HATS, BATS, AND ANTITRUST

AN ANALYSIS OF *AMERICAN NEEDLE* AND THE MAJOR LEAGUE BASEBALL ANTITRUST EXEMPTION

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INTRODUCTION

Professional athletes, affiliates, and associated business organizations across the nation breathed a sigh of relief on May 24, 2010 when the United States Supreme Court decided *American Needle, Inc. v. National Football League*,[1] holding that the franchises of the National Football League ("NFL") remained subject to antitrust scrutiny as thirty-two separate entities acting

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[1] Am. Needle, Inc. v. NFL, 130 S. Ct. 2201 (2010).

in concert.[2] If the Court had decided differently, professional sports leagues could create and maintain monopolistic structures that would preclude economic competition and negatively impact the market, drastically altering the business of professional sports.[3]

Initially, it might appear that a case concerning the NFL and its business strategy to sell trademark headgear would have a minimal impact on nonparties. The stakes in this case, however, were higher than usual—the NFL was playing for antitrust immunity.[4] Indeed, the lower court holding marked the first time that a circuit court had recognized the single entity defense for a professional sports league, effectively immunizing the NFL from antitrust scrutiny in the licensing market.[5] If the Supreme Court had left the lower court's decision unscathed, the likely domino effect of such antitrust immunity had the potential to infiltrate not only the activity of other professional sports leagues but also much of the business activity associated with such leagues.[6] For that reason, the Supreme Court's reversal of the Seventh Circuit's

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[2] *Id.* at 2216-17. Specifically, the agreement of the thirty-two NFL teams through National Football League Properties (NFLP)—an organization formed by the NFL teams in 1963 to "develop, license and market their intellectual property"—to grant an exclusive license to Reebok International Ltd. to manufacture and sell NFL headgear was considered activity in violation of Section 1 of the Sherman Act. *Id.* at 2207. *See* discussion *infra* Part II.

[3] *See generally* Michael McCann, *Why American Needle-NFL is most important case in sports history*, SI.COM (Jan. 12, 2010, 3:28 PM), http://sportsillustrated.cnn.com/2010/writers/michael_mccann/01/12/americanneedlev.nfl/index.html.

[4] Michael A. McCann, American Needle v. NFL*: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 728 (2010).

[5] Gabriel Feldman, *The Puzzling Persistence of the Single Entity Argument for Sports Leagues:* American Needle *and the Supreme Court's Opportunity to Reject a Flawed Defense*, 2009 WIS. L. REV. 835, 837 (2009). The concept of a single entity was articulated by the Supreme Court in *Copperweld Corporation. v. Independence Tube Corporation*, 467 U.S. 752 (1984), explaining that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of Section 1 of the Sherman Act" because they "have a complete unity of interest." *Id*. at 771. "Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one." *Id*. Professional sports leagues have taken this concept and applied it to their structure, arguing that their "unity of interest" makes their activity that of a single entity.

[6] *See generally* McCann, *supra* note 4, at 762-77.

decision is one of the most important decisions—if not *the* most important decision—in recent sports history.[7]

Prior to the Court's decision in *American Needle*, a multitude of concerned entities filed amicus briefs on behalf of both parties, reflecting the importance of the case.[8] Of the four major United States professional sports leagues,[9] one remained silent throughout the *American Needle* proceedings—Major League Baseball.[10] But why? The reason for its silence was simple: Major League Baseball already enjoys antitrust immunity.[11]

Since its creation by the Supreme Court in 1922, the baseball antitrust exemption has remained untouched, but not without scrutiny.[12] Its continued existence has led to questions concerning the basis of the exemption, its reach, and the Court's refusal to extend it to similarly organized sports leagues.[13] While the Supreme Court has not revisited the issue since 1972 in *Flood v. Kuhn*,[14] lower courts continue to express their competing opinions as to its validity, reach and application.[15] In the presence of such contention, one cannot help but wonder about the current posture of the Supreme Court and its adherence to *stare decisis* on this issue for the past 89 years.

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[7] *See supra* note 3.

[8] Thirteen amicus briefs were filed by nineteen businesses and organizations. A. Jeffrey Standon, *Is the NFL a Single Entity and Therefore Exempt from Antitrust Liability?* 38 A.B.A. PREVIEW 177, 180 (2010).

[9] The three major professional sports leagues in addition to the NFL are Major League Baseball (MLB), the National Basketball Association (NBA), and the National Hockey League (NHL).

[10] While the MLB Players' Association filed an amicus brief in favor of American Needle, MLB, unlike the other leagues, did not file on behalf of the NFL. *See supra* note 8.

[11] MLB first received this immunity in 1922, and has maintained this immunity for a majority of its activities. *See* discussion *infra* Part I.B.

[12] Thomas J. Ostertag, *Baseball's Antitrust Exemption: Its History and Continuing Importance*, 4 VA. SPORTS & ENT. L.J. 54, 54 (2004).

[13] Ostertag, *supra* note 12.

[14] 407 U.S. 258 (1972).

[15] *See generally* Nathaniel Grow, *Defining the "Business of Baseball": A Proposed Framework for Determining the Scope of Professional Baseball's Antitrust Exemption*, 44 U.C. DAVIS L. REV. 557, 580-90 (2010) (discussing how various courts have interpreted the Supreme Court's treatment of the MLB in the antitrust context, categorizing the decisions as (1) holding the business of baseball completely exempt from antitrust scrutiny, (2) restricting the exemption to only baseball's reserve clause which, in effect, made the exemption obsolete, and (3) adopting a "unique characteristics and needs" standard in applying the exemption).

