Marquette Sports Law Review

Volume 27
Issue 2 *Spring*

Article 7

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THE LIMITATION OF LABOR PREEMPTION: SURVIVABILITY OF CONTRACT RIGHTS DURING EMPLOYER LOCKOUTS

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"In life, as in chess, forethought wins."
~Charles Buxton

I. INTRODUCTION

In March 2011, the National Football League (NFL) and the National Football League Players Association (NFLPA) entered into a situation where each side had to choose a legal strategy that would create the best result for its organization as the collective bargaining agreement (CBA) expired.[1] This single document, the CBA, concerned the entire relationship between the NFL and the NFLPA. After the CBA expired, this single document no longer governed the relationship between the employer and employees until the parties agreed upon a new CBA. Faced with this expiration and the goal of signing a more favorable CBA, the NFL decided to lockout its players, preventing the players from receiving any paychecks until a new CBA was signed. In response, the NFLPA decided to no longer be the bargaining arm of the NFL players by disclaiming its interest, allowing the players to bring an antitrust violation against the NFL for its lockout strategy. While facially this strategy seemed plausible, the NFL players ultimately lost their antitrust action and were forced to sign an arguably less-than-ideal CBA agreement.[2] With the

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1. Brady v. NFL, 644 F.3d 661, 663 (8th Cir. 2011). Throughout this paper, I will use the terms "league" and "team" interchangeably. While this opening paragraph sets the stage and goal of the paper, the following three paragraphs will return to *Brady v. NFL* and provide a concrete example concerning this article's proposed legal strategy to the 2011 labor dispute.

2. I must note that nothing in this article should be taken as suggesting any negativity towards the NFLPA. As the recent developments in NFL player concussions has shown, the NFLPA is an integral part of a player's life and safety. This article only produces a framework that could be utilized to

history of the 2011 CBA negotiations as the backdrop, this article explores a different legal strategy that contracted NFL players could use. This strategy, explained more fully below, would involve the ability of any NFL player with a valid contract to bring a state-law-breach-of-contract claim demanding to be paid. This ability to bring state-law-contract claims during a lockout would be a complete game-changer and allow the NFL players to regain some market control in future CBA expirations, ensuring that a fair, market-controlled CBA is agreed upon. Ultimately, this article provides the NFLPA with an alternative strategy to fill the void left after the 2011 labor dispute.

To better understand the dynamic of bringing state-law claims, it is important to fully examine the contours of the 2011 labor dispute and provide an example of two players who could have utilized this state-law strategy to obtain a successful result. As mentioned above, on March 11, 2011, the CBA between the NFL and the NFLPA expired. On March 12, 2011, the teams decided to lockout their players.[3] By locking out the players, the teams prevented the players from entering their facilities, practicing, or playing any games. To combat this lockout, the players decertified the union[4] and brought antitrust actions against the teams seeking injunctive relief from the lockout.[5] But, the players were unsuccessful in this action as the Eighth Circuit ultimately denied their injunction request.[6]

Without the ability to obtain an injunction against a lockout, many sports analysts have argued that the players will never have a strong bargaining position when negotiating a CBA in the future.[7] For example, *Brady v. NFL* forced players to accept an arguably unfavorable CBA.

However, what if this conventional wisdom is wrong? What if the players had a chance to regain bargaining power through an alternative mechanism that is the focus of many of their lives—player contracts? Let us imagine, for example, that on March 12, 2011, two famous brothers, Eli and Peyton

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produce a more favorable CBA in the future.

3. *Brady*, 644 F.3d at 663.

4. This action results in the Union no longer having the ability to bargain on behalf of the players.

5. *Brady*, 644 F.3d at 663.

6. *Id.*

7. *See generally* NFL COLLECTIVE BARGAINING AGREEMENT (2011), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/General/2011_Final_CBA_Searchable_Bookmarked.pdf [hereinafter CBA]. *See* Gregg Rosenthal, *The CBA in a Nutshell*, PROFOOTBALLTALK (July 25, 2011), http://profootballtalk.nbcsports.com/2011/07/25/the-cba-in-a-nutshell/. These articles could be the result of the media's portrayal of the CBA negotiations, which failed to realize any positive clauses the NFLPA gained. However, with that aside, this article strives to ensure that the players are capable of signing a more favorable CBA in the future.

Manning, decided not to join the action seeking antitrust violations. Instead, suppose the Manning brothers sought state-breach-of-contract claims on grounds that their player contracts had been violated by the lockout.[8] The Manning brothers could have brought suit in the states where they are popular public figures, New York and Indiana respectively. In addition, either judges, many of whom are elected, or juries, who would likely be made up of local team fans, would decide these cases.

With this hypothetical lawsuit in mind, this article argues that NFL contracted players should consider a breach of contract lawsuit when the CBA expires in the future. In order to elaborate on that argument, this article proceeds in four parts (with the Introduction being Part I). Part II of this article begins by discussing past labor disputes in the NFL. This discussion will show that the labor disputes in the past have resulted in a flip-flop of bargaining power between the teams and players. With *Brady*, the power remains in the hands of the teams. Second, it discusses two critical cases: *Brown v. Pro Football, Inc.*,[9] and *Brady v. NFL*.[10] Finally, this section analyzes the impact of section 301 of the Labor Management Relations Act.[11]

Part III examines the possible preemptive effect of section 301. It begins with a broad discussion of the United States Supreme Court case law directly involving section 301. This discussion will show that the Supreme Court views section 301's preemptive effect narrowly. Part III then turns to sports-specific case law to demonstrate that player contracts remain valid through possible labor strife. One specific case, *Williams v. NFL*,[12] provides strong arguments that section 301 does not preempt state law in the sports context, and it provides a more generalized discussion of section 301 preemption as it specifically relates to state-contract law.

Part IV explains why this state-contract law exemption should not frighten labor law scholars since professional sports athletes are the only viable plaintiffs. This is due to two unique labor situations. First, professional sports

8. Both of these players had valid contracts that extended into the 2011–2012 season. Ralph Vacchiano, *Manning, Giants Agree to Record Contract*, NY DAILY NEWS (Aug. 5, 2009), http://www.nydailynews.com/sports/football/giants/giants-eli-manning-richest-qb-nfl-super-bowl-mvp-agrees-6-year-97-5m-extension-article-1.394959; Albert Breer, *Colts Put Franchise Tag on Manning While Negotiating New Deal*, NFL (Aug. 3, 2012), http://www.nfl.com/news/story/09000d5d81e534e5/article/colts-put-franchise-tag-on-manning-while-negotiating-new-deal.

9. 518 U.S. 231 (1996).

10. 644 F.3d 661.

11. 29 U.S.C. § 185(a) (2016).

12. 582 F.3d at 876–78.

athletes are able to sign long-term contracts that extend past the CBA's expiration. These contracts are highly individualized with the exact term and money negotiated for each athlete.[13] Second, professional athletes, more specifically NFL athletes, are not afforded comparable employment in the North American market. Due to this limited scope, these potential actions must be considered a "sporting exception" analog.

