand the truth of this statement an economic analysis of the N.F.L. and its teams is necessary.

IV. Economic Analysis of the N.F.L. — The Single Entity and Interleague Structural Analyses

A. Economic Motivation Within the N.F.L. — Cooperation, Not Competition

Competition is a commonly used word. In the context of professional football and antitrust, two definitions are relevant: "official participation in a sport" and "rivalry in business for customers or markets."\textsuperscript{79} However, the \textit{Smith} court held that since only positive, economic procompetitive benefits would offset the anticompetitive effects of the player service market restraints, competition which can be defined as "official participation in organized sport" must be excluded from consideration as noneconomic. In order for the N.F.L. player draft, or other player service market restraints, to pass muster under the antitrust laws, the overall intent and effect must be to enhance rivalry in business for customers or markets, \textit{i.e.}, there must be positive, economic procompetitive benefits.

Although the phrase "rivalry in business for customers or markets" serves to differentiate economic competition from "official participation in organized sports," a more refined definition is required for a proper examination of competition as it exists in the N.F.L. Drawn from numerous judicial interpretations of "competition," the following is an accurate

\textsuperscript{77} Bork, \textit{The Rule of Reason and the Per Se Concept: Price Fixing and Market Division}, 74 \textit{Yale L.J.} 775, 805 (1965).

\textsuperscript{78} If its overall effect is anticompetitive, it is unreasonable and therefore illegal under the White test. If the overall effect is anticompetitive under the Taft formulation, it means the anticompetitive effects of the restraint itself outweigh the procompetitive effects of the legitimate transaction and the restraint is not commensurate with, and thus not ancillary to, the transaction.

\textsuperscript{79} \textit{WEBSTER'S NEW WORLD DICTIONARY} 289 (2d ed. 1968).
expression of economic competition: the efforts of two or more parties acting independently\textsuperscript{80} to secure the same trade\textsuperscript{81} in the same territory\textsuperscript{82} by furnishing their merchandise or rendering their service better or cheaper than each other;\textsuperscript{83} economic competition is rivalry\textsuperscript{84} for superiority\textsuperscript{85} in the market system.

In seeking to apply this definition to the N.F.L., it must be recognized that professional football and other professional team sports such as hockey, baseball, and basketball have unique characteristics which distinguish them from other business enterprises. While professional football teams are in some respects normal, individual economic units competing to sell a service to the public, economic competition with other pro-football teams is not the sole determinant of their behavior. Although they are rivals in combat, they are also partners in a joint venture called the National Football League. Professional sports leagues present a unique form of economic competition, where members must compete fiercely in some respects and cooperate in others. The end "product" of each team is competition on the playing field, but the demands of producing the best sports entertainment possible often require cooperation in the economic sphere.

\textsuperscript{80} In Lipson v. Socony Vacuum Corp., 87 F.2d 265 (1st Cir. 1937), it was held that defendants’ policy of selling gasoline in tank cars at prices less than when sold in tank trucks or tank wagons, provided that the buyer agrees to sell no other oil companies’ products, was not violative of the Clayton Act as substantially lessening competition. In the course of the decision the court defined competition as “the efforts of two or more . . . parties to secure the custom of a third party by the offer of the most favorable terms,” and as “the struggle between rivals for the same trade at the same time; the act of seeking or endeavoring to gain what another is endeavoring to gain at the same time.” Id. at 270.

\textsuperscript{81} The court in Stockton Dry Goods Co. v. Girsh, 221 P.2d 186 (Cal. App. 1950), implied an obligation on the part of a corporation not to operate a shoe department in its store where it leased space to a tenant engaged in selling shoes. The court defined competition as “the effort of two or more parties acting independently to secure the custom of a third party by the offer of the most favorable terms.” Id. at 188.