American Needle represents a first step in responding to this consideration, as the Court makes its position on antitrust and professional sports leagues clearer than ever. While the nature of professional sports leagues requires a level of cooperation that justifies *some* collective decision-making to achieve success, such decision-making in the realm of business *must* undergo antitrust scrutiny.[16]

The holding of the Supreme Court in *American Needle* should result in a similar, modern and clear analysis of the business of baseball—the reasoning of the Court in *American Needle* should serve as a basis by which to abolish baseball's antitrust exemption. The Court has maintained the baseball exemption through the justification of *stare decisis*, yet it has become clear that the 1922 foundation for the exemption no longer exists in 2011. If the Court truly wants to adhere to the doctrine of *stare decisis*, it should reconcile the competing lines of precedent (that of baseball and the other professional leagues) by overruling baseball's exemption and applying the standard of antitrust scrutiny to baseball that it applies to all other professional sports. Whether accomplished by the Court in a future case or through legislative action, *American Needle* provides a new pathway to ending the baseball antitrust exemption's 89-year reign.

This article argues that the consequence of the *American Needle* decision is to alter the application of the principle of *stare decisis* to the baseball antitrust exemption. Specifically, this article claims that the reasoning in the *American Needle* case undermines the authority of the Court's baseball exemption precedents, superseding them in such a way as to require the Court to overrule *Flood* and its progeny.

This article begins in Part I by discussing the application of antitrust law to professional sports, focusing on its application, history, and status pre-*American Needle*. In Part II, the article describes *American Needle v. NFL*, tracing its background, the opinions of the lower courts, and an analysis of the case on remand. In Part III, the article explains *American Needle*'s impact on the baseball antitrust exemption and argues that the Court's decision requires the removal of the exemption, placing a

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[16] Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2216-17 (2010).

particular emphasis on the role of *stare decisis* in this determination.

I. ANTITRUST LAW IN PROFESSIONAL SPORTS LEAGUES

A Brief Overview of Antitrust Laws

America's antitrust laws seek to protect trade from unreasonable restraint and to maintain competition in the market.[17] The Sherman Act[18] and the Clayton Act[19] are the two principal federal antitrust statutes governing the area, with the first section of the Sherman Act giving rise to a majority of antitrust litigation. Section 1 of the Sherman Act—the section of antitrust primarily affecting professional sports leagues—reads in pertinent part, "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."[20]

The statute does not prohibit all restraints on trade; rather, the Supreme Court interprets this section to prohibit only agreements that *unreasonably* restrict competition.[21] A violation requires proof of an agreement or concerted action between separate entities; therefore, the two primary considerations are (1) whether the conduct in question qualifies as a "contract, combination . . . , or conspiracy, in restraint of trade," and (2) whether such restraint is unreasonable.[22]

The reasonableness of a restraint depends in part on its effect on competition—restraints that promote competition are reasonable and those that restrict competition are unreasonable.[23]

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[17] *See, e.g.*, N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions.").

[18] Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2004).

[19] Clayton Antitrust Act, 15 U.S.C. §§ 12-27 (2002).

[20] 15 U.S.C. § 1 (2004).

[21] Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

[22] 15 U.S.C. § 1 (2004).

[23] *See, e.g.*, Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978).

This Court evaluates the reasonableness of a restraint through application of either the *per se* rule or the Rule of Reason test.[24] The Court applies the *per se* rule when a practice appears on its face to always or almost always restrict competition.[25] Thus, application of the *per se* rule generally results in finding an antitrust violation without further analysis of the effect on competition.[26]

Challenges under the Rule of Reason test, the more common approach, consist of a much more detailed analysis. This approach requires consideration of the relevant market, any justifications for the restriction, and the balance of competition's promotion and suppression resulting from the restriction.[27] The burden of proof rests on the plaintiff to illustrate the anti-competitive effects of the practice at issue. The burden then shifts to the defendant to show the pro-competitive benefits of the practice, despite its other anti-competitive effects. Finally, the burden shifts back to the plaintiff to demonstrate a way to achieve the pro-competitive benefits without the restraining practice.[28] The proof presented and the court's evaluation of such proof will result in the final determination of whether the practice at issue is so unreasonable as to be in violation of the Sherman Act.

Application of Antitrust in Professional Sports

Application of the antitrust laws in the ambit of professional sports is a particularly difficult undertaking because of the unique

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[24] *See, e.g.*, NCAA v. Bd. of Regents, 468 U.S. 85, 103 (1984) ("Both per se rules and the Rules of Reason are employed to form a judgment about the competitive significance of the restraint." (internal citations omitted)).

[25] *Id.* This typically occurs with horizontal restraints on trade.

[26] *Id.* at 103-04.

[27] *See* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.").