II. THE GAME FIELD: UNDERSTANDING THE CONTOURS OF THE FIELD

A. Brief History of NFL Labor Disputes

Before one can understand the importance of this article, the history of NFL labor strife must be examined.[14] This history begins in 1968, when the NFLPA asserted itself as an independent union and the sole bargaining body for NFL players.[15] Six months after this designation, the players decided that they were not receiving proper compensation and initiated a strike.[16] Less than two weeks later, the strike ended and a new CBA was finalized.[17] Unfortunately, many players were still unsatisfied with the salary provisions of this new CBA.[18]

Two years later, in 1970, the players went on strike again.[19] This strike was short-lived, however, because the owners threatened cancellation of the season.[20] With the new four-year CBA adopted that year, the players did not have another opportunity to strike until July 1, 1974. The players demanded the "[e]limination of the option clause and 'Rozelle Rule,'"[21] and called for impartial arbitration disputes and individualized contracts.[22] This time, the

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13. As Part IV explains, these individualized contracts may only exist in one other setting: the entertainment industry.

14. For a brief overview of the labor disputes, *see* Jarrett Bell, *Timeline of NFL Labor Disputes*, USA TODAY (Mar. 12, 2011), http://usatoday30.usatoday.com/sports/football/nfl/2011-03-03-nfl-labor-disputes-timeline_N.htm.

15. *See* William N. Wallace, *The Players Won*, N.Y. TIMES, July 17, 1968.

16. *See* William N. Wallace, *N.F.L. Players Reject Owner's Offer: Strike Favored by a 377–17 Vote*, N.Y. TIMES, Oct. 2, 2011.

17. *See id.*

18. Kevin Nogle, *NFL and NFLPA Officially End Labor Negotiations and Sign 10-Year CBA*, PHINSIDER (Aug. 6, 2011), http://www.thephinsider.com/2011/8/6/2347749/nfl-and-nflpa-officially-end-labor-negotiations-and-sign-10-year-cba.

19. *History*, NFL PLAYERS ASS'N, https://www.nflpa.com/about/history (last visited May 15, 2017).

20. *Id.*

21. *Id.* The "Rozelle Rule" was also famously litigated in *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976).

22. *History*, *supra* note 19.

players returned to the field and played without a new CBA until March 1977. This new CBA included some of the players' requests, such as the impartial arbitration, and was set to expire after the 1981 season.[23] Two weeks into the 1982 football season, the players executed a strike, demanding a fixed 55% of the league revenues.[24] In November 1982, the parties reached a tentative settlement, giving the players $1.28 billion over the next five seasons.[25] On December 5, 1982, a new CBA was ratified.[26]

In 1987, with the 1982 CBA set to expire, the players decided to initiate a strike.[27] To combat this strike in a different way, the owners began the season with replacement players.[28] On October 15, 1987, after two weeks of replacement player games, the contracted NFL players decided to return to the field.[29] In addition to ending the strike, the NFLPA filed an antitrust suit.[30] In *Powell v. NFL*, the players challenged the first refusal, compensation system, and other restrictions that were at issue in prior labor negotiations dating back to the early 1970s.[31] The district court judge determined that the first refusal, compensation system, and standard player contract were not protected labor practices because of the expiration of the CBA.[32] On appeal, the Eighth Circuit

reversed and held that the labor exemption applied because there was an "ongoing" collective bargaining relationship.[33] In order to combat this decision, the NFLPA voted to disclaim its interest.[34] By disclaiming, the union would renounce its representation of the players through the bargaining process, thus causing *Powell* to lose its legal force.[35] Subsequently, the players, without the NFLPA, filed another lawsuit.[36] In *McNeil v. NFL*, players, whose contracts were set to expire after the 1989 season, challenged the same modi-

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23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Bell, *supra* note 14.

30. Powell v. NFL, 678 F. Supp. 777, 778 (D. Minn. 1988).

31. *Id.* at 779.

32. *Id.* at 788–89.

33. Powell v. NFL, 930 F.2d 1293, 1303 (8th Cir. 1989).

34. *See* Bell, *supra* note 14.

35. *See id.*

36. *See generally* McNeil v. NFL, No. 4-90-476, 1992 U.S. Dist. LEXIS 21561, at *1 (D. Minn. Sept. 10, 1992).

fied free agency system as the *Powell* litigation.[37] After two days of deliberating, the jury returned a favorable verdict for the players,[38] awarding damages of $543,000.[39] In order to capitalize on this verdict, the players filed another suit seeking an injunction against the newly modified free agency system.[40] The district court judge granted the injunction, forcing both sides to negotiate a new CBA in 1993 with the players gaining the upper hand.[41]

From 1993 to 2008, the labor negotiations continued peacefully with each side agreeing to extend the previous CBA. However, in 2008, the owners decided to halt these peaceful labor negotiations as they sought to regain control and opt out of the final two years of the CBA.[42] As a result, the CBA was set to expire on March 11, 2011.[43] Leading up to this expiration, the league owners and players negotiated to no avail.[44] Understanding that the deadline was going to arrive with no agreement, the owners decided that they would institute a "lockout" of the "bargaining unit" instead of allowing the players to strike first.[45] This lockout procedure prevented players from "entering League facilities, from receiving any compensation or benefits, and from performing any employment duties including playing, practicing, working out, attending meetings, making promotional appearances, and consulting medical and training personnel."[46] To combat this lockout, the NFLPA once again declaimed its interest[47] and the players brought suit.[48] As the next section explains, this action was not successful, and the players lost their bargaining power, resulting in a CBA arguably in favor of the owners.[49]

In the end, this labor dispute illustrates three important points. First, it

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37. *Id.* at *2–3. *See* Bell, *supra* note 14.

38. *History*, *supra* note 19.

39. *Id.*

40. *Id.* (referring to *Jackson v. NFL*, 802 F. Supp. 226 (D. Minn. 1992)).

41. *History*, *supra* note 19.

42. Brady v. NFL, 644 F.3d 661, 666 (8th Cir. 2011).

43. *Id.* at 666–67.

44. *Id.*

45. *See id.* at 668. This bargaining unit included the "professional football players under contract, free agents, and prospective players who have been drafted or entered into negotiations with an NFL team." *Id.* This was a more significant term since the disclaiming interest of the union actually occurred a few hours before the lockout was official. As the prior history shows, the owners had never locked-out the players first. The owners always responded to the player strike by formally announcing a lockout. However, this really provided no change to the dynamic. This was the first time that the owners would initiate the conduct, and this strategy would prove to be successful.

46. *Id.*

47. This strategy had worked before. *See History*, *supra* note 19.

48. *Brady*, 644 F.3d at 663.

49. *See generally* CBA, *supra* note 7.

shows that the players and teams have continued to exchange bargaining control over the years. Second, history proves that the mechanisms used have become more legally complicated over time. In the beginning, the teams used scare tactics, including threats, that they would cancel the season. More recently, the teams have used a very complicated lockout regime that is propped up by labor law.[50] Lastly, it shows that the teams have regained very powerful bargaining control with *Brady*.

B. The "Brown Period" and Brady v. NFL

In addition to examining the history of labor disputes, one must understand the period within the labor negotiation scheme that this article deals with. The "Brown Period," as this article concerns, is the negotiation timeframe after the CBA has expired and before legal impasse occurs where antitrust litigation becomes available. This can best be understood by reviewing two cases.[51] In *Brown*, professional football players sought relief through an antitrust action against the NFL for unilaterally implementing player contract provisions that were not legally agreed upon between the NFL and the players.[52] More specifically, the action concerned a wage dispute.[53] When negotiations over the wage issue came to an impasse, the owners agreed, without the players union involvement, to implement the wage contract provisions that were a result of the last reasonable negotiation effort.[54] The players argued that these unilateral changes violated antitrust laws under the Sherman Act.[55] Relying on prior sports precedent,[56] the Supreme Court determined that the unilateral changes did not violate the Sherman Act.[57] Moreover, the Supreme Court embraced a broader notion that action taken place as a result of the implementation of the CBA would be exempt from federal antitrust law and thus be governed by federal labor laws, even if the agreement expired.[58] This decision has been understood as implementing a period of time called the "Brown Period," during which federal labor laws, rather than federal antitrust provisions, govern

50. One reason for this complexity and sophistication is the fact that the NFLPA has become stronger over the past decade.