\textsuperscript{82} The Supreme Judicial Court of Massachusetts refused to enjoin a shoe store’s use of the name “Emerson’s Shoes” upon the suit of a plaintiff managing women’s and children’s clothing stores under the name of “Emerson’s Fashions” because the competition between the stores was negligible and there was no intent to deceive the public. The court defined competition as existing “only where both parties are soliciting purchasers of similar goods in the same territory at the same time.” Silbert v. Kerstien, 318 Mass. 476, 479, 62 N.E.2d 109, 111 (1945).

\textsuperscript{83} The court in Continental Securities Co. v. Interborough Rapid Transit, 207 F. 467 (S.D.N.Y. 1913), held that although stockholders had assisted in the formulation of an illegal combination, this did not affect their power to mortgage corporate property for legitimate business purposes. The court defined competitors as “persons endeavoring to do the same thing and each offering to perform the act, furnish the merchandise, or render the service better or cheaper than his rival.” Id. at 470.

\textsuperscript{84} The Supreme Court of Montana, in Merchants’ Nat’l Bank of Glendive v. Dawson County, 93 Mont. 310, 19 P.2d 892 (1933), held that a tax on national bank shares is not unlawfully discriminatory as compared with a tax on moneyed capital of business and loan associations and insurance companies, in view of the absence of evidence of competition. Competition was defined as “rivalry between aspirants for . . . advantage in business.” Id. at __, 19 P.2d at 896.

\textsuperscript{85} In Simmons v. Johnson, 11 So. 2d 710 (La. Ct. App. 1942), the grantor contracted with grantee not to compete with grantees in the restaurant business within a specified area. Thereafter, the grantor contracted with a third party to erect a restaurant three blocks from lots previously conveyed to the grantees, and to convey the property to the third party. The grantor did not try to obtain for himself any of the business which the grantees were trying to get for themselves, and did not share in the operation of the third party’s business. The court held that the grantor was not a “competitor” within the meaning of grantee’s contract, defining “competition,” \textit{inter alia} as “strife for superiority.” Id. at 712.
In a free market system such as exists in the United States, each individual, functioning, economic unit seeks to improve the quality of its product in order to compete more effectively and therefore capture a larger share of the market. The natural corollary of such a system is that each economic unit strives to improve its own product at the expense of its competitors.

However, in professional league sports such as the National Football League, theoretically conflicting economic goals exist. Each team seeks to improve the quality of its own team through the draft, player trades, free agents, improved scouting analysis, more competent coaching staffs, and so on. But each team also has a great interest in maintaining the quality of its playing field competitors at a level nearly equal to its own.

The desire of a football team to maintain the quality of its playing field competitors is premised upon the assumption that if the result of any individual contest is seen as inevitable, the contest will have little or no customer attractiveness. Continuation of this pattern will result in the league’s eventual financial demise. Under this theory, the failure to maintain competitive balance could easily result in total domination of the league by one team, from its inception to its collapse. The abrupt failure, for example, of the All America Football Conference graphically illustrates that, unlike other individually functioning economic units in a free market system, it is essential to the survival of each pro-football team to maintain the quality of their playing field competitors.

The necessity to maintain playing field balance is implicit in the distinction, differentiating pro-football from other business enterprises, which is identified by the concept "league sports." As compared to boxing or golf, which may be more appropriately viewed as periodic exhibitions of sporting contests, the major characteristic of league sports is that no team can rest its success upon the league race, play-offs and championship. In order for any team to continue to succeed economically, it is necessary that its league

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87 See H. Claassen & S. Boda, Encyclopedia of Football (3d ed. 1963). From its inception in 1946 to its collapse after the 1949 season, the All America Football Conference was totally dominated by the Cleveland Browns. Under the guidance of the legendary Paul Brown, the Browns won all four league championships, compiling an overall record of forty-seven wins, four losses and three ties and outscoring their opponents 1,561 to 669. As might be expected in such a situation, the attendance at Brown’s games in the early stages of the conference averaged between sixty and seventy thousand, but had dwindled to twenty thousand by the fourth season, after which the conference collapsed.

have standardized rules, team schedules, and, most importantly, player
control systems to ensure balanced competition. Thus, professional football,
as a league sport, must act in many respects as a single entity to ensure its
survival.