[28] *See, e.g.*, K.M.B. Warehouse Distribs. Inc. v. Walker Mfg. Co., 61 F.3d 123, 127 (2d Cir. 1995).

nature of professional sports.[29] As entertainment, professional sports leagues compete for the economic support of consumers. Consequently, a certain degree of agreement is necessary both to achieve and maintain competitive balance as well as to provide a product that consumers are willing to support.[30] Antitrust expert Stephen Ross has explained the difference between antitrust in conventional markets and in professional sports:

> [S]ports leagues operate in an industry where some agreements among competitors—perhaps even *all* the competitors—is necessary for there to be a product at all. . . . In conventional markets, both society and individual consumers prefer that firms strive independently (or in rival joint ventures) to produce the best possible product, and are willing to reward the most successful firm . . . . In contrast, courts seem to accept the economic premise that consumers as a whole are better off, and will show it through greater patronage of a sports league's product, when a championship race is characterized by real competition and each fan's team has a reasonable shot at contention.[31]

In an effort to ensure the maintenance of real competition, sports leagues require agreement in the form of uniform rules, a governing body, and other regulatory practices.[32] While in other industries this level of agreement would be considered anticompetitive, the unique nature of sports demands that it be pro-competitive.[33]

The principal case outlining the application of antitrust law to sports is *NCAA v. Board of Regents*, a case in which universities alleged that the NCAA unreasonably restrained trade by restricting the televising of college football games.[34] The Court recognized that the actions of the NCAA were prima facie restraints on trade, but the unique nature of sports required a Rule of Reason analysis rather than a *per se* illegality

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[29] NCAA v. Bd. of Regents, 468 U.S. 85, 101-02 (1984).

[30] *Id.*

[31] Stephen F. Ross, *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 CASE W. RES. L. REV. 133, 134 (2001).

[32] *NCAA*, 468 U.S. at 101-02.

[33] *Id.*

[34] *Id.* at 88.

determination because of the marketed product. The Court explained, "[w]hat the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. . . . the integrity of the 'product' cannot be preserved except by mutual agreement."[35]

The important aspect of this case is the framework through which the Court made its ruling: because competition itself was the marketed product, a certain level of concerted agreement between member organizations was necessary to maintain the product. As such, a Rule of Reason analysis, and not *per se* review, applies when questions of antitrust law arise in the realm of sports.[36] As the Court emphasized, "[t]he hypothesis that legitimates the maintenance of competitive balance as a pro-competitive justification under the Rule of Reason is that equal competition will maximize consumer demand for the product."[37]

Antitrust History: The Baseball Exemption and Other Professional Sports Leagues

The first application of the antitrust laws to professional sports occurred in 1922 with the *Federal Baseball* case.[38] The case concerned the dissolution of the Federal League in 1913.[39] The plaintiff, the Baltimore Club, was a member of the Federal League, a league in competition with the defendants, the National League and the American League.[40] The Baltimore club alleged that the National League and the American League conspired to monopolize professional baseball by destroying the Federal League, accomplished by buying up some of the other member clubs and encouraging others to leave the Federal League for one of their own, except, of course, for the Baltimore club.[41]

As the Baltimore club was left without a league, it filed suit in antitrust and asserted that baseball was subject to the

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[35] *Id.* at 101-02.
[36] *Id.* at 119-20.
[37] *Id.*
[38] Fed. Baseball Club v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922).
[39] *Id.* at 207.
[40] *Fed. Baseball Club*, 259 U.S. at 207.
[41] *Id.*

Sherman Act, because competition among the clubs required travel across interstate lines, placing baseball in interstate commerce.[42] The specific issue before the Supreme Court was whether professional baseball was subject to antitrust law, and the Court unanimously held professional baseball exempt under the Sherman Act.[43]

Justice Holmes delivered the unanimous opinion of the Court and reasoned that "[t]he business is giving exhibitions of base ball [sic], which are purely state affairs." [44] Despite competitions occurring in different States and requiring players to cross state lines, this did not make baseball part of interstate commerce, according to Holmes. The Court found the transport to be "a mere incident, not the essential thing," taking baseball out of the scope of the antitrust laws and making it exempt from the antitrust provisions of the Sherman Act.[45]

Thirty years passed before the Supreme Court revisited the issue of the application of the antitrust laws to baseball. In *Toolson v. New York Yankees*, the Court reconsidered its holding in *Federal Baseball* .[46] In a six-sentence *per curiam* opinion, the Court rendered its decision to adhere to the doctrine of *stare decisis* and reaffirm *Federal Baseball*, calling upon Congress to make the change if it felt so inclined.[47] The Court reasoned,

Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. . . . We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.[48]

Unlike *Federal Baseball*, *Toolson* was not a unanimous decision. While the majority of the Court chose to defer to *Federal Baseball* and Congress on the issue, Justices Burton and Reed

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[42] *Id*. at 208. For the Sherman Act to be applicable, the asserted activity must occur in interstate commerce.

[43] *Id*. at 209.

[44] *Id.* at 208-09.

[45] *Id.* at 209.

[46] Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953).