51. Brown v. Pro Football, Inc., 518 U.S. 231 (1996); *Brady*, 644 F.3d at 661.

52. *Brown*, 518 U.S. at 233–34.

53. *Id.* at 235.

54. *Id.*

55. *Id.*

56. *See generally* Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976).

57. *Brown*, 518 U.S. at 250.

58. *See id.*

the NFL's action.

Fifteen years later, the Supreme Court decided another case that solidified the boundaries of the "Brown Period."[59] In *Brady*, the NFL players brought suit, claiming that the 2011 lockout, discussed above, violated federal antitrust laws.[60] More specifically, the players sought a preliminary injunction, claiming that "the lockout [was] an unlawful group boycott that was causing irreparable harm to the Players."[61] When the district court granted the injunction, the NFL teams appealed to the Eighth Circuit.[62]

In holding that the injunction violated the Norris-LaGuardia Act, the Eighth Circuit provided an expanded view of *Brown*. After restating the factors
significant in *Brown*,[63] the court analyzed the specific case facts with these factors in the backdrop. Most importantly, the court held that the "Brown Period" extended to the specific facts of this case.[64] Although the district court had reasoned that both parties had foregone traditional labor law negotiations, the Eighth Circuit held that the labor law protections extended well beyond this abandonment.[65]

In the end, *Brown* and *Brady* established the playing field for this article. This playing field is the "Brown Period"—after the CBA expiration but before traditional impasse. During this timeframe, NFL teams are allowed to lockout its players and prevent them from working. Furthermore, the *Brady* case provided that this timeframe can be extended well beyond the time those traditional negotiations ceased. Left with no other option, NFL players would have two choices during this "Brown Period": either sit out from playing and not get paid, or agree to a less than optimal CBA. With only these two options, it is easy to see why the 2011 CBA resulted in arguably unfavorable terms for the players.[66] But, if state-contract-law claims become viable, a third option would be provided to these players during the "Brown Period."

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59. *See* Brady v. NFL, 644 F.3d 661, 663 (8th Cir. 2011).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 665–66 ("The Supreme Court held that the non[-]statutory labor exemption applied to the employer conduct at issue, which (1) took place during and immediately after a collective-bargaining negotiation, (2) grew out of, and was directly related to, the lawful operation of the bargaining process, (3) involved a matter that the parties were required to negotiate collectively, and (4) concerned only the parties to the collective-bargaining relationship.").

64. *See id.* at 682.

65. *Id.* at 668, 682.

66. *See generally* CBA, *supra* note 7.

C. Section 301 of the Labor Management Relations Act

Now that the labor dispute history and "Brown Period" have been explained, the last area of background is the relevant statutory language. Part I explained that labor law scholars would quickly trash this article thinking that federal labor law preempts state-contract-law claims. The basis for this argument comes from section 301 of the Labor Management Relations Act, as codified at 29 U.S.C. §185(a), which states as follows:

> **(a) Venue, amount, and citizenship.** Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this [Act], or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.[67]

Although this language does not provide guidance or analysis on the preemptive effect,[68] the language itself can help recognize what exactly the United States Supreme Court is interpreting in the next section.[69]

III. PREEMPTIVE SCOPE OF SECTION 301

A. Section 301 Supreme Court Precedent

Preemption occurs when a federal statute displaces a state statute.[70] Because the federal and state government run concurrently in numerous areas, the doctrine of preemption has become a vitally important principle.[71] Originally, preemption was viewed as an arm of the Supremacy Clause.[72]

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67. Labor Management Relations Act, 29 U.S.C. § 185(a) (2016).

68. The United States Supreme Court's interpretation of this language will be thoroughly examined in the next section.

69. Furthermore, the language of the statute will become important in Part III.C. In that subsection, I will generally discuss section 301 preemption as it specifically pertains to state-contract law. For this discussion, I will dispose of the idea of express preemption. This is clear because the language shows that there is no express preemption clause. Even the language itself, suits "may be brought" is not an affirmative requirement.

70. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225–26 (2000) (and sources cited therein).

71. *See id.* at 225.

72. *Id.* at 234.

However, this view has been displaced. Leading scholars, such as Caleb Nelson, have reversed this view, and preemption is now firmly placed within the framework of statutory interpretation.[73] To understand the preemptive scope of section 301, the applicable Supreme Court case law must be analyzed.[74]

In *Textile Workers Union of America v. Lincoln Mills of Alabama*, the Supreme Court received its first opportunity to analyze section 301.[75] There, the union and employer entered into a CBA that was to run from year-to-year unless terminated with specific notice.[76] The agreement also provided that "there would be no strikes or work stoppages and that grievances would be handled pursuant to a specified procedure."[77] Soon after, many grievances arose out of concern for workloads and work assignments.[78] After the employer refused to utilize the specified procedures required in the CBA to solve these grievances, the union brought suit.[79] After reviewing section 301, the Court held that section 301 is more than merely a jurisdictional statute.[80] Instead, the statute "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements."[81] Therefore, the federal district court could not only adjudicate the suit, but could also provide proper remedial measures.[82]

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73. *Id.* at 265.

74. In *San Diego Building Trades Council v. Garmon*, the Court discussed the possible preemption of the NLRA in connection with the Board authority. While this could have some bearing on this case, *Garmon* preemption does not apply because nothing in this article's state-contract-law claim would question the NLRB or possible unfair labor practices. *San Diego Bldg. Trades Council*, 359 U.S. at 239. This was the significance in Joe Caldwell's case in which he claimed that the ABA's unfair labor practices were a tort violation. *See* Caldwell v. Am. Basketball Ass'n, Inc., 66 F.3d 523, 525 (2d Cir. 1995). However, *Caldwell v. American Basketball Ass'n, Inc.* resulted directly from a valid CBA which gave the NLRB exclusive jurisdiction. *Id.* at 527. Furthermore, the state-tort claim imposed duties on the parties that are outside the scope of duties voluntarily invoked on the teams. *See id.* This practical difference will be further explained in Part III.C. In that section, I will explain how state-contract law just provides a forum to adjudicate the claims that the parties voluntarily agreed upon. This 'voluntariness' element is a significant distinguishing factor with possible everlasting effects. As the section will provide, no one will argue that the owners are: 1) required to lockout the players or 2) required to agree to these contractual obligations outside of the CBA. By doing these actions, the owners could arguably be waiving their protections.

75. *See* Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 449–51 (1957).

76. *Id.* at 449.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 450–51.

81. *Id.* at 451.

82. *Id.* at 451–52.

