



Adjusting the Stream? Analyzing Major League
Baseball’s Antitrust Exemption After *American Needle*

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I. INTRODUCTION

In the summer of 2010, the Supreme Court heard and decided *American Needle, Inc. v. National Football League*,¹ a case that some have called the most important in sports law history.² The National Football League (“NFL”) asked the Supreme Court to hold it immune from antitrust laws as a single entity. The predictions were dire. Worries of the NFL “killing free agency [and] dictat[ing] ticket prices”³ grabbed the headlines. Even some players, like New Orleans Saints quarterback Drew Brees, a member of the NFL Players Association (“NFLPA”) Executive Committee, became involved, saying, “[t]he gains we fought for and won as players over the years could be lost, while the competition that runs through all aspects of the sport could be undermined.”⁴ In the end, the Court decided that the NFL was not a single entity for purposes of licensing its apparel and that the NFL’s behavior would have to be judged according to the rule of reason analysis, which is the classic formulation of Sherman Act Section 1 analysis.⁵

While Major League Baseball (“MLB”) was not a party to the *American Needle* suit, the Supreme Court can draw lessons from its decision in that case in determining whether to abolish what remains of professional baseball’s long-standing antitrust exemption. Parts II and III of this article summarize the history of how baseball’s antitrust exemption developed and how courts have interpreted it in the nearly ninety years since it was first announced by the Court. Part IV analyzes the current reach of the antitrust exemption. Part V summarizes the *American Needle* litigation. Part VI discusses the antitrust exemption after *American Needle* and how that case

¹ 130 S. Ct. 2201 (2010).

² Michael McCann, *Why American Needle-NFL Is Most Important Case in Sports History*, SI.COM (January 12, 2010), http://sportsillustrated.cnn.com/2010/writers/michael_mccann/01/12/americanneedlev.nfl/index.html.

³ Ameet Sachdev, *American Needle Victory Puts NFL on Defense*, CHICAGO TRIBUNE (May 25, 2010), http://articles.chicagotribune.com/2010-05-25/business/ct-biz-0525-chicago-law--20100525_1_antitrust-exemption-american-needle-appeals-court.

⁴ Drew Brees, *Saints' Quarterback Drew Brees Weighs in on NFL's Supreme Court Case*, WASHINGTON POST (Jan. 10, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/07/AR2010010702947.html?hpid%3dopinionsbox1>.

⁵ *Am. Needle*, 130 S. Ct. at 2206–07.

should influence the Court's reasoning in future cases regarding baseball's exemption, as well as a discussion about the effects of removing the exemption.

II. PURELY STATE AFFAIRS

Section 1 of the Sherman Act provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.”⁶ In the early twenty-first century, it seems almost incomprehensible that MLB would not be considered interstate commerce.⁷ In the first quarter of the twentieth century, however, the Supreme Court thought otherwise. In *Federal Baseball*,⁸ Justice Oliver Wendell Holmes wrote for a unanimous Court that the American and National Leagues were not subject to the antitrust laws because their “business is giving exhibitions of base ball, which are purely state affairs.”⁹ According to the Court, the transport of players across state lines

⁶ 15 U.S.C. § 1 (2006).

⁷ MLB currently has a fourteen team American League and a sixteen team National League, including teams in seventeen states, the District of Columbia, and Canada. Team-by-Team Information, <http://mlb.mlb.com/team/> (last visited March 29, 2011). MLB also owns an off-season winter league, the Arizona Fall League. Arizona Fall League, <http://mlb.mlb.com/mlb/events/winterleagues/about/?league=119&id=history> (last visited March 6, 2011). It also operates two spring training leagues, one in Florida and another in Arizona. Spring Training: The Official Site of MLB's Cactus and Grapefruit Leagues, http://mlb.mlb.com/mlb/events/spring_training/ (last visited March 29, 2011). The League also partners with three national television broadcasters and has its own television station, MLB Network. National Broadcasters, MLB.COM, http://mlb.mlb.com/mlb/official_info/broadcasts/national.jsp?tcid=mm_mlb_schedule (last visited March 29, 2011). Major League Baseball's television contracts will generate approximately \$5.3 billion through 2013. Matthew J. Mitten, American Needle v. NFL: U.S. Professional Clubs Are Separate Economic Threads When Jointly Marketing Intellectual Property 5 n.10 (Marquette University Law School Legal Studies Research Paper Series, Research Paper No. 10-33, 2010), available at <http://ssrn.com/abstract=1645364>. Major League Baseball is also affiliated with a number of Minor League Baseball leagues, of which there are fifteen that include 176 teams as of 2009. General History, MLB.COM, http://web.minorleaguebaseball.com/mlb/history/general_history.jsp (last visited March 6, 2011). In addition, the team with the lowest revenue during the 2009 season, the Florida Marlins, had revenues of 144 million dollars, while the New York Yankees made 441 million dollars, highest in the MLB. Kurt Badenhausen et al. eds., *The Business of Baseball*, FORBES.COM (April 7, 2010), http://www.forbes.com/lists/2010/33/baseball-valuations-10_The-Business-Of-Baseball_Revenue.html.

⁸ Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Professional Base Ball Clubs, 259 U.S. 200 (1922).

⁹ *Id.* at 208. See also Nathaniel Grow, *Defining the "Business of Baseball": A Proposed*

was not commerce because it was only incidental to playing the games. “[P]ersonal effort, not related to production, is not a subject of commerce.”¹⁰ *Federal Baseball* laid the groundwork for what is now nearly ninety years of MLB’s freedom from antitrust scrutiny.¹¹

The Court once again took up the issue of applying antitrust laws to baseball in *Toolson v. New York Yankees*.¹² In a one paragraph per curiam opinion upholding *Federal Baseball*, the Supreme Court used baseball’s reliance on that decision as a basis to leave *Federal Baseball* undisturbed.¹³ In addition, without examining the underlying facts of how baseball operated or developed over the thirty years since *Federal Baseball*, the Court deferred to Congress to hold baseball subject to the antitrust laws if it so desired, even though Congress never removed baseball from the Sherman Act’s scope in the first place.¹⁴

The Court examined the issue a third time nineteen years after *Toolson* when Curt Flood brought a suit challenging baseball’s reserve clause¹⁵ after being traded from St. Louis to Philadelphia. The majority in *Flood v.*

Framework for Determining the Scope of Professional Baseball’s Antitrust Exemption, 44 U.C. DAVIS L. REV. 557, 568 (2010) (arguing that *Federal Baseball* may not be unreasonable given that baseball’s revenue was generated mainly through local ticket sales).