[47] *Id.*

[48] *Id.* at 357.

vigorously dissented.[49] They painstakingly addressed the reasons why the business of baseball was interstate in nature, how Congress's silence on the issue was not an express exemption, and, as a result, baseball should be subject to antitrust scrutiny.[50] The justices explained,

> the present popularity of organized baseball *increases*, rather than diminishes, the importance of its compliance with standards of reasonableness . . . required by law of interstate trade or commerce. It is interstate trade or commerce and, as such, it is subject to the Sherman Act until exempted.[51]

While the *Toolson* decision received its fair share of criticism, most of the modern controversy stems from the Court's decisions thereafter. Since *Toolson*, the Supreme Court has consistently held that all other professional sports leagues *are* subject to antitrust scrutiny. A short two years after *Toolson*, the Court held professional boxing subject to the antitrust laws because its activities were interstate in nature; professional football received the same treatment two years thereafter; and the Court followed suit with professional basketball in 1971.[52]

The Court's third and final consideration of the application the antitrust laws to baseball came in 1972 in *Flood v. Kuhn*.[53] Curt Flood started his major league career in 1956 with the Cincinnati Reds, who then traded him to the St. Louis Cardinals in 1958 where he rose to fame.[54] After 12 seasons with the Cardinals, they traded him to the Philadelphia Phillies.[55]

Flood complained to baseball commissioner Bowie Kuhn about the deal, requesting to be made a free agent in order to make his own decisions and bargains regarding his career as a

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[49] *See Toolson*, 346 U.S. at 357-65 (Burton, J., dissenting).

[50] *Id.*

[51] *Id.* at 364-65 (emphasis added).

[52] *See U.S. v. Int'l Boxing Club of N.Y., Inc.*, 348 U.S. 236 (1955) (holding boxing is subject to antitrust scrutiny); *Radovich v. NFL*, 352 U.S. 445 (1957) (holding the same for football); *Haywood v. NBA*, 401 U.S. 1204 (1971) (holding the same for basketball).

[53] 407 U.S. 258 (1972).

[54] *Id.* at 264.

[55] *Id.* at 265.

major league player, but Kuhn denied his request.[56] Aggrieved, Flood filed suit against the Commissioner, claiming that baseball's reserve system violated the Sherman Act.[57]

After both the trial court and court of appeals reaffirmed *Federal Baseball* and *Toolson*, the Supreme Court granted certiorari "to look once again at this troublesome and unusual situation."[58]

For the first time, the Court declared the business of baseball a matter of interstate commerce. Nevertheless, the Court reaffirmed the antitrust exemption for baseball.[59] Justice Blackmun, writing for the Court, explained that the Court would yield to the doctrine of *stare decisis*:

It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court's expanding concept of interstate commerce. . . . Other professional sports operating interstate . . . are not so exempt. . . . If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court. . . . there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency.[60]

The Court clearly recognized the issue with finding professional baseball exempt from antitrust scrutiny, yet rejecting such an exemption for other professional sports. Even so, the Court found adherence to the doctrine of *stare decisis* more important than remedying this obvious inconsistency.

The decision, however, was not without dissent. Justices Douglas and Brennan argued that the Court was responsible for the "derelict in the stream of the law" created in *Federal Baseball* and, as such, the Court, not Congress, should be responsible for its removal.[61] Justice Marshall agreed, and directly responded to the majority's *stare decisis* assertion. He argued that

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[56] *Id.* at 265. At the time, Major League Baseball still used the reserve system, which provided players only a limited form of free agency, which required compensation from the new team to a player's old team, chilling player movement. *Id.*

[57] *Id.* at 266.

[58] Flood v. Kuhn, 407 U.S. 258, 269 (1972).

[59] *Id.* at 282-84.

[60] *Id.* at 282-84.

[61] *Id.* at 286 (Douglas, J., dissenting).

> [w]e do not lightly overrule our prior constructions of federal statutes, but when our errors deny substantial federal rights, like the right to compete freely and effectively to the best of one's ability as guaranteed by the antitrust laws, we must admit our error and correct it."[62]

Douglas agreed: "[t]here can be no doubt 'that were we considering the question of baseball for the first time upon a clean slate' we would hold it to be subject to federal antitrust regulation."[63]

Since *Flood*, the Supreme Court has not again considered the issue of baseball's exemption from antitrust scrutiny. The lower courts have continued to apply the exemption to baseball decisions while subjecting the decisions of other professional sports to the antitrust laws as the Court's cases required—at least until *American Needle*.

Congressional Action in Antitrust

While the Court has continued to defer to Congress on the issue of baseball's exemption from antitrust, Congress has not been completely silent on the subject. There are two significant acts of Congress that have impacted professional sports leagues in antitrust: The Sports Broadcasting Act of 1961[64] and the Curt Flood Act of 1998.[65]

The Sports Broadcasting Act ("SBA") exempts professional football, baseball, basketball, and hockey leagues from Section 1 of the Sherman Act when such leagues create joint agreements to sell or transfer the rights of member clubs in the sponsored broadcasting of their games.[66] The SBA allows the leagues to package games and sell those packages to broadcast networks and other similar entities, a practice that could be considered a restraint of trade.[67] Like the courts, Congress recognized the need to maintain competitive balance in professional sports, and this

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[62] *Id.* at 292-93 (Marshall, J., dissenting).
[63] *Id.* at 287 (Douglas, J. dissenting).
[64] Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (1986).
[65] Curt Flood Act of 1988, 15 U.S.C. § 26b (2002).
[66] Sports Broadcasting Act, *supra* note 64.
[67] S. REP. NO. 87-1087, at 1 (1961).