Less than five years later, the Supreme Court faced another opportunity to determine section 301's meaning.[83] In *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, an employee was discharged after causing damage to the employer's equipment.[84] After being discharged, the union questioned this action and received notice that the employee had been discharged due to unsatisfactory work.[85] Due to this response, the union called a strike to get the employee rehired.[86] After the eight-day strike, the issue was submitted to an arbitration board, which ultimately agreed with the employer.[87] In addition, the employer brought suit in Washington state court requesting damages for lost business.[88] After determining that the state court was not preempted jurisdictionally or substantively, the Court held that the "strike was a violation of the collective bargaining contract" and awarded damages.[89] On appeal, the Supreme Court reviewed "whether § 301(a) of the Labor Management Relations Act of 1947 deprives state courts of jurisdiction over the litigation."[90] Easily disposing of this question, the Court held that section 301 does not preclude state courts from taking jurisdiction over cases that involve the possible interpretation of CBAs.[91]

However, the Court did not stop at the jurisdictional question, and moved to a discussion of the substantive question. Relying on *Lincoln Mills*, the Court held that the state court, although obtaining jurisdiction over the action, must substantively apply federal common law when ruling on conduct within the
statute.[92] A contrary rule, according to the Court, would completely undermine the entire scheme and provide for possible different interpretations of the CBA in different jurisdictions.[93] The Court further expanded this view seven

83. *See generally* Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co., 369 U.S. 95 (1962).

84. *Id.* at 97.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 97–98.

90. *Id.* at 101.

91. *Id.*

92. *Id.* at 103.

93. *See id.* ("The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of Lincoln Mills, requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy.").

years later.[94] In *Avco Corp. v. Aero Lodge No. 735, International Ass'n of Machinists & Aerospace Workers*, the Court held that these actions, which fall into the purview of the federal substantive law, are ripe for removal to federal court with compliance of the removal statute.[95]

While the precedent clearly shows that federal common law is warranted when the action falls within section 301, it does not provide clear guidance on how to determine whether state-law claims are preempted entirely. In 1985, the Court began to clarify this point.[96] In *Allis-Chalmers Corp. v. Lueck*, the Court had to determine whether "the state[-]tort claim is preempted by the national labor laws" when concerning disability plans.[97] The facts showed that the employee had lost his disability benefits due to the employer's numerous late payments.[98] Although the CBA provided a grievance mechanism for this type of conduct, the employee never attempted this mechanism and instead brought suit in state court.[99] On appeal, the Court held that section 301 preempted the state-law claim because the clause directly related to the CBA.[100] However, the Supreme Court held that state-law rights and obligations that exist independently within a private contract are not preempted.[101] Furthermore, the

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94. *See generally* Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers, 390 U.S. 557 (1968).

95. *Id.* at 560.

96. *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 203 (1985).

97. *Id.*

98. *Id.* at 205.

99. *Id.* at 206.

100. *Id.* at 210–11.

> The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract.

Id. at 211.

101. *Id.* at 213.

> Therefore, state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements. Cf. *Malone* v. *White Motor Corp*., 435 U.S. [497,] 504–505 (NLRA pre-emption). Our analysis must focus, then, on whether the Wisconsin tort action for breach of the duty of good faith as applied here confers non[-]negotiable state-law rights on employers or employees independent of any right established by

Court noted the limited scope of section 301 preemption:

> Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law. Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract. Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored.[102]

While *Allis-Chalmers Corp.* disposed of the case at hand, the Court failed to provide a clear standard to apply in future preemption cases. However, the Court provided this standard three years later.[103] In *Lingle v. Norge Division of Magic Chef, Inc.*, the employee brought charges under state-tort law against her employer for retaliatory discharge.[104] Because the CBA provided "her with a contractual remedy for discharge without just cause,"[105] the federal district court dismissed the complaint, holding that it was preempted by the CBA's
provision.[106] The Seventh Circuit Court of Appeals affirmed this decision.[107] On appeal, the Supreme Court reversed. While the district court had held that the state-law claim was "inextricably intertwined" with the CBA, the Court disagreed, holding that none of the elements of the retaliatory discharge claimed required interpretation of the CBA.[108] Under the Illinois retaliatory discharge claim, the Court noted that the plaintiff's burden required that she prove: "'(1) [that] [s]he was discharged or threatened with discharge and (2)

> contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract. If the state[-]tort law purports to define the meaning of the contract relationship, that law is pre-empted.

Id.

102. *Allis-Chalmers Corp.*, 471 U.S. at 211–12.

103. *See generally* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988).

104. *Id.* at 401.

105. *Id.*

106. *Id.* Her suit was in federal court because it had been promptly removed by the employer from Illinois state court.

107. *Id.*

108. *Id.* at 407.

the employer's motive in discharging or threatening to discharge [her] was to deter [her] from exercising [her] rights.'"[109] According to the Court, "[n]either of th[os]e elements requires a court to interpret any term of a [CBA]."[110] Furthermore, the Court fleshed out the argument relating to the use of the CBA as an element of the state claim, stating that "[a]lthough the state-law analysis might involve attention to the same factual considerations as the contractual determination whether petitioner was fired for just cause, such parallelism does not render the state-law analysis dependent upon the contractual analysis."[111]

Since *Lingle*, courts have held this independent versus dependent rationale as a significant distinction in determining section 301 preemption.[112] For example, in *Hawaiian Airlines, Inc. v. Norris*, the employee brought a retaliatory discharge suit after bringing a grievance concerning his employment.[113] After the employee requested that a piece of equipment be replaced to prevent future injury and his supervisor denied this request, the employee was suspended pending a termination hearing.[114] In determining that the state-law claim was not preempted, the Court held:

> The CBA is not the "only source" of respondent's right not to be discharged wrongfully. In fact, the "only source" of the right respondent asserts in this action is state[-]tort law. Wholly apart from any provision of the CBA, petitioners had a state-law obligation not to fire respondent in violation of public policy or in retaliation for whistle-blowing. The parties' obligation under the RLA to arbitrate disputes arising out of the application or interpretation of the CBA did not relieve petitioners of

109. *Id.* (quoting Horton v. Miller Chem. Co., 776 F.2d 1351, 1356 (7th Cir. 1985)) (discussing the retaliatory discharge cause of action). For an Illinois Supreme Court case explaining the retaliatory discharge cause of action elements, see generally Gonzalez v. Prestress Eng'g Corp., 503 N.E.2d 308 (Ill. 1986).

110. *Lingle*, 486 U.S. at 407.

111. *Id.* at 400.

112. *See* Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 257 (1994). *See also* Livadas v. Bradshaw, 512 U.S. 107, 120 (1994) (holding that a state-law claim is not preempted because the obligations and rights existed independent of the CBA); Thompson v. Hibbing Taconite Holding Co., No. 08-868 (JRT/RLE), 2008 U.S. Dist. LEXIS 87045, at *11 (D. Minn. Oct. 24, 2008) ("[V]iolat[ions] [of] such non-negotiable state law rights [which did] not require an interpretation of the CBA, and would not be preempted under the LMRA.").

113. *Hawaiian Airlines, Inc.*, 512 U.S. at 249–50.

