October 30, 2011


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FALSE STARTS AND TECHNICAL FOULS IN SPORTS LABOR DISPUTES

LABOR DISPUTES IN PROFESSIONAL SPORTS:  
HOW FEDERAL JUDGES REFEREE ANTITRUST LAWSUITS—  
FALSE STARTS AND TECHNICAL FOULS

Fall 2011

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Word Count: 21,951
Abstract

Using a database of 83 published court opinions from 1970-2011, I show that players have utilized conflicting federal laws to improve their labor market mobility. They formed unions under the National Labor Relations Act, and bargained collectively with leagues. Often, however, they lacked bargaining power to modify the draft or reserve clause, which bound them to a team. Players sued, therefore, under the Sherman Act to challenge these practices as restraints of trade. Thus, players have used a dual engagement strategy of bargaining with leagues under the NLRA while holding identical negotiations under the threat of Sherman Act treble damages.

The dual engagement strategy has created jurisdictional and choice-of-law conflicts for federal judges. District courts often ruled that league restrictions on free agency are anti-competitive business practices. Seeing no conflict between antitrust and labor law, they issued injunctions or found antitrust violations.

But the data in this study show a different side to the jurisdiction and choice-of-law story. After passage of the Sherman Act, businesses used this law ironically to challenge unions. Congress concluded that federal judges subverted antitrust law by enjoining union activities in labor disputes; and consequently, enacted a “labor exemption” to protect workers from this potent economic regulation. But the Clayton Act stated the labor exemption vaguely, referring to labor organizations but not their activities. When courts continued to issue injunctions in labor disputes, Congress responded again by stripping their jurisdiction in the Norris-LaGuardia Act.

This history came to life in my sample. Some courts perceived an intolerable conflict between antitrust and labor law. Thus, they denied jurisdiction to player complaints, or ruled that league-imposed labor restraints are immune under the antitrust “labor exemption.” This background provides essential context for the main findings in my statistical analysis:

1. When leagues pleaded the Norris-LaGuardia Act as a jurisdictional defense to an antitrust injunction, district and appellate courts differed significantly in their rulings. Trial judges rejected Norris-LaGuardia arguments in 5.0% of cases in the district court sample, and accepted it in 1.7%. But appellate courts reversed this pattern by applying the Norris-LaGuardia defense in 13.0% of their decisions—meaning that these judges ruled that lower courts lacked jurisdiction.

2. Ruling on the antitrust labor exemption, district courts rejected this league defense in 15.0% of cases, and applied it in 8.3%. Appellate courts treated the issue differently, applying the exemption in 26.1% of their cases and rejecting it only once (4.3%). Thus, appellate courts were more likely to immunize the disputed restriction from antitrust enforcement. In other words, appellate courts chose to apply the NLRA over the Sherman Act more often than district courts.

3. District courts usually did not rule on a motion for an injunction (73.3% of the cases). But when they ruled on this motion, they were more likely to grant (20.0%) or affirm (1.7%) an injunction than deny this order (5.0%). Appellate courts behaved differently. More than half their rulings did not involve an injunction (60.9%). However, when they ruled on an injunction, they stayed or vacated 8 injunctions (34.8% of their cases), and affirmed only 1 order (4.3%).
In sum, district and appellate judges behaved differently in these hybrid labor law-antitrust cases. Some cases involved the highly technical antitrust labor exemption. In those cases, district judges committed “technical fouls” by failing to apply this exemption as required by federal labor law. In injunction cases, where district courts often granted the motion but appellate courts routinely overruled them, the former were guilty of “false starts.” On the one hand, the data suggest that appellate courts have cleaned up these district court “fouls,” and therefore, no legislative remedy is indicated. But the cases also imply that by the time appellate courts corrected lower courts, a judge’s “false start” or “technical foul” altered the balance of bargaining power, enabling players to gain an advantage that they could not achieve through collective bargaining. Regardless of whether federal judicial power should be legislatively curbed in sports labor disputes, or left to appellate correction, my study shows that district courts often misuse their power in these antitrust cases.
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I. INTRODUCTION

A. The Research Question and Its Context

Using textual analysis and data in eighty-three published opinions from 1970-2011, I show that players have utilized two federal laws to achieve greater labor market mobility. Under the National Labor Relations Act (NLRA),1 players formed unions and bargained collectively with leagues.2 Because they lacked bargaining power to modify player restraints such as the reserve clause and draft, they sued under the Sherman Antitrust Act to challenge these league practices as restraints of trade.3 This two-pronged approach has allowed players to bargain in two

3 Flood v. Kuhn, supra note 68, dealt with a highly restrictive employment practice (reserve clause) that continued after the formation of a collective bargaining relationship. Id. at 294. Flood was pivotal because the Supreme Court continued baseball’s complete exemption from antitrust law. Id. at 282, reasoning: “With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly.” For basketball, Robertson v. NBA, 556 F.2d 682 (2d Cir. 1977) was similarly pivotal—though, in contrast, the decision allowed an antitrust lawsuit to forge a settlement agreement involving issues that were already part of the CBA. The culminating nature of this decision appeared in the appellate court’s recitation of the six-year history of litigation and negotiation, during which 479 players approved a settlement and only three players opposed it. Id. at 684.
Mackey v. NFL, 407 F.Supp. 1000 (D.Minn.1975) was an early test case in football. Active and retired football players filed an antitrust lawsuit in 1972 to challenge the NFL’s Rozelle Rule. Id. at 1002. The rule required a team that signed a free agent to provide fair and equitable compensation to the player’s previous team. Judge Larson agreed with the players, holding that the Rozelle Rule was an antitrust violation, because the rule deterred free agent signings. Id. at 1007-1008.
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venues—one private under the auspices of the NLRA, and the other public under the coercive power of federal judges who often fostered negotiations after issuing injunctions against leagues.

This player strategy of dual engagement with their employers under the NLRA and Sherman Act has created a running jurisdictional conflict for judges. Congress enacted the Sherman Act, and amended it in the Clayton Act, to deter anti-competitive business practices. As companies invoked these laws to challenge unions, Congress believed that judges undermined the intent of antitrust laws. They legislated, therefore, a “labor exemption.” When

Applying the rule of reason test, the Eighth Circuit affirmed. Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976). The court reasoned that an antitrust exemption would apply if (1) the restraint primarily affected only the parties to the collective bargaining relationship, (2) the disputed practice involved a mandatory subject of collective bargaining, and (3) the underlying labor agreement resulted from bona fide arm’s-length bargaining. Although the Rozelle Rule satisfied the first two prongs of the test, the court said it did not result from arm’s-length bargaining. Id. at 623.

For hockey, McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979) was pivotal. Earlier cases in the collective bargaining relationship resulted in narrow rulings—for example, whether a player’s contract clause was enforceable when it allowed a team to sue for an injunction. Boston Professional Hockey Ass’n, Inc. v. Cheevers, 348 F.Supp. 261 (D.Mass. 1972). McCourt was an appellate court antitrust ruling, occurring relatively early in the collective bargaining relationship, that involved the NHL’s authority to enforce its reserve system (id. at 1194-95), its version of the “Rozelle Rule” (id. at 1196), and the labor exemption under the Sherman Antitrust Act (id. at 1197-1203).


Let the Sherman law affect trade and commerce and those who deal in and with trade and commerce as it, in fact, was intended when it was passed. Take labor and labor organizations out from under the law entirely, and let us formulate a statute governing labor and its organizations . . . we should treat labor and its relations to interstate trade as really an independent proposition . . . we must define the rights of labor so far as it affects commerce . . . we should separate it and legislate for it, of course in its relation to interstate trade and commerce, but not treat it . . . as an article of commerce, because it is not an article of commerce. It is no part of commerce. It is not a commodity at all.

Id. at 195, n. 84, quoting 51 Cong.Rec. 13979-80 (1914).

Infra note 51.
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courts continued to issue injunctions against unions in labor disputes. Congress angrily responded by stripping their jurisdiction in the Norris-LaGuardia Act. Against this backdrop, I show how contemporary labor disputes in professional sports echo the industrial warfare that pitted labor against management. The comparison is paradoxical, however: Leagues and teams take the position that courts should apply the antitrust labor exemption, and thereby dismiss player challenges to labor market restrictions. In other words, leagues take the opposite position of industrial-era employers by seeking to shield their labor disputes from antitrust purview. Players take a similarly inverted position: Compared to their working class forbears, they seek antitrust relief in federal court. They are often plaintiffs, and rarely defendants, in Sherman Act lawsuits. And at times, they disband their unions.

8 Frankfurter & Greene, infra note 44.
9 Infra note 55.
10 E.g., McNeil v. Nat’l Football League 790 F.Supp. 871 (D.Minn. 1992). The NFL also argued unsuccessfully that antitrust laws do not apply to restraints that operate solely within a labor market. Id. at 880-81. Judge Doty ruled that the NFL’s labor exemption under the Sherman Act ended when the parties’ collective bargaining relationship terminated. Id. at 883-884.
11 E.g., American Steel Foundries v. Tri-City Central Trade Council, 257 U.S. 184 (1921). A district court enjoined a union from preventing an employer during a strike from hiring replacement workers. The Court recognized that “[i]t is clear that Congress wished to forbid the use of federal courts of their equity arm to prevent peaceable persuasion by employees . . . in promotion of their side of the dispute and to secure them against judicial restraint in obtaining or communicating information . . . .” Id. at 203. But where “those of the labor side adopt methods which however lawful in their announced purpose inevitably lead to intimidation and obstruction, then it is the court’s duty which the terms of § 20 do not modify, so to limit what the propagandists do as to time, manner, and place. . . .” Id. at 203-04. This reasoning appeared to conflict with the Clayton Act’s jurisdictional limits on courts adjudicating labor disputes, which provided that “no restraining order or injunction shall be granted by any court of the United States . . . in any case between an employer and employees. . . . of growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property . . . for which injury there is no adequate remedy at law. . . .” Clayton Act, supra note 4.
12 Infra notes 204 - 206.
13 Michael H. LeRoy, The Narcotic Effect of Antitrust Law in Professional Sports: How the Sherman Act Subverts Collective Bargaining, 89 TULANE L.REV. __ (forthcoming), showing that individual players were the most common plaintiff, suing in 65.5% (38) of these antitrust cases. Amateurs were plaintiffs in 8.6% (5) of cases, followed by unions (8.6%, 5 cases) and retirees (6.9%, 4 cases). Leagues were plaintiffs in 25.9% (15) of cases, followed by teams (1.7%, 1 case). Because some cases had joint plaintiffs, the figures do not sum to 100%. Drawing from bargaining theory in industrial relations, the thesis of that Article is that extensive court intervention creates a
Unlike industrial workers who struggled to have employers recognize and bargain with their union. Continuing with the juxtaposition, players mimic early twentieth century corporations by arguing that the antitrust “labor exemption” does not apply to their work disputes.

B. Questions for Empirical Investigation

I ask a normative question in this study: Should federal courts adjudicate antitrust lawsuits filed by union-represented athletes who challenge labor market restrictions imposed by their league? I approach the question by collecting and analyzing data from antitrust litigation involving pro players and their employers. I measure how frequently courts grant or deny jurisdictional motions and defenses that determine whether a federal court will intervene in a sports labor dispute. For example: How often do courts apply a league’s “labor exemption” defense? When courts disregard this exemption, they effectively substitute antitrust settlement talks for traditional labor negotiations, even though the bargaining subjects are the same. Similarly, how often do courts invoke the Norris-LaGuardia Act to deny federal jurisdiction in a sports labor dispute? And how often do courts rule that the National Labor Relations Board has exclusive jurisdiction of a sports labor dispute? Also, I quantify the extent to which courts grant or deny injunctions, or award or deny antitrust damages; and on appeal, how often they affirm or continue injunctions compared to how often they stay or vacate these orders.