¹⁰*Federal Baseball*, 259 U.S. at 209. As discussed below, the *Flood* Court points out fifty years later that the business of baseball is not necessarily the same thing as the playing of baseball games. *Flood v. Kuhn*, 407 U.S. 258, 269 (1972).

¹¹ As discussed below, Major League Baseball is now explicitly subject to the antitrust laws in some areas like labor negotiations.

¹² 346 U.S. 356 (1953).

¹³ “The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation.” *Id.* at 357.

¹⁴ “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.” *Id.*

¹⁵The reserve clause prevented players from moving to another team for the duration of their contract by allowing the team to renew the standard player contract for another season with the same contractual provisions. See *Am. League Baseball Club of Chi. v. Chase*, 149 N.Y.S. 6, 12 (N.Y. Sup. Ct. 1914) (explaining the elements of the reserve system). Players that attempted to play for another team were subject to an injunction requiring them to remain with their current team. See *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 222 (1902). For an interesting argument supporting the resurrection of a modified reserve clause, see Sky Andrecheck, *The Case for the Reserve Clause*, SI.COM (January 14, 2010), http://sportsillustrated.cnn.com/2010/writers/sky_andrecheck/01/14/andrecheck.free.agency/index.html. Interestingly, NBA player Rick Barry unsuccessfully challenged the NBA’s reserve clause after attempting to leave the Warriors for the ABA. The Ninth Circuit affirmed a San Francisco judge’s order that upheld the clause and made Barry sit out a year before playing in the ABA. *Wash. Capitols Basketball Club v. Barry*, 419 F.2d 472 (1969). See also TERRY PLUTO, *LOOSE BALLS* 50–51 (2007).

*Kuhn*¹⁶ began its opinion with an exploration of the history of baseball, which includes a recital of the fact that the first professional baseball team, the Cincinnati Red Stockings, had only one Cincinnati on the roster, traveled over 11,000 miles during its first seasons, and played fifty-seven games.¹⁷ Justice Blackmun continued the opinion with a litany of several of baseball's greatest players and references to works about sports, including *Casey at the Bat* and *Tinker to Evers to Chance*.¹⁸ The Court explained how *Federal Baseball* had been cited favorably in both baseball and non-baseball antitrust cases for fifty years. Based on *stare decisis* and Congress' awareness of the exemption and subsequent inaction, the Court upheld the antitrust exemption created in *Federal Baseball*, while also holding that baseball is a business engaged in interstate commerce.¹⁹

III. INTERPRETING *FEDERAL BASEBALL*

Although the Supreme Court bears responsibility for the creation of MLB's antitrust exemption, the Court, to its credit, has signaled its desire to cut down the exemption, admitting that the cases creating and upholding the exemption, *Federal Baseball* and *Toolson*, were "aberration[s] confined to baseball."²⁰ These "anomal[ies]"²¹ are "unrealistic, inconsistent, [and] illogical."²² Justice Douglas even referred to the exemption as a "derelict in the stream of the law."²³ Unfortunately, despite what seemed early on to be

¹⁶ 407 U.S. 258 (1972).

¹⁷*Id.* at 261. It is hard to imagine how this level of economic activity across state lines would not have given rise to interstate commerce.

¹⁸*Id.* at 262–64. Blackmun's list also included some baseball players who were not so well known, a sportswriter, an umpire, and eight owners or managers. Roger I. Abrams, *Blackmun's List*, 6 VA. SPORTS & ENT. L.J. 181, 188–89 (2007). Interestingly, Justice White found this homage so unnecessary that he concurred in all but this part of the Court's opinion.

¹⁹*Flood*, 407 U.S. at 282.

²⁰*Id.* See also Martin M. Tomlinson, *The Commissioner's New Clothes: The Myth of Major League Baseball's Antitrust Exemption*, 20 ST. THOMAS L. REV. 255, 259 (2008) (arguing that the antitrust exemption applies only to the reserve system in professional baseball). Upon this premise, the Curt Flood Act of 1998 effectively removed the exemption, since the reserve system deals with labor negotiations.

²¹*Flood*, 407 U.S. at 282.

²² *Radovich v. Nat'l Football League*, 352 U.S. 445, 452 (1957). *Federal Baseball* held that baseball was not commerce because the leagues were in the business of "giving exhibitions of base ball, which are purely state affairs." *Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208 (1922). The Court in *Flood* rejects this interpretation of commerce, holding that MLB is indeed engaged in interstate commerce, while refusing to apply the antitrust laws to it. *Flood*, 407 U.S. at 282.

²³*Flood*, 407 U.S. at 286 (Douglas, J., dissenting).

the best of intentions, the Court has never definitively removed the exemption.

In his *Toolson* dissent, Justice Burton recognized the Court's error in refusing to apply antitrust laws to baseball.²⁴ While he understood the Court's position in 1922 to exempt baseball as not engaging in interstate commerce, he also recognized that the facts in 1953 could not support that same decision.²⁵ While the Court later comes to recognize the exemption as an aberration, the Court uses *stare decisis* and congressional inaction to uphold baseball's antitrust exemption, while in the same breath pointing out that other major sports are not exempt.²⁶ In his dissent in *Flood*, Justice Douglas criticizes *Federal Baseball*, and by extension the *Flood* majority's upholding *Federal Baseball* under the principle of *stare decisis*, for having a "parochial view of commerce."²⁷ He asserts that, "the whole concept of commerce has changed."²⁸ Even if the Court were not comfortable with baseball as interstate commerce in 1922, by *Flood*, baseball was clearly a national enterprise, based on both the law²⁹ and the facts.³⁰

²⁴ *Toolson v. N.Y. Yankees*, 346 U.S. 356, 357 (1953) (Burton, J., dissenting).