114. *Id.*

this duty.[115]

The Supreme Court's decisions discussed above can be summarized as embracing three overarching principles. First, section 301's preemption purpose is to ensure that CBA provisions are interpreted under the same principles from state to state.[116] Second, section 301's preemptive scope is limited[117] to only those state-law principles that require an explicit interpretation of, or understood as being "inextricably intertwined" with, the CBA.[118] Finally, this preemption does not extend to any state-law claim that provides rights and obligations outside the CBA.[119]

Applying these principles to NFL players' state-law-contract claims after the expiration of the CBA, it can easily be argued that section 301, in light of precedent, is not preemptive. This preemption failure can be explained by analyzing the prior precedent as it applies to the NFL. First, this situation presents a scenario that is distinguishable from the prior preemption case law. In each of the prior cases, a valid CBA existed with specified provisions concerning the conduct at hand. In *Brady,* the CBA was no longer valid as it had expired. In addition, the CBA provided no specified language concerning the individualized contracts.[120] Second, section 301's preemption could not possibly be interpreted to extend to the situation discussed here. The state-contract-law claim would neither require an explicit interpretation of the CBA nor would it be "inextricably intertwined" with the CBA. Each of these individualized contracts provides a stand-alone obligation that was individually negotiated between each player[121] and each team. For example, in 2009, the New York Giants and Eli Manning entered into a six-year contract extension.[122] Both parties agreed to these terms knowing the agreement would extend well beyond the 2011 CBA expiration.[123] This agreement does not require the CBA for interpretation, nor is it "inextricably intertwined."[124] At no

115. *Id.* at 258.

116. This does not mean that state courts are stripped of the ability to adjudicate these claims. Instead, it provides the substantive law used in this adjudication.

117. *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985).

118. *See* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 408 (1988).

119. *Hawaiian Airlines, Inc.*, 512 U.S. at 257.

120. Only two provisions could arguably even be used: the Preamble and Appendix A. However, both of these provisions are very bare and do not provide any substantive rules regarding this issue.

121. This is one reason why player agents have become so important over recent years.

122. Vacchiano, *supra* note 8.

123. *See id.*

124. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 408 (1988). Furthermore, any interpretation of the CBA would be totally tangential and irrelevant to the actual claim as the *Lingle v. Norge Division of Magic Chef, Inc.* Court explained: "[T]he state-law analysis might well involve

point would either Manning or the New York Giants argue that the CBA expiration invalidated the 2009 contract. Furthermore, neither party argued that the parties should execute a new agreement with the new 2011 CBA. Third, it is clear that the player contracts provide rights and obligations clearly outside the CBA. As the Eli Manning example proves, the contract provides stand-alone rights and obligations that extend well past the expiration of one CBA into the validation of another. If the contractual provisions were dependent upon the CBA, the parties would not validly be allowed to enter into contracts beyond the CBA's expiration. Furthermore, the contracting parties, such as Manning and the New York Giants, would be required to execute a new agreement upon the new CBA's signing.

In the end, the Supreme Court precedent cannot be interpreted to preempt the state-contract-law claims. While section 301's preemptive effect in some situations has been accepted, the Court has narrowed such situations to where the CBA either must be interpreted or that the issue involved is "inextricably intertwined" with the CBA. With neither of these scenarios applying, the state-law-contract claim must be allowed to proceed against section 301's backdrop.

B. Significant Sports-Specific Case Law

i. Contract Claim Viability: *Cincinnati Bengals, Inc. v. Bergey*

In addition to the Supreme Court case law concerning section 301, two sports specific cases complement the non-preemption argument. The first case provides that even the NFL teams understand that these professional player contracts remain enforceable throughout labor strife, whether it is a lockout or strike, and continue to be valid after a new CBA is signed.[125]

In *Cincinnati Bengals, Inc. v. Bergey*, an NFL team sought preliminary and permanent injunctions against one of its players who sought to play for a team in the newly organized World Football League (WFL).[126] The WFL was an American football league that sprung up for the 1974 season. While the WFL held a college draft in 1974, it also pursued established NFL players for future contractual years.[127] Signing such players, in the eyes of the WFL,

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attention to the same factual considerations as the contractual determination of whether Lingle was fired for just cause. But we disagree with the court's conclusion that such parallelism renders the state-law analysis dependent upon the contractual analysis." *Id.*

125. *See generally* Cincinnati Bengals, Inc. v. Bergey, 453 F. Supp. 129 (S.D. Ohio 1974).

126. *Id.* at 131.

127. *Id.* at 132–33.

would garner "credibility" for the league.[128] Although Bergey was contracted with the Cincinnati Bengals through the 1974 season, he signed a personal service contract with a WFL team, the Virginia Ambassadors.[129] This contract provided that Bergey "shall commence playing professional football for the Virginia Ambassadors in May[] 1976."[130] Disapproving of this contract, the Bengals brought suit.[131]

While the Bengals were denied the preliminary injunction, the court's decision relates to preemption issues in two ways. First, the Bengals were unconcerned about the future labor strife that was surely on the horizon in early 1974. Furthermore, neither party argued during the litigation that the possibility of a future strike could invalidate the Bengals' contract with Bergey.[132] Second, the Bengals were also concerned with enforcing a contract that surely would extend into a new CBA. Because the CBA would expire in July 1974, the Bengals were seeking to enforce a contract, Bergey's 1974–75 player contract, which would be enforceable only during the new CBA. This proves that neither the Bengals nor anyone else argued that the new CBA would require the parties to execute a new contract.

In the end, *Bergey* strongly suggests that the player contracts remain valid during labor strife.[133] These labor "protests" do not affect the contract's validity and provide enforceable provisions during the "Brown Period."[134]

ii. *Williams v. NFL*

The second principle concerns the interplay between section 301 and the

128. *Id.* at 133.

129. *Id.*

130. *Id.*

131. *Id.* at 131.

132. It is possible that the Bengals feared Bergey would jump to the WFL during the strike, however, this fear has nothing to do with the validity of the contract.

133. It also proves the arguments that were made in the prior section. *See* Part III.A (discussing Eli Manning and the Giants).

134. In order for the NFL to argue otherwise, they would have to provide a flip-flop argument. In *Cincinnati Bengals v. Bergey*, the Bengals clearly understood that Bergey's contract would be enforceable regardless of the potential 1974 strike. *See Bergey*, 453 F. Supp. at 148. Furthermore, and somewhat oddly, the Bengals argued that the contract was enforceable against the potential negotiation of future contracts—even ones beyond the expiration of the current player's contract. *Id.* at 143.

NFL.[135] In *Williams v. NFL*, Kevin and Pat Williams, after both testing positive for banned substances and receiving suspensions, brought suit against the NFL, citing Minnesota statutory and common law claims related to drug testing.[136] In the district court, section 301 was deemed not preemptive over the claims supported through Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA); yet, the state-tort-law claims were preempted.[137] Each party appealed.[138]

Beginning with the Minnesota statutory claims, the district court held that these claims were not "inextricably intertwined" with the CBA.[139] On appeal, the NFL argued that Minnesota's DATWA[140] was preempted for three reasons. First, "the claim[s] turn[ed] on [the] analysis of the Policy in order to determine whether it 'meets or exceeds' DATWA's requirements."[141] Second, "the claim requires interpretation of the Policy in order to determine whether the NFL qualifie[d] as an employer under DATWA such that the statute's protections extend to the Players."[142] Finally, the NFL argued that preemption is necessary because the "uniform interpretation of the CBA/Policy is necessary to preserve the integrity of the NFL's business as a national organization."[143] Reviewing these arguments, the Eighth Circuit began with section 301's Supreme Court precedent.[144] The court noted that this precedent proves that section 301's preemptive power is limited.[145] With that limited scope on the horizon, the court turned to the claims themselves.[146] In order to determine the

135. *See* Williams v. NFL, 582 F.3d 863 (8th Cir. 2009). *See generally* Dana A. Gittleman, *Home Field Advantage: Determining the Appropriate "Turf" for Williams v. National Football League and Clarifying Preemption Precedent*, 19 VILL. SPORTS & ENT. L.J. 203 (2012).