There is no economic competition between the N.F.L. franchises. The
N.F.L. clubs do not compete in the same territory; rather the market for each
club extends only as far as its fans are willing to travel to attend its games. In
effect, the N.F.L., through its franchise system, has granted each team a
monopoly over its own market. Therefore, no competition exists for the
same trade, i.e., fans in the same territory. The competition that exists within
the N.F.L. is athletic, not economic, competition. Although attempts have
been made to validate the player service market restraints under the rule of
reason by showing their beneficial effect on inter-team playing field
competition, these benefits are not economic in nature as required by the rule
of reason, so that such attempts must fail. As the Smith court stated,
Professional Engineers holds that only economic procompetitive benefits will
offset the anticompetitive effects of restrictive practices such as the N.F.L.
player draft.

The Smith court, however, seemed reluctant to invalidate the player
service market restraints for all time, so it expressed the rule of reason as two
tests, the second allowing future validation of the restraints if they have a
legitimate business purpose and an insubstantial net anticompetitive effect.
Such brutalization of the key rule of reason test would have been unnecessary
had Pro-Football, Inc. or the N.F.L. argued, or had the Smith court
recognized, that under at least one other viable means of economic analysis
the player service market restraints clearly do have positive, economic
procompetitive benefits which offset their anticompetitive effects.

B. An Alternative Structural Analysis — the
Single Entity Approach

The economic procompetitive benefits of the player service market
restraints will not be found within the N.F.L.’s structure. The focus should be
placed instead upon the N.F.L. as a single, functioning economic unit, a single
business entity. With this perspective the market becomes national, and the
N.F.L. itself becomes the economic competitor of other professional sports
leagues or of other entertainment packages. The individual teams do not

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89 Smith v. Pro-Football, Inc., 593 F.2d 1173, 1178-79 (D.C. Cir. 1978); see notes 80-85 supra
and accompanying text for a definition of economic competition.

90 Although it might be argued that each team’s market is national when its game is televised,
and that it therefore competes with other N.F.L. clubs being televised in the same time slot, the
Sports Broadcast Act permits the N.F.L. to bargain as a unit for telecasting rights, the revenues of
which are shared equally by all teams. See note 103 infra and accompanying text. Thus, so far as
television is concerned, there is clearly no economic competition between N.F.L. clubs, and the
only appropriate view of economic competition involved is that of the N.F.L. as an entity
competing against other entertainment packages for increased air time.

91 Potential exceptions to this statement, such as the Oakland Raiders and San Francisco
Forty-Niners or the New York Jets and the New York Giants, exist only because the N.F.L. has
determined that the local market involved can support two franchises.

92 See text accompanying note 62 supra.
compete but cooperate to produce for consumers a form of entertainment
called professional football. 93

If the N.F.L. had thus been considered a single business entity, the Smith
court would have discovered the economic procompetitive benefits of the
N.F.L. draft. The court acknowledged that the draft had improved the
competitive quality of the teams on the playing field 94 but held that such
procompetitive benefits were not of the nature required by the Supreme
Court in Professional Engineers. However, if Pro-Football, Inc. or the Smith
court had taken the analysis one step further, it would have been discovered
that by improving the competitive equality of all football teams, the draft
had improved the quality of professional football, thereby enabling it to
compete more efficiently with other forms of professional sports or with other
entertainment products.