²⁵ "In the light of organized baseball's well-known and widely distributed capital investments used in conducting competitions between teams constantly traveling between states, its receipts and expenditures of large sums transmitted between states, its numerous purchases of materials in interstate commerce, the attendance at its local exhibitions of large audiences often traveling across state lines, its radio and television activities which expand its audiences beyond state lines, its sponsorship of interstate advertising, and its highly organized 'farm system' of minor league baseball clubs, coupled with restrictive contracts and understandings between individuals and among clubs or leagues playing for profit throughout the United States, and even in Canada, Mexico and Cuba, it is a contradiction in terms to say that the defendants in the cases before us are not now engaged in interstate trade or commerce." *Id.* at 357–58 (Burton, J., dissenting).

²⁶ *Flood*, 407 U.S. at 282–83.

²⁷ *Id.* at 286 (Douglas, J., dissenting). See also Tomlinson, *supra* note 20, at 261 (arguing that the holding that baseball was not interstate commerce was "an odd rationale for the decision" especially since the leagues "clearly market[ed] themselves as national products with the best players in the nation playing for various franchises located across the country").

²⁸ *Flood*, 407 U.S. at 286 (Douglas, J., dissenting).

²⁹ By this time, the Court was firmly entrenched in post-New Deal Commerce Clause jurisprudence that expanded the reach of federal power. See *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the commerce clause reached the activities of a farmer growing wheat for his personal consumption).

³⁰ By 1972, MLB consisted of 24 teams (12 in the American League and 12 in the National League) stretching from Boston to Los Angeles and Montreal to Houston. *MLB Season History – 1972*, ESPN.COM, http://espn.go.com/mlb/history/season/_/year/1972 (last visited March 30, 2011). The first players' strike in baseball also occurred in 1972 under the direction of Marvin Miller, which resulted in salary arbitration for the players. Eldon L. Ham & Jeffrey Malach, *Hardball Free Agency—The Unintended Demise of Salary Arbitration in Major League Baseball: How the Law of Unintended Consequences*

The *Flood* court also looks to Congress's not acting to remove baseball's antitrust exemption as evidence that Congress approves, or at least does not disapprove, of the exemption.³¹ This explanation relies on the assumption that Congress has actively taken up the issue of the exemption and has refused to apply the antitrust laws to it. The Court's evidence of this deliberation is remedial legislation that was introduced but never passed.³²

The majority's reliance on Congressional inaction misses the mark in two respects. First, Congress did not create the exemption; that responsibility lies with the Court itself.³³ As Justice Douglas put it, baseball's antitrust exemption is a peculiarity "that [the Supreme Court], its creator, should remove."³⁴ Additionally, the *Toolson* Court should never have mentioned Congressional intent at all given that Congressional intent was never mentioned in *Federal Baseball* as a basis for baseball's exemption.³⁵ Some commentators have suggested this "statement by the *Toolson* Court is particularly noteworthy because it effectively changes the rationale underlying baseball's antitrust exemption."³⁶ Second, Congressional refusal to remove the exemption with legislation cannot be read as an approval of the judicially created exemption.³⁷ On the contrary, Congressional refusal to pass legislation that exempts other major sports leagues from antitrust laws cuts against the proposition that Congress

Crippled the Salary Arbitration Remedy—and How to Fix It, 1 HARV. J. SPORTS & ENT. L. 63, 69 (2010).

³¹*Flood*, 407 U.S. at 283.

³²*Id.*

³³ Justice Burton argued in his *Toolson* dissent that *Federal Baseball* indicated that the "then incidental interstate features of organized baseball might rise to a magnitude that would compel recognition of them independently." *Toolson v. New York Yankees*, 346 U.S. 356, 360 (1953) (Burton, J., dissenting). Others argue that *Federal Baseball* was wrongly decided in the first place. See, e.g., *Flood*, 407 U.S. at 286 (Douglas, J., dissenting) (referring to the exemption as a "derelict in the stream of the law"). Both of these views strengthen the argument that the Supreme Court should be the institution to overturn the exemption.

³⁴*Flood*, 407 U.S. at 286 (Douglas, J., dissenting).

³⁵See Grow, *supra* note 9, at 570–71.

³⁶*Id.* at 570. See also Kevin McDonald, *Antitrust and Baseball: Stealing Holmes*, 2 J. SUP. CT. HIST. 88, 102–05 (1998).

³⁷See, e.g., *Flood*, 407 U.S. at 288 note 3 (Douglas, J., dissenting). Douglas' dissent cites another Supreme Court decision, *Helvering v. Hallock*, 309 U.S. 106 (1940), which expressly rejects Congressional inaction as a basis to uphold an erroneous application of a statute. The *Helvering* Court stated, "[i]t would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities. . . . [W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." 309 U.S. at 119–121.

approves of any antitrust exemption.³⁸ As Justice Douglas rightly states, “[t]he unbroken silence of Congress should not prevent us from correcting our own mistakes.”³⁹ It is improper for the Court to read silence as anything but silence. If Congress truly wanted to exempt MLB from antitrust laws, it could do so through legislation.⁴⁰ The lack of legislation codifying the exemption is evidence no less powerful than the absence of legislation that would apply antitrust laws. It is also important to note that Congress is a democratically elected body with a constituency to consider. Each Congressman’s constituents no doubt have an opinion on whether baseball should keep its exemption. But, their ideas may be based more on how a lifting of the exemption would affect their own favorite team, rather than on an analysis of antitrust law. In this respect, the Supreme Court can act more effectively and efficiently by acting unilaterally to remove baseball’s exemption, rather than waiting on Congress to act, which it may never do because of political expediency.