Act accomplished that.[68] As the Committee on the Judiciary noted in its report in favor of the Act, "the public interest in viewing professional league sports warrants some accommodation of antitrust principles and this legislation achieves this purpose with minimal sacrifice of antitrust principles . . . ."[69]

The Curt Flood Act turned in a different direction from the SBA, as *Flood v. Kuhn* significantly influenced its passage and content. Because professional baseball was exempt from the antitrust laws, Flood did not have any autonomy in shaping his professional baseball career. The Curt Flood Act sought to change this, providing MLB players with some of the protections of the antitrust laws that they otherwise did not have.[70]

The need for this Act became particularly apparent in 1994 when MLB players went on strike.[71] The strike "reemphasized the need for Congress to clarify its intent to apply to professional baseball the same rules of fair and open competition that are followed by all other unregulated business enterprises in this country, including other sports leagues."[72] The effect was to provide Major League Baseball players with alternatives to striking that other professional athletes enjoy when issues of employment arise.[73]

Congress's language specifically limited the use of the Act to Major League Baseball players for actions "directly relating to or affecting employment . . . to play baseball at the major league level."[74] Congress also made clear to the courts how they should interpret the Act: "No court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than those set forth in subsection (a) of this section."[75] While this language certainly clarifies how courts should interpret the Curt

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[68] *Id.* at 2 ("[P]roponents of this legislation stated that a league needs the power to make 'package' sales of the television rights of its member clubs to assure the weaker clubs of the league continuing television income and television coverage on a basis of substantial equality with the stronger clubs.").

[69] *Id.* at 3.

[70] Curt Flood Act, *supra* note 65.

[71] S. REP. NO. 105-118, at 3 (1997).

[72] *Id.* at 2.

[73] S. REP. NO. 105-118, at 2 (1997).

[74] *Id.*

[75] *Id.*

Flood Act, it also makes clear that Congress is continuing to cede the issue of baseball's exemption from antitrust law to the judiciary. By merely addressing a narrow portion of baseball's exemption, Congress avoided the primary disparity of maintaining the exemption for one league while rejecting it for every other similarly situated league.

II. AMERICAN NEEDLE V. NFL

The *American Needle* case began in 2004 when American Needle, Inc. filed its complaint in the Northern District of Illinois against the NFL, NFL Properties ("NFLP"),[76] the thirty-two individual NFL club teams, and Reebok International, alleging four antitrust violations under the Sherman Act.[77] Specifically, American Needle challenged the decision of the NFL and its clubs to use Reebok as the exclusive manufacturer of NFL and team paraphernalia.[78]

Before 1963, NFL teams individually arranged for the licensing and marketing of their respective trademark materials. In 1963, the teams unilaterally decided to form NFLP to license and market intellectual property for all of them.[79] Each team had an equal interest in the corporation, which gave a majority of the profits to charity and the distributed surplus equally to the individual teams.[80] The corporation also granted licenses to various vendors to manufacture and sell products with the teams' respective names and logos.[81] For over twenty years, American Needle, Inc. was one such vendor.[82]

In December 2000, the NFL teams changed the corporation's practices by authorizing NFLP to grant exclusive licenses to sell various products rather than allowing multiple vendors to produce and sell those same products.[83] In accordance with this new

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[76] *See supra* note 2.

[77] Am. Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941 (N.D. Ill. 2007) (complaint of American Needle, Inc.).

[78] *Id.*

[79] Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2207 (2010).

[80] *Am. Needle*, 496 F. Supp. 2d at 942.

[81] *Am. Needle*, 130 S. Ct. at 2207.

[82] *Am. Needle*, 496 F. Supp. 2d at 942.

[83] Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2207 (2010).

approach, NFLP granted an exclusive license to Reebok International to manufacture and sell each teams' trademark headgear. As a result, the NFLP did not renew American Needle's license to sell hats.[84] Aggrieved, American Needle sued.[85]

The District Court Opinion

At the district court level, American Needle argued that the conduct of NFL Properties in granting an exclusive license to Reebok International was an illegal conspiracy in restraint of trade and, therefore, a violation of Section 1 of the Sherman Act.[86] As a defense, defendants argued that their actions could not constitute a conspiracy within the meaning of Section 1 because their conduct was that of a single economic entity, one that was not capable of conspiring with itself.[87]

The District Court thus identified the issue to be whether "the NFL and its 32 teams are, in the jargon of antitrust law, acting as a single entity."[88] In a very brief opinion, the District Court concluded that they "clearly are" because "they have so integrated their operations that they should be deemed to be a single entity rather than joint ventures."[89]

The District Court relied primarily on *Copperweld Corporation v. Independence Tube Corporation*,[90] a 1984 Supreme Court case holding that a corporation and its wholly owned subsidiary are incapable of conspiring within the meaning of Section 1 of the Sherman Act.[91] As *Copperweld* emphasized, "function, not form" was the proper means of determining whether two or more entities can conspire. The District Court broadly concluded that the function of the NFL and other professional sports leagues should term such organizations single entities.[92]

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[84] *Id.*

[85] *Id.*

[86] Am. Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941, 942 (N.D. Ill. 2007).

[87] *Am. Needle*, 130 S. Ct. at 2207.

[88] *Am. Needle*, 496 F. Supp. 2d at 943.

[89] *Id.*

[90] 467 U.S. 752 (1984).

[91] *Am. Needle*, 496 F. Supp. 2d at 943.