For example, the Cleveland Browns’ economic competitors may be seen
as the other professional sports teams in Cleveland: the basketball Cavaliers,
the baseball Indians, 95 the soccer Cobras, and so on. These teams compete for
the same trade, spectators, in the same territory, the Cleveland market area. 96
In order to draw fans, each sports league attempts to produce an
entertainment product of higher quality than its competing sports organi-
izations. 97

93 Perhaps an analogy would aid in illustrating this proposition. One might consider the N.F.L.
as one large national corporation, with the franchised clubs as corporate offices located in the
various cities throughout the country. Commissioner Rozelle is the corporate president and
chairman of the board; team owners are vice-presidents and members of the board; and head
coaches are the managers of the various corporate offices. In order to maintain the quality of its
service the corporation must maintain the quality of each individual office, and not improve one
at the cost of another. However, should the corporate office managers decide to transfer
employees, they are free to do so. The various corporate offices clearly are not economic
competitors with one another, but are all members of the same economic “team,” the National
Football League.

94 593 F.2d at 1179.

95 The considerable conflict of popular opinion as to whether football has overtaken the
“grand old game” of baseball as this country’s favorite sport indicates a popular awareness of the
competition which exists between professional football and professional baseball. This
competition, and the necessity of the player service market restraints, will increase, because, as
White Sox owner Bill Veeck recently stated, we are presently experiencing a “baseball

96 The Cleveland market designates the market territory in which the Cleveland Browns are
able to compete, and is determined by the distance which the average fan is financially able, as
well as personally disposed, to travel in order to attend a game.

97 To elaborate, the potential season ticket purchaser who lives in the Cleveland market has a
set amount of money with which he can purchase a season ticket to any team in any professional
sport. He must, therefore, decide which sport and which team in that sport to choose. Concerning
which sport to choose, the basic premise of “league sports” is that any individual contest which is
seen as an inevitable victory or defeat will have little or no audience appeal. See notes 86-88 supra
and accompanying text. As a result, if the N.F.L. is able through its draft to maintain a higher
degree of competitive equality than in other league sports, it will compete more effectively with
those sports for the potential ticket purchaser. In turn, other professional sports will seek to
improve the quality of their products in order to compete with professional football. Viewed in
this manner, the N.F.L. player draft produces economic procompetitive benefits.

Once the potential season ticket purchaser has chosen professional football, his next choice is
which team to patronize. Due to normal financial limitations he cannot travel weekly to another
franchised city to see its home games, even though that team may be his favorite team. His choice
is his local team. The result is that, through the franchise system, the local teams have obtained
natural monopolies within their market area, and are thus not in economic competition with other
football franchises.
While the N.F.L. player draft promotes competitive equality on the playing field, this is but an intermediate step to the ultimate effect intended by the player draft, the purpose of which is to promote the quality of professional football in order to produce more effective competition with other sports leagues. Enhanced “league sports” competition is the positive, economic procompetitive benefit of the player service market restraints, which offsets their anticompetitive effects, thus making the restraints reasonable under the rule of reason standard.

An examination of judicial, scholarly and congressional reports and opinions reveals an openness to analysis of the N.F.L. structure as a single business entity. The unique economic nature of professional sports has received both judicial recognition and support. A judicial receptivity towards accepting the N.F.L. as a single business entity may be inferred from past judicial opinions recognizing the uniqueness of professional sports, and in some cases accepting legal theories which would not be permitted in defense of a normal business enterprise.

In Deesen v. Professional Golfers Ass’n, the appellant, a professional golfer, was eligible to compete as a P.G.A.-approved tournament player in P.G.A. sponsored and co-sponsored tournaments from 1952 to 1958. Pursuant to P.G.A. rules, the appellant had to compete in ten P.G.A. sponsored tournaments each year and maintain an ability to finish “in the money.” During this period he placed in the money three times, earning $240.35. His expenses from 1952 to 1958 were $13,500.00. In 1958, Deesen sustained an injury which affected his playing ability and prevented him from competing in ten tournaments that year. In 1958, the P.G.A.’s national tournament committee undertook to terminate the approved tournament player status of a number of professional golfers, including Deesen. On a number of