In the wake of these cases, courts have treated the exemption differently depending on the aspect of the game under challenge. In *Salerno v. American League of Professional Baseball Clubs*,⁴¹ the Second Circuit applied the exemption to MLB’s dealings with umpires. The court refused to predict the overruling of *Federal Baseball*, saying that the “Supreme Court should retain the exclusive privilege of overruling its own decisions.”⁴² However, it is important to note that this decision preceded *Flood*. It is unclear after the *Flood* decision whether the Court would come to the same conclusion with regard to umpires. Another case, *Postema v. National League of Professional Baseball Clubs*,⁴³ suggests that it would not apply the exemption to interactions with umpires. In *Postema*, the court concluded that “the exemption does not provide baseball with blanket immunity for anti-competitive behavior in every context in which it operates.”⁴⁴ Since baseball’s relations with its umpires are not unique to the game, unlike the reserve system, it is not essential to preserve the integrity

³⁸*Flood*, 407 U.S. at 288 (Douglas, J., dissenting) (“I would not ascribe a broader exemption through inaction than Congress has seen fit to grant explicitly.”).

³⁹*Id.*

⁴⁰ One might argue that Congress has no need to take up this issue as baseball already enjoys the protections of the judicially created antitrust exemption. However, the Court can strike down such a judicial creation the next time the issue comes before it. To remove the exemption from the Court’s purview, Congress would have to codify the exemption into law.

⁴¹429 F.2d 1003 (2d Cir. 1970).

⁴²*Id.* at 1005.

⁴³799 F. Supp. 1475 (S.D.N.Y. 1992).

⁴⁴*Id.* at 1489.

of the game and does not get the benefit of the exemption.⁴⁵ Courts have also refused to apply baseball's exemption to a number of "outside" parties, including concessionaires,⁴⁶ merchandisers,⁴⁷ and radio broadcasters.⁴⁸

With regard to franchise relocation, on the other hand, after two minor detours, courts have upheld the exemption. In *Piazza v. Major League Baseball*,⁴⁹ a group of investors wanted to buy the San Francisco Giants and move them to Tampa, Florida.⁵⁰ After MLB rejected the offer, the investors sued, alleging that the league put illegal restraints on the purchase and relocation of baseball teams in violation of the Sherman Act.⁵¹ The court refused to apply the antitrust exemption, narrowing the exemption's scope to the reserve clause.⁵² The saga did not end with that decision. After MLB disapproved of the sale to the Piazza-led group, the Giants were sold to a local San Francisco investment group.⁵³ When Florida lost its battle for a Major League franchise, Florida Attorney General Robert Butterworth issued antitrust civil investigative demands that focused on whether there was any "combination or conspiracy in restraint of trade in connection with the sale and purchase of the San Francisco Giants baseball franchise."⁵⁴ In *Butterworth*, the Florida Supreme Court chose to defer to the interpretation of *Piazza* in its reading of *Flood*, *Toolson*, and *Federal Baseball*, and limited the antitrust exemption to the reserve clause.⁵⁵

This diversion from a broad reading of the antitrust exemption did not last long, however. In 1999, the Minnesota Supreme Court prevented that state's attorney general from serving civil investigative demands on MLB because "the business of professional baseball is exempt from federal

⁴⁵*Id.*

⁴⁶*Twin City Sportservice Inc. v. Charles O. Finley & Co.*, 365 F. Supp. 235 (N.D. Cal. 1972), *rev'd on other grounds*, 512 F.2d 1264 (9th Cir. 1975).

⁴⁷*Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981).

⁴⁸*Henderson Broad. Corp. v. Hous. Sports Ass'n*, 541 F. Supp. 263 (S.D. Tex. 1982).

⁴⁹831 F. Supp. 420 (E.D. Pa. 1993).

⁵⁰*Id.* at 422.

⁵¹*Id.* at 423–24.

⁵²*Id.* at 438. Of course, *Flood* never explicitly limited the scope of the baseball exemption to the reserve clause, leading at least one commentator to say that "the entirety of the *Flood* majority opinion simply does not support the *Piazza* court's conclusion that *Flood* 'clearly' limited baseball's antitrust exemption to the reserve clause." Grow, *supra* note 9, at 595.

⁵³See *Giants to Stay in San Francisco*, THE MILWAUKEE J., Jan. 13, 1993, at C3, available at

<http://news.google.com/newspapers?id=JTAgAAAIBAJ&sjid=nCwEAAAIBAJ&pg=3030,3984713&dq=giants+stay+in+san+francisco&hl=en>.

⁵⁴*Butterworth v. Nat'l League of Prof'l Baseball Clubs*, 644 So. 2d 1021, 1022 (Fla. 1994).

⁵⁵*Id.* at 1025.

antitrust laws.”⁵⁶ The case arose after owner Carl R. Pohlad announced that he intended to sell the Twins to a North Carolina investment group, and MLB said it would approve the move if a publicly funded stadium were not to be built in Minnesota.⁵⁷ The court admitted that the *Piazza* decision was “intellectually attractive”⁵⁸ but felt “compelled to accept the paradox the Supreme Court acknowledged in *Flood* when it declined to overrule *Federal Baseball*” because “the sale and relocation of a baseball franchise, like the reserve clause discussed in *Flood*, is an integral part of the business of professional baseball and falls within the exemption.”⁵⁹ Two years after *Minnesota Twins*, Florida Attorney General Butterworth issued another set of civil investigative demands on MLB after finding out that it planned to contract the League to twenty-eight teams for the 2002 season.⁶⁰ In *Butterworth II*, a Federal District Court in Florida applied the antitrust exemption to the contraction at issue, saying, “It is difficult to conceive of a decision more integral to the business of major league baseball than the number of clubs that will be allowed to compete.”⁶¹