[92] *Id.*

The District Court explained, "[t]he economic reality is that the separate ownerships [have] no economic significance."[93] The facts "lead undeniedly [sic] to the conclusion that the NFL and the teams act as a single entity in licensing their intellectual property."[94]

The Circuit Court Opinion

American Needle subsequently appealed the District Court's decision to the Seventh Circuit Court of Appeals.[95] Its affirmance of the decision of the District Court marked the first time in history that a circuit court had ever granted a professional sports league single entity status.[96]

The Seventh Circuit identified the "murky waters" of the issue before the court, noting the lack of a conclusive opinion as to "whether the teams of a professional sports league can be considered a single entity in light of *Copperweld*."[97] Whereas the District Court was quick to broadly conclude a new policy in identifying all professional sports leagues as single entities, the Seventh Circuit declined to address this broader issue, noting that it should be addressed "not only 'one league at a time,' but also 'one facet of a league at a time.'"[98]

In addressing this specific facet of the NFL—the licensing of their intellectual property—the Circuit Court agreed with the District Court's single-entity determination.[99] The Circuit Court argued that the NFL, when collectively producing NFL football, should be able to function as a single economic source.[100] It identified the "vital economic interest" that the NFL teams share in collectively promoting NFL football because "the league competes with other forms of entertainment . . . and the loss of audience members to alternative forms of entertainment

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[93] *Id.* at 944.

[94] Am. Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941, 944 (N.D. Ill. 2007).

[95] Am. Needle, Inc. v. NFL, 538 F.3d 736 (7th Cir. 2008).

[96] *Id.* at 744.

[97] *Id.* at 741.

[98] *Id.* at 742.

[99] *Id.* at 743.

[100] *Id.*

necessarily impacts the individual teams' success."[101] In this light, the court stated that "it makes little sense to assert that each individual team has the authority, if not the responsibility, to promote the jointly produced NFL football."[102] The court thereafter concluded:

Simply put, nothing in § 1 prohibits the NFL teams from cooperating so the league can compete against other entertainment providers. Indeed, antitrust law encourages cooperation inside a business organization—such as, in this case, a professional sports league—to foster competition between that organization and its competitors. Viewed in this light, the NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property, and we thus cannot say that the district court was wrong to so conclude.[103]

The Supreme Court Opinion

At the outset of its opinion, the Supreme Court unanimously reversed the Seventh Circuit: "[w]e conclude that the NFL's licensing activities constitute concerted action that is not categorically beyond the coverage of § 1."[104]

Justice Stevens wrote the opinion of the Court.[105] His approach focused on laying a foundation for understanding the intricacies of the Sherman Act, describing in great detail the purpose of the Act and how various conduct should be interpreted under its language.[106] He also clarified the proper interpretation of *Copperweld*, distinguishing the generally applied inquiry of whether the actors allegedly conspiring constitute a single entity, from the proper inquiry: "whether there is a contract, combination . . . or conspiracy amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decision-making, and

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[101] *Id.*
[102] *Id.*
[103] Am. Needle, Inc. v. NFL, 538 F.3d 736, 744 (7th Cir. 2008).
[104] Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2206-07 (2010).
[105] *Id.* at 2206.
[106] *Id.*

therefore of diversity of entrepreneurial interests, and thus of actual or potential competition."[107] In so distinguishing, the Court concluded that independent centers of decision-making joined under an agreement are capable of conspiring within the meaning of Section 1 of the Sherman Act. From there, the question remained whether such action constituted an unreasonable restraint of trade.[108]

As to the actions of the NFL, the Court opined that each team is independently owned, independently managed, and has its own individual "corporate consciousness."[109] Each team licensing its intellectual property does so for its individual economic best interest; therefore, "each team . . . is a potential independent center of decision-making."[110] As independent centers of decision-making, the teams' collective decision to grant an exclusive license to a single vendor falls within *Copperweld*'s definition of conspiracy under Section 1 of the Sherman Act.[111] The Court explained: "[a]lthough NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned."[112]

The Court likewise identified the need for cooperation regarding competition on the field, but distinguished such cooperation from competition in business.[113] Justifications exist in professional sports for a number of collaborative decisions, the Court stated; however, "[t]he justification for cooperation is *not relevant* to whether that cooperation is concerted or independent action."[114] The necessity for cooperation does not change the action from concerted to independent,[115] and it does not exempt such activity from antitrust scrutiny.[116]

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[107] *Id.* at 2212 (internal citations omitted).
[108] *Id.*
[109] *Id.*
[110] *Id.* at 2213 (internal citations omitted).
[111] *Id.*
[112] Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2213 (2010).
[113] *Id.* at 2214.
[114] *Id.* (emphasis added).
[115] *Id.* at 2214.
[116] *Id.* at 2216.

In circumstances such as this where some degree of cooperation among competing entities is necessary, Justice Stevens turned to *NCAA v. Bd. of Regents* to identify the appropriate analysis: "When 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason."[117] As such, the Court held that the actions of the NFL were subject to antitrust scrutiny, and the reasonableness of its actions were subject to determination on remand.[118]

American Needle on Remand

Since the Supreme Court's decision last year, the Northern District of Illinois has not yet heard *American Needle* on remand.[119] As the Supreme Court instructed application of the Rule of Reason analysis in its Seventh Circuit reversal,[120] the District Court must interpret the facts within this framework to ultimately determine whether or not the actions of the NFL are reasonable within the meaning of Section 1 of the Sherman Act.