136. *Williams*, 582 F.3d at 872.

137. *Id.* at 873.

138. *Id.*

139. *See id.* at 872–73.

140. Minnesota Drug and Alcohol Testing in the Workplace Act, MINN. STAT. §§ 181.950–957 (2016).

141. *Williams*, 582 F.3d at 873.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 874. "However, the Court has established that section 301 does not preempt state-law claims merely because the parties involved are subject to a CBA and the events underlying the claim occurred on the job." *Id.* (citation omitted). "Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 . . . ." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985).

146. *Id.*

preemption, the court cited a two-prong test provided in an earlier case:

> First, a "state-law claim is preempted if it is 'based on' a . . . provision of the CBA," meaning that "the CBA provision at issue" actually sets forth the right upon which the claim is based. Second, section 301 preemption applies where a state-law claim "is 'dependent upon an analysis' of the relevant CBA," meaning that the plaintiff's state-law claim requires
> interpretation of a provision of the CBA.[147]

For the first prong, the court held that the claim at issue is "predicated on Minnesota law."[148] While the action concerned a clause found in the CBA, Minnesota state law determined the action itself. Furthermore, the state law provided that the CBA could contract around these provisions as long as the minimum, or floor, was maintained.[149] For the second prong, the court held that "[t]he Supreme Court has distinguished those [claims] which require interpretation or construction of the CBA from those which only require reference to it."[150] Furthermore, the court noted "'the crucial inquiry is whether "resolution of a state-law claim depends upon the meaning of a CBA."'"[151] With this framework, the court held that the NFL could not point to a single provision within the CBA that must be interpreted.[152]

After upholding the district court's decision that the Minnesota statutory claims were not preempted, the court turned to the state-common-law-tort claims.[153] Once again, the court reasoned that the same test must be applied.[154] This time, however, the outcome resulted in preemption based on the fact that the duties required under these tort claims "cannot be determined without examining the parties' legal relationship and expectations as established by the CBA."[155] Thus, the court reasoned that these claims were "inextricably

147. *Id.* (quoting Bogan v. Gen. Motors Corp., 500 F.3d 828, 832 (8th Cir. 2007)).

148. *Id.* at 878.

149. *See id.*

150. *Id.* at 876 (citations omitted).

151. *Id.* at 877 (quoting Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 405–06 (1988)).

152. *Id.* The court noted that the NFL could argue that the Preamble covered this conduct, but such argument would be a reach. *See id.*

153. *Id.* at 880–81.

154. *Id.* at 881.

155. *Id.*

intertwined with consideration of the terms of the [CBA]."[156]

The *Williams* case perfectly shows the opposite ends of the spectrum and allows the state-law claims after the expiration of the CBA, which are at issue in this article, to be analyzed. With that being said, the state-law-contract claims at issue in this article resemble Minnesota's DATWA claims more than the

Minnesota state-tort law. First, these contracts are agreed upon individually. With such individual, stand-alone contracts, the claim at issue would be dependent upon the contract itself rather than the CBA. Furthermore, no provision of the CBA would have to be interpreted to succeed on these state-law claims. As with the Minnesota's DATWA claims, in a lawsuit based on multi-year player contracts, the NFL cannot point to one provision of the CBA, outside of the Preamble and other sprinkled unclear provisions, that would influence the contract claim that the *Williams* court disavowed. With no provision, the state-contract-law claims would pass the single most crucial inquiry, "'whether "resolution of a state-law claim depends upon the meaning of a CBA."'"[157] In this case, the state-contract-law claim would not be dependent upon anything but the contract terms themselves.[158]

C. General Preemption Discussion[159]

i. Express Preemption

Although section 301-specific case law provides sufficient arguments that state-contract claims are not preempted, a more generalized discussion of

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156. *Id.* The same analysis was very similar for the other tort claims. *Id.*

157. *Id.* at 877 (quoting Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 405–06 (1988)).

158. In addition to these claims, it can also be reasoned that the state-contract-law claim is actually more independent from the CBA than the drug testing at issue in *Williams v. NFL*. No one would argue that the NFL could drug test any of its players once the CBA has expired. Furthermore, the ability to test players would not be restored until the new CBA was agreed upon and executed. However, this is not the case with the contract. As mentioned in prior sections, the contract remains a valid stand-alone agreement after the CBA's expiration. Once the new CBA is executed, no player is forced to sign a new contract. Therefore, the player contracts would be more independent than any drug testing policy at issue. In addition, as Part III.C will explain, the state-contract-law provides no duties or obligations. It is only a passive statute that can only come into play when parties have voluntarily agreed to the provisions of a contract. At no point would the state-contract-law provide a cause of action without a valid contract. This is very different from the Minnesota law at issue in *Williams*. The Minnesota law provided a floor that could not be contracted around. This law would provide a cause of action regardless of any other provision.

159. This general discussion will follow the rubric of preemption as Caleb Nelson expounds upon in his textbook. *See* CALEB NELSON, STATUTORY INTERPRETATION 813–90 (2011).

preemption is warranted. This discussion will close any loopholes from the prior cases.[160] Furthermore, this general discussion will provide analysis for each preemption group. This is also important because case law provides that the failure of one preemptive group does not foreclose the success of another.[161]

The best place to begin this discussion is with express preemption. While express preemption is hard to overcome, it is the easiest to recognize.[162] As Part II.C recognizes, section 301 provides no express preemption clause. Without this clause, section 301 cannot expressly preempt the state-contract-law claim.

ii. Implied Preemption

After determining that no express preemption clause is included, implied preemption must be analyzed. Implied preemption can be broken into two groups: field and conflict.[163] Conflict preemption can further be broken into four more groups: impossibility, obvious contradictions, wholly precluded activity, and obstacle preemption.[164]

Beginning with field preemption, a federal statute is deemed field preemptive if it "occupies the field."[165] While this type of preemption is significant,[166] courts are reluctant to find field preemption.[167] As for section 301, the Supreme Court has already determined that it does not occupy the field. In *Allis-Chalmers Corp.*, the Court clearly stated "[o]f course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law."[168] This language alone proves that section 301 is not field preemptive. Furthermore, other cases prove section 301 does not occupy

160. Furthermore, it will provide more analysis of why *Garmon* preemption would fail. *See* Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 449 (1957).

161. *See* Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 870 (2000). Although the express preemption clause failed to preempt the state-law claim, the claim was still preempted under the conflict preemption inquiry. *Id.* at 869.

162. *See e.g.,* Riegel v. Medtronic, Inc., 552 U.S. 312, 322 (2008).

163. NELSON, *supra* note 159, at 847.

164. *See id.* at 852–53.

165. *See id.* at 847–48.

166. If federal law is deemed to be field preemptive, the state cannot pass any law within the entire "field." *See id.* at 851.

167. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 237 (1947) (describing the factors that must be considered when determining field preemption).

168. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985).

the field.[169]

With field preemption disposed of, we must next turn to conflict preemption. While conflict preemption contains four subcategories, obstacle preemption would be the major battleground for these state-contract law-suits.[170] Obstacle preemption analysis begins with breaking up the potential "obstacle" into two subcategories: purpose and effect.[171] As for purpose, it is clearly true that the state-contract law has no purpose to conflict with the federal labor law. Most of these state-contract laws come from common law that dates back well before section 301's passing and any federal-labor laws.

While the purposiveness analysis was determinative in prior case law,[172] the Supreme Court determined that effect could undercut the lack of purpose.[173] Therefore, we must consider the effect of the state-contract-law claims. On their face, it seems clear that these state-contract-law claims could result in the NFL teams paying players for their contracts or disposing of the lockout strategy; however, this "effect" must be analyzed more thoroughly. While these claims could bring the end of the lockout, it is not the state law itself that has the result. The state law is completely passive and unenforceable unless parties voluntarily agree to the contract provisions. Only after this agreement is executed will the state law gain teeth for the athletes to bring suit. However, the "teeth" are based on the contract itself rather than state law. Therefore, it is the contract that provides the obstacle rather than the state-contract law. This analysis proved to be important for the Supreme Court.[174] In *American Airlines, Inc. v. Wolens*, the Court recognized the difference between enforcing the "parties'

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169. *See* Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 255–56 (1994); Williams v. NFL, 582 F.3d 863, 868 (8th Cir. 2009); Livadas v. Bradshaw, 512 U.S. 107, 134–35 (1994); Thompson v. Hibbing Taconite Holding Co., No. 08-868 (JRT/RLE), 2008 U.S. Dist. LEXIS 87045, at *13 (D. Minn. Oct. 24, 2008).

170. As obstacle preemption will show, state-contract law is passive and does not provide any rights or obligations outside of the contract. Due to this significant fact, the state law cannot be deemed, upon its own force, to make an action impossible, provide obvious contradictions, or wholly preclude an activity. Furthermore, the NFL has voluntarily agreed to these contractual provisions. If the NFL felt that locking out players was significant, they can certainly include that provision within the contract. Part VI will discuss this more thoroughly.

171. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941) ("Our primary function is to determine whether, under the circumstances of this particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").

172. *See* Kesler v. Dep't of Pub. Safety, Fin. Responsibility Div., State of Utah, 369 U.S. 153, 154 (1962) (finding that lack of purpose of the state statue was determinative in finding no preemption); Reitz v. Mealey, 314 U.S. 33, 39–40 (1941) (finding that lack of purpose of the state statue was determinative in finding no preemption).

173. *See e.g.*, Perez v. Campbell, 402 U.S. 637, 651–52 (1971).

174. *See* Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228–29 (1995).

own,
self-imposed undertakings" rather than "state-imposed obligations."[175] Furthermore, the Court held that preemption did not prevent the states from "hold[ing] parties to their [own] agreements."[176] In 2014, the Supreme Court once again recognized the importance of this distinction.[177]

With *Wolens* in mind, these state-contract laws do not impose any obligations upon the NFL or the players. These obligations are the parties' "own, self-imposed undertakings."[178] Furthermore, this line of analysis can be further explained. While on its face, the state-contract-law claims appear to prevent the NFL from locking out its contracted players, the NFL's inability to initiate a lockout is better understood as a result of its own initiative. For example, the NFL would never argue that it "must" lockout players upon the CBA's expiration. Furthermore, the NFL would argue that it could contract away its lockout rights if it felt necessary.[179] Therefore, in practical terms, the NFL has chosen to contract away its right to lock out the players on the front end—before the CBA expires. By signing players to an extended contract past the CBA's impending expiration, these teams have decided that these players, like Eli Manning, are more important than the possible lockout in the future.[180]

In the end, Part III shows that it is arguable that section 301 does not preempt state-contract-law claims through three lines of analysis. First, the section 301-specific precedent has been evaluated to prove that section 301's preemption is narrow. Second, the sports-specific precedent has been evaluated to show that these player contracts remain valid through labor strife. The *Williams* case also provides two sports-specific data points to compare these state-contract claims. Finally, this subsection argues that the general discussion of preemption results in state-contract-law claims not being preempted.

IV. ULTIMATE SPORTING EXCEPTION ANALOG

175. *Id.* at 228.

176. *Id.* at 229.

177. Nw., Inc. v. Ginsberg, 134 S. Ct. 1422, 1431 (2014) ("With these preliminary issues behind us, we turn to the central issue in this case, *i.e.*, whether respondent's implied covenant claim is based on a state-imposed obligation or simply one that the parties voluntarily undertook. Petitioners urge us to hold that implied covenant claims are always pre-empted, and respondent suggests that such claims are generally not pre-empted, but the reasoning of [*American Airlines, Inc. v.*] *Wolens* neither dooms nor spares all such claims.").

178. *Am. Airlines, Inc.*, 513 U.S. at 228.

179. NFL teams could negotiate this provision as a trade-off for something else the teams deem more valuable. An example contract provision is: "at no point in the future upon expiration of this agreement, the NFL will not lockout its players."

180. If this is not the case, Part VI will discuss possible ways to combat this effect.

If taken seriously, the last section provided, at the very least, arguable grounds that state-contract-law claims could remain viable with labor law preemption. However, in order to prove to labor law scholars that this labor law preemption exception will not ruin the federal labor law regime, this section will provide that these state-law-contract claims are ultimately nestled under a tight "sporting exception" rubric.[181]

The "sporting exception" verbose was first introduced in Europe.[182] This so-called exception rose out of the "specificity of sport[s]."[183] With sports' markets being unique, the exception provides sports "with its own complex structure of regulation and dispute resolution" that "merits a reserved domain of authority beyond EU supervision and regulation."[184] As described, the sporting exception was originally thought to be a blanket exception. However, the
exception no longer provides blanket immunity from European law; rather a case-by-case analysis to determine the applicability of general law.[185] As Stephen Weatherill famously described,

> In my view the correct way to understand the so-called "sporting exception" in EC law is simply to regard it as the space allowed to sports governing bodies to show that their rules, which in principle fall within the EC Treaty where they have economic effects, represent an essential means to protect and promote the special character of sport. There is no blanket immunity. There is case-by-case scrutiny. EC law applies, but does not (necessarily) condemn.[186]

While Europe has thrived on this exception, the American sports' model has not followed the same open concept. However, America does have a few

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181. As mentioned in the subsection title, this is not truly equivalent to the sporting exception. As explained below, the sporting exception connotes a situation where sports, as an industry, provide a unique circumstance to where normal legal principles do not apply. In this case, sports itself does not provide this unique circumstance; rather it is the extended contracts that the players enter that provides this circumstance. However, as argued below, professional sports, specifically the NFL, provide unique situations that allow these circumstances to flourish.

182. A whole book is dedicated to the discussion of the sporting exception. *See generally* RICHARD PARRISH & SAMULI MIETTINEN, THE SPORTING EXCEPTION IN EUROPEAN UNION LAW (2008).

183. JAMES A.R. NAFZIGER & STEPHEN F. ROSS, HANDBOOK ON INTERNATIONAL SPORTS LAW 89 (2011).

184. *Id.*

185. Case C-415/93, Union Royale Belge des Sociétés de Football Ass'n ASBL v. Bosman, 1995 E.C.R. I-04921.

186. PARRISH & MIETTINEN, *supra* note 182, at vii.

isolated situations that easily could fit into this rubric as an analog. The most historic would be the antitrust exemption afforded to Major League Baseball.[187] In *Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Base Ball Clubs*, plaintiffs brought an antitrust action arguing that the National League of Professional Base Ball Clubs had violated antitrust provisions through the monopolization of the sport.[188] Resolving the dispute in favor of the defendants, Justice Holmes, writing for the majority, held that Major League Baseball was exempt from antitrust violations.[189] He reasoned that Major League Baseball was a truly "state affair" and did not qualify as a regulated business for antitrust purposes.[190] In 1952, this decision was affirmed under *stare decisis*. While baseball's market had changed to where it was easily characterized as national rather than purely state, the Court continued to hold the exception valid.[191] In 1998, this exception became a congressional statute.[192] Although this exception was never expanded to other American sports,[193] it provides an easy example of how the "sporting exception" analog exists in American sports law.