Courts have varied in their approaches to determining how to apply the antitrust exemption. In general, the courts seem to have drawn a distinction between those things that they believe are intimately a part of baseball, such as the reserve system and franchise relocation,⁶² and those things that are not, such as concessions.⁶³

In addition to the judiciary explicitly limiting the antitrust exemption, Congress limited the scope of baseball’s exemption in the Curt Flood Act of 1998.⁶⁴ Seventy-six years after *Federal Baseball*, Congress finally got involved in the business of baseball by explicitly applying antitrust laws to Major League Baseball players in the same way it applies to other professional athletes.⁶⁵ The Act, however, specifically excludes from its purview minor league players,⁶⁶ umpires,⁶⁷ broadcasting,⁶⁸ and franchise

⁵⁶ *Minn. Twins P’ship v. State*, 592 N.W.2d 847, 856 (Minn. 1999).

⁵⁷ *Id.* at 849.

⁵⁸ *Id.* at 856.

⁵⁹ *Id.*

⁶⁰ *Major League Baseball v. Butterworth*, 181 F. Supp. 2d 1316, 1319 (N.D. Fla. 2001).

⁶¹ *Id.* at 1332.

⁶² *See, e.g., Portland Baseball Club v. Kuhn*, 491 F.2d 1101 (9th Cir. 1974) (applying the antitrust exemption to the minor league system).

⁶³ *Twin City Sportservice Inc. v. Charles O. Finley & Co.*, 365 F. Supp. 235 (N.D. Cal. 1972), *rev’d on other grounds*, 512 F.2d 1264 (9th Cir. 1975).

⁶⁴ 15 U.S.C. § 26b (2011).

⁶⁵ *Id.* at § 26b(a).

⁶⁶ *Id.* at § 26b(b)(1).

⁶⁷ *Id.* at § 26b(b)(5).

⁶⁸ *Id.* at § 26b(b)(4). The Sports Broadcasting Act of 1961 exempts from antitrust laws the

relocation issues.⁶⁹ It should be noted that this language does not necessarily mean that antitrust laws do not apply to those areas or any other areas not covered explicitly by the statute.⁷⁰ In light of the Act's non-effect on most of the issues, Congress really only brought a small part of the business of baseball into the mainstream.⁷¹ However, the combination of the limiting principles of the courts and Congress's limitation in the Flood Act serves to restrict baseball's judicially created antitrust exemption to extremely isolated fragments of the business of baseball.

IV. APPLYING LIMITING PRINCIPLES: AN ANALYSIS OF BASEBALL'S ANTITRUST EXEMPTION AND FRANCHISE RELOCATION

Synthesizing the limits on the antitrust exemption requires some skill given the variety of decisions and rationales courts have given over the years. Nevertheless, there are at least two issues that are likely presently included within the scope of baseball's antitrust exemption, the minor league system and franchise relocation,⁷² the latter of which will be the

agreements covering the television broadcasting of sports contests in the major leagues. 15 U.S.C. § 1291 (2011).

⁶⁹ 15 U.S.C. § 26b(b)(3) (2011).

⁷⁰ The Act states that “[n]o 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.” *Id.* at § 26b(b). Senator Orrin Hatch of Utah, a co-sponsor of the bill, noted on the Senate Floor, “With regard to all other context or other persons or entities, the law will be the same after passage of the Act as it is today.” 145 CONG. REC. S9621 (daily ed. July 31, 1998) (statement of Sen. Hatch). President Clinton agreed. *See* Statement on Signing the Curt Flood Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2150 (Oct. 27, 1998) (“The Act in no way codifies or extends the baseball exemption . . .”). *See* Tomlinson, *supra* note 20, at 284–89, for a more lengthy discussion of the Act's history.

⁷¹ Some have argued that Congress really did not accomplish anything by passing the Curt Flood Act because of the Supreme Court's decision in *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996), two years earlier, in which the Court held that the non-statutory labor exemption prevented NFL players from suing the league for an antitrust violation. Nathaniel Grow, *Reevaluating the Curt Flood Act of 1998*, 87 NEB. L. REV. 747, 749–51 (2009). *See infra* note 138 for background on the non-statutory labor exemption. In other words, although Congress has given MLB players the same rights as other professional athletes to sue for antitrust violations, those athletes are unable to use these rights so long as they remain in a collective bargaining relationship with their respective leagues. However, this point does not lessen the fact that the Flood Act did signal Congress's intent to get involved to limit baseball's exemption; nor does it matter whether the Flood Act is effective in analyzing whether the antitrust exemption applies.

⁷² *But see* Pete Toms, *LWIB: MLB's Anti-Trust Exemption and Franchise Relocation*, THE BIZ OF BASEBALL, Jan. 4, 2010,

focus of this section.

The judicial limits on the antitrust exemption and the Curt Flood Act go further in restricting the exemption than may be obvious at first. As discussed above, both the Supreme Court and Congress have weighed in to reduce the reach of the antitrust exemption, if only to a limited extent. Such limitations are important for those facets of baseball that are expressly no longer included in the exemption, most notably subjects of mandatory bargaining in labor negotiations with the players. But what is often overlooked is how MLB reacts to such judicial and legislative limits on its beloved exemption, specifically in the context of those issues that are still subject to the antitrust exemption, like franchise relocation.

Baseball's commissioner, Allan "Bud" Selig, believes a good reason to maintain franchise relocation under the exemption is to "vigilantly enforce strong policies prohibiting clubs from abandoning local communities which have supported them."⁷³ Selig focuses on baseball's best interests, as well as those of society at large, arguing that "[n]o legitimate public policy would be served by legislation that would force MLB to defend constantly the reasonableness of its efforts to promote franchise stability."⁷⁴

A. *The Similarity Among the Leagues*

It seems unclear why the public policy served by antitrust laws in general is less served in the context of professional baseball than other professional sports. Courts have declared such restraints on franchise movement illegal in other professional sports contexts, as explicated in the *Raiders*⁷⁵ cases and *In re Dewey Ranch Hockey*.⁷⁶ In *Raiders I*, the Ninth

http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=3897:lwi-b-mlbs-anti-trust-exemption-and-franchise-relocation-&catid=67:pete-toms&Itemid=155 (Providing an overview of arguments about the ambiguity relating to whether the exemption applies to franchise relocation). See also Andrew Zimbalist, *May the Best Team Win: Making Baseball Competitive*, THE BROOKINGS INSTITUTION, http://www.brookings.edu/articles/2003/fall_competitiveness_zimbalist.aspx (last visited March 6, 2011) ("Together the rulings cover only three of the eleven judicial circuits in the United States, leaving ample ambiguity in the status of the scope of the exemption in the remaining circuits.").

⁷³ Allan Selig, *Major League Baseball and Its Antitrust Exemption*, 4 SETON HALL J. SPORT L. 277, 280 (1994). Indeed, teams are so entrenched in the local consciousness that losing them could be compared to losing a relative. Thomas R. Hurst & Jeffrey M. McFarland, *The Effect of Repeal of the Baseball Antitrust Exemption on Franchise Relocations*, 8 DEPAUL-LCA J. ART & ENT. L. 263, 264 n.4 (1998) (citing CHARLES C. EUCHNER, *PLAYING THE FIELD: WHY SPORTS TEAMS MOVE AND CITIES FIGHT TO KEEP THEM* 5 (1993)).

⁷⁴ Selig, *supra* note 73, at 278.

⁷⁵ "Collectively, the *Raiders* opinions held that rule of reason analysis governed a

Circuit held that the NFL rule requiring three-quarters approval⁷⁷ of team owners to relocate a franchise (regardless of whether the new location would infringe upon another team's exclusive territory) was an unlawful restraint of trade under the Sherman Act.⁷⁸ When it comes to NHL relocation, an issue raised in *In re Dewey Ranch Hockey*, the NHL Constitution contains what appears to be a veto for franchise relocation, which may violate *Raiders I* as an unreasonable restraint on trade.⁷⁹

The operative question then is whether there is any difference between baseball and other professional sports that should allow MLB to control when and where its teams locate. Some commentators are quite outspoken on this question:

Quite simply, football and basketball have not only managed to survive while being subject to antitrust regulation, but both have grown tremendously, particularly relative to baseball, over the past few decades. There does not seem to be any material distinction between baseball and other sports that would explain why it would not be able to adapt and continue to thrive if subjected to federal antitrust law.”⁸⁰

But, the Supreme Court seemingly has gone in different directions on this question. On one hand, the Court has relied on Congressional inaction in removing the exemption. This would seem to suggest that the Court thinks there is a principle protecting the exemption that should only be challenged by a democratically accountable entity. On the other hand,

professional sports league's efforts to restrict franchise movement.” *National Basketball Association v. San Diego Clippers Basketball Club, Inc.*, 815 F.2d 562, 567 (9th Cir. 1987).

⁷⁶ 406 B.R. 30 (Bankr. D. Ariz. 2009).

⁷⁷ Originally, Rule 4.3 required unanimous vote of the clubs for a move into another team's home territory. *L.A. Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381, 1385 (9th Cir. 1984).

⁷⁸ *L.A. Memorial Coliseum Commission*, 726 F.2d 1381. See also *San Diego Clippers Basketball Club*, 815 F.2d at 567. Shortly after the Raiders won their suit to move the team from Oakland to Los Angeles, the San Diego Clippers challenged NBA franchise relocation rules and successfully defended its move to Los Angeles.

⁷⁹ See Ryan Gauthier, *In re Dewey Ranch Hockey*, 1 HARV. J. SPORTS & ENT. L. 181, 201 (2010). The NHL Constitution reads: “No other member of the League shall be permitted to play games (except regularly scheduled League games with the home club) in the home territory of a member without the latter member's consent. No franchise shall be granted for a home territory within the home territory of a member, without the written consent of such member.” CONSTITUTION OF THE NATIONAL HOCKEY LEAGUE, art. 4.3. It is important to note that these cases do not hold that franchise movement restrictions are invalid as a matter of law, but they may be so under antitrust analysis.

⁸⁰ Tomlinson, *supra* note 20, at 297.

given the *Flood* majority's contempt of the basis underlying *Federal Baseball*, it seems unlikely that the Court would continue to see a principled justification for separating MLB from all other major sports. In that case, the key element keeping the exemption alive for franchise relocation is *stare decisis*. This conclusion seems correct given that baseball's franchise relocation rules are not unique to baseball, even if they are part of the business of baseball.

B. The Free Market Analysis

Commissioner Selig's concern for the local communities that support baseball teams is appealing because the league does not want to alienate fans whose teams have left the local market, but his concerns are misplaced. Selig does not explain why MLB as a whole is in a better position than a local team to determine what will serve the public best, although he does admit that the League will block owners who want to relocate to increase profits. What is unclear is why allowing moves in a more or less free market would necessarily be a bad decision for the League, its teams, and local communities. In fact, preventing a move, and thus forcing a team to remain in an undesirable situation, would arguably promote the competitive imbalance that MLB has spent many years trying to remedy and would not serve the interest of the League or the public.⁸¹

If a franchise is a profit-conscious entity, and intuitively it should be in order to stay in business, it should relocate when there is a profit or benefit to the move outweighing any economic costs.⁸² One of the most important aspects of profit maximization for a franchise depends on the fan base. In this aspect, Selig's arguments regarding the fan base particularly are misguided. As one commentator has noted, "Concerning the fans, loyal fans don't get winners. Instead, fickle fans get winners because they express their demands at the box office."⁸³ In addition, "[c]ities that during some years appear apathetic toward baseball appear passionate in other years, depending on team performance."⁸⁴ So if a team has a weak fan base, it should be in a better position to relocate because "a team can have

⁸¹See ANDREW ZIMBALIST, MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND PUBLIC POLICY 35-53 (2003) (discussing competitive balance).

⁸² Craig A. Depken II, *Fan Loyalty in Professional Sports: An Extension to the National Football League*, 2 J. SPORTS ECON. 275, 282-83 (2001).

⁸³ Philip Porter, *Market Advantage as Rent: Do Professional Teams in Larger Markets Have a Competitive Advantage?*, in 1 ADVANCES IN THE ECONOMICS OF SPORT 237, 246 (Gerald W. Scully ed., 1992).

⁸⁴ANDREW ZIMBALIST, BASEBALL AND BILLIONS: A PROBING LOOKS INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME 145 (1992).

a lower quality and higher price combination than it would have been able to extract in its previous host city,"⁸⁵ which will in turn improve its profit margin. This financial success could eventually mean better players, a new stadium, better equipment, and so on, which would increase interest in baseball, seemingly in the game's best interests, meeting Selig's primary concern. After all, owners move a franchise (even if only motivated by profits) because of a determination that having a Major League franchise is more highly valued in the destination city than in the departure city.

Another factor that might contribute to a desire for relocation is the location's population, which is an important factor in determining franchise revenues.⁸⁶ Each win in the regular season increases revenue between \$65,000 and \$88,000 for every one million residents in the metropolitan area.⁸⁷ In addition, teams playing in new stadiums have higher franchise values on average than teams playing in older stadiums. A new facility increases a Major League franchise's value by about \$17 million⁸⁸ and local revenues by almost \$50 million if a team has a new stadium, which gives teams that relocate the ability to afford better players, coaches, and managers.⁸⁹ Admittedly, these revenue streams are not benefits exclusive to relocations, but new stadiums are often part of the package that lures a team to a new area.⁹⁰ Regardless, it is hard to see how a move to a more baseball-friendly city could be bad for baseball.

It is also important to note that an owner's desire to relocate his franchise may not be due entirely to a desire to increase profits.⁹¹ Nevertheless, this reality does not change the analysis in any meaningful

⁸⁵ Depken, *supra* note 82, at 282–83 (“Team owners typically know what their costs will be for a given season. Player salaries are, for the most part, determined before the beginning of the season. Furthermore, in general, stadium expenditures are also predetermined. Therefore, the most important random element of a team's profit relation is revenue. Although season ticket sales provide a predetermined level of revenue, the number of marginal ticket sales is the source of the randomness in team revenues. A team owner desires the strongest fan base possible to weather random influences on his or her team's competitiveness. Random impacts to a team's competitiveness, such as player injuries, opponent competitiveness, or overall team synergies, cause a team owner to prefer a fan base that attends games at a level greater than predicted by the quality-price relationship alone.”).

⁸⁶ Daniel Brown & Charles R. Link, *Population and Bandwagon Effects on Local Team Revenues in Major League Baseball*, 9 J. SPORTS ECON. 470, 483 (2008).

⁸⁷ *Id.*

⁸⁸ Donald L. Alexander & William Kern, *The Economic Determinants of Professional Sports Franchise Values*, 5 J. SPORTS ECON. 51, 59 (2004).

⁸⁹ Brown & Link, *supra* note 86, at 485.

⁹⁰ See ZIMBALIST, *supra* note 84, at 136–40 (discussing the relationship between relocation and stadiums).

⁹¹ Hurst & McFarland, *supra* note 73, at 293.

way. If, as Leonard Koppett has argued,⁹² owners are in the business more for social prestige than profit, it presumably would not be in an owner's best interest to move a franchise that the community still supports. Additionally, as mentioned above, team relocation may also be in the public interest since a team moves to a city "with a stronger demand for the game, and the abandoned city usually succeeds in attracting an expansion team."⁹³ Without an antitrust exemption, teams might be able to move into a market that would be the exclusive territory of another team. Thus, perhaps the League's desire to keep its antitrust exemption has to do more with mollifying the owners of certain teams in order to avoid competition in their exclusive territories.

Admittedly, there are times when an individual franchise owner's interest may conflict with the interests of the League and possibly the public.⁹⁴ Given this, and evidence that a "free market" relocation system generally serves the needs of owners, fans, and the League, the important question is whether those needs are better served with the exemption in place. The exemption would not do as well in promoting those interests that concern baseball when "fellow owners might disapprove of welfare-enhancing relocations, even when a nonintegrated competition organizer or an independent board of directors might see the move as in the league's overall interest."⁹⁵

Since Major League Baseball is "confident that it operates free from a

⁹²LEONARD KOPPETT, *SPORTS ILLUSION, SPORTS REALITY: A REPORTER'S VIEW OF SPORTS, JOURNALISM AND SOCIETY* 49–51 (1981). "[T]he most important true 'profit' to the franchise owner is an intangible: there are enormous ego rewards." *Id.* at 50.

⁹³ZIMBALIST, *supra* note 81, at 31.

⁹⁴Stephen F. Ross, *Antitrust, Professional Sports, and the Public Interest*, 4 J. SPORTS ECON. 318, 323 (2003) ("An owner with great personal wealth might seek to relocate a team to a small city, even though the most efficient allocation of franchises would preserve the team in a larger city where many more fans can attend the games or closely follow the team on television. An owner might seek a relocation that will disrupt effective team travel (a team in Tokyo); a relocation could affect traditional rivalries; it could prop up an inefficient owner when the best result would be to force a sale to new management who can operate the club profitably in its existing location; for newer leagues, the relocation could reflect free-riding on efforts by a franchise in another city to promote the entire sport; and a relocation could be inconsistent with a clear, long-term strategy of building credible commitments with localities that encourage local investment in return for assurances that the club will not move absent extraordinary circumstances.").

⁹⁵*Id.* ("Two prominent examples come to mind. A club might find itself in a nonviable situation that requires relocation, but the owner is a maverick who is aggressive and innovative thus annoying his fellow owners. Relocation might be refused that owner and then permitted when the franchise is sold. The other scenario would be where a league would be better off with multiple teams in a large media market or a new team in a market proximate to an existing club's home, but the owners reject the relocation to protect the existing franchise.").

credible threat of entry[, it] will artificially suppress the number of franchises that participate in its competition.”⁹⁶ “[W]ithout competitors, a single merchandiser has no incentive to innovate, so it offers consumers fewer options.”⁹⁷ This market position allows the League to “exploit local communities for monopoly rents in the stadium market.”⁹⁸ This exploitation goes even further in Leagues where the owners of the franchises and the organizers of the competition are one in the same, rather than the organizers being an independent body. In this case, “the number of franchises will be set even below the reduced number that would be established by an efficient monopolist independently providing competition-organizing services.”⁹⁹ Furthermore, owners are concerned

⁹⁶*Id.* at 326. See also MARK S. ROSENTRUB, MAJOR LEAGUE LOSERS: THE REAL COST OF SPORTS AND WHO’S PAYING FOR IT 74–75 (1997) (“Like any business, professional sports teams can increase their profits if they reduce or eliminate competition. Most businesses must accomplish this objective by producing the best possible product at the lowest price. The professional sports leagues, however, have been able to establish a protected environment and eliminate competition while maintaining the illusion of a free market. All the professional sports leagues are, in reality, cartels or private business associations insulated from the competitive pressures of a free market. These cartels control the number of teams that exist, allowing association members to extract subsidies and welfare from state and local governments that want one of the controlled franchises located within their borders. . . . The labor strife that has dominated each of the leagues in the last several years is really a battle for control of the cartels’ profits, with neither players nor owners desiring a market-based environment that would end the subsidies provided by governments.”).

⁹⁷ Derek Taylor, *Splitting the Uprights: How the Seventh Circuit’s American Needle Holding Created a Circuit Split and Exempted the NFL from Antitrust Scrutiny, and Why the Supreme Court Should Overturn the Seventh Circuit*, 6 DEPAUL J. SPORTS L. CONTEMP. PROBS. 143, 170 (2010).

⁹⁸ Ross, *supra* note 94, at 326. See also Zimbalist, *supra* note 72 (“Baseball’s monopoly allows it to restrict artificially the number of franchises and to dally with cities that have no team—to hold out to them the elusive promise of a franchise, pressuring existing host cities to build new stadiums or otherwise do MLB’s bidding. As a consequence, cities and states compete against each other, leading to exorbitant stadium-financing packages and sweetheart leases. Cities have attempted on their own to include lease provisions that deter team relocation and provide a more equitable sharing of the facility returns. But usually only the largest cities have sufficient bargaining leverage to accomplish even part of these aims.”).

⁹⁹ Ross, *supra* note 94, at 326. See also Sanghoo Bae & Jay Pil Choi, *The Optimal Number of Firms with an Application to Professional Sports Leagues*, 8 J. SPORTS ECON. 99, 107 (2007) (“We conclude that the semi-collusive cartel [which does not set the prices of the firms in the cartel] provides a smaller number of firms than the fully collusive cartel [which does set the prices]. Because the semi-collusive league cartel cannot control prices, it chooses a smaller number of firms to relax price competition. Second, the fully collusive cartel chooses a larger number of firms compared to the socially optimal one. The cartel’s choice is based on the difference between the surplus of the marginal consumer and the fixed cost. On the other hand, the social planner’s choice is based on the average surplus of consumers. This leads to the league’s overprovision in the variety of firms to maximize its

with the possible capital gain from the future sale of a franchise.¹⁰⁰ In order to maintain or increase the market value of the team, and thereby maximize the resale value, the owners will artificially suppress the number of teams.¹⁰¹

Additionally, while Selig claims that efforts to block franchise relocation are in the best interest of the game, in many cases attempts to block franchise relocations “appear to have been motivated more by personality conflicts than by a genuine desire to protect the interests of the host city or of the league in general.”¹⁰² Because of the possibility in this case that owners will act contrary to the public interest and the interest of baseball, “a rule that requires supermajority approval for franchise relocations would not be in the public interest.”¹⁰³

In a free market, however, there is a concern of teams fleeing small market cities for the bright lights of the big cities like New York and Los Angeles. Certainly, this might happen, as teams try to build on the success of already-established franchises in those cities. But, in fact, this will only happen to a certain point. “The market will react to the needs of the consumer and thus determine how much . . . is too much [I]t is better to err on the side of competition than on the side of monopoly.”¹⁰⁴ Certainly, the antitrust exemption cannot be “the only policy that is in the public interest”¹⁰⁵ or in the best interest of baseball.

C. *The Effect of the Exemption – Use It and Lose It*

In fact, for all the talk of how the antitrust exemption is needed to preserve franchise stability, it is unclear how much of an effect the exemption has on relocation.¹⁰⁶ The reality is that there have been more franchise relocations in MLB than the NFL since 1950.¹⁰⁷ In fact, since

joint profits. Therefore, the effects of any policy toward the number of franchises in the sports leagues should be evaluated with more caution because they depend crucially on the extent to which the leagues can control franchisees’ pricing behavior.”).

¹⁰⁰ Bruce I. Oppenheimer, *Comments on League Contraction in Baseball*, 4 J. SPORTS ECON. 393, 395–96 (2003).

¹⁰¹ *Id.*

¹⁰² Hurst & McFarland, *supra* note 73, at 266–67. This is evidenced by the attempts to block “maverick” owners like Charles Finley and Bill Veeck. *Id.* at 266.

¹⁰³ Ross, *supra* note 94, at 324.

¹⁰⁴ Gary Chester, Op-Ed. *Views of Sports; Question in Antitrust Case: