Upon Further Review:
Why the NFL May Not be Free after Clarett, and Why Professional Sports
May be Free from Antitrust Law

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Stemming from the infamous Flood v. Kuhn Supreme Court
decision in 1972, Major League Baseball’s control over its labor
market benefited from a unique antitrust exemption built solely upon
a foundation of admittedly-suspect precedent.1 Though Congress
subsequently demolished baseball’s bizarre exemption with the Curt
Flood Act of 1998,2 every other major professional sport in America

   Baseball and Toolson should be overruled, thus eliminating baseball’s anomalous
   exemption from antitrust laws, the retroactivity problems that would inevitably ensue
   from such a ruling lead the court to prefer legislative action, which is prospective by nature).

   agreements from coverage under baseball’s unique exemption. As a result, baseball is still
   exempt in all matters other than labor. See id.
has universally been declared by the courts to be subject to federal antitrust laws.\(^3\)

But the story by no means ends there. While the Court in *Flood* refused to consider any issues aside from baseball's unique exemption, dissenting Justices Marshall and Brennan cited federal labor law issues as a hurdle “lurking in the background.”\(^4\) And with the recent unsuccessful challenge to the National Football League's eligibility rule by former Ohio State sophomore running back Maurice Clarett,\(^5\) it seems that federal labor law issues have moved to the forefront, becoming an impenetrable wall which may now have effectively stifled any impact federal antitrust laws once had over major professional sports.

The essence of the labor law issue is that “in order to accommodate the collective bargaining process, certain concerted activity among and between labor and employers must be held to be beyond the reach of the antitrust laws.”\(^6\) As such, a non-statutory exemption has been inferred “from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining.”\(^7\) The exemption exists, in large part, to protect from antitrust scrutiny “some restraints on competition imposed through the bargaining process” that would otherwise violate core antitrust principles.\(^8\)

“The Supreme Court has never delineated the precise [contours or] boundaries of the exemption,”\(^9\) and what little guidance it gives comes mostly from cases in which agreements between an employer and a labor union were alleged to have eliminated a competitor in the employer's market (collectively referred to as the “Jewel Tea” line of cases).\(^10\) Since none of the major professional sports leagues have any real “competitors” to eliminate, it has been argued that these cases provide only limited assistance in applying the non-statutory

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6. See id. at 130 (citing United States v. Hutcheson, 312 U.S. 219 (1941)).
8. Id. at 237.
exemption to the athletic arena. Consequently, in the thirty-four years since the dissenting justices in Flood identified the ubiquitous labor law hurdle, the interaction of the antitrust laws and labor laws in the sports world have remained “an area of law marked more by controversy than by clarity.”

But while controversy still looms large, the uncertain haze surrounding the interaction between antitrust laws and labor laws is beginning to clear up. Most recently, the 2003 Maurice Clarett saga featured more momentum swings than Ohio State’s dramatic 2002 Division I-A football national championship victory over Miami. Challenging the rule that at least “three full college seasons [must] have elapsed since [a player’s] high school graduation” for a player to be eligible to enter the NFL draft, the District Court in Clarett initially found an antitrust violation, holding that the eligibility rule did not fall within the scope of the non-statutory exemption. The labor law obstacle, however, ultimately proved too large to overcome, as the Second Circuit Court of Appeals reversed the District Court’s decision, declaring that the NFL’s eligibility rule indeed fell within the scope of the exemption despite the fact that the NFL and the player’s union seemingly did not bargain over the rule.

The decision in Clarett highlighted – and in some respects created – a split among circuits in the way courts define the limits of the non-statutory exemption. The Sixth, Eighth, and Ninth Circuits follow the three factor test articulated in Mackey v. National Football League, 543 F.2d 606, 614 (8th Cir. 1976). In order to fall within the non-statutory exemption under the Mackey test, the restraint must: (1) primarily affect “only the parties to the collective bargaining relationship,” (2) concern a “mandatory subject of collective bargaining,” and (3) be a “product of bona fide arm’s-length

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11. As will be discussed further below, the Second, Third, and Seventh Circuits all take this position with regard to the Jewel Tea line of cases.
14. Clarett, 369 F.3d at 128-29 (citing the NFL Bylaws and quoting a memorandum issued by the Commissioner of the NFL on February 16, 1990).
bargaining." Using the Mackey test, the District Court ruled in favor of Maurice Clarett.19

On the other side of the coin, the Second, Third, and Seventh Circuits have declined to follow the Mackey test in cases where the only alleged anticompetitive effect of the challenged restraint is on a labor market organized around a collective bargaining relationship.20 A trio of Second Circuit decisions (collectively referred to as the “Wood” line of cases) set forth a separate test for cases involving players’ claims that the concerted action of a professional sports league imposed a restraint upon the labor market for players’ services.21 In its crudest, most elementary form, this test essentially finds exempt any restraint that pertains to a mandatory subject of collective bargaining. It is based on the general idea that “to permit antitrust suits against sports leagues on the ground that their concerted action imposed a restraint upon the labor market would seriously undermine many of the policies embodied by [federal] labor laws, including the congressional policy favoring collective bargaining . . . .”22 Using this rationale, the Court of Appeals ruled against Maurice Clarett.23

The broadly-encompassing test of the Second Circuit arguably finds some auxiliary support from the Supreme Court decision in Brown v. Pro Football, Inc., where the Court held that the non-statutory exemption protected the NFL’s unilateral implementation of new salary caps for developmental squad players after its collective bargaining agreement with the players’ union had expired and negotiations over the salary cap had reached a dead end.24 Many observers have criticized the Brown decision for its seemingly all-encompassing exemption of labor market restraints,25 but even the Clarett court acknowledged that the Brown decision did stop short of

20. See U.S. Football League v. Nat’l Football League, 842 F.2d 1335, 1372 (2d Cir. 1988); Mid-America Reg’l Bargaining Ass’n v. Will County Carpenters Dist. Council, 675 F.2d 881, 893 (7th Cir. 1982); Consol. Express, Inc. v. N.Y. Shipping Ass’n, 602 F.2d 494, 513 (3rd Cir. 1979).
21. See Wood v. Nat’l Basketball Ass’n, 809 F.2d 954 (2d Cir. 1987); see also Caldwell v. American Basketball Ass’n, 66 F.3d 523 (2d Cir. 1995); Nat’l Basketball Ass’n v. Williams, 45 F.3d 684 (2d Cir. 1995).
22. Clarett, 369 F.3d at 135.
23. See id. at 138.
entirely waiving antitrust liability for labor markets characterized by collective bargaining.26

This note begins by reviewing the *Jewel Tea* line of cases that theoretically serve as the starting point for any non-statutory exemption discussion, followed by brief overviews of the contrasting *Wood* and *Mackey* lines of cases. The background section then turns to a summary of *Brown* – the latest Supreme Court decision relating to the collective bargaining process in professional sports – followed by a brief discussion of the NFL eligibility rule and how it differs from the recently-enacted NBA eligibility rule,27 which is of unquestioned legality. Finally, both the District Court and Court of Appeals decisions in *Clarett* are summarized.

The analysis begins with the premise that had the *Clarett* case been brought in the Sixth, Eighth, or Ninth Circuits, the application of the *Mackey* approach may have provided a more favorable outcome for Mr. Clarett. Consequently, if a future college underclassman, such as Oklahoma running back Adrian Peterson, decides to challenge the eligibility rule in one of the aforementioned circuits, the court would likely declare that the rule violates antitrust laws. And instead of refusing to hear the case, as it did with *Clarett*, the Supreme Court’s hand would almost be forced to choose between two contradictory decisions based on nearly-identical sets of facts.

In an attempt to provide a proposal to help guide the future decision-makers of this issue, this note goes on to analyze which circuit’s approach does the best job of appeasing the policies behind both antitrust law and labor law when dealing with restraints on the labor market of professional sports leagues, and then proposes a solution to the circuit split that takes the form of a “modified *Mackey* approach.”

I. BACKGROUND

A. The “Classic Formulation” of the Exemption – The *Jewel Tea* Line of Cases

Simply put, both the statutory and non-statutory labor exemptions collectively immunize otherwise anticompetitive conduct...
from antitrust scrutiny. The statutory exemptions, which can be found in both the Clayton Act and the Norris-LaGuardia Act do not cover the issues present in the NFL eligibility rule. However, the non-statutory exemption, a construct of the courts, has been “implied . . . from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining, which require good faith bargaining over wages, hours, and working conditions . . . .” If any rule or agreement is found to be immune from antitrust scrutiny based on this non-statutory labor exemption, it provides a complete defense for its legality.

The Supreme Court first dealt with the non-statutory exemption in Allen Bradley Co. v. Local No. 3, International Brotherhood of Electrical Workers (Allen), where the New York City electrical workers union negotiated a series of agreements in which local manufacturers agreed to deal only with fellow manufacturers that employed the union’s members. A non-local manufacturer that was excluded from the market sued under antitrust laws, and although the Court recognized that the restraints were sought out of “a desire to get and hold jobs for [union members] at good wages and under high working standards,” essentially two of the three aforementioned pillars of labor law – it held that the non-statutory exemption did not apply where unions combined with employers and manufacturers of goods to restrain competition in such goods.

Two decades after the Allen decision, the Supreme Court dealt with the non-statutory exemption twice in the same year. In United Mine Workers v. Pennington (Pennington), a miners union agreed with large coal mining companies that the union would demand higher wages from small coal mining companies in an attempt to drive the smaller companies out of business. In holding that the non-statutory exemption again did not apply, the Court stated that while “a union may make wage agreements with a multi-employer bargaining unit and may . . . seek to obtain the same terms from other employers,” it

33. 325 U.S. 797, 799-800 (1945).
34. Id. at 798.
35. Id. at 809.
cannot “agree[ ] with one set of employers to impose a certain wage scale on other bargaining units.”  

Later that year, the Court delivered its most lucid interpretation of the non-statutory exemption in Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co. (Jewel Tea), which involved a collective bargaining agreement between the butchers union and the meat sellers in Chicago whereby the meat sellers agreed to limit the hours of operation of meat counters.  

Jewel Tea, a meat seller that signed the agreement under pressure from the union, challenged the agreement on antitrust grounds, but it notably did not allege that the hours restriction eliminated competition amongst meat sellers.  

The Court held that the restriction did fall within the non-statutory exemption, but the reason for applying the exemption was the subject of intense disagreement.  

Justice White, writing for himself and two other Justices, believed the application of the exemption should be determined by balancing “the interests of union members” served by the restraint against “its relative impact on the product market.”  

Applying this test, the Justices found the hours restriction was “so intimately related to wages, hours and working conditions that the unions’ successful attempt to obtain that provision through bona fide, arm’s-length bargaining in pursuit of their own labor policies, and not at the behest of or in competition with nonlabor groups, falls within [the exemption].”  

This test is widely regarded as the “classic formulation” of the non-statutory exemption.  

Concurring in Jewel Tea (but dissenting in Pennington), Justice Goldberg and two other Justices found that “no such balancing was necessary”.  

Adopting the most ardent support of labor law to date, the Justices found that all “collective bargaining activity concerning mandatory subjects of bargaining under the [labor laws] is not subject to antitrust laws.”

37. Id. at 665.  
39. See id. at 688.  
40. See id.  
41. Id. at 690 n.5.  
42. Id. at 689-90.  
45. Jewel Tea, 381 U.S. at 710 (Goldberg, J., concurring) (emphasis added).
B. The Beginnings of the Circuit Split – Mackey vs. Wood

The first court to (attempt to) define the boundaries of the non-statutory exemption in the context of professional sports was the Eighth Circuit Court of Appeals, when in 1976, legendary tight end, John Mackey, led a pack of professional football players challenging an NFL rule which essentially required teams to compensate any team from which they hired away a player whose contract had expired. Known as the “Rozelle Rule,” the players argued that this requirement constituted an unlawful conspiracy amongst the NFL teams to restrict players’ abilities to freely contract for their services. In its defense, the NFL argued the Rozelle Rule was exempt from antitrust law by virtue of its inclusion in the collective bargaining agreement.

Deducing “certain principles” from the *Jewel Tea* line of cases, the *Mackey* court held that in order to fall within the non-statutory exemption, a restraint must: (1) primarily affect only the parties to the collective bargaining relationship, (2) concern a mandatory subject of collective bargaining relationship, and (3) be a product of bona fide arm’s-length bargaining. While the court found the first two prongs to be satisfied, it ruled that the exemption did not apply because the Rozelle Rule was not the product of arm’s-length negotiation. Of particular importance was the fact that the Rozelle Rule predated the making of the collective bargaining agreement, and the record lacked sufficient evidence that the players union had received some *quid pro quo* in exchange for including the rule in the agreement.

With the *Mackey* test on the books, the Sixth and Ninth Circuits quickly followed suit in *McCourt v. California Sports, Inc.*, and *Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal*...
However, the Second Circuit, along with the Third and Seventh Circuits, did not acquiesce. Whereas the Second Circuit has adopted the *Jewel Tea* reasoning for cases involving union agreements that disadvantage their competitors, it has not addressed the *Jewel Tea* – and by implication the *Mackey* – reasoning for cases involving restraints upon the labor market characterized by a collective bargaining relationship. Instead, as is outlined below, the Second Circuit essentially adopts Justice Goldberg’s concurring opinion in *Jewel Tea* that *all* “collective bargaining activity concerning mandatory subjects of bargaining under the labor laws is not subject to the antitrust laws.”

In *Wood*, a recently-drafted player challenged the NBA’s policies regarding the entry draft process and team salary caps alleging that the agreements among horizontal competitors served to eliminate competition for college players. The court held that “in light of the unusual economic imperatives of professional basketball,” the non-statutory exemption applied to the policies “particularly because *Wood* challenged agreements concerning mandatory subjects of bargaining.” Moreover, the court reasoned that to allow *Wood* to “cherry-pick” particular policies that were simply small parts of “unique bundle[s] of compromises” would run counter to the freedom to contract that labor law intends unions and employers to have during collective bargaining.

Eight years after the *Wood* decision, the Second Circuit dealt with another antitrust suit in *National Basketball Ass’n v. Williams*, only this time the challenged restraints were not encompassed in any collective bargaining agreement because the agreement had expired after negotiations had reached an impasse. Despite the fact that the rules were implemented unilaterally by the NBA, the court

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56. 817 F.2d 1391 (9th Cir. 1986).
60. *Clarett*, 369 F.3d. at 136.
61. *Wood*, 809 F.2d at 961.
62. *See id.* at 957-58.
63. 45 F.3d 684, 686 (2d Cir. 1995).
nonetheless applied the non-statutory exemption, explaining that “multi-employer bargaining units are a long-accepted and commonplace means of giving employers the tactical advantages of collective action,” and to allow the challenge would “[imperil] the legitimacy of the multi-employer bargaining unit.”

C. Brown v. Pro Football

With facts similar to Williams, the Supreme Court in 1996 finally heard a case involving a challenged restraint upon the market for players’ services. In Brown, the NFL unilaterally implemented a rule capping the weekly salaries of developmental squad players after negotiations with the players union over such a proposal became deadlocked. The Court held that employers could agree to take actions to impose controls on a labor market, if those actions: “grew out of” and were “directly related to” a multi-employer bargaining process; did not offend the federal labor laws that sanction and regulate the process; affected terms of employment subject to compulsory bargaining; and concerned only parties to the collective bargaining relationship.

In finding that the non-statutory exemption did apply, the Court made numerous other important comments. First, it held that the exemption was not so narrow as to protect only understandings embodied in an existing collective bargaining agreement, “for the collective-bargaining process may take place before the making of any agreement or after an agreement has expired.” Second, the Court refused the players’ contention that the labor of professional sports players was unique and that the market for players’ services therefore should be treated differently than other organized labor markets for purposes of the exemption.

Finally, the Court refused to endorse the broad ruling from the lower courts that “waiv[ed] antitrust liability for restraints on competition imposed through the collective-bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining.”

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64. Clarett, 369 F.3d at 136.
66. See id. at 250. See generally Harper, supra note 3 (providing an in-depth critique of Brown).
68. See id. at 248-49.
69. Id. at 234.
D. NFL Eligibility Rule

The current collective bargaining agreement (CBA) between the NFL and its players union became effective in 1993 and governs through 2007.\footnote{Clarett v. Nat’l Football League, 369 F.3d 124, 127 (2d Cir. 2004) (referring to the NFL Collective Bargaining Agreement (1993)), cert. denied, 125 S. Ct. 1728 (2005).} Despite its scrupulous treatment of the manner in which teams select players in the draft, as well as the compensation scheme by which rookies are paid, there is no mention of the eligibility rule in the CBA itself.\footnote{Id.} Contrast this with the new NBA eligibility rule, which is explicitly included within the four corners of its collective bargaining agreement.\footnote{See generally NAT’L BASKETBALL LEAGUE, NBA COLLECTIVE BARGAINING AGREEMENT (2005), available at http://www.nbpa.com/cba_articles.php (last visited Sept. 20, 2005).}

At the time the CBA became effective, the eligibility rule was included in Article XII of the NFL Constitution and Bylaws, which were last amended in 1992, though the original version of the eligibility rule was first adopted shortly after the 1925 draft.\footnote{Clarett, 369 F.3d at 127; see Rosner, supra note 25, at 542.} According to the CBA, the players’ union agreed to “waive . . . its rights to bargain over any provision of the Constitution and Bylaws . . . .”\footnote{Clarett v. Nat’l Football League, 306 F. Supp. 2d 379, 396 (S.D.N.Y. 2004) (quoting the NFL Collective Bargaining Agreement).}

In its form today, the rule states that at least “three full college seasons must have elapsed since [a player’s] high school graduation” for him to be eligible to enter the draft.\footnote{Clarett, 369 F.3d at 128-29 (citing the NFL Bylaws and quoting a memorandum issued by the Commissioner of the NFL on February 16, 1990).}

E. Clarett: Touchdown Overruled Upon Further Review

The modern version of the NFL eligibility rule was challenged for the first time by Maurice Clarett, a controversial running back coming off a sophomore season where he was found to be ineligible to play college football for violating various NCAA and school rules.\footnote{See Mike Freeman, Buckeyes Suspend Clarett For Year, N.Y. TIMES, Sept. 11, 2003, at D1.} Aside from the millions likely awaiting him in the NFL, there was also a strong possibility that, had Clarett returned to Ohio State for his junior year, he would be ineligible for at least a handful of games to begin the season.\footnote{See id.} With these factors in mind, Clarett, an Ohio
resident, filed an antitrust suit in the Southern District of New York in January of 2004.78

The court initially embarked on a lengthy discussion of the non-statutory exemption, stating unequivocally that “the Second Circuit has not adopted a test that controls the [exemption’s] application.”79 However, after articulating the Mackey test, the court stated that “in more recent cases, the Second Circuit acknowledged the [Mackey test], but preferred to apply the simple formulation enunciated by the Supreme Court in [Jewel Tea].”80 And despite the Wood line of cases expressly rejecting Jewel Tea’s “simple formulation” in cases where the anti-competitive restraint is being placed on competitors to the labor market organized around the collective bargaining relationship,81 the court distinguished the Wood line by finding that instead of involving job eligibility, “the league provisions in [those cases] govern[ed] the terms by which those who are drafted are employed.”82 Accordingly, when it applied the NFL eligibility rule to the exemption, the court analyzed the rule within the framework of the three Mackey requirements instead of the Wood analysis as adopted by the Second Circuit.83

The court first opined that “the rule does not address a mandatory subject of collective bargaining.”84 The mandatory subjects deal only with wages, hours, or conditions of employment, and according to the court, nothing in the rule references those three subjects.85 Furthermore, the rule “makes a class of potential players unemployable.”86 “Wages, hours or working conditions affect only those who are employed or eligible for employment.”87

The court next stated that “the exemption is also inapplicable because the Rule only affects players, like Clarett, who are complete strangers to the bargaining relationship.”88 While the court

78. See generally Clarett, 306 F. Supp. 2d at 379.
79. Id. at 391.
80. Id. at 392; see Local 210, Laborers’ Int’l Union. v. Labor Relations Div. Associated Gen. Contractors, 844 F.2d 69, 80 (2d Cir. 1988) (stating that “although we believe that the agreement in the instant case could satisfy [the Mackey] test, we need not adopt this particular analysis. Rather, we rely on ... Jewel Tea.”).
82. Clarett, 306 F. Supp. 2d at 395 (additional emphasis added).
83. See id. at 393-97.
84. See id. at 393 (capitalization altered).
85. See id.
86. Id.
87. Id.
88. Id. at 395.
acknowledged the exemption’s applicability to both current and prospective employees, it found Clarett’s situation different because the rule made him unemployable, and thus not a “prospective employee.”89 According to the court:

Employees who are hired after the collective bargaining agreement is negotiated are nonetheless bound by its terms because they step into the shoes of the players who did engage in collective bargaining. But those who are categorically denied eligibility for employment, even temporarily, cannot be bound by the terms of employment they cannot obtain.90

Finally, the court held that the exemption also does not apply because “the NFL . . . failed to demonstrate that the rule evolved from arm’s-length negotiations.”91 From the “meager facts” presented, the court found “that the first version of the rule could not have arisen from the collective bargaining process,” and “the NFL offer[ed] no evidence that the Rule was addressed during the collective bargaining negotiations prior to 1993.”92

But before the end zone celebration from Clarett’s in-court victory could be finished, the Second Circuit Court of Appeals announced its decision in favor of the NFL just days before the scheduled NFL draft.93

After summing up the District Court’s decision, the court reiterated its stance from Wood that it has “never regarded the [Mackey] test as defining the appropriate limits of the non-statutory exemption.”94 Therefore, instead of applying the eligibility rule to the three Mackey requirements, the court framed the issue in terms of “whether subjecting the NFL’s eligibility rules to antitrust scrutiny would ‘subvert fundamental principles of our federal labor policy.’”95

In answering that inquiry, the court determined that “to regard the NFL’s eligibility rules as merely permissive bargaining subjects would ‘ignore the reality of collective bargaining in sports.’”96 First, due to the “unusual economic imperatives of professional sports,” the

89. Id.
90. Id. at 395-96.
91. Id. at 396.
92. Id.
93. NFL Draft was held on April 24 -25, 2004 in New York City. The Clarett case was argued on April 19, 2004. After arguments the Court announced its decision in favor of the NFL, however, the opinion was not published until May 24, 2004. See Clarett v. Nat’l Football League, 369 F.3d 124, 127 (2d Cir. 2004), cert. denied, 125 S. Ct. 1728 (2005).
94. Clarett, 369 F.3d at 133.
95. Id. at 138 (quoting Wood v. Nat’l Basketball Ass’n, 809 F.2d 954, 959 (2d Cir. 1987)).
96. Id. at 140 (quoting Silverman v. Major League Baseball Player Relations Comm., Inc., 67 F.3d 1054, 1061-62 (2d Cir. 1995)).
rule constitutes a “mandatory bargaining subject because [it has] tangible effects on the wages and working conditions of current NFL players.”97 Second, the court found that the rule “[represents] a quite literal condition for initial employment and for that reason alone might constitute a mandatory bargaining subject.”98 Aside from the complex issues of free agency, team salary caps, and league-wide salary pools for rookies, the court also believed that the rule affected job security of veteran players by reducing competition in the market for entering players.99

The court continued to address the mandatory subject inquiry when it countered Clarett’s claim that the exemption does not apply because the rule affects players outside of the union, declaring that “simply because the eligibility rules work a hardship on prospective rather than current employees does not render them impermissible.”100 In support of this assertion, the court compared the eligibility rule to hiring hall arrangements, where the criteria for employment are set by the rules of the hiring hall rather than the employer alone, and where such arrangements have still been found to be mandatory subjects of bargaining despite the fact that they concern prospective rather than current employees.101

In dicta, the court then further opined that the absence of any evidence of arm’s-length bargaining over the rule was inconsequential.102 The eligibility rule, along with many other NFL rules and policies included in the NFL’s Constitution and Bylaws, was well known to the union, and “given that the eligibility rules are a mandatory bargaining subject . . . the union or the NFL could have forced the other to the bargaining table if either felt that a change was warranted.”103 Furthermore, the court believed that since the union waived “any challenge to the Constitution and Bylaws and thereby acquiesced in the continuing operation of the eligibility rules,”104

In short, while the Second Circuit refused to apply the Mackey test, it nevertheless addressed and rebutted each of the three Mackey requirements analyzed by the District Court. And when the Supreme

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97. Id. at 140.
98. Id. at 129 (citing Caldwell v. Am. Basketball Ass’n, 66 F.3d 523, 529 (2d Cir. 1995)).
99. Id. at 140.
100. Id. (citing Wood, 809 F.2d at 960).
101. Id. at 140-41 (citing Associated Gen. Contractors, Houston Chapter, 143 N.L.R.B. 409, 412, enforced, 349 F.2d 449 (5th Cir. 1965)).
102. Id. at 142.
103. Id.
104. Id.
Court refused to grant certiorari for Clarett just days before the NFL draft, the eligibility rule remained fully intact . . . at least for the time being.

II. ANALYSIS

A. The Critical Decision to Bring the Suit in the Second Circuit

When the Second Circuit rejected the Mackey approach in Clarett, it joined the Third and Seventh Circuits in their method of “defining the appropriate limits of the non-statutory exemption.”\(^{105}\) With the Sixth, Eighth, and Ninth Circuits all having already adopted the Mackey approach,\(^ {106}\) three circuits now reside on each side of the recently well-defined circuit split.

Hindsight being the national pastime that it is, lawyers for Maurice Clarett undoubtedly rue the day they brought the action in the U.S. District Court for the Southern District of New York. Knowing their ultimate fate would be decided by the Second Circuit Court of Appeals, who previously recognized in Wood that Mackey is “of limited assistance in determining whether an athlete can challenge restraints on the market for professional sports players imposed through a collective bargaining process,”\(^ {107}\) one must wonder why the suit was not brought in a district court residing in the Sixth, Eighth or Ninth Circuits, where the Courts of Appeals all follow the more-stringent Mackey approach. The decision is particularly suspicious when considering the fact that Clarett resided and played football in the state of Ohio, which is a Sixth Circuit state.

According to the CBA, nothing prohibits a suit against the NFL from being brought outside the state of New York.\(^ {108}\) The only partially relevant provision, Article LIX entitled “Governing Law,” states that “to the extent that federal law does not govern the implementation of this Agreement, this Agreement shall be construed and interpreted under, and shall be governed by, the laws applicable

\(^{105}\) Id. at 133.


\(^{107}\) Clarett, 369 F.3d at 134.

This provision only pertains to the choice of law principles that will govern a suit brought in the United States; it does not preclude any lawsuit fulfilling the requirements of both subject matter and personal jurisdiction from being brought in a federal district court outside of New York.

Without a provision in the CBA restricting the choice of venue, the question remains: Could Clarett’s lawyers have brought in suit in the Sixth, Eighth or Ninth Circuits, just as John Mackey’s lawyers did in 1976? In short: yes.

The subject matter jurisdiction over an antitrust challenge in federal court is easily satisfied, as such actions undoubtedly fall exclusively within the ambit of federal law (thus making the aforementioned Article LIX irrelevant to the cases at hand). Moreover, courts have unanimously declared that “the doctrine of exclusive primary National Labor Relations Board jurisdiction has never been applied by the Supreme Court to avoid a determination on the merits of an antitrust claim.”

Similarly, personal jurisdiction over the NFL is also easily satisfied. The NFL is an unincorporated association consisting of thirty-two professional football teams which are located in each of the eleven U.S. Circuits. The NFL has minimum contacts sufficient to satisfy personal jurisdiction with every state or circuit in which it conducts business. “The business of professional football . . . involves a variety of activities, including the playing of football games, transporting players and other team personnel, employing players and other personnel, purchasing and transporting equipment, and arranging telecasts and broadcasts of professional football games through contracts with television and radio networks or stations.”

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109. Id. art. LIX.


111. First Circuit (New England Patriots), Second Circuit (New York Jets, Buffalo Bills), Third Circuit (New York Giants, Pittsburgh Steelers, Philadelphia Eagles), Fourth Circuit (Baltimore Ravens, Carolina Panthers, Washington Redskins), Fifth Circuit (New Orleans Saints, Dallas Cowboys, Houston Texans), Sixth Circuit (Tennessee Titans, Detroit Lions, Cleveland Browns, Cincinnati Bengals), Seventh Circuit (Green Bay Packers, Indianapolis Colts, Chicago Bears), Eighth Circuit (St. Louis Rams, Kansas City Chiefs, Minnesota Vikings), Ninth Circuit (Arizona Cardinals, San Diego Chargers, Oakland Raiders, San Francisco 49ers, Seattle Seahawks), Tenth Circuit (Denver Broncos), Eleventh Circuit (Atlanta Falcons, Jacksonville Jaguars, Miami Dolphins, Tampa Bay Buccaneers). Note that the D.C. Circuit is the only U.S. Circuit without an NFL team located in its jurisdiction.

112. Mackey, 407 F. Supp. at 1002.
As such, since it conducts business in states within all twelve circuits (including the District of Columbia), courts in every circuit will have personal jurisdiction over the NFL.

B. Peterson v. National Football League – Under the Mackey Approach

In 2004, for the first time in the seventy year history of the Heisman Trophy – which is awarded annually to the most outstanding college football player in the country – two of the five finalists were either freshmen or sophomores. Adrian Peterson, then a freshman at the University of Oklahoma, actually made college football history by finishing second in the voting. It is not difficult to see why professional scouts are licking their chops for the chance to draft the 6-foot, 2-inch, 210 pound running back who tallied 1,925 rushing yards in his debut season. And it’s not difficult to see how this nineteen-year-old, who has been living without his biological parents since elementary school, may not want to delay the million dollar security of the NFL for two more years, which he is required to do under the current NFL eligibility rules.

It is almost inevitable that some time in the near future, an athlete like Peterson, who by all accounts would have been a top five pick if the 2005 NFL draft, will decide to challenge the NFL’s eligibility rules after his freshman or sophomore season. Surely Peterson would not bring the suit in the Second Circuit, for he would be stopped cold by a recently-overturned District Court. However, if Peterson were to bring the suit in the any of the circuits that have firmly adopted the Mackey approach, it is possible that he may find a crack in one of the three Mackey requirements and bust through the non-statutory exemption protecting the NFL’s eligibility barrier.

As stated previously, in order to fall within the non-statutory exemption under the Mackey test, the restraint must: (1) “primarily affect[] only the parties to the collective bargaining relationship,” (2) “concern[] a mandatory subject of collective bargaining,” and (3) be a “product of bona fide arm’s-length bargaining.” The District Court


114. Id.


in *Clarett* found that the NFL eligibility rule violated all three of the requirements, but even though the Court of Appeals declined to follow the *Mackey* test, it still presented compelling arguments that the NFL did satisfy each of the three requirements. Consequently, the application of the *Mackey* test would not automatically result in a landmark decision against the NFL, but it certainly does open up more avenues for players like Peterson.

1. **Mandatory Subject of Collective Bargaining**

Peterson would first argue that the NFL’s eligibility rule does not constitute a mandatory subject of collective bargaining. Under the National Labor Relations Act (NLRA), parties in collective bargaining have an obligation to “confer in good faith with respect to wages, hours, and . . . conditions of employment . . . .” Therefore, if a subject of collective bargaining does not somehow pertain to “wages, hours, and conditions of employment,” then it will be characterized as permissive instead of mandatory.

The rule at issue states that at least “three full college seasons must have elapsed since [a player’s] high school graduation” for them to be eligible to enter the draft. On the surface, there is no reference to wages (e.g., the salary cap for rookies in *Wood and Williams*), hours (e.g., limits on the length of rookie training camps) or conditions of employment (e.g., availability of proper medical personnel during games).

However, two arguments can be set forth supporting the proposition that the eligibility rule is a mandatory subject of collective bargaining. First, the NFL could argue – echoing the Court of Appeals in *Clarett* – that the rule is a mandatory subject of collective bargaining because it has a tangible effect on the wages and working conditions of current NFL players. Using a loose interpretation of “tangible effect” tailored to the “special arrangements in professional sports,” the *Clarett* court stated that the “complex scheme by which individual salaries in the NFL are set, which involves, *inter alia*, the NFL draft, league-wide salary pools, and free agency, was built around the long-standing restraint on the market for entering players

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119.  *Clarett*, 369 F.3d at 128-29 (citing the NFL Bylaws and quoting a memorandum issued by the Commissioner of the NFL on February 16, 1990).
120.  *See id. at* 140.
imposed by the eligibility rule.” 121 The Second Circuit found its support in a case where it held that free agency and baseball’s reserve system were mandatory subjects of collective bargaining. 122 However, no such case law exists in the Sixth, Eighth, or Ninth Circuits, and even if it did, the NFL’s eligibility rule is quite different than baseball’s free agency and reserve system. For one thing, since there are a fixed number of draft picks and rookie positions available, it is hard to see how the eligibility rule can affect the rookie salary cap. The same number of players, and in theory the same caliber of players, will be selected regardless of who is eligible to be selected.

The NFL may argue that by reducing competition in the market for entering players, the eligibility rule also affects the job security of veteran players. The counter to this argument is that most NFL teams have a limited number of roster spots available for rookie players, and the fact that the competition for those spots increases without the eligibility rule has no effect on the job security of veteran players. Put another way, the fact that younger rookies may take roster spots which would otherwise be occupied by older rookies has virtually no impact on the job security of veteran players. Additionally, unlike the National Basketball Association, where rosters consist of only twelve players, NFL rosters consist of sixty players, so the addition of a handful of younger rookies in place of a handful of older rookies has even less of an impact than it would in a sport like professional basketball.

The second (and more persuasive) argument is that “the eligibility rules for the draft represent a quite literal condition for initial employment and for that reason alone might constitute a mandatory bargaining subject.” 123 On the surface, this argument seems to mistake conditions of employment with conditions for employment. Conditions of employment are defined as “personnel policies, practices, and matters . . . affecting working conditions.” 124 The term “working conditions” ordinarily calls to mind the day-to-day circumstances under which an employee performs his or her job.

121. Id.
123. Clarett, 369 F.3d at 139 (citing Caldwell v. Am. Basketball Ass’n, 66 F.3d 523, 529 (2d Cir. 1995)).
125. See Fibreboard Paper Prods. Corp. v. N.L.R.B., 379 U.S. 203, 221-22 (1964) (Stewart, J., concurring) (although “the phrase ‘conditions of employment’ is no doubt susceptible of diverse interpretations . . . in common parlance, the conditions of a person’s
The Supreme Court, however, in 1958 held that, in the context of deciding whether a subject of bargaining is a mandatory, “‘employment’ connotes the initial act of employing as well as the consequent state of being employed.”126 In fact, the National Labor Relations Board has specifically held that the collective bargaining process does include the obtaining of employment, and is not limited only to those conditions which arise after an actual employment relationship has been established.127 As a result, a court in the Sixth, Eighth, or Ninth Circuits would likely find the rule to be a permissive – not a mandatory – subject of the collective bargaining process.

2. Parties to the Collective Bargaining Relationship

With the mandatory bargaining subject avenue likely closed, Peterson would next argue that the non-statutory labor exemption is inapplicable because the eligibility rule only affects players who are complete strangers to the bargaining relationship. Whereas wages, hours, and working conditions affect only those who are employed or eligible for employment, Peterson would argue that the eligibility rule makes a class of potential players simply unemployable.128 This argument is closely linked to whether the rule is or is not a mandatory subject, as the District Court in Clarett made clear when it stated, “[t]hat the non-statutory exemption does not apply in such a case is simply the flip side of the rule that the exemption only applies to mandatory subjects of collective bargaining, those governing wages, hours, and working conditions.”129

However, since the District Court was likely incorrect in its assessment that the eligibility rule was a not mandatory subject, it follows that the District Court was also incorrect in its assessment that the rule affects parties outside the collective bargaining process. Just as the Supreme Court found that “employment” connotes the initial act of employing as well as the consequent state of being employed, the National Labor Relations Board has interpreted the Supreme Court’s 1958 ruling as including within the definition of “employees” those individuals already working for the employer as employment are most obviously the various physical dimensions of his working environment”).

127. See id.
129. Id. at 395.
well as prospective employees. As a result, the Court of Appeals in *Clarett* was correct in saying that “simply because the eligibility rules work a hardship on prospective rather than current employees does not render them impermissible.” Accordingly, a court in the Sixth, Eighth, or Ninth Circuits would likely find that prospective players do fit within the definition of parties to the collective bargaining relationship.

3. Product of Bona Fide Arms-Length Negotiation

With the first two *Mackey* requirements likely satisfied by the NFL, Peterson would finally argue that the NFL cannot show that the eligibility rule arose from bona fide, arm’s-length negotiation. The original version of the eligibility rule was adopted shortly after 1925, but the first collective bargaining agreement was not adopted until 1968. Thus, the original version of the eligibility rule seemingly did not arise from the collective bargaining. Moreover, the NFL likely cannot offer any compelling evidence that the eligibility rule was addressed during collective bargaining negotiations leading up to the current agreement in 1993, which contains no mention of the rule.

It is this crucial distinction that highlights the difference between the NBA eligibility rule, which stands on firmly entrenched legal ground, and the NFL eligibility rule, which wobbles on precariously shaky legal ground. Perhaps learning from the NFL’s mistake, the NBA specifically included its eligibility rule in its CBA, thereby providing unequivocal evidence that the rule was indeed a product of bona fide negotiation.

The absence of the NFL rule in its CBA, however, does not necessarily preclude the application of the non-statutory exemption since the Supreme Court in *Brown* held that the exemption was not so narrow as to protect only agreements between parties that are embodied in an existing collective bargaining agreement. While not mentioned in the collective bargaining agreement, the eligibility rule can be found in the NFL’s Constitution and Bylaws, which the players’ association “waive[d] . . . its rights to bargain over any provision of the

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130. *Houston Chapter*, 143 N.L.R.B. at 412.
133. *See id.* (referencing the Declaration of Peter Ruocco ¶ 8).
134. *See generally supra* note 72.
Constitution and Bylaws.” The NFL would maintain that since the players’ association agreed to waive any challenge to the Constitution, and thereby acquiesced to the continuing operation of the eligibility rule contained therein, it was “bargained for.” However, the players’ association actually waived its right to bargain over any provision in the Constitution, which suggests that the eligibility rule contained therein clearly was never the subject of bargaining.

Countering this argument, the Second Circuit in *Clarett* found that it was entirely possible that the players’ association might not have regarded the difference in opinions over the eligibility rule as sufficient to warrant the expenditure of precious time at the bargaining table in light of other important issues. The court went on to hold that “[i]t would disregard those policies [favoring the collective bargaining process] to hold that some ‘particular quid pro quo must be proven to avoid antitrust liability.’”

But while this argument held up in the Second Circuit, it is entirely inconsistent with established precedent in the Sixth, Eighth, and Ninth Circuits. In *Mackey*, the court refused to apply the non-statutory exemption based largely on the fact that the record lacked sufficient evidence to conclude that the players union had received some *quid pro quo* in exchange for including the rule at issue in the collective bargaining agreement.139 Since the NFL will be arguing that the non-statutory exemption should apply, it is the NFL’s burden to establish each of the three *Mackey* factors. Therefore, according to *Mackey*, it is the NFL’s burden to present sufficient evidence to conclude that the players’ association received some *quid pro quo* in exchange for the inclusion of the eligibility rule. The NFL has no such evidence,140 which leads to the conclusion that the *Mackey* test would likely defeat the NFL’s defense that the non-statutory exemption protects it from antitrust liability.

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137. *Clarett*, 369 F.3d at 142.
138. *Id.* at 143 (citing *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954, 962 (2d Cir. 1987)).
140. The only evidence presented to the court in *Clarett* was a vague and conclusory declaration from an NFL employee stating: “During the course of collective bargaining that led to the 1993 CBA, the eligibility rule itself was the subject of collective bargaining.” This declaration is unsubstantiated by any documents or supporting declarations. *Clarett*, 369 F.3d at 128.
C. Mackey Test vs. Clarett Test – Discussing the Merits of Both Approaches

With the possibility of a contrary holding in the Peterson hypothetical, it is likely that the Supreme Court will grant certiorari to settle the circuit split created by Clarett; thus finally resolving the labor law issues that, according to Justice Marshall in Flood, “[move] in and out of the shadows like an uninvited guest at a party whom one can’t decide either to embrace or expel.”141

Very plainly, the purpose behind the non-statutory exemption is to favor labor law over antitrust law by permitting collective bargaining over wages, hours, and working conditions.142 Though whichever test eventually adopted should give the policies inherent in labor law the most weight, the test must strike an effective balance of “the conflicting policies embodied in the labor and antitrust laws.”143

The Mackey approach is essentially based on the belief that the Jewel Tea line of cases dictates the appropriate boundaries of the non-statutory exemption for cases in which the only alleged anti-competitive effect is on the labor market organized in the collective bargaining relationship.144 The Second Circuit, which expressly rejected this view in Wood and Clarett, has held that the Jewel Tea line of cases should only apply when the anti-competitive restraint is being placed on competitors to the labor market organized around the collective bargaining relationship.145

While both the Mackey approach and the Clarett approach acknowledge that the non-statutory exemption was designed to shield from antitrust scrutiny conduct that is mandated under the labor laws (mandatory bargaining subjects),146 the Mackey approach goes two steps further by requiring that the restraint primarily affect only the parties to the collective bargaining relationship and be a product of bona fide, arm’s-length bargaining. But with the Supreme Court’s expansive view of “employees” as covering prospective as well as current employees,147 the only material difference is the requirement of bona fide arm’s-length bargaining.

144. See Clarett, 369 F.3d at 134.
145. See id.
According to the Clarett court, the overarching issue it had to decide was “whether subjecting the NFL’s eligibility rules to antitrust scrutiny would ‘subvert fundamental principles of our federal labor policies.’”\(^{148}\) As mentioned above, those fundamental principles “[favor] free and private collective bargaining . . . which require[s] good-faith bargaining over wages, hours, and working conditions . . . .”\(^{149}\) Accordingly, it seems clear that the extra Mackey requirement of bona fide arm’s-length bargaining furthers – rather than subverts – the goal of “free,” “private,” and “good faith” bargaining. For this reason, even though the added requirement of arm’s-length bargaining places an extra limitation on the applicability of the non-statutory exemption, the Mackey approach is actually more in line with labor law ideals than the Clarett approach . . . and thus the Mackey approach more effectively strikes a balance between labor law and antitrust law.

As a general matter, the differences in Mackey and Clarett can be summed up by looking at the differences in Justice White’s majority opinion and Justice Goldberg’s concurring opinion in Jewel Tea.\(^{150}\)

Support for the arm’s-length negotiation requirement can be found in the binding language of Justice White in Jewel Tea. In finding that the provision in question was intimately related to wages, hours and working conditions, Justice White made special note of the fact that the provision was obtained through arms-length bargaining, and thus fell within the non-statutory exemption. Even though the facts and circumstances in Jewel Tea differ from the eligibility rule, such arm’s-length negotiation still furthers labor law goals whether the restraint is being placed on the labor market itself (as is the case with the eligibility rule) or the competitors to the labor market (as is the case in Jewel Tea).

It can be argued that in light of Brown, where the Court found the non-statutory exemption could also protect some agreements not embodied in the collective bargaining agreement, the Supreme Court has rejected a requirement of arm’s-length negotiation.\(^{151}\) However, the Court only included this caveat to protect agreements that took place not during the collective bargaining process, but before the

\(^{148}\) Clarett, 369 F.3d at 138 (quoting Wood v. Nat’l Basketball Ass’n, 809 F.2d 954, 959 (2d Cir. 1987)).


\(^{151}\) See Brown, 518 U.S. at 243.
making of the agreement or after the expiration of an agreement.\textsuperscript{152} Where there is absolutely no evidence of an agreement during the collective bargaining process – such as a rule that originated in 1925 and was included in a document which the union waived its right to bargain over – the protection Brown offers is not applicable.

Furthermore, the Clarett approach, which mirrors Justice Goldberg's opinion that all "collective bargaining activity concerning mandatory subjects of bargaining under the [labor laws] [should not be] subject to the antitrust laws,"\textsuperscript{153} is inconsistent with the Brown decision, which laid out further requirements for the exemption to apply. In fact, the entire basis of the Clarett (and Wood) line of cases – that the exemption should be applied differently to professional sports due to its "unusual economic imperatives"\textsuperscript{154} – is also inconsistent with Brown, which refused the players' contention that the labor of professional sports players was unique and that the market for players' services therefore should be treated differently.\textsuperscript{155}

But, the question remains: should the parties be forced to prove particular quid pro quo to satisfy the bona fide arm's-length bargaining requirement, as adopted by the Eighth Circuit in Mackey and rejected by the Second Circuit in Clarett? In this respect, neither circuit has the correct approach.

Collective bargaining is indeed a process, and the resulting collective bargaining agreement consists of "unique bundle[s] of compromises" over a great deal of complex issues.\textsuperscript{156} As a result, establishing proof of quid pro quo for a subject of bargaining can sometimes be an unrealistic enterprise even when the subject was a product of bona fide arm's-length bargaining. For this reason, it may not be wise to demand proof of quid pro quo to defeat these types of antitrust challenges.

However, while proof of quid pro quo may be an unrealistic way to realize labor law's fundamental principles requiring good faith bargaining, proof that the restraint was discussed at all during the bargaining process is a different story. Aside from it being realistic for the parties to present a minimum showing that the issue was simply discussed, it is also a desirable way to keep the parties honest when they maintain a provision that was indeed a product of bona fide,

\textsuperscript{152} See id.
\textsuperscript{153} Jewel Tea, 381 U.S. at 710 (Goldberg, J., concurring).
\textsuperscript{155} See discussion supra Part I.C.
\textsuperscript{156} Clarett, 369 F.3d at 143 (quoting Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 959 (2d Cir. 1987)).
arms-length bargaining. While this minimum showing should consist of more than a single, unsubstantiated declaration from a league employee (as the NFL attempted to do in Clarett), it should likely be satisfied by an accompanying declaration from a players’ union representative, or even something as insignificant as the minutes from the meeting in which the matter was discussed.

This modified Mackey approach, requiring a minimum showing in lieu of *quid pro quo*, is therefore the most practical and efficient way to realize labor law’s fundamental principles, and should be the catalyst for another dramatic turn in the meandering precedent dating back to *Flood v. Kuhn*.

III. CONCLUSION

The fate of Maurice Clarett became sealed when he brought his lawsuit within the Second Circuit, but the fate of the NFL eligibility rule may still be in doubt. With a trio of circuits on record as having adopted the Mackey test when deciding on the application of the non-statutory exemption, it is quite possible that such a court would find the eligibility rule to violate antitrust laws. These courts would place the burden on the NFL to prove that the rule was a product of bona fide arms-length negotiation, and since the NFL likely does not have sufficient evidence to satisfy this burden, the third requirement in the Mackey test would not be satisfied and the exemption would not apply.

With a successful challenge by someone like Adrian Peterson, the circuit split would become crystallized, and the Supreme Court would likely be forced to grant certiorari once and for all. And even though many legal analysts feel the Supreme Court’s decision in *Brown* “sacrificed antitrust goals to a degree unnecessary to the service of labor law goals,” it is also apparent that the *Brown* decision “failed to provide a proper clarification of how antitrust law should accommodate federal labor law.”

A comparison of each approach to the circuit split reveals that the only material difference between the two is that the Mackey requirement that the restraint be a product of bona fide arms-length bargaining, which actually furthers the fundamental principles of federal labor policies – those of “free,” “private,” and “good faith” bargaining. However, since establishing proof of *quid pro quo* for a subject of bargaining can sometimes be impossibly burdensome, the Court would likely find that it was entirely possible that the NFL

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158. *Id.* at 1666.
players’ association “might not have regarded any difference of opinion with respect to the eligibility rules as sufficient to warrant the expenditure of precious time at the bargaining table in light of other important issues.” 159

But, if the Court were to adopt the modified Mackey approach, which requires a minimum showing that the provision in question was simply discussed during the collective bargaining process, it is likely the NFL would not be able to produce sufficient evidence that the test requires. As a result, the eligibility rule would not fall within the non-statutory exemption, and the floodgates for underclassmen would be forced open for any youngster daring enough to run through.

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159. Clarett, 369 F.3d at 142.

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