With this background, these state-contract lawsuits to enforce contracts that extend beyond the CBA's expiration are surely a sporting exception analog as no other industry would have the same capacity to bring suit.[194] This is

187. There is an entire book recently published thoroughly explaining this exemption. *See generally* STUART BANNER, THE BASEBALL TRUST: A HISTORY OF BASEBALL'S ANTITRUST EXEMPTION (2013). In this easy to read monograph, Professor Banner provides a detailed and well-delineated discussion of baseball's antitrust exception.

188. Fed. Base Ball Club of Balt., Inc. v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200, 207 (1922).

189. *Id.* at 208.

190. *Id.* ("The business is giving exhibitions of base ball, which are purely state affairs. It is true that in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the 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.").

191. Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953).

192. Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (1998). This act was named after the famous Curt Flood, who challenged the exception's validity in *Flood v. Kuhn*, 407 U.S. 258 (1972).

193. Radovich v. NFL, 352 U.S. 445, 447 (1957) (holding that the exception does not extend to the NFL).

194. This sporting exception idea could also become significant even if the court would determine that the federal labor law preempts these claims. As *Geier v. American. Honda Motor Co.*, explains, the Supreme Court is willing to consider preemption waiver if the conflict does not extend far. *See* Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 871–72 (2000). This section will prove that this exception would only extend to professional sports and more exclusively to football in North America.

a result of two unique features of the professional sporting market: 1) long-term,
individualized contracts that extend well beyond the CBA's expiration; and 2) lack of comparable employment in North America.

First, the long-term contracts are certainly unique to professional sports. As the introduction explains, Eli Manning signed a huge contract extension with the CBA expiration looming.[195] This would certainly never happen in another industry for two reasons: first, no other industry, besides possibly other
entertainment personnel, would sign individualized contracts; and second, the employment contracts would unilaterally expire at the CBA's expiration. For example, any conventional laborer would never sign an individualized contract nor negotiate his or her salary.[196] These terms would be entirely fixed within the CBA terms. Furthermore, when the CBA expires, these laborers would not rightfully have an action because their "contract," the provisions fixed within the CBA, would ultimately lapse with the expiration. Therefore, the normal laborer, unlike professional athletes, would resemble the great majority of individuals that are considered unionized employment.[197]

Second, professional sports athletes, specifically NFL athletes, are unable to find comparable employment. Continuing the example above, the normal laborer, if locked out by their employer, would ultimately seek new employment. While it may be hard to find the exact same type of employment, they certainly would try to find comparable employment. This is not the case for NFL players. Once the owners lock them out, many of these individuals are at a loss. They have relied on such extravagant lifestyles that they are left to pick up the pieces when the huge paychecks cease to be deposited. Therefore, these individuals would be more willing to risk these state-contract-law claims rather than seek comparable employment.[198] For example, NFL

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195. *See* Vacchiano, *supra* note 8.

196. This is known through personal experience. My mother works at a paper mill where the relationship with her employer is controlled by a CBA.

197. For example, most unionized pipe fitters, welders, and other laborers would certainly not have an individualized contract and their compensation would be based on a fixed agreement between the
employer and union. Throughout the rest of this section, these individuals are coined "normal laborers." This connection is not meant to spark any resentment; however it is meant to show a difference between normal labor negotiations and professional athletes.

198. For example, my mother, and many other unionized laborers, would not have the means to front a state-contract-law claim even if it was afforded. Furthermore, this distinction eliminates the entertainment industry personnel that could possibly have a long-term, individualized contract. These individuals would likely seek other comparable employment, such as another movie role, rather than waste time and resources to seek these contract claims.

players' only resort in North America would be the Canadian Football League (CFL).

Unfortunately, the CFL provides at least two significant obstacles. First, the pay would be greatly decreased. Many NFL players would be unwilling to risk their NFL contracts, once the lockout is lifted, in order to pursue such a decreased salary. Second, and most significant, the CFL itself implements a "non-import player ratio."[199] This ratio limits the number of non-Canadian players that each team can have on its active roster and starting lineup.[200] Due to this ratio, the CFL teams would be unwilling to take a risk on these NFL players. For example, in order to sign an NFL player, a CFL club would have to cut one of its non-Canadian players. Furthermore, it may have to rearrange the starting lineup in order to comply with the ratio. While this NFL player could provide a huge reward, the risk would be equally as daunting. As soon as the lockout is lifted, the NFL player would likely leave to seek his past employment. This would result in harmed relations with the roster players with truly no reward.

In the end, these state-contract-law claims are clearly a "sporting exception" analog. As this section provides, this exception would only apply to professional sports athletes and particularly athletes, such as NFL players, who could not find comparable employment.

V. CONCLUSION

While the 2011 CBA resulted in arguably unfavorable terms for players, this article has provided a legal mechanism to ensure that future CBAs could be negotiated more favorably.[201] At the outset, this article posed a hypothetical scenario where it questioned the ability of the Manning brothers to bring state-contract-law claims during the 2011 lockout. After reading this article, it becomes clear that Eli and Peyton would have a strong likelihood of success bringing a state-contract-law claim.[202] If this is correct, players with valid player contracts would be allowed to bring suit against the NFL teams. By using this mechanism, the NFL teams would be required to return to the bargain-

199. *See e.g.*, *Game Rule Ratio*, CANADIAN FOOTBALL LEAGUE, http://www.cfl.ca/game-rule-ratio/ (last visited May 15, 2017).

200. *Id.*

201. This article does not, however, make a conclusion about how this legal mechanism will play out or unfold. For example, it is not entirely implausible to believe that the NFL teams may choose a strategy to pay these contracted players in order to maintain a significant edge in the collective bargaining process.

202. While a debate can occur on whether a single state presents the best likelihood of success, this debate would provide little to this article. It would only take one successful suit on behalf of any player for the negotiation process to shift.

ing table and negotiate a fair CBA. While the jury is still out on the significance of this article's legal mechanism concerning the NFL labor negotiation context, one thing will remain certain: this article has presented NFL players with a significant legal strategy that has never been used in the past.

As the famous sports figure, John Wooden, stated, "Failing to prepare is preparing to fail."[203] With that in mind, this article's goal is to prepare NFL players for the probable future CBA expiration. In order to accomplish this feat, a thorough analysis of federal labor law preemption history and an argument to prove that federal law does not preempt state contract law in the NFL player contract setting was presented. With federal labor preemption unlikely, this article suggests that NFL players could regain market power in the collective bargaining process. Furthermore, this article provided an analytical framework to prove that these state-law-contract lawsuits are a "sporting exception" analog. In the end, the success of this article will depend on whether an NFL player decides to pursue it as a strategy; still, such pursuit does not discount the availability of this game-changing strategy for all professional sports in the future.

203. Robert Buderi, *Failing to Prepare Is Preparing to Fail, and Other John Wooden Advice for the Innovation Community (and Everyone Else)*, XCONOMY (June 7, 2010), http://www.xconomy.com/boston/2010/06/07/failing-to-prepare-is-preparing-to-fail-and-other-john-wooden-advice-for-the-innovation-community-and-everyone-else/.