II. The Collision Course of Antitrust and Labor Law:

Strong disincentive for players to settle their disagreements with owners in traditional collective bargaining. That study quantifies how often players and teams win and lose in antitrust cases, and concludes that antitrust offers a pain free, addictive alternative to the harsh realities of collective bargaining. The current Article, in contrast, examines court rulings on key procedural and substantive law issues. The focus of this study is judicial behavior, and concludes that too many district courts misuse judicial power in these labor disputes.

14 McNeil, infra note 96.
15 See Edwin E. Witte, Yellow Dog Contracts, 6 Wisc. L. Rev. 21 (1933).
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ANTECEDENTS OF FEDERAL JURISDICTION IN SPORTS LABOR DISPUTES

Their seasons, rules, and scoring systems differ; but baseball, basketball, football and hockey leagues are organized along similar lines. To make their sport entertaining, each league relies on stringent rules that spread athletic talent among their teams. In their bylaws or constitution, leagues utilize a draft (which limits a new player to negotiate with one team), reserve clause (which allows a team to renew automatically a player’s contract for next season), compensation rule (which allows a team that loses a valuable player through free agency to receive a player of equal value in return), and in some cases, a salary cap (which sets a ceiling on player pay). As I show below, baseball players and common laborers found themselves bound to one-sided employment contracts. The laborer often had to agree to refrain from union membership. Since the 1880s, players worked under a severe contractual restriction known as the reserve clause, which disallowed players from joining another team. By perpetually renewing a player’s contract, a team monopolized his talent. This comparison shows

17 E.g., Denver Rockets v. All-Pro Management, Inc., 325 F.Supp. 1049, 1056 (D.C.Cal. 1971). Occurring once a year, the draft is designed to maintain the various NBA teams “at roughly equivalent levels of playing ability, so that the games played between league teams shall be as attractive as possible to spectators and others interested in the sport of professional basketball.” Id. Weaker teams draft first to improve the competitiveness of the league.

18 E.g., Robertson v. National Basketball Ass’n, 389 F.Supp. 867 (D.C.N.Y. 1975). The reserve clause is part of every player’s Uniform Contract. Id. at 874. If a player refused to sign the Uniform Contract for the next season, his preceding agreement allowed the club “unilaterally to renew and extend the Uniform Contract for one year on the same terms and conditions including salary.” Id. If a player was traded or his contract was sold, the reserve clause bound him anew the new club.


20 E.g., Bridgeman v. National Basketball Ass’n, 838 F.Supp. 172, 176 (D.N.J. 1993), detailing terms of a salary cap that the NBA negotiated with the player’s union. This complex formula set a maximum cap, and minimum floor, on player salaries. Salary parameters required teams to pay 53% of the NBA’s revenues in aggregate pay (salaries and benefits). The cap was intended “to preserve team competition throughout the entire league by preventing the richest teams from taking the bulk of the best players to the disadvantage of less well-situated teams.” Id.

21 Infra note 31.

22 See Hallman, infra note 26, for an early example.
that pro athletes and laborers were subjected to employer-imposed rules that were designed to frustrate their bargaining power.

A. The Uniform Player Contract and Yellow Dog Contracts: Judicial Differentiation of Pro Athletes and Laborers

Baseball leagues in the late 1800s were successful because of their approach in managing player contracts.23 These agreements were uniform across teams and players, and set forth lengthy and detailed terms and conditions of employment.24 Thus, for example, no team could gain a competitive advantage over a rival team by offering a player more job security.25 A player could be terminated with a ten day notice from his team.26 His team, however, could bind him from year to year by invoking a standard contract term called the reserve clause.27 The player could not play for another team in the league, unless he was traded or his contract was not renewed. Nor could he bargain for better terms by seeking offers from competing teams.

This rigged market was upset when teams from a rival league ignored these restrictions and signed valuable players for more money than their first team was willing to pay.28 Teams

23 See American League Baseball Club of Chicago v. Chase, 86 Misc. 441, 442 (N.Y.Sup. 1914), providing this overview: “The National Agreement for the government of professional baseball, together with the Rules of the National Commission, present to the court the scheme of co-operation and management of baseball leagues and baseball clubs and the control of baseball players.”


25 See ROGER I. ABRAMS, LEGAL BASES: BASEBALL AND THE LAW 15-17 (1998), explaining that the National League instituted the reserve clause in 1879 in response to increasing player salaries. Initially, NL teams agreed that each team could reserve five players, thereby restricting any other team from negotiating with a designated player. In 1883, the NL and its rival, the American League, agreed to allow each team to reserve 11 out of 14 players on their squads.


27 An excellent explanation of the reserve clause appears in Comment, Organized Baseball and the Law, 46 YALE L. J. 1386, 1386-7 (1937) (“Since the contract entered into in each succeeding season will have a similar provision, the player is really signing for the duration of his baseball life.”). E.g., Metropolitan Exhibition Co. v. Ewing, 42 F. 198, 200 (C.C.N.Y. 1890).

28 Columbus Base Ball Club v. Reiley, 11 Ohio Dec.Reprint 272, 1891 WL 331 (Ohio Com.Pl. 1891), and
holding the reserve option sought injunctions and contractual enforcement in state courts. But courts usually dismissed these lawsuits.\(^{29}\) Judges found the player contracts were too indefinite,\(^{30}\) or lacking in mutuality to be enforced.\(^{31}\) One court compared the reserve clause to peonage and hinted that baseball violated the Sherman Act.\(^{32}\) But another concluded that this contractual restriction was not a form of involuntary servitude.\(^{33}\)

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\(^{30}\) Ward, supra note 24 at 417, stating:

It will thus be seen that I do not fully concur in the claims made by plaintiff that the probability of finally succeeding is of the strongest and most certain kind. Upon either one or both of the grounds considered, but principally upon the ground that the contract is indefinite and uncertain, does there arise a serious doubt as to plaintiff being accorded upon the trial the relief asked for.

\(^{31}\) See Hallman, supra note 26 at *4, where the court reasoned:

So that, if the proper construction of the contract is that which the plaintiffs put upon it, the necessary result is that while the defendant has sold himself for life to the plaintiffs for $1,400 per annum, if they choose to hold him for that length of time, he has no hold upon them for any period longer than ten days. He is absolutely at their mercy, and may be sent adrift at the beginning or in the middle of a season, at home or two thousand miles from it, sick or well, at the mere arbitrary discretion of the plaintiffs, provided only they give him the ten days’ notice.

The court concluded that “it is perfectly apparent that such a contract is so wanting in mutuality that no court of equity would lend its aid to compel compliance with it.” \(\text{Id.}\)

\(^{32}\) See American League Baseball Club of Chicago v. Chase, 86 Misc. 441, 465 (N.Y. Sup. 1914), observing: “The quasi peonage of baseball players under the operations of this plan and agreement is contrary to the spirit of American institutions, and is contrary to the spirit of the Constitution of the United States.” The court considered, too, whether baseball was an illegal combination under the Sherman Act. \(\text{Id.}\) at 461-462.

\(^{33}\) Augusta Baseball Ass’n v. Thomasville Baseball Club, 93 S.E. 208 (1917). Rejecting an argument that the assignment of a player’s contract was illegal as a form of involuntary servitude, the court reasoned that “[i]f the ball player consented to this arrangement and contracted with the Augusta ball club to perform services for it, we do
As in baseball, industrial employers exploited their bargaining power by requiring employees to sign a uniform contract. Derisively called a “yellow dog” contract, this agreement prohibited workers from joining a union. Industrial states such as Illinois, Massachusetts, New York, Ohio, Pennsylvania and others enacted laws to protect employees from discharge for joining a union. Like state courts that refused to enforce the reserve clause in baseball, judges ruled that employers who coerced workers to sign yellow dog contracts violated the law.

The Supreme Court, with an apparent eye toward protecting employer interests, changed this landscape by striking down federal and states law that protected workers who joined a union. Using ironic reasoning, *Adair v. United States,* held that the yellow dog contract provision under the Erdman Act violated the due process rights of employees, noting that the “right of a person to sell his labor upon such terms as he deems proper (is) the same as a purchaser of labor to prescribe the conditions. (T)he employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with liberty of contract.”

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35 HARRY A. MILLIS AND ROYAL E. MONTGOMERY, 512 ORGANIZED LABOR (1945).
36 U.S. BUREAU OF LABOR STATISTICS, LABOR LAWS OF THE UNITED STATES, BULLETIN 148 (1914), Pts. I & II.
37 E.g., State v. Julow, 129 Mo. 163 (1895); Gillespie v. The People, 188 Ill. 176 (1900); and People v. Marcus, 185 N.Y. 257 (1906).
38 208 U.S. 161 (1908).
39 *Id.* at 174. Responding to numerous labor disputes affecting the important railroad industry, Congress passed the Erdman Act. 38 Stat. 424 (1898). The law grew out of the nation’s bitter experience in the 1894 Pullman rail strike, and recommendations from a federal commission that studied the strike. See *U.S. STRIKE COMMISSION*, *REPORT ON THE CHICAGO STRIKE OF JUNE-JULY, 1894* (1895), at xxxii – xxxiv. The commission suggested that if employers “take labor into consultation at proper times, much of the severity of strikes can be tempered and their number reduced.” *Id.* at liv. Thus, the Erdman Act protected rail employees who joined unions, recognized the representative function of unions, and provided for mediation and conciliation of disputes. The law also made “yellow dog” contracts illegal. The law extended only to the rail industry, however. But the Adair Court contradicted the U.S. Strike Commission’s finding that measures to promote unionism would insulate the rail
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Court undermined union affiliation again in a state law case, *Coppage v. State.*\(^{40}\) After a Kansas rail employee was discharged for refusing to sign a yellow dog contract, the state’s supreme court held that his employer violated a state law that prohibited these coercive contracts.\(^{41}\) The U.S. Supreme Court reversed this ruling on the theory that the state law interfered with an employer’s unfettered liberty right to make contracts with employees.\(^{42}\)

**B. The “Labor Question” under Federal Antitrust Law:**

*More Judicial Differentiation of Pro Athletes and Laborers*

From the 1890s through the early 1930s, federal courts were involved in labor disputes, and often ruled for employers. Judicial preference for employers over the common laborer was evident when courts blocked strikes, boycotts and organizing drives by issuing injunctions against union leaders and supporters.\(^{43}\) Critics accused federal judges of bias when dealing with organized labor.\(^{44}\) As workers and farmers struggled to counteract powerful corporate interests,

\(^{40}\) 236 U.S. 1 (1915).

\(^{41}\) *State v. Coppage,* 87 Kan. 752 (1912).

\(^{42}\) *Coppage,* supra note 40.


\(^{44}\) See FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930). To make their point about judicial bias, Frankfurter and Greene explained that businesses often contrived a way to obtain federal diversity jurisdiction in order to win a broadly phrased injunction. *Id.* at 13-14. They observed: “A device of modest beginnings, the injunction assumed new and vast significance in a national economy in which effective organization and collective action had attained progressive mastery.” *Id.* at 24. *Also see* William Draper Lewis, *Strikes and Courts of Equity,* 46 AM. L. REG. (N.S. 37) 1, 2 (1898), remarking: “The courts still say that these injunctions are
Congress passed the Sherman Antitrust Act, a law that prohibits contracts and conspiracies that restrain trade. Lawmakers intended to address the anti-competitive effect of large corporate trusts. Notably, they did not want the law to deter combinations formed by farmers or labor unions.

not criminal, yet the language of the opinions indicates very clearly their essentially criminal nature.” F. J. Stimson, *The Modern Use of Injunctions*, 10 Pol. Sc. Q. 189, 192 (1895), condemned contempt proceedings because they ignored “the criminal law and its safeguards of indictment, proof by witnesses, jury trial, and a fixed and uniform punishment.” In another attack on the federal judiciary’s involvement in labor disputes, William Draper Lewis, *A Protest Against Administering Criminal Law by Injunction— The Debs Case*, 33 Am. L. Reg. (N.S. 1) 879, 883 (1894), noted that with respect to the Pullman Strike there was “no necessity to strain the principles of the procedure of civil courts, and to make a precedent which will be used over and over again to undermine the most valuable of the safeguards of individual liberty—the trial by jury.” A particularly severe critique appears in Charles Claflin Allen, *Injunction and Organized Labor*, 28 Am. L. Rev. 828, 847 (1895), observing that “(i)nnovation writs have covered the sides of cars, deputy marshals have patrolled the yards of railway termini, and chancery process has been executed by bullets and bayonets.” He despaired that equity was leading to government by injunction:

Equity jurisdiction has passed from the theory of ‘public rights’ to the domain of political prerogative. In 1888, the basis of jurisdiction was the protection of the private right of civil property; in 1893 it was the preservation of public rights; in 1894, it has become the enforcement of political powers.

45 *Supra* note 4.

46 *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 50 (1911), explaining:

[The main cause which led to the legislation was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.]

47 When a Senate committee considered the Sherman Act, there was debate as to whether this bill applied to farm groups and unions who had formed associations to protect their interests in marketing their crops and supplying their labor. As the bill advanced, it became clear that the Senate meant for the law to apply only to corporate restraints of trade. For example, Senator Hoar obtained unanimous consent “that the trust bill be taken up [emphasis added].” *See* 21 Cong. Rec. 3145. More tellingly, an amendment offered by Sen. Sherman expressly excluded labor groups and farm organizations—and this version became the law. *See* 21 Cong. Rec. 2612, and also 21 Cong. Rec. 3145. Indeed, the legislative history shows that the purpose of the bill was to address the “evil” of corporate trusts. In this vein, the comments of Sen. Hoar appear to be the clearest evidence of congressional intent. As the senator who was in charge of the bill, he spoke in support of farm and labor organizations. *See* 21 Cong. Rec. 2728. Emphasizing that the bill was an “undertaking to curb by national authority an evil,” he referred to “these great monopolies which are becoming not only in some cases an actual injury to the comfort of ordinary life, but are a menace to republican institutions itself.” 21 Cong. Rec. 3146. Leaving nothing to doubt, he added the following point to note that commerce—not labor—was the object of the bill: “We have affirmed the old doctrine of the common law in regard to all interstate and international commercial transactions.” 21 Cong. Rec. 3146. Other senators joined in this view of the eventual Sherman Act, speaking in terms of regulating corporate trusts while at the same time protecting farmers and laborers. Sen. George noted that the legislation was meant to protect “the wretched victims” who are oppressed by “these great combinations”; and to allow them to recover damages in a
The Supreme Court did not agree, however, that the Sherman Act exempted the actions of labor unions. In a landmark 1908 case, *Loewe v. Lawler*, the Court construed the Sherman Act to include labor combinations as unlawful restraints against trade.\(^{48}\) When Congress took up legislation to broaden the enforcement of antitrust law in the Clayton Act, lawmakers also made explicit their intent to exempt labor and farm groups from this potent regulation.\(^{49}\) Thus, when the Clayton Act passed in 1914,\(^{50}\) its section 6 exempted union activities.\(^{51}\) Addressing the pro-employer tilt of federal courts, Congress added Section 20 as a jurisdictional constraint on class action lawsuit, further noting that “small farmers” were unable to go to a distant town, employ a lawyer and sue a large trust. See 21 Cong. Rec. 3147-3148. Senator Edmunds said the Sherman Act was about “the United States defending all small people.” 21 Cong. Rec. 3149. Reinforcing the idea that the Sherman Act was meant to apply only to commercial interests who were harming trade, Sen. Hoar remarked: “The great thing that this bill does . . . is to extend the common law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States.” 21 Cong. Rec. 3152.

\(^{48}\) 208 U.S. 274 (1908). Hat manufacturers in Danbury, Connecticut sued union officers who attempted to organize their workers by orchestrating recognition strikes and by circulating publications urging the public to boycott the hat maker. The Court concluded that “the combination described in the declaration is a combination ‘in restraint of trade or commerce among the several states,’ in the sense in which those words are used in the act.” *Id.* at 292. The Court reasoned that the Sherman Act treated labor organizations as combinations because “the records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act, and all these efforts failed. . . .” *Id.* at 310.

\(^{49}\) Rep. Henry, who authored the section that exempted labor, said:

> In my judgment, when Congress was dealing with ‘combinations in restraint of trade’ it never intended that the law should apply to labor organizations or farmers’ organizations without capital and not for profit. The courts took a different view of it and construed the Act as it was never intended that it should be interpreted. . . . We are now about to correct that error, and make it plain and specific, by clear cut and direct language that the Anti-Trust Laws against conspiracies in trade shall not be applied to labor organizations and farmers’ unions.

51 Cong. Rec. 9540. Other lawmakers agreed. See statements of Rep. Konop (51 Cong. Rec. 9545); Quinn (51 Cong.Rec. 9546); Rep. Towner (51 Cong.Rec. 9548); Rep. Barkley (51 Cong. Rec. at 9555); Rep. Crosser (51 Cong. Rec. 9556); Rep. Casey (51 Cong.Rec. 9557); Rep. Lewis, 51 Cong.Rec. 9565), and Rep. LaFollette (51 Cong.Rec. 9573). When the labor exemption bill was considered by the Senate, that chamber added a key sentence to ensure that courts did not apply the federal antitrust laws to unions. This was done by adding to Section 6 the phrase: “That the labor of a human being is not a commodity or article of commerce.” Sen. Culbertson proposed this language. See 51 Cong. Rec. 14610.

\(^{50}\) See Clayton Act, *supra* note 4.

\(^{51}\) *Id.* in section 6, stating “(t)hat the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . instituted for the purpose of mutual help.” That section also stated: “nor shall (labor) organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.”
But judicial activism in labor disputes continued. A commentator observed that “the Clayton Act made the position of organized labor under the antitrust laws distinctly worse than before because of a provision allowing private parties to obtain injunctions under the antitrust laws against persons guilty of conduct in violation of these laws.”

52 Id. in section 20, providing “that no restraining order or injunction shall be granted by any court of the United States . . . in any case between an employer and employees, or between employers and employees, or between persons employed and persons seeking employment, involving . . . a labor dispute.”

53 See Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), and Bedford Co. v. Stone Cutters Ass’n, 274 U.S. 37 (1927). The union in Duplex represented workers at three of the nation’s four manufacturers of large printing presses. Id. at 463. Duplex Company refused, however, to recognize the union; it paid wages below union-scale and had longer working hours than unionized firms. Id. Before long, two of these firms informed the union that they would have to terminate their labor agreements in order to compete against Duplex. In consequence, the union undertook a campaign to pressure Duplex into negotiating an agreement. Id. The union had a few members who worked at Duplex’s Michigan plant, but not enough to affect production when these workers went out on strike. It understood, though, that Duplex was vulnerable in other respects because the employer shipped its large and heavy presses great distances, depended on contractors and their employees to assemble the presses on-site, and indirectly depended on the willingness of consumers to buy the newspapers printed on their presses. Id. Thus, the union organized boycotts of these papers and strikes by workers who assembled or hauled the presses. Id. A court enjoined this secondary activity, and the Supreme Court upheld the injunction.

In Bedford Stone, a national union had a labor agreement until 1921 with Bedford Company, a large Indiana producer of limestone used throughout the nation in building construction. The company terminated the agreement, thereby closing their shops to union members, and the national union retaliated by declaring a strike against any builder who used Bedford stone (called unfair stone by the union). 254 U.S. at 42-43. This led to secondary strikes, typified by one in Denver, Colorado in which union workers with a good relationship with their employer nevertheless went on strike because the builder was using Bedford stone. Lower courts dismissed Bedford’s petitions to enjoin this conduct, but the Supreme Court reversed, finding that the Clayton Act authorized injunctive relief sought by Bedford. Id. at 55.

This ruling was based on expansive antitrust theory. The Court reasoned that although Bedford proved no actual injury caused by the union’s secondary strikes, the union’s “intent to restrain interstate commerce . . . is enough to justify equitable interposition by injunction if there be a dangerous probability that such injury will happen; and this clearly appears.” Id. Although the union’s activities here were entirely peaceful and free of threats, intimidation, and coercion, the Court thought it proper to enjoin the union from “even persuasion with the object . . . of causing any person to decline employment.” Id.

In sum, Duplex and Bedford Stone greatly expanded injunction powers in labor disputes based on the Court’s antitrust theories.

54 See Edwin E. Witte, The Government in Labor Disputes 68 (1932). He added:

In the fifteen years’ history of the Clayton Act, there have been a great many more cases against labor under the federal antitrust laws than during the previous twenty-two years. As many of them are unreported, their exact number is not known, but in this period have occurred at least twenty-three criminal prosecutions, six damage suits, and about forty suits for injunctions. Twenty-eight of these criminal prosecutions and injunctions were instituted by the federal Department of Justice, or by United States district attorneys. In more than half of the criminal cases convictions have resulted, with long prison sentences in several instances. Considerably more than half of the injunctions sued for have been allowed, and there have been settlements for large damages in two
FALSE STARTS AND TECHNICAL FOULS IN SPORTS LABOR DISPUTES

Congress felt compelled again to limit injunctive relief for employers during a labor dispute. The result was a strong jurisdiction stripping law, the Norris-LaGuardia Act, enacted in 1932. Representative LaGuardia succinctly stated Congress’ intent in passing this law:

Gentlemen, there is one reason why this legislation is before Congress, and that one reason is disobedience of the law on the part of whom? On the part of organized labor? No. Disobedience of the law on the part of a few Federal judges. If the courts had been satisfied to construe the law as enacted by Congress, there would not be any need of legislation of this kind. If the courts had administered even justice to both employers and employees, there would be no need of considering a bill of this kind now. If the courts had not emasculated and purposely misconstrued the Clayton Act, we would not today be discussing an anti-injunction bill.56

Although similar to section 20 of the Clayton Act, the Norris-LaGuardia Act differed by enumerating labor disputes in which courts could not issue injunctions.57

While ordinary workers and their unions were often restrained by judges in antitrust lawsuits, baseball players labored under monopoly conditions created by their employers. But the Supreme Court ruled that their sport was beyond antitrust purview. Adding to this mystery, the Court suggested that their uniform player contracts were also beyond the purview of antitrust—even though their employers, unlike those in manufacturing and related economic fields, tightly restricted the labor market by denying professional players access to other teams. This left ball players trapped by the reserve clause.

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56 75 Cong.Rec. 5478 (1932).
57 Norris-LaGuardia Act, supra note 55, at § 4. The law denies federal courts jurisdiction “to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute . . . .” Activities that are immune from federal injunctions include ceasing or refusing to perform any work; becoming a member of a labor organization; paying to support someone involved in a labor dispute; aiding persons in a labor dispute; publicizing a labor dispute; and assembling to promote the interests of labor in a dispute.
Federal Baseball Club\textsuperscript{58} started the differential treatment of ball players and common workers by courts. The Baltimore team in the Federal Baseball League filed an antitrust complaint against the National League after the latter absorbed all Federal League teams, except the Baltimore club.\textsuperscript{59} The excluded club claimed harm from the merger because it had no teams to play.\textsuperscript{60} Federal Baseball Club ruled that the sport of baseball was exempt from antitrust law.\textsuperscript{61} Taking an extremely restrictive view of how baseball is unrelated to commerce, Justice Holmes wrote: “The business is giving exhibitions of base ball, which are purely state affairs. It is true that in order to attain for these exhibitions . . . great popularity . . ., competitions must be arranged between clubs from different cities and States. But the fact that . . . Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business.”\textsuperscript{62} Federal Baseball Club not only viewed the baseball diamond as too small to be an enterprise in interstate commerce; but it also immunized the uniform player contract from the Sherman Act with this reasoning: “If we are right the plaintiff’s business is to be described in the same way, . . . the restrictions by contract that prevented the plaintiff from getting players to break their bargains . . . were not an interference with commerce among the States (emphasis added).”\textsuperscript{63} This implied that the reserve clause was not a proper subject for antitrust enforcement.

For perspective, consider the oddly paradoxical treatment of baseball players and other

\textsuperscript{58} 259 U.S. 200 (1922).
\textsuperscript{59} Id. at 207.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 208.
\textsuperscript{62} Id. at 208 - 209.
\textsuperscript{63} Id.
workers as the federal courts applied antitrust laws to their labor disputes in the years following *Federal Baseball Club*. While the ruling pertained to a league merger, it had a profound effect on individual players. Baseball’s reserve clause was immune from antitrust even though it completely stifled labor market competition.64 A generation after *Federal Baseball Club*, a New York Yankee whose contract was assigned to a minor league franchise challenged the reserve clause.65 By the early 1950s, baseball had business tentacles all over the U.S. and beyond. Its radio revenue was a form of interstate commerce, and baseball maintained minor league teams throughout the U.S. and Mexico.66 Finding no better reason than adherence to the *Federal Baseball Club* precedent, the Supreme Court in *Toolson v. New York Yankees, Inc.* rejected the player’s antitrust action.67 Another generation later, a great player who built a career in St. Louis strenuously objected to being traded to Philadelphia.68 Bowing again to precedent, the Supreme

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64 Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949) is a notable exception. Danny Gardella, a player who had run-ins with management and left the country to play in Mexico, sued the New York Giants (the baseball franchise, before it moved to San Francisco) under the Sherman Act after he tried to return to American baseball and found himself blocked by the league blacklisting rule. His lawsuit, dismissed by a district court (Gardella v. Chandler, 79 F.Supp. 260 (D.C.N.Y. 1948)), was revived by a Second Circuit ruling that sympathized with Gardella and all professional ball players. Judge Frank lambasted baseball as “a monopoly which, in its effect on ball-players like the plaintiff, possesses characteristics shockingly repugnant to moral principles . . . basic in America. . . .” *Id.* at 409. Also, he said that players labored under conditions that are “something resembling peonage.” *Id.* Judge Learned Hand refused to find that baseball was exempt under antitrust law because the game was so integrated with commercial activities in interstate commerce. But baseball settled its case with Gardella before any antitrust trial occurred. See Note, Craig F. Arcella, *Major League Baseball’s Disempowered Commissioner: Judicial Ramifications for the 1994 Restructuring*, 97 COLUM. L. REV. 2420, 2440-41 (1997), reporting that the commissioner of baseball settled the case with Gardella to avoid the possibility of a successful challenge to baseball’s antitrust exemption. By not reaching the Supreme Court, the Gardella case was precluded from serving as a good test case to reverse or distinguish *Federal Base Ball Club*.


67 *Id.* at 357.

Court ruled that baseball was exempt from antitrust law.\textsuperscript{69}

Meanwhile, in the years following \textit{Federal Base Ball Club}, federal courts continued to issue injunctions against union leaders and supporters during labor disputes, citing federal antitrust law as a basis for these orders.\textsuperscript{70} To summarize: During the period before federal law allowed collective bargaining, baseball players and ordinary workers were employees who were often compelled to sign coercive employment agreements that robbed them of bargaining power. Their labor market situations differed greatly, with laborers competing en masse against each other while superior ball players could attract lucrative bids from rival leagues. Players were shackled, however, by the reserve clause, while laborers were unrestricted in their relevant labor markets but could not join a union without being fired. Congress enacted antitrust laws to deal with large corporations, not workers—but federal courts misread these laws when they issued injunctions against laborers and their union leaders. If any labor market condition called for the application of antitrust law, baseball provided an ideal context. But due to an odd ruling in \textit{Federal Baseball Club}, this sport enjoyed an absolute antitrust exemption. Why? There is no obvious explanation, but judicial veneration for the game of baseball is a possibility. One commentator from the period reasoned: “So long as baseball’s much maligned combination

\textsuperscript{69} \textit{Id.} at 285, where the Court reiterated what it said in Toolson: (“the (judgment) below (is) affirmed on the authority of Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs . . . so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.”).

\textsuperscript{70} \textit{E.g.}, International Organization, United Mine Workers of America v. Red Jacket Consol. Coal & Coke Co., 18 F.2d 839 (4th Cir. 1927); Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, 2 F.2d 993 (D.C.III. 1924); U.S. v. Railway Employees’ Dept., Am. Federation of Labor, 286 F. 228 (D.C.III. 1923); and Great Northern Ry. Co. v. Brosseau, 286 F. 414 (D.C.N.D. 1923); and J.I. Hass, Inc., v. Local Union No. 17 of Brth. of Painters, Decorators, and Paper Hangers of America, 300 F. 894 (D.C.Conn. 1924). \textit{Also see} Frankfurter & Greene, \textit{supra} note 44, at 99, commenting: “The Clayton Act, intended to restrict the federal chancellor’s power of decreed intervention, has apparently served to stimulate it.”
operates to the satisfaction of owners, players and public, its present form of self-government will probably be allowed to continue notwithstanding apparent infractions of the law.”

In addition, there is a jurisdictional explanation. When players prevailed in rulings that denied enforcement to the reserve clause, these were state law contract cases. As such, they could not change an entire business model. Indeed, because teams were plaintiffs in these contract cases, the worst outcome for clubs was a single ruling that allowed one particular player to jump to another team. Only an antitrust action could challenge the entire reserve system. But players did not take this broad approach until after Congress enacted a collective bargaining law. As I explain later, once players voted to bargain collectively, courts should have precluded their efforts to use antitrust law to attack league-imposed restraints on free agency.

III. Player Unions and Professional Sports: Federal Jurisdiction in Labor Disputes during the Modern Era

A. Players’ Initial Wave of Antitrust Litigation: The Ease of Winning Injunctions

Having little or no success with antitrust law, pro athletes voted for union representation in the 1950s-60s; and thereafter, began to bargain collectively with leagues. Because baseball was entirely exempt from antitrust law, players relied exclusively on their union to move them

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71 Comment, Organized Baseball and the Law, 46 YALE L. J. 1386 (1937), at 1390.
72 E.g., Cincinnati Exhibition Co. v. Marsans, 216 F. 269 (E.D.Mo.1914); Brooklyn Baseball Club v. McGuire, 116 F. 782 (E.D.Pa.1902); Metropolitan Exhibition Co. v. Ewing, 42 F. 198 (S.D.N.Y.1890); Augusta Baseball Ass’n v. Thomasville Baseball Club, 147 Ga. 201, 93 S.E. 208 (1917); Cincinnati Exhibition Co. v. Johnson, 190 Ill.App. 630 (1914); American Base Ball and Athletic Exhibition Co. v. Harper, 54 Cent.L.J. 449 (Cir.Ct. of St. Louis, May 1902); America League Baseball Club of Chicago v. Chase, 149 N.Y.S. 6 (Sup.Ct.1914); Metropolitan Exhibition Co. v. Ward, 9 N.Y.S. 779 (Sup.Ct.1890); Philadelphia Ball Club, Ltd. v. Lajoie, 202 Pa. 210, 51 A. 973 (1902).
73 Supra note 71, at 1390.
74 Supra note 2.
toward their goal of free agency.\textsuperscript{75} Conversely, basketball players followed their union leadership in a sweeping, class action lawsuit under the Sherman Act. \textit{Robertson v. National Basketball Association} led to an injunction of the NBA’s restrictions on free agency.\textsuperscript{76} Eventually, players and the NBA agreed to settle the antitrust lawsuit by loosening restrictions in the draft and free agency.\textsuperscript{77} Football players had a similarly pivotal experience, as their union president filed a class action antitrust lawsuit in \textit{Mackey v. National Football League}.\textsuperscript{78} A district court enjoined the NFL’s restrictions on free agency.\textsuperscript{79} Later, the Eighth Circuit Court of Appeals ruled that the NFL did not qualify for a “labor exemption” under antitrust law.\textsuperscript{80} These two cases were significant because unions experienced more success in their antitrust settlement talks than in

\textsuperscript{75} Kansas City Royals v. Major League Baseball Players, 532 F.2d 615, 617-18 (8th Cir. 1976). After Andy Messersmith, a star pitcher, played out his option year, he thought he was free to sign with another team. Arbitrator Peter Seitz agreed with him, and the Eighth Circuit Court of Appeals found no reason to vacate this award. \textit{Id.} at 619, n.3. These events curtailed, but did not eliminate, the reserve system.

\textsuperscript{76} NBA players, who were also union officers, filed an antitrust lawsuit in 1970 for current and future players. Robertson v. National Basketball Ass’n, 389 F.Supp. 867, 873 (D.C.N.Y. 1975). A proposed merger of the NBA and its rival, the American Basketball Association, precipitated their lawsuit. \textit{Id.} The merger would eliminate labor market competition for pro basketball players. \textit{Id.} at 873-74. Seeking to preserve labor market competition, players sued to abolish the draft, reserve clause, and other restrictions. \textit{Id.} at 874. This effort bore fruit when a judge issued a temporary restraining order against any merger or non-competitive agreements between the two leagues for players. \textit{Id.} at 873, referring to Judge Tenney’s May, 1970 preliminary injunction.

\textsuperscript{77} Robertson v. National Basketball Association set a precedent for professional athletes to resolve their labor issues by suing for an antitrust injunction. Robertson v. National Basketball Ass’n, 389 F.Supp. 867 (D.C.N.Y. 1975). Before this occurred, the judge ordered the presence of players’ counsel or the general counsel of the National Basketball Players Association in merger talks. After extensive discovery, the players and NBA began settlement negotiations. \textit{Id.} at 873. The result was an agreement that NBA player representatives unanimously approved. Robertson v. National Basketball Ass’n, 72 F.R.D. 64, 66 (D.C.N.Y. 1976).


\textsuperscript{79} NFL rules required a team that signed a free agent to provide fair and equitable compensation to the player’s previous team. \textit{Id.} at 1004, referencing Article 12.1(H) of the NFL Constitution and By-Laws. Judge Larson agreed with the players, holding that the Rozelle Rule was an antitrust violation, because the rule deterred free agent signings. \textit{Id.} at 1006. In Ruling 4.3.1, Judge Larson found: “The extreme reluctance of clubs to sign such a player without a prior agreement on compensation is clearly evidenced by the few isolated instances in which it has occurred since the adoption of the Rozelle Rule in 1963.” \textit{Id.} He added in Ruling 4.3.2: “Numerous witnesses have testified that the Rozelle Rule has a chilling effect on negotiations between free agents who have played out the option and other clubs.” \textit{Id.}

\textsuperscript{80} Mackey v. NFL, \textit{supra} note 3, 543 F.2d 606, 620-21. The NFL later settled the class action for $13 million in damages. This information is reported in Brady, \textit{supra} note 16, at 1006.
periodic collective bargaining negotiations. Antitrust was not as beneficial to union-represented hockey players. In McCourt v. National Hockey League, a rising star sued to block the NHL from reassigning his contract from the Detroit Red Wings to the Los Angeles Kings to compensate the Kings for the loss of a star goalie to Detroit via free agency. Citing an earlier hockey precedent, the district court enjoined the NHL’s equalization rule. Unlike Robertson and Mackey, where appellate court rulings paved the way for antitrust settlements that loosened league restrictions on labor, the Sixth Circuit in McCourt vacated an antitrust injunction and immunized hockey’s version of the Rozelle Rule.

In these early cases, courts devoted only sporadic attention to their jurisdiction. District court judges dived into antitrust complaints and issued injunctions, without considering the possibility that their orders could intrude on federal labor policy or exceed the antitrust exemption. The fact that the Robertson litigation eventually narrowed to the issue of whether the plaintiff class was properly certified is evidence of how deeply federal judicial power intruded in the collective bargaining relationship.