95 The Smith court took cognizance of professional football’s unique characteristics, stating:

[T]he N.F.L. clubs which have “combined” to implement the draft are not competitors in any economic sense. The clubs operate basically as a joint venture in producing an entertainment product — football games and telecasts. No N.F.L. club can produce this product without agreements and joint action with every other team. To this end the league not only determines franchises locations, playing schedules, and broadcast terms, but also ensures that the club receive equal shares of telecast and ticket revenues. These economic joint ventures “compete” on the playing field, to be sure, but here as well cooperation is essential if the entertainment product is to attain a high quality: only if teams are “competitively balanced” will spectator interest be maintained at a high pitch.

No N.F.L. team, in short, is interested in driving another team out of business, whether in the countinguhouse or on the football field, for if the league fails, no one team can survive.

593 F.2d at 1178-79.

The court in Mackey v. N.F.L., 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 424 U.S. 801 (1977), also noted the “joint ventures” characteristics of the N.F.L.: “The N.F.L. assumes some of the characteristics of a joint venture in that each member club has a stake in the success of the other teams. No one club is interested in driving another team out of business, since if the League falls, no one team can survive.” Id. at 619. In Kapp v. N.F.L., 390 F. Supp. 73 (N.D. Cal. 1974), aff’d in part and dismissed in part as moot, 586 F.2d 644 (9th Cir. 1978), the necessity for player restraints was acknowledged “in this unique field of sports league activities . . . wherein to achieve fairly evenly matched teams on the field, there must be some degree and kind of restriction on the right of clubs to hire and players to sign as they please.” Id. at 81.

99 The Smith court took cognizance of professional football’s unique characteristics, stating:

[T]he N.F.L. clubs which have “combined” to implement the draft are not competitors in any economic sense. The clubs operate basically as a joint venture in producing an entertainment product — football games and telecasts. No N.F.L. club can produce this product without agreements and joint action with every other team. To this end the league not only determines franchises locations, playing schedules, and broadcast terms, but also ensures that the club receive equal shares of telecast and ticket revenues. These economic joint ventures “compete” on the playing field, to be sure, but here as well cooperation is essential if the entertainment product is to attain a high quality: only if teams are “competitively balanced” will spectator interest be maintained at a high pitch.

No N.F.L. team, in short, is interested in driving another team out of business, whether in the countinguhouse or on the football field, for if the league fails, no one team can survive.

593 F.2d at 1178-79.

The court in Mackey v. N.F.L., 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 424 U.S. 801 (1977), also noted the “joint venture” characteristics of the N.F.L.: “The N.F.L. assumes some of the characteristics of a joint venture in that each member club has a stake in the success of the other teams. No one club is interested in driving another team out of business, since if the League falls, no one team can survive.” Id. at 619. In Kapp v. N.F.L., 390 F. Supp. 73 (N.D. Cal. 1974), aff’d in part and dismissed in part as moot, 586 F.2d 644 (9th Cir. 1978), the necessity for player restraints was acknowledged “in this unique field of sports league activities . . . wherein to achieve fairly evenly matched teams on the field, there must be some degree and kind of restriction on the right of clubs to hire and players to sign as they please.” Id. at 81.


100 358 F.2d 185 (9th Cir.), cert. denied, 385 U.S. 846 (1966).
occasions, Deesen applied to the P.G.A. and its tournament committee for reinstatement but was refused.

The appellant contended, among other things, that through its rules and regulations governing the eligibility of entrants into P.G.A. sponsored and co-sponsored tournaments, the P.G.A. had combined and conspired to unreasonably restrain the business of tournament golf professionals, in violation of section 1 of the Sherman Act. The court noted that the purpose of the P.G.A.'s requirement that persons who seek approved tournament standing meet certain requirements was to insure that professional golf tournaments were not bogged down with players of inferior ability, and accepted the P.G.A.'s evidence that the welfare of club professionals has a direct relationship to the extent of public interest and participation in the game, and that such interest is maintained only if a high quality of competition is presented. In conclusion, the court held that the entrance restrictions imposed by the P.G.A. upon applicants for tournament player status were not for the purpose of destroying or suppressing competition but in reality fostered economic competition by maintaining a high quality of athletic competition.\(^{101}\)

In *Molinus v. National Basketball Assoc.*,\(^{102}\) the plaintiff was drafted by the Fort Wayne Pistons (now the Detroit Pistons), a member of the defendant National Basketball Association. In the fall of 1953, he signed a contract to play with the Pistons but in January of 1954 admitted in writing that he had placed several bets on the Pistons to win particular games. The president of the league, acting pursuant to a clause in plaintiff's contract and section 79 of the league constitution, indefinitely suspended the player from the league. The plaintiff made several applications for reinstatement, all of which were refused, and the league president testified that he would never allow the plaintiff to re-enter the league.

Plaintiff alleged, among other things, that his suspension by the league and its subsequent refusal to reinstate him was the result of a conspiracy in violation of the antitrust laws. In essence the plaintiff alleged that the league's refusal to allow him to play was a group boycott which foreclosed all opportunities for him to play professional basketball. The court found the suspension clause was not only reasonable but necessary to the economic survival of the league. It stated that although a rule may by its nature involve some sort of restraint, it may not violate antitrust laws. The court considered league efforts to maintain public interest and confidence, which is vital to the league's existence.

In addition to this judicial support, Congress has in certain situations recognized the N.F.L. as theoretically a single business entity. Congress has enacted legislation exempting joint arrangements for club television rights from antitrust laws. Popularly termed the "Sports Broadcast Act," the legislation permits professional sports leagues to bargain as a unit for the television contracts of individual teams, free from the restrictions of antitrust

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\(^{101}\) *Id.* at 170. The *Deesen* court applied the test set forth by the Supreme Court in Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918), viz: "The true test of legality is whether the restraint imposed is such that it merely regulates and thereby perhaps promotes competition, or whether it is such as may suppress or even destroy competition." 358 F.2d at 170.

\(^{102}\) 40 F. Supp. 440 (E.D. N.Y. 1940).
laws.\textsuperscript{103} The Football Merger Act,\textsuperscript{104} enacted November 8, 1966, authorized the merger of the American Football League and the National Football League, again by waiving antitrust limitations.

The \textit{Deesen} and \textit{Molinas} opinions, the Sports Broadcast Act and the Football Merger Act establish that an economic structural analysis of the N.F.L. as a single business entity is acceptable in the area of antitrust law. This is the critical step necessary to make the N.F.L. player draft and other player market restraints reasonable and therefore legal under antitrust law. The N.F.L. player draft and other player market restraints improve the competitive equality of clubs on the playing field. This in turn improves the quality of professional football as an entertainment product, which enables it to compete more effectively in the professional sports league market. Because competition in the professional sports league market is economic competition, the N.F.L. player market restraints have positive, economic pro-competitive benefits which offset their anticompetitive effects, and, as a result, are reasonable under the rule of reason test.

\textbf{C. The Interleague Structural Analysis Argument:}
\textit{An Extension of the Single Entity Analysis}

The Supreme Court's decision in \textit{Continental T.V. v. GTE Sylvania, Inc.}\textsuperscript{105} provides a thought-provoking analogy to the position of the N.F.L. player draft under the antitrust laws. Continental was a franchised dealer of Sylvania. Sylvania's franchise plan limited the number of franchises granted for any given area and required each franchisee to sell his Sylvania products only from the location or locations in which he was franchised. Under this plan, Sylvania retained sole discretion to increase the number of retailers in an area. Dissatisfied with its treatment under the franchise arrangement, Continental crossclaimed in a suit with the finance company representing Sylvania, alleging that Sylvania had violated section 1 of the Sherman Act by entering a franchise agreement which was a per se illegal vertical restriction.

The district court, applying the Supreme Court’s decision in \textit{United States v. Arnold Schwinn and Co.},\textsuperscript{106} agreed with Continental. The \textit{Schwinn} franchise plan involved retail customer restrictions, but in intent and

\textsuperscript{103} The Sports Broadcast Act, 15 U.S.C. § 1291 (1976) provides that:
The antitrust laws, as defined in Section 1 of the Act of October 15, 1914, as amended (38 Stat. 730), or in the Federal Trade Commission Act, as amended (38 Stat. 717), shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey . . . contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.

In addition, such [antitrust] laws shall not apply to a joint agreement by which the member clubs of two or more professional football leagues, which are exempt from income tax under section 501 of the Internal Revenue Code of 1954 [26 U.S.C. § 501(c) (6)], combine their operations in expanded single league so exempt from income tax, if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto.

\textsuperscript{105} 433 U.S. 36 (1977).
competitive impact it was indistinguishable from the Continental T.V. franchise agreement. The Schwinn Court articulated a "bright line" per se rule of illegality for vertical restrictions, holding that it is per se illegal to seek to restrict or confine areas within which, or to persons with whom, an article may be traded, once the manufacturer has parted with dominion of the article. However, if the manufacturer retains title and therefore the accompanying risks, the role of the franchised distributor is indistinguishable from that of a manufacturer's representative or sales agent and the rule of reason applies to vertical restraints in such a situation.107

The Supreme Court in Continental T.V. overruled the Schwinn decision, stating that although vertical restrictions have the potential for reduction in intrabrand competition, they simultaneously have the potential to stimulate interbrand competition. This "redeeming virtue" may make vertical restrictions reasonable108 even where the manufacturer has not parted with dominion of the product involved. As a result, vertical restrictions fail to meet the demanding standards of Northern Pacific Ry. v. United States109 and cannot be classified as per se illegal.

1. Emphasis Upon Economic Realities Rather than Form

The Supreme Court's opinion in Continental T.V. is analogous to the N.F.L. player draft situation in two respects. First, Continental T.V. stated that the Schwinn Court had erred in placing emphasis upon the "form of the transaction" instead of upon economic analysis. Schwinn had held that if the franchised distributor was independent and purchased title to the product, it was per se illegal for the manufacturer to impose vertical restrictions; however, if the distributor acted as a sales agent or manufacturer's representative and never had title to the product, vertical restrictions were not per se illegal.110 The Supreme Court in Continental T.V. held that the sales plans should not have been differentiated based upon the "form of the transaction" but upon the economic realities which underlie the plans.

Applying this "form of the transaction"/economic reality distinction to the N.F.L., it is clear that although the N.F.L. is composed of numerous independent corporations, the courts should not be prohibited from examining the N.F.L. as one large corporation because it functions as a single corporation. It is the economic reality of the situation, and not the "form of the transaction," that should determine whether the N.F.L. is a single corporation. Just as the vertical restrictions in Continental T.V., while reducing intrabrand economic competition, were potentially beneficial to interbrand economic competition, so the N.F.L. player market restraints, although reducing economic competition between N.F.L. franchises, have positive, procompetitive benefits as to economic competition between the N.F.L. as a single entity and other league sports or entertainment packages. The

107 Id. at 379.
108 433 U.S. at 51-52.
109 356 U.S. 1 (1958); see text accompanying note 23 supra.
110 388 U.S. at 379.
economic reality that the N.F.L. competes with other entertainment products, and not the ostensible form of the transaction, should control.

2. Intrabrand v. Interbrand Competition

The distinction between intrabrand and interbrand economic competition, which prompted the Court in Continental T.V. to overrule Schwinn's bright line per se illegality rule for vertical restrictions where a manufacturer has not parted with dominion of the product, is analogous to the distinction set forth herein as to playing field competition and economic competition with other league sports or entertainment products. The N.F.L. player draft rules prohibit clubs from bidding competitively for the services of players drafted by other N.F.L. clubs, thus hindering intraleague economic competition. The Standard Player Contract, tampering rule, Rozelle Rule and option clause rule have similar anticompetitive effects upon intraleague economic competition, but these player service market restraints clearly improve the N.F.L.'s ability to compete economically with other sports leagues or entertainment packages. Although anticompetitive on an intraleague plane, the restraints may be reasonable on an interleague plane because they enhance economic competition between sports leagues.

V. Conclusion

Two convergent paths of precedent faced the D.C. Circuit Court of Appeals in Smith. On one hand were the earlier decisions dealing with the player service market restraints which held the restraints unreasonable. The courts in these decisions also stated that if the restraints were tailored to meet the goals sought, they would be reasonable. On the other hand was the recent Supreme Court decision in Professional Engineers, requiring that for a restraint to be reasonable, it must have an economic procompetitive effect sufficient to offset its economic drawbacks.

As a result of these converging precedential paths, and because the N.F.L. failed to prove any economic procompetitive benefits which arose from the player draft, the Smith court was forced to find the draft unreasonable. However, because the implication of such a decision would be that regardless of the extent to which the player service market restraints were tailored, they would still be unreasonable because they failed to provide economic procompetitive benefits, the Smith court declined to stop there. Instead it continued, sidestepping the Supreme Court's mandate in Professional Engineers and contradicting its previous statement, when it wrote that the draft as it existed in 1968 was unreasonable, but if the draft were tailored to meet the goals sought, it may be reasonable. This suggestion followed the trend of Kapp and Mackey regarding the player service market restraints.

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111 See notes 7-11 supra and accompanying text.
112 See also the discussion of Deesen and Molinas in notes 100-02 supra and accompanying text. These cases apparently found sufficient economic procompetitive benefits through enhanced league sports competition as to player restrictions similar to the N.F.L. player service market restraints.
before *Professional Engineers* had been decided.113 Thus the *Smith* court did not commit itself to either *Professional Engineers* or the *Kapp/Mackey* line of decisions regarding the player service market restraints.

Regardless of the wording of the test applied, the rule of reason, in conjunction with the Supreme Court's decision in *Professional Engineers*, requires that a restraint foster or promote economic competition in order to be reasonable. Therefore, the *Smith* court's suggestion that something less than a net economic procompetitive benefit will suffice to legalize the player service market restraints is incorrect.

The economic relationship between the teams within the N.F.L. is more correctly characterized as cooperation than as competition. Thus the N.F.L. player draft and other player service market restraints will not result in economic procompetitive benefits between the teams within the N.F.L. However, had Pro-Football, Inc. argued, and had the *Smith* court applied, the single entity structural analysis in its examination of the N.F.L., it would have found the economic procompetitive effect of the player draft. While the draft does not promote intraleague economic competition, it promotes interleague competition. If the *Smith* court had looked beyond the "form of the transaction" as the Supreme Court did in *Continental T.V.* and had examined the economic realities of the N.F.L.'s rather unique situation, it would have found that the N.F.L. functions as a single business entity in competition with other sports leagues. It is this economic interleague competition which the N.F.L. player draft promotes and which makes the draft and other player service market restraints reasonable and legal under antitrust laws.

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113 See notes 25-36 supra and accompanying text. Note that because the *Smith* court ruled only on the 1968 draft, which was more restrictive than the current draft, see note 40 supra, and because the suggestion persists that sufficient tailoring will make the player service market restraints reasonable, the legality of the current restraints is undetermined. Nonetheless, in light of the *Professional Engineers* requirement of economic procompetitive benefits, and the *Smith* court's holding that enhanced playing field competition is wholly noneconomic when the N.F.L. is viewed as a collection of economic competitors, a new and viable approach to the N.F.L. economic structure may be key to the N.F.L.'s continued economic survival.