As previously discussed, analysis of any action under Section 1 requires consideration of two specific questions: (1) whether the conduct in question qualifies as a "contract, combination . . . , or conspiracy, in restraint of trade," and (2) whether such restraint is unreasonable.[121] The Supreme Court has already answered the first question, finding the conduct in question to be a conspiracy in restraint of trade.[122] It is the District Court's responsibility to determine whether or not such agreement is reasonable. If the court finds that NFL Properties' decision to grant an exclusive license to Reebok is a reasonable restraint of trade, then the activities survive the Sherman Act and the conduct may continue with no issue of legality. But, if found unreasonable, the license

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[117] *Id.* (citing NCAA v. Bd. of Regents, 468 U.S. 85, 101 (1984)).
[118] *Id.* at 2217.
[119] Am. Needle, Inc. v. NFL, 391 F. App'x 564 (7th Cir. 2010).
[120] *See* discussion *supra* Part II.C.
[121] 15 U.S.C. § 1 (2004).
[122] *See* discussion *supra* Part II.C.

and underlying conduct are illegal and in violation of the Sherman Act.

As also previously discussed, the court must determine the reasonableness of alleged illegal conduct by the effect on competition in the market; pro-competitive effects are generally considered reasonable, and anti-competitive effects unreasonable.[123] The initial burden rests on the plaintiffs to demonstrate the anti-competitive effects of the concerted activity.[124] It should not be difficult for American Needle to provide sufficient proof to meet the burden here: as a result of the agreement of the thirty-two NFL teams under the guise of NFL Properties, an exclusive license to market and sell trademark headgear was granted to a single corporation (that was not American Needle), depriving vendors of the opportunity to enter (or remain) in that specific market.[125]

Once American Needle makes these arguments, the burden will shift to defendants to establish the pro-competitive benefits of the agreement despite the anti-competitive effects presented by plaintiffs.[126] This point in the analysis marks the crossroads for the court's interpretation of the facts. The arguments the NFL will make are relatively predictable, but it is the court's determination of their sufficiency that is questionable. As the NFL has consistently argued—and the courts in general have been receptive to—the nature of professional sports requires a degree of agreement among member clubs in order to maintain a successful league and provide a "product," which is competition itself.[127]

In the District Court's opinion in 2007, when initially presented with this set of facts, its reasoning demonstrated a receptiveness to the justifications proffered by the NFL.[128] Between the Court's predisposition in favor of the NFL and the Supreme Court's opinion describing the various justifications for (and acceptance of) the action at issue, there is strong potential for

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123 *See* discussion *supra* Part I.A.
124 *See* discussion *supra* Part I.A.
125 *See generally* discussion *supra* Part II.
126 *See* discussion *supra* Part I.A.
127 *See* discussion *supra* Part I.B.; *see generally* discussion *supra* Part II.
128 *See* discussion *supra* Part II.A.

the District Court to find the NFL's argument sufficient to meet the evidentiary burden in this part of the Rule of Reason analysis.

If the District Court determines the defendants have not met their burden of proof in establishing pro-competitive benefits of the action, the Rule of Reason analysis ends and the court must find in favor of plaintiffs. If the court finds the burden has been met, the analysis continues. The burden of proof shifts once more to plaintiffs—here, American Needle, Inc.—to establish how the pro-competitive benefits may be accomplished without the restraining practice.[129] American Needle will have to provide sufficient evidence demonstrating that NFL Properties does not have to grant exclusive licenses in order to be successful.

The potential arguments and likely evidence to be proffered could result in the District Court ruling in either party's favor, and the ultimate outcome has the potential to either end the *American Needle* dispute, or return the case to the Seventh Circuit for a second look.

III. *AMERICAN NEEDLE* AND THE BASEBALL EXEMPTION

While the conclusion of *American Needle* will garner great discussion and debate in the legal community, the ultimate determination will not effect the "big picture" consideration. It is the Supreme Court's reversal of the Seventh Circuit that is the most important aspect of *American Needle*'s history, and it is through this decision that Major League Baseball's antitrust exemption should be eliminated.

The history of the baseball exemption may be lengthy, but its foundation is rocky. Its genesis—the conclusion that the sport of professional baseball is not within interstate commerce—is an element of the court's reasoning that no longer remains true. Despite the cracks in the exemption's foundation, the Court has justified its maintenance through the doctrine of *stare decisis*. Such reliance begs the question: when should the court deviate from this doctrine?

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[129] *See* discussion *supra* Part I.A.

The concept of "adjudicative consistency"[130] lies at the heart of *stare decisis* and courts have adhered to it since the nineteenth century.[131] Indeed, in 1833, Justice Story wrote, "[a] more alarming doctrine could not be promulgated by any American court than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles."[132] It is, however, well established that such adherence to precedent is not absolute; rather, "American courts of last resort recognize a rebuttable presumption against overruling their own past decisions."[133]

A mere two years ago, the current Supreme Court spoke directly to this concept: "[t]he doctrine of *stare decisis* is of course essential to the respect accorded to the judgments of the Court and to the stability of the law, but it does not compel us to follow a past decision when its rationale no longer withstands careful analysis."[134] The Court went a step further in a subsequent case, stating that "the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned."[135] Considering these factors in light of Major League Baseball's antitrust exemption, the analysis favors deviating from precedent.

The MLB antitrust exemption originated 89 years ago with *Federal Baseball*, which, no doubt, renders the exemption long-standing. The Court's affirmation of the decision only two additional times since 1922, however, provides better perspective on the precedent's stronghold. As the Court has not tested the decision with any regularity, and indeed not in the past thirty-nine years, the antiquity of the precedent does not favor its maintenance. As to the reliance interests at stake, the only entity

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[130] Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 Yale L.J. 2031, 2036 (1996).

[131] Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. Va. L. Rev. 43, 87 (2001) (arguing that the doctrine is not a constitutional requirement).

[132] *Id.* at 87 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 337, at 349-50 (Rothman & Co. 1991)).

[133] Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1, 1 (2001).

[134] Arizona v. Gant, 129 S. Ct. 1710, 1722 (2009) (internal citations omitted).

[135] Montejo v. Louisiana, 129 S. Ct. 2079, 2088-89 (2009) (citing Pearson v. Callahan, 129 S. Ct. 808, 816-17 (2009)).

with a direct interest is MLB itself—and its reliance is minimal since the Curt Flood Act went into effect.

The most compelling argument in favor of eliminating the baseball exemption is consideration of the third factor, which asks whether the decision was well-reasoned. The basis for the exemption, as previously stated, was the Court's determination that professional baseball was not engaged in interstate commerce and was therefore not subject to the antitrust laws. In its most recent decision on the issue (in 1972), the Court explicitly stated, "[p]rofessional baseball is a business and it is engaged in interstate commerce."[136] The basis for the precedent has thus been eroded. The *Flood* Court was unable to justify its decision in terms of reason and logic, merely stating that "the aberration is an established one,"[137] and the "inconsistency and illogic" of the exemption "is to be remedied by the Congress and not by this Court."[138] If the foundation upon which the decision was rendered no longer exists, it follows that the decision has no ground upon which to stand.

While the Court has not addressed the application of the antitrust laws to MLB since 1972, it has addressed its application to other professional sports leagues more recently and more frequently, with *American Needle* being its most recent. The Court has consistently found all other professional sports leagues subject to antitrust scrutiny. In this vein, the Court has upheld a competing line of precedent for which it has applied the doctrine of *stare decisis*. In the Court's effort to achieve "adjudicative consistency," it has in effect developed two inconsistent lines of precedent for which there is no substantial distinction. The Court has even identified this inconsistency in *Flood*, yet has allowed it to remain intact. If the purpose of the doctrine of *stare decisis* is to achieve consistency in the application of the laws, then the Court has clearly failed to achieve this purpose. As such, the only remedy available for the Court is to deviate from *stare decisis* in one line of precedent in favor of the other. The consistency of the Court in finding professional sports leagues within the reach of the Sherman Act suggests that it deems its former analysis

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136 Flood v. Kuhn, 407 U.S. 258, 282 (1972).

137 *Id.*

138 *Id.* at 284.

improper. Thus, the Court should apply the doctrine of *stare decisis* with respect to *American Needle*, not *Federal Baseball* and its progeny.

The Supreme Court's opinion in *American Needle* makes this conclusion clearer than ever. As Justice Stevens explained, the justifications for cooperation do not transform the concerted activity into individual behavior.[139] Because individual member clubs have their own separate economic interests and have the ability to compete with each other beyond contest on the field, they are capable of concerted activity within the meaning of Section 1 of the Sherman Act.[140] With the *Flood* Court's admission that professional baseball is a business within interstate commerce, it follows that it, like other professional sports, is capable of concerted activity within the meaning of the Sherman Act. The distinctness of this argument leaves no room for uncertainty, and its soundness should apply across the board, to *all* professional sports leagues.

A particular problem with extending the Court's arguments in *American Needle* to professional baseball is the opportunity to do so. The Court's last occasion to revisit the issue was more than thirty years ago in *Flood*.[141] Without a case or controversy before the Court, it cannot explicitly overrule *Federal Baseball*, *Toolson*, and *Flood*. If the opportunity does not arise, the most the Court could do (if the circumstances provide) is either provide a blanket holding that subjects all professional sports leagues to antitrust scrutiny or expressly address an argument relying on one of the three baseball exemption cases and indirectly overrule it. Otherwise, the only other entity with the ability to end the exemption is the legislature—which should take the opportunity to do so.

Congress has, in the past, shown its willingness to enact statutory law concerning professional sports and the antitrust laws. As previously discussed, its actions lean in favor of removing the exemption.[142] Without the concern of the Court determining the legislation unconstitutional, Congress should use *American*

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[139] Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2214 (2010).

[140] *Id.*

[141] *See generally* discussion *supra* Part I.C.

[142] *See* discussion *supra* Part I.D.

Needle to bolster approval of an act removing the baseball exemption. The inaction of both Congress and the Court up to this point is without sufficient justification, and Congress, with the immediate ability to act, should do so.

CONCLUSION

American Needle is a landmark professional sports antitrust case. The decisions of the District Court and Seventh Circuit to exempt an area of professional sports from the reach of the Sherman Act resulted in overall concern as to the potential impact on professional leagues and the business associated with those leagues. The Supreme Court's reversal of the Seventh Circuit judgment alleviated this concern, and the decision made a bold statement regarding the Court's stance on antitrust law in this field. The unanimous opinion of the Court compellingly asserted the ability of professional sports teams to engage in conspiracy within the meaning of the Sherman Act.

Applying the Court's definitive holding, this article has argued that *American Needle* should serve as a gateway to eliminating the infamous baseball exemption. The Court's opinion in *American Needle* is in complete conflict with the reasoning for the baseball antitrust exemption, and when provided the next opportunity, either the Court or the legislature should right the wrong that is tremendously overdue.