83 Id. at 912.
85 Mackey, supra note 80.
86 McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979), concluding that “it is apparent that the inclusion of the reserve system in the collective bargaining agreement was the product of good faith, arm’s-length bargaining, and that what the trial court saw as a failure to negotiate was in fact simply the failure to succeed, after the most intensive negotiations, in keeping an unwanted provision out of the contract.” Id. at 1203.
87 Infra Part V.A.
88 Robertson v. National Basketball Ass’n, 72 F.R.D. 64, 71 (D.C.N.Y. 1976) (concluding that the “proposed settlement constitutes a negotiated compromise which fairly seeks to protect the interests of both the
B. Players’ Second Wave of Antitrust Litigation: More Injunctions

After the initial wave of antitrust litigation in the 1970s, players and management used collective bargaining to press their demands on each other. In football, after an inconsequential strike in 1982, players struck in 1987—and this time, suffered a humiliating loss after the NFL resumed league play with replacement players.90 Defeated in collective bargaining, players simply moved their bargaining from the labor-management arena to the federal courthouse by filing multiple antitrust lawsuits. Powell v. NFL presented a series of player challenges to the college draft, NFL’s Right of First Refusal/Compensation System (RFR/CS), and uniform player contract.91 In May 1989 the Eight Circuit ruled that the antitrust labor exemption continues after the CBA expires and the parties reach a bargaining impasse.92

But another Eighth Circuit opinion in Powell, decided in November 1989, unwittingly opened a new chapter in the relationship between the players and the NFL.93 The court repeated the NFL’s argument that the Sherman Act would apply, for example, if the players ceased to be represented by a union.94 A month later, the players took this as a cue, and decertified their

89 McCourt v. California Sports, Inc., 600 F.2d 1193, 1207 (6th Cir. 1979) (J. Edwards, dissenting).
90 Staudohar, supra note 81 (1982 produced player solidarity but few gains for them [id. at 26], and in 1987 strike, there is no real question that the union lost [id. at 31]).
92 Powell v. National Football League, 888 F.2d 559, 567 (8th Cir. 1989), reasoning: “To now allow the Players to pursue an action for treble damages under the Sherman Act would, we conclude, improperly upset the careful balance established by Congress through the labor law.”
94 Id. at 1303, n.12.
Then, in 1990, eight individual players challenged the NFL’s restrictions on free agency as Sherman Act violations. At the same time, the NFL argued to the court that the union engaged in a sham decertification. The district court in McNeil granted the players’ motion for summary judgment, concluding that the antitrust labor exemption ended because there was no ongoing collective bargaining relationship after the union dissolved itself. Following a jury trial, the McNeil court found that the NFL violated the Sherman Antitrust Act. This prompted another player to sue to enjoin Plan B free agency rules. Citing McNeil, Jackson v. Nat’l Football League temporarily enjoined this labor market restriction. Other NFL players sued for an injunction to achieve total free agency in White v. Nat’l Football League.


97 See Powell v. National Football League, 764 F.Supp. 1351, 1354 (D. Minn. 1991), where the NFL argued that the players engaged in a sham decertification to gain standing as antitrust plaintiffs. In a later phase of this litigation, the NFL observed behaviors by former NFLPA officers, such as requesting salary data from the league, advising players to adhere to licensing agreements, and using player agents to act as surrogate union officers. Also see McNeil v. National Football League, 777 F.Supp. 1475, 1479 (D.Minn. 1991) (NFL contended that union’s documents showed that the NFLPA was using player agents as a surrogate for the defunct union).

98 McNeil, supra note 96. In a subsequent ruling on NFL defenses, the players were largely victorious. McNeil v. Nat’l Football League, 790 F.Supp. 871 (D.Minn. 1992). Judge Doty rejected the NFL’s defense that it was a single economic entity and therefore incapable of conspiring within the meaning of § 1 of the Sherman Act. Id. at 878-881. The NFL also argued unsuccessfully that antitrust laws do not apply to restraints that operate solely within a labor market. Id. at 880-81. Completing the rout of the NFL’s defenses, Judge Doty ruled that the labor exemption ended when the parties’ collective bargaining relationship was terminated. The NFL had argued that the liability period started on May 23, 1991; instead the court said the period began much earlier, when the collective bargaining relationship ended in December 1989. Id. at 883-884.


100 Jackson v. Nat’l Football League, 802 F.Supp. 226, 228 (D. Minn. 1992). The NFL implemented Plan B free agency in February 1989. This gave NFL teams a right of first refusal if any of the designated players signed an offer sheet with another team. Id. at 228, n.1.

101 The court ruled that players who were subject to Plan B restrictions were irreparably injured due to the “undisputed brevity and precariousness of the players’ careers in professional sports, particularly in the NFL.” Id. at 231.

102 White v. Nat’l Football League, 822 F.Supp. 1389, 1394 (D.Minn.1993), reporting that these plaintiffs
This web of antitrust lawsuits achieved far more for the players than the 1987 strike. In a later phase of the White litigation, the league entered into a class settlement with players.\textsuperscript{103} Interesting to note, the player’s union participated in the settlement negotiations as a consultant to the plaintiffs’ class counsel.\textsuperscript{104} In a significant development, the settlement retained the district court’s jurisdiction to enforce the agreement.\textsuperscript{105} Once the dust cleared from this complex litigation, the reconstituted player’s association entered into a new collective bargaining agreement with the league.\textsuperscript{106} From 1993 until 2011, the White settlement formed the backbone of the NFL-NFLPA labor agreements.\textsuperscript{107}
Meanwhile, in basketball the *Robertson* settlement was extended as a framework for a CBA that ran from 1988 through the 1994-95 season.\(^{108}\) As this labor agreement was expiring, the player’s union told the NBA to end the college draft, hard salary cap, and right-of-first-refusal restriction on free agency or face another antitrust lawsuit.\(^{109}\) After the NBA refused to budge, the players sued for a temporary restraining order and prevailed.\(^{110}\)

Thereafter, courts took a different view of their role in this labor dispute. When a new judge took on the case to determine whether to extend the temporary restraining order, he ended this antitrust lawsuit by ruling that the matter was a labor dispute best suited for resolution at the collective bargaining table.\(^{111}\) The Second Circuit Court of Appeals also ruled for the NBA, noting that “the soup-to-nuts array of rules and remedies afforded under the labor laws”\(^{112}\) applied to this situation, and “application of antitrust principles to a collective bargaining

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\(^{108}\) National Basketball Ass’n v. Williams, 45 F.3d 684, 685-86 (2d Cir. 1995), recounting the first 30 years of collective bargaining between the NBAPA and NBA.

\(^{109}\) *Id. Also see* Staudohar, *supra* note 81, at 3-4 (1999).

\(^{110}\) National Basketball Ass’n v. Williams, 1994 WL 320426 (S.D.N.Y. 1994). Issuing a temporary restraining order, Judge Keenan said that the players met the burden of showing irreparable harm and injury because continuation of the salary cap would result in newly negotiated player contracts that, if found to violate antitrust law, could not be “unscramble(d)” by a court due to their complexity. *Id.* at *1. The judge also reasoned that without intervening, the court would give players “the unenviable choice of either structuring a contract based upon a salary cap they believe to be illegal or awaiting for a determination upon the merits of these counterclaims that if unsuccessful, would leave them less room to negotiate contracts under the salary cap.” *Id.* The judge concluded: “Such irreparable harm should not be placed upon players who have legitimately exercised their rights to seek clarification on complex legal issues that would affect their marketability.” *Id.*

\(^{111}\) National Basketball Ass’n v. Williams, 857 F.Supp. 1069, 1071 (S.D.N.Y.1994), where Judge Duffy said: “I am convinced that this is a case where neither party cares about this litigation or the result thereof. Both are simply using the court as a bargaining chip in the collective bargaining process.” He added: “Parties are once again urged to pursue the only rational course for the resolution of their disputes; that is, a course of collective bargaining pursued by both sides in good faith. No court, no matter how highly situated, can replace this time honored manner of labor dispute resolution. Rather than clogging the courts with unnecessary litigation, the parties should pursue this course.” *Id.* at 1079.

\(^{112}\) National Basketball Ass’n v. Williams, 45 F.3d 684, 693 (2d Cir. 1995).
relationship would disrupt collective bargaining as we know it.\textsuperscript{113} These court decisions show that the NBA preferred collective bargaining, while the players sought to avoid it.

Federal jurisdiction played an insignificant role in baseball and hockey, albeit for different reasons. Due to the Supreme Court’s grant of a total exemption to baseball under the Sherman Act, players had no choice but to use collective bargaining as a vehicle to loosen the reserve clause. Baseball players went on strike five times from 1972 and 1994, while owners resorted to three lockouts in this period.\textsuperscript{114}

Hockey had no antitrust activity after \textit{McCourt}, and throughout the 1980s and early 1990s, the NHLPA was overly accommodative to management. During this long period of quiescence, its executive director received financial benefits from the NHL.\textsuperscript{115} In time, this caused players to question whether he sold out his union members while performing his representational duties.\textsuperscript{116} A federal appeals court commented that by 1989 NHL players were behind their counterparts in baseball, basketball, and football, and suggested this was due to the “cozy” relationship between the NHLPA’s leader and NHL owners.\textsuperscript{117}

\textbf{C. Players’ Third Wave of Antitrust Litigation: Enforcement of Settlement Agreements}

\begin{itemize}
\item[113] \textit{Id.}
\item[114] \textit{Id.}
\item[115] Paul Staudohar, \textit{Have We Seen the Last of Baseball’s Labor Wars?}, 61 LABOR LAW J. 192, 193 (2010) (reporting that baseball experienced three lockouts and five strikes).
\item[116] Forbes v. Eagleson, 228 F.3d 471, 474 (3d Cir. 2000).
\item[117] \textit{Id.} at 485, where the court said:
\end{itemize}

We have no doubt that by 1989 (and probably earlier), NHL players were aware that they did not enjoy similar salaries, free agency rights, or other advantages available to players in other professional sports. Furthermore, we do not understand how anyone who has considered the Garvey report— which was commissioned at the behest of some 200 NHL players— can doubt that it should have led the players to believe that their situation was largely a result of the “cozy” collective bargaining relationship between Eagleson on the one hand and Ziegler, Wirtz, and the owners on the other.
By the 1990s, collective bargaining agreements in basketball and football codified terms from antitrust settlements.\footnote{White v. National Football League, 836 F.Supp. 1458, 1473 (D.Minn.1993) (“the court has agreed to retain jurisdiction over this action during the express term of the Settlement Agreement, and thus the court will be in a position to ensure that all class members’ interests will be protected throughout the life of the settlement.”).} While the dual engagement strategy succeeded for players, it put federal district courts in the anomalous position of constantly adjudicating disputes between labor and management.\footnote{White v. National Football League, 88 F.Supp.2d 993 (D.Minn. 2000).} Grievance arbitration—an internal dispute resolution process that is governed by a CBA—is the usual method for resolving these types of labor disputes.\footnote{White v. National Football League, 88 F.Supp.2d 993 (D.Minn. 2000).} But again, because these CBAs were anchored in antitrust settlements, disputes involving these judicially administered agreements were heard by a court designated special master.

To illustrate: The 1993 antitrust settlement in \textit{White} lasted indefinitely, and left the NFL and player’s union constantly dependent on a federal court to adjust their relationship. The 2000 case, \textit{White v. National Football League}, is a case in point.\footnote{White v. National Football League, 88 F.Supp.2d 993 (D.Minn. 2000).} By agreement, teams were entitled to designate one free agent as a franchise player, if they paid the star player a premium salary for...
a one year contract. The reconstituted player’s union brought an action before the court’s special master, alleging that the Arizona Cardinals violated the settlement agreement by applying the franchise tag to one player, while signing him late in the contract negotiation cycle to a multi-year deal so that the team could designate another player in the upcoming salary cycle as a franchise player. The special master ruled that the Cardinals’ contract with the first player did not circumvent the antitrust settlement, and therefore the franchise tag could be applied to the second player. The district court affirmed this ruling. The case shows how deeply the antitrust settlement intruded on the collective bargaining relationship.

Federal courts in the early 1990s similarly regulated basketball. Judges refereed disputes over terms in the Robertson settlement and a later antitrust settlement, called the Bridgeman Settlement Agreement. Under the BSA, which became part of the CBA, the league capped player compensation at 53% of annual gross revenues. Some teams and players creatively avoided the annual cap. The Portland Trail Blazers had too little room under the salary limit to sign Chris Dudley, a valuable free agent. But they enticed him with a low salary in the first year, much higher pay in later years, and an “opt-out” after the first year so that he could play the market sooner rather than later. The league complained that this contract violated the intent of the settlement. The judge’s disagreement with the NBA sounded like a labor arbitrator’s decision,
D. Players’ Fourth Wave of Antitrust Litigation: Another Injunction

As the CBA neared expiration in 2011, the football player’s union sued to enforce the 1993 White settlement agreement that had been renewed over 18 years. The expiring CBA obligated the NFL to use its best efforts to maximize TV revenues. Players claimed that the league violated the settlement when it bargained for TV contracts that offered the networks concessions in exchange for higher payments to the NFL if a lockout occurred. The new TV deals gave the NFL $4 billion as insurance against a lockout. After the special master dismissed the players’ claim, Judge Doty reversed this ruling. As a result, players petitioned the judge to escrow the provisional lockout money from TV agreements, and enjoin the lockout.

In a separate but related development, after the CBA expired the NFL imposed a lockout. To make a stronger case for finding that the labor exemption did not shield the league’s action from antitrust law, the players decertified their union—again—and sued as individuals in

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129 Id. at 183, stating: “It is quite possible that the widespread use of such contracts would have a devastating impact upon the teams’ salary cap objectives.” The judge continued: “it cannot be said that entry into a contract having such terms was designed to serve the purpose of defeating or circumventing the intention of the parties as reflected by the salary cap provisions.” Id. Accordingly, the judge ruled: “A contract such as Dudley’s finds authorization in the BSA [Bridgeman Settlement Agreement].” Id.


131 Id. at *6.

132 Id. at *5.

133 Id.

134 Id. at *12.

135 Trial Motion, Memorandum and Affidavit, Class Counsel’s and the NFLPA’s Memorandum of Law in Support of Money Damages and Equitable Relief Pursuant to the Court’s Order of March 1, 2011, 2011 WL 1204848 (D.Minn. 2011).

136 Supra note 95.
Brady v. National Football League. Judge Susan Nelson enjoined the lockout. In taking this strong action, the court rejected the league’s various jurisdictional arguments and other defenses. Appealing the order, the NFL treated its bargaining impasse as a labor dispute under the National Labor Relations Act. The Eighth Circuit agreed and ruled that the district court lacked jurisdiction to issue an injunction.

IV. RESEARCH METHODS AND STATISTICAL RESULTS: ANTITRUST RULINGS DURING COLLECTIVE BARGAINING IN PROFESSIONAL SPORTS

A. Research Methodology

This Article is part of a broader research project that is based on my assembly of federal court antitrust cases involving labor disputes in professional sports. The following explanation of my research methodology is published elsewhere in connection with a different research question: whether antitrust rulings create a disincentive for players to engage in collective bargaining by providing a court-administered process for negotiating new terms and conditions of employment. The policy question I pose here is distinct from my previous study: Should federal judicial power extend to antitrust lawsuits filed by pro athletes who challenge labor

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137 Brady v. National Football League, 779 F.Supp.2d 992 (D. Minn. 2011), at 1003, reporting that on March 11, 2001, the date that the CBA was set to expire at 11:59 p.m., a majority of players voted to end the collective bargaining status of their union and also voted to restructure the organization as a professional association. The players took this action immediately before individual players filed an antitrust lawsuit to challenge practices that were included in the NFL’s collective bargaining proposals. Id.

138 Id. at 1043.

139 Id. at 1028-1032.

140 Brady v. National Football League, 640 F.3d 785, 788 (8th Cir. 2011), reporting that when the NFL imposed a lockout, the league also filed an unfair labor practice charge with the National Labor Relations Board, alleging that the union’s disclaimer of representation was a “sham” and therefore a “ploy and an unlawful subversion of the collective bargaining process.” Id.

141 Brady v. National Football League, 644 F.3d 661, 680 (8th Cir. 2011) (“we conclude that § 4(a) of the Norris–LaGuardia Act deprives a federal court of power to issue an injunction prohibiting a party to a labor dispute from implementing a lockout of its employees”).

142 LeRoy, supra note 13
market restrictions imposed by their league? To answer this policy question, I pose the following research questions for empirical investigation:

(1) How often do courts invoke the Norris-LaGuardia Act to avoid exercising federal jurisdiction in a sports labor dispute?

(2) How often do courts grants apply the “labor exemption” defense interposed by leagues and teams to defeat federal jurisdiction?

(3) How often do courts rule that the National Labor Relations Board has exclusive jurisdiction of a sports labor dispute?

(4) How often do courts grant or deny injunctions; and on appeal, how frequently do they affirm or continue injunctions, or stay or vacate these orders.

To answer these questions, I developed a sample of federal court rulings on antitrust complaints involving labor market restrictions in baseball, football, basketball, and

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hockey. Court opinions were included if they were decided after players formed collective bargaining relationships with the NFL, NBA, NHL and MLB. Decisions involving a rival league, such as the American Basketball Association, were included if they involved a player union, a collective bargaining agreement, and labor restrictions. The sample contained cases


Denver Rockets v. All-Pro Management, Inc., 1971 WL 3015 (9th Cir. 1971). Also see Caldwell v. American Basketball Ass’n, Inc., 66 F.3d 523 (2d Cir. 1995).
involving a disputed term or condition of employment—for example, the reserve clause\textsuperscript{149} or salary cap.\textsuperscript{150} Challenges to labor market restrictions by non-employees—for example, college athletes who challenged draft restrictions as a restraint of trade—were also included because this type of employment qualification is a mandatory subject of bargaining under the NLRA.\textsuperscript{151} The database excluded antitrust cases before a collective bargaining relationship.\textsuperscript{152}

My goal was to assemble a comprehensive sample of published cases. Applying the search criteria, I identified, read, and coded 60 federal district court and 23 appellate court rulings (a total of 83) that were published from 1970 through July 2011. I developed a form to record and code data from cases. Captions were often repetitive, even when disputes involved separate court actions. \textit{White v. National Football League} illustrates this situation.\textsuperscript{153}

I also counted appellate decisions as separate cases—for example, the recent case of \textit{Brady v. National Football League}.\textsuperscript{154} The cases were coded separately because the passage of time changed the legal arguments, motions, and type of court rulings. For example, some cases involved a temporary restraining order, or a preliminary restraining order, or a permanent restraining order. These were issued at different points in a dispute, and sometimes required

\textsuperscript{152} Toolson, \textit{supra} note 65, and Molinas v. National Basketball Association, 190 F.Supp. 241 (S.D.N.Y.1961) (dismissing antitrust lawsuit by professional player who was ruled ineligible due to his violation of the league’s gambling rules). \textit{Compare} Flood v. Kuhn, 316 F. Supp. 271, 283, n. 18 (S.D.N.Y. 1970). This case, included in the sample, was an antitrust lawsuit that was commenced shortly after the player’s association entered into a collective bargaining relationship with the league.
\textsuperscript{153} This complex litigation led to a stipulation and settlement agreement that continued the jurisdiction of the district court of Minnesota. Under this single caption, my database included 14 separate court rulings, at the district and appellate levels, from 1993-2011—an 18 year span during which the original plaintiffs were no longer players. By uniquely counting all of these cases, I captured data for each new antitrust claim that a party presented to a court. \textit{See} White, \textit{supra} note 119.
\textsuperscript{154} Brady v. National Football League, 638 F.3d 1004 (8\textsuperscript{th} Cir. 2011).
different proofs and arguments. To illustrate my point, consider the Eighth Circuit’s response on May 16, 2011 to the district court’s issuance of a temporary restraining order three weeks earlier in *Brady*.

By treating each case as unique, I developed a more complete image of the changing complexion of economic and legal arguments. Moreover, because these cases involved collective bargaining, they were time sensitive. Consider the passage of just one month from issuance of an injunction to an appellate order staying the order. In *Brady*, the NFL held its annual draft during a lockout. This put veterans and new rookies in direct competition for roster spots as the NFL overstocked itself with new talent.

**B. Statistical Results**

1. **Tables 1.1- Table 1.3**

Table 1.1 (below) shows how courts ruled on plaintiff and defendant jurisdictional arguments in the antitrust cases in the sample. Table 1.2 shows how often courts granted or continued these antitrust injunctions, and how often they stayed or vacated these orders. The percentages are for all cases in the sample.

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155 *Brady v. National Football League*, 640 F.3d 785, 793 (8th Cir. 2011): The League contends that it is irreparably harmed by the district court’s injunction, because its ability to maintain the lockout is essential to the League’s negotiating position in an ongoing dispute with the Players, and that there is no way to measure and compensate the League for its loss of leverage and consequent delay if the injunction is not stayed (citation omitted). The NFL observes that this court, in a different context, has recognized irreparable harm based on the impossibility of recreating a negotiating environment that a stay pending appeal was designed to preserve (citation omitted). The League also maintains that player transactions that will occur under the injunction—trades, free agent signings, and roster cuts of players under contract—will cause irreparable harm to the League if the district court’s order is not stayed, because it will be impossible to restore the status quo as of April 25 after contracts are formed and transactions completed during the processing of an appeal.

156 *Id.* at 787, reporting that when the NFL filed a motion with the appellate court to stay the district court’s injunction, it also petitioned for an expedited hearing of the appeal. On April 29, the appellate court granted an administrative stay of the injunction, and on May 3 the appellate court granted the league’s motion for an expedited appeal.
Table 1.1

<table>
<thead>
<tr>
<th>Labor Exemption</th>
<th>Norris-LaGuardia</th>
<th>NLRB</th>
<th>Labor Exemption</th>
<th>Norris-LaGuardia</th>
<th>NLRB</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ruling Favors</td>
<td>Favors Plaintiff</td>
<td></td>
<td>Ruling Favors</td>
<td>Favors Plaintiff</td>
<td></td>
</tr>
<tr>
<td>12%</td>
<td>3.60%</td>
<td>3.60%</td>
<td>13.30%</td>
<td>4.80%</td>
<td>0%</td>
</tr>
</tbody>
</table>

Table 1.2

<table>
<thead>
<tr>
<th>Grant/Continue</th>
<th>Affirm</th>
<th>Deny</th>
<th>Stay/Vacate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ruling Favors</td>
<td>Favors Plaintiff</td>
<td></td>
<td>Ruling Favors</td>
</tr>
<tr>
<td>15%</td>
<td>2.40%</td>
<td>3.60%</td>
<td>9.60%</td>
</tr>
</tbody>
</table>
To put the data in Tables 1.1 and 1.2 in perspective, consider the wide range of court rulings in these 83 antitrust decisions. On the litigation continuum, from the point of initiation to a later stage such as compliance with an earlier antitrust order, the cases included rulings on motions for summary judgment,\(^{157}\) class certification,\(^{158}\) proposed settlement,\(^{159}\) award of damages,\(^{160}\) contempt,\(^{161}\) recusal,\(^{162}\) and judicial review of special master rulings.\(^{163}\)

Table 1.1 (\textit{supra}) shows that in more than 25\% of the total cases in the sample, courts ruled on jurisdictional defenses asserted by antitrust defendants.\(^{164}\) In 12\% of the cases, plaintiffs won rulings that rejected a league’s or team’s defense that antitrust law provides an exemption for the subject of litigation.\(^{165}\) Courts ruled in favor of defendants who asserted the labor exemption defense in more than 25\% of the total cases. The remaining cases included rulings on motions for summary judgment, class certification, proposed settlement, award of damages, contempt, recusal, and judicial review of special master rulings.

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\(^{164}\) This figure is derived by adding the percentage of pro-plaintiff (12\%) and pro-defendant (13.1\%) rulings on the “labor exemption” defense.

\(^{165}\) A concise explanation of the antitrust labor exemption appears in Clarett v. National Football League, 369 F.3d 124 (2d Cir. 2004), stating that:

The non-statutory exemption has been inferred 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; and which delegate related rulemaking and interpretive authority to the National Labor Relations Board. The exemption exists not only to prevent the courts from usurping the NLRB’s function of determining, in the area of industrial conflict, what is or is not a reasonable ‘practice, but also to allow meaningful collective bargaining to take place by protecting some restraints on competition imposed through the bargaining process from antitrust scrutiny (internal quotes omitted).

\textit{Id.} at 131.

FALSE STARTS AND TECHNICAL FOULS IN SPORTS LABOR DISPUTES

exemption in 13.3% of the rulings in the sample. In 3.6% of the cases, courts ruled in favor of plaintiffs who argued that the Norris-LaGuardia Act did not apply to their dispute. By the same percentage, courts ruled for defendants on the applicability of the Norris-LaGuardia Act. Also, courts ruled in 3.6% of the cases that the NLRB did not preclude the court’s jurisdiction. No courts ruled that the NLRB precluded their jurisdiction.

Turning to Table 1.2, courts ruled favorably on a plaintiff’s motion to grant or continue an antitrust injunction in 15% of all cases in the sample. These injunctions were affirmed in 2.4% of the cases. Courts ruled in favor of defendants by denying motions for injunctions in

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3.6% of cases,\textsuperscript{172} and by staying or vacating injunctions in 9.6% of cases.\textsuperscript{173}

Table 1.3 (infra) shows how courts have ruled on antitrust violations and damages claims. Overall, the rulings have favored plaintiffs. Ten percent (10\%) of the rulings in the total sample found that a league or team caused an injury. Courts awarded damages in 4.8\% of cases. In 3.6\% of the cases, they affirmed a special master’s finding of damages; and in 4.8\% of the rulings, they reversed a master’s finding of no damages.

In only 2.4\% of the cases, courts sided with a league or team by finding no injury. In 4\% of the cases, they affirmed a special master’s finding of no damages. In 5\% of the rulings in the sample, courts reversed a master’s finding of damages.


\textsuperscript{173} Denver Rockets v. All-Pro Management, Inc., 1971 WL 3015 (9th Cir. 1971); McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979); Brown v. NFL, 50 F.3d 1041 (D.C.Cir.1995); Clarett v. National Football League, 369 F.3d 124 (2d Cir. 2004); Brady v. National Football League, 638 F.3d 1004 (8th Cir. 2011); Brady v. National Football League, 640 F.3d 785 (8th Cir. 2011); and Brady v. National Football League, 644 F.3d 661 (8th Cir. 2011).
Tables 2.1 - 2.3 (infra) compare district and appellate rulings on jurisdictional defenses and injunctions. This arrangement reflects the progression of an antitrust lawsuit involving a labor dispute in professional sports. Table 2.1 reveals how often courts ruled on their jurisdiction (i.e., whether the Norris-LaGuardia Act divested jurisdiction), while Table 2.2 shows the frequency of antitrust labor exemption rulings. Table 2.3 reflects cases where a court ruled on an injunction.
Table 2.1 shows that the Norris-LaGuardia Act was rarely pleaded as a defense to an antitrust action (93.3% of the district cases had no such issue). This defense means that the antitrust complaint involved a labor dispute over which federal courts lack jurisdiction. Interestingly, however, when the issue was litigated, district and appellate courts had significantly different responses. District judges rejected an employer’s Norris-LaGuardia arguments in 5.0% of all their cases (three rulings), and accepted it only once (1.7% of the cases). Appellate courts, however, reversed that pattern by applying the Norris-LaGuardia defense in three cases (13.0% of all their decisions). Appellate courts never rejected this employer defense, while district courts always disallowed this argument.

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174 I used a statistical program in SPSS called Crosstabs to analyze the data that resulted in Tables 2.1-2.3. For Table 2.1, the analysis yielded: Chi-Square ($\chi^2$) 5.689, df = 2, p < .058. Due to the small sample size, my conclusion assumes significance at the .10 level.
Table 2.2

<table>
<thead>
<tr>
<th></th>
<th>No Ruling</th>
<th>Ruling Rejects Labor Exemption Defense</th>
<th>Ruling Applies Labor Exemption Defense</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>District Court</strong></td>
<td>46 (76.7%)</td>
<td>9 (15.0%)</td>
<td>5 (8.3%)</td>
</tr>
<tr>
<td><strong>Appellate Court</strong></td>
<td>16 (69.6%)</td>
<td>1 (4.3%)</td>
<td>6 (26.1%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>62</td>
<td>10</td>
<td>11</td>
</tr>
</tbody>
</table>

In Table 2.2, district courts ruled on the Sherman Act’s labor exemption in about one-fourth of the cases (76.7% of the district court cases had no such ruling). By a margin of 9 cases (15.0%) to 5 cases (8.3%), district courts rejected leagues who asserted this antitrust defense. Again, however, appellate courts treated the issue differently. By a 6 case (26.1%) to 1 case (4.3%) margin, they applied the labor exemption, immunizing the rule from antitrust.

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175 For Table 2.2, the analysis yielded: Chi-Square ($\chi^2$) 5.632, df = 2, p < .06. Due to the small sample size, my conclusion assumes significance at the .10 level.
Table 2.3

<table>
<thead>
<tr>
<th></th>
<th>No Injunction Ruling</th>
<th>Ruling Grants or Continues Injunction</th>
<th>Rulings Affirms Injunction</th>
<th>Ruling Denies Injunction</th>
<th>Ruling Stays or Vacates Injunction</th>
</tr>
</thead>
<tbody>
<tr>
<td>District Court</td>
<td>44</td>
<td>12</td>
<td>1</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>73.3%</td>
<td>20.0%</td>
<td>1.7%</td>
<td>5.0%</td>
<td>0%</td>
</tr>
<tr>
<td>Appellate Court</td>
<td>14</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>60.9%</td>
<td>0%</td>
<td>4.3%</td>
<td>0%</td>
<td>34.8%</td>
</tr>
<tr>
<td>Total</td>
<td>58</td>
<td>12</td>
<td>2</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>69.9%</td>
<td>14.5%</td>
<td>2.4%</td>
<td>3.6%</td>
<td>9.6%</td>
</tr>
</tbody>
</table>

Table 2.3 shows that district courts did not usually rule on a motion for an injunction (73.3% of their cases). But when a party pleaded this motion, district courts were much more likely to grant (12 of their cases, or 20.0%) or affirm (1, or 1.7%) an injunction than deny it (3 of their cases, or 5.0%). As in Table 2.1 and table 2.2, appellate courts behaved differently. More than half their rulings did not involve an injunction (14 of their cases, or 60.9%). When this order was litigated, appellate courts stayed or vacated 8 injunctions (34.8% of their cases), and affirmed 1 (4.3%).

IV. TEXTUAL ANALYSIS OF CASES: DISTRICT COURTS COMMIT “FALSE STARTS” AND “TECHNICAL FOULS”

In pro football, the rulebook provides a penalty when the team that possesses the ball tries to gain an advantage by starting a play prematurely. The NFL defines several actions as false

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176 For Table 2.3, the analysis yielded: Chi-Square ($\chi^2$) 27.485, df = 4, p < .000.
starts. For my analysis, two definitions provide apt metaphors to describe the behavior of district judges who, according to appellate courts, issued injunctions in error: “[n]o interior lineman may move abruptly after taking or simulating a three-point stance,”\textsuperscript{177} and “[n]o player of either team may enter neutral zone before snap.”\textsuperscript{178} I italicize “move abruptly” because, as I show below, some courts appear to have ruled hastily in ordering injunctions. In addition, I discerned a lack of judicial neutrality in some injunction cases—notably, when they assumed that a league rule caused damages.

\textit{A. False Starts}

Injunctions are among the most potent tools available to judges, and are to be used very sparingly.\textsuperscript{179} Courts in this survey resorted to injunctions with haste or pre-judgment of the merits. Some judges, for example, ordered injunctions because of the supposed harm caused to players with short careers. Judge MacMahon’s epitomized this view in \textit{Robertson v. National Basketball Ass’n}: “When we consider that youth passes away and consequently basketball players have limited professional careers, the threat of immediate and irreparable injury to the plaintiffs seems clear enough.”\textsuperscript{180} He gave no consideration, however, to the fact that the main source of new talent in the NBA—the draft—occurs only once a year. Its infrequency and small scale provide an orderly and delayed process for substitutes to enter immediately the labor market. A trial might have been possible in this time to ascertain damages.

Voicing a similar rationale, Judge Doty said in \textit{Jackson v. National Football League} that

\begin{itemize}
\item \textsuperscript{177} Rule Book (NFL), available at http://www.nfl.com/rulebook/positionofplayers.
\item \textsuperscript{178} Id.
\item \textsuperscript{179} See Aaron v. SEC, 446 U.S. 680, 703 (1980) (Burger, C.J., concurring) (“An injunction is a drastic remedy, not a mild prophylactic, and should not be obtained against one acting in good faith.”).
\end{itemize}
the “existence of irreparable injury is underscored by the undisputed brevity and precariousness of the players’ careers in professional sports, particularly in the NFL.” Elaborating, he worried that “the career of a professional athlete is more limited than that of persons engaged in almost any other occupation” [emphasis added]. Consequently the loss of even one year of playing time is very detrimental.”

His logic failed, however, to explain why players had no remedy at law. Given the availability of data on player pay, there would be no paucity of expert witnesses to estimate, with a reasonable degree of professional certainty, the damages resulting from a restrictive labor market rule. Furthermore, when Judge Doty found that football players were unlike “persons engaged in almost any other occupation,” he meant that the market value of these athletes has precious limited duration. Certainly, the rosters in these sports turn over regularly, and most players have a narrow window of opportunity to capitalize on their market value.

But consider the labor market in 2010 for elite law graduates. While major law firms (those with more than 500 lawyers) in the U.S. did not apparently conspire to fix salaries, or hire new lawyers by utilizing a draft, salary data from the National Association for Law Placement show that there was no differentiation for firms whose pay was in the 25th percentile, 50th percentile, and 75th percentile of law firm compensation for new hires. In other words, the data imply that every firm with over 500 lawyers in the NALP survey paid exactly $160,000 to each 2010 law graduate. If this reading of the data is correct, elite graduates faced a more rigid labor

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181 Jackson, supra note 101.
182 Id.
market than NFL players. Unable to bargain away from this \textit{de facto} monopoly, new lawyers
were hired on a probationary basis, meaning that many of these star-quality hires will undergo a
highly competitive promotion process that shortens their careers at this premier level of practice.
Those who are not promoted to partner will suffer a long-term financial loss.

The point is that the rigged labor market for professional athletes might not be as unique
as Judge Doty suggested. He rushed to judgment in concluding that players were injured in their
restricted labor market. Indeed, in either case—top law graduates or pro football players—while
these professionals can plausibly argue that the employer-rigged market causes financial injuries
by suppressing robust competition, it is quite possible that juries would have some difficulty
sympathizing. Minimum wage jurors also face labor market conditions that appear to them to be
uniformly unfriendly. My analysis suggests that Judge Doty’s injunctions were false starts.

Other injunction courts reasoned that they could not possibly calculate damages if illegal
league rules were not immediately enjoined. One court justified its restraining order by
comparing a trial on damages to “unscramble[ing] the egg” of so many illegally negotiated
player contracts.\footnote{National Basketball Ass’n v. Williams, 1994 WL 320426 (S.D.N.Y. 1994) at *1.}
Similarly, another court issued a restraining order because it believed that
monetary damages would be too difficult to assess.\footnote{Jackson, \textit{supra} note 100 (“many of the economic injuries alleged by the players, such as their inability to play for teams that may better utilize their skills, and thus maximize their value, their inability to switch to teams that would allow them to start or that to play on natural grass [which may prolong a player’s career], may be impossible to quantify in monetary terms.”).}

When Judge Nelson enjoined the NFL’s 2011 lockout, she believed that the players were
irreparably harmed by “the various restrictions imposed by the League over the several decades
of this on-going dispute. . ."186 After the Eighth Circuit vacated her injunction,187 the players were left to bargain under the league’s restrictions. Nonetheless, the new CBA that they negotiated with management included a $55,000 increase from the prior year in the minimum salary, meaning that the NFL set its base player salary at $420,000.188 The new CBA set an overall limit on rookie compensation for 2011—but the ceiling was set at $874 million.189 The agreement also set minimum pay for high draft picks at a graduated scale based on average pay of the highest-paid players at those positions.190 Thus, the agreement offset the anti-competitive nature of the draft by guaranteeing players pay that is comparable to the high-end of the market.

Could these improvements in pay, negotiated while players were forced to the sidelines by a lockout, be accurately characterized as irreparable harm and injury? Or, was Judge Nelson’s injunction a false start by concluding that collective bargaining would injure players?

**B. Technical Foul**s

District courts do not openly defy authority, as the definition of a technical foul means. I use this term to reflect the arcane meaning of the antitrust labor exemption—and to portray that appellate courts believe that district judges err when they fail to apply this defense. In other words, district courts tend to see these conflicts as antitrust problems, while appellate judges understand that these are a special type of labor-management dispute.

Judge Royce Lambeer ruled in Brown v. Pro Football, Inc. that the NFL’s bargaining

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186 Brady, *supra* note 136, at 1035.
189 *Id.*
190 *Id.*
impasse with the players did not qualify as an antitrust labor exemption. He believed that the labor exemption created a disincentive for the NFL to agree to a new CBA. By his reasoning, if “the NFL is satisfied with the terms in the expired agreement, all it need do is maintain the status quo and continue to receive exemption from antitrust liability for restraints to which the union no longer agrees.” Judge Lamberth went further, contending that antitrust helped to create pressure for an employer to bargain: “The certainty that treble damages under the antitrust laws would attach after a date certain would create the atmosphere of economic certainty and urgency necessary for the parties to negotiate seriously and sign a new collective bargaining agreement.” He concluded that the union had “every right to seek treble damages for unlawful NFL antitrust restraints.”

Judge Edwards, writing for the D.C. Court of Appeals, could not have seen the matter more differently. The Sherman Act disrupted collective bargaining by “giving unions a powerful new weapon, one not contemplated by the federal labor laws.” He explained that “[w]ith such a weapon at their disposal, union workers could do what the plaintiff class has done here: invoke the antitrust laws and their threat of treble damages to gain an advantage in bargaining over a salary provision about which union members do not care deeply enough to strike.” He was referring to the fact that the lawsuit involved a uniform pay scale for practice

\begin{footnotesize}
\begin{enumerate}
\item[192] id. at 131.
\item[193] id.
\item[194] id.
\item[195] id. at 132.
\item[197] id. at 1052.
\item[198] id.
\end{enumerate}
\end{footnotesize}
squad—hardly a major concern for most NFL players. Affirming the appellate court, the
Supreme Court took a different tack, particularly questioning the competence of antitrust courts
to referee labor disputes. 199

Powell v. NFL involved a different disagreement between a district and appellate court. 200
Judge Doty ruled on the technical issue of whether the antitrust labor exemption under the
Sherman Act ends when the NFL and players association reach impasse over a mandatory
subject of bargaining. 201 While declining initially to rule that the NFL and players association
were at impasse, he set forth a standard that laid the foundation for the union to return to court
and seek a declaration that the NFL could no longer claim a labor exemption. 202 Eventually, the
NLRB advised the league and players association that impasse had been reached, whereupon
Judge Doty opened his court to the players’ antitrust challenge to the equalization rule and other
NFL labor restrictions. 203 This meant that the league’s rules no longer enjoyed immunity under

We recognize . . . that, in principle, antitrust courts might themselves try to evaluate particular
kinds of employer understandings, finding them “reasonable” (hence lawful) where justified by
collective-bargaining necessity. But any such evaluation means a web of detailed rules spun by
many different nonexpert antitrust judges and juries, not a set of labor rules enforced by a single
expert administrative body, namely the [National Labor Relations] Board. The labor laws give the
Board, not antitrust courts, primary responsibility for policing the collective-bargaining process.
And one of their objectives was to take from antitrust courts the authority to determine, through
application of the antitrust laws, what is socially or economically desirable collective-bargaining
policy.

Id. at 242.

200 Compare Powell v. NFL, 678 F.Supp. 777 (D.Minn. 1988), and Powell v. NFL, 930 F.2d 1293 (8th Cir.
1989).

201 Id. 778.

202 Id. at 788-89, concluding that “[u]nder the Court’s formulation, a determination that the parties have
reached impasse as to a particular issue results in termination of the labor exemption protecting that particular
provision.” The court added: “In the instant case, once the parties reach impasse concerning the player restraint
provisions, those provisions will lose their immunity and further imposition of those conditions may result in
antitrust liability.” Id. at 789.

the antitrust exemption.

Taking a very different view, the Eighth Circuit found that impasse did not provide an occasion to deny the NFL’s an antitrust labor exemption. The district court erred by treating a “lawful stage as misconduct.” Judge Doty’s approach also conflicted with federal labor law and usurped the role of the National Labor Relations Board. Impasse did not mark an end in the collective bargaining process. It simply marked a phase when new options became available to parties in furtherance of their relationship. The union could strike, or the employer could press its position by locking out players. The union could challenge the league by filing an unfair labor practice complaint with the NLRB. Or, the NFL could unilaterally implement any of its pre-impasse offers. But an antitrust action at this stage undermined federal labor law. At the core of its technical disagreement with Judge Doty, the appellate panel said: “We are influenced by those commentators who suggest that, given the array of remedies available to management and unions after impasse, a dispute such as the one before us ought to be resolved free of intervention by the courts where the union has had a sufficient impact in shaping the content of the employer’s offers and where the challenged restraint is clothed with union approval [internal

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had reached an impasse on the free agency issue. This cleared the way for a trial on whether the NFL’s First Refusal/Compensation system violated the Sherman Act.

204 Powell v. NFL, 930 F.2d 1293 (8th Cir. 1989), at 1301-02.
205 Id. at 1302.
206 Id.
207 Id.
208 Id.
209 Id. at 1300.
210 Id. at 1302 (“To now allow the Players to pursue an action for treble damages under the Sherman Act would, we conclude, improperly upset the careful balance established by Congress through the labor law.”).
To summarize: Parts IV and V should be read together. The former presents statistics on court rulings in labor disputes that are litigated under the Sherman Act. While these rulings cover the lifespan of a lawsuit— from threshold issues of jurisdiction and motions to dismiss, to proposed settlements, to trial verdicts and damages, and finally, to post-settlement claims under a court’s extended jurisdiction— general trends appear in the data. First, few of these lawsuits were dismissed at the outset. Usually, a ruling kept the labor dispute before a federal judge for a subsequent phase of litigation. Occasionally, courts enjoined leagues from enforcing their restrictive labor practices. But even when judges took a less extreme measure, such as rejecting a league’s antitrust exemption, the ruling kept the litigation alive. Second, these lawsuits occurred in a context of collective bargaining between the league and a players association. I refer to this process as dual engagement, whereby players were able to negotiate wages and terms and conditions of employment in two, parallel forums. Third, the data show that district courts, acting under the jurisdiction of the Sherman Act, were extensively involved in these protracted labor disputes in basketball and football. This tendency was in apparent conflict with the intent of Congress, as evidenced in the Clayton Act’s labor exemption, as well as the Norris-LaGuardia and National Labor Relations Act. Reading the three statutes together, I conclude that Congress intended to remove federal jurisdiction from antitrust lawsuits that involve labor disputes.

In Part V, I refer to specific cases that mistakenly apply antitrust to these labor disputes as “false starts” and “technical fouls.” In fairness to the courts I criticize, they were well aware of the hard choice they were making between the Sherman Act and National Labor Relations Act.

211 *Id.*
In their defense, they believed antitrust law was enacted to regulate powerful corporate interests. Thus, when they intervened on the side of players, they believed they were fulfilling a congressional mandate to eliminate monopolistic practices by large corporate entities that hurt individuals. Simply put, they applied the Sherman Act to protect athletes from much wealthier owners. As I conclude below, however, these courts misapplied judicial power by intervening in these labor disputes.

VI. CONCLUSIONS

The dual engagement strategy has created jurisdictional and choice-of-law conflicts for federal judges. District courts often ruled that league restrictions on free agency are anti-competitive business practices. Seeing no conflict between antitrust and labor law, they issued injunctions or found antitrust violations. But the data in this study show a different side to the jurisdiction and choice-of-law story. Other courts—notably, at the appellate level—perceived an intolerable conflict between antitrust and labor law. Thus, they denied jurisdiction to player complaints, or ruled that league-imposed labor restraints are immune under the antitrust “labor exemption.” This background provides essential context for the main findings in statistical analysis:

(1) When leagues pleaded the Norris-LaGuardia Act as a jurisdictional defense to an antitrust injunction, district and appellate court rulings differed significantly. Trial judges rejected Norris-LaGuardia arguments in 5.0% of cases in the district court sample, and accepted it in 1.7%. Appellate courts reversed this pattern by applying the Norris-LaGuardia defense in 13.0% of their cases—meaning that these judges ruled that lower courts lacked jurisdiction.

212 E.g., Brown, supra note 193.
FALSE STARTS AND TECHNICAL FOULS IN SPORTS LABOR DISPUTES

(2) Ruling on the antitrust labor exemption, district courts rejected this league defense in 15.0% of their cases, and applied it in 8.3%. Appellate courts treated the issue differently, applying the exemption in 26.1% of their cases and rejecting it in 4.3%. Thus, appellate courts were more likely to immunize the disputed restriction from antitrust enforcement. In other words, appellate courts applied the NLRA over the Sherman Act more often than district courts.

(3) District courts usually did not rule on a motion for an injunction (73.3% of the cases). But when they ruled on this motion, they were more likely to grant (20.0% of their cases) or affirm (1.7%) an injunction than deny this order (5.0% of their cases). Appellate courts behaved differently. More than half their rulings did not involve an injunction (60.9%). However, when they ruled on an injunction, they stayed or vacated 8 injunctions (34.8% of their cases), and affirmed only 1 order (4.3%).

In sum, district and appellate judges behaved differently in these hybrid labor law-antitrust cases. Some cases involved the highly technical antitrust labor exemption. In those cases, district judges committed “technical fouls” by failing to apply this exemption as required by federal labor law. In injunction cases, where district courts often granted the motion but appellate courts routinely overruled them, the former were guilty of “false starts.” On the one hand, the data suggest that appellate courts have cleaned up these district court “fouls,” and therefore, no legislative remedy is indicated.213

But the cases also imply that by the time appellate courts corrected lower courts, a judge’s “false start” or “technical foul” altered the balance of bargaining power, enabling players

213 If Congress were to consider a legislative remedy, they might amend the Norris-LaGuardia Act to remove federal jurisdiction from disputes over pay and conditions of employment for current players in the National Football League, National Basketball Association, and National Hockey League.
to gain an advantage that they could not achieve through collective bargaining. The NFL offers a prime example, where collective bargaining occurred under the auspices of a federal district judge in Minneapolis who administered an antitrust settlement from 1993 through 2011. Players decertified their union twice in order to leverage their dual engagement strategy. After an appellate court ruling effectively ended judicial administration of football players’ employment relationship, the league and players union negotiated a new labor agreement within a month.

More broadly, my study raises a serious question about the scope of judicial power in labor disputes involving professional sports. When two laws such as the NLRA and Sherman Act have co-existed with so much tension, and Congress has tried to mitigate this conflict by stripping federal jurisdiction in most labor disputes, why is judicial power used to foster duplicative bargaining over wages and terms and conditions of employment in the arena of professional sports? And why do courts intervene today in antitrust disputes between millionaire players and billionaire owners when players have chosen collective bargaining as their path for achieving free agency? The data in my study provide evidence that federal district courts have ignored the tandem evolution of the Sherman Act, Clayton Act, Norris-LaGuardia Act, and National Labor Relations Act, while enabling players to leverage antitrust law as a vehicle for negotiating lucrative settlements under their jurisdiction. The legislative history behind these laws does not warrant judicial intervention, nor do the underlying economics in these ordinary labor-management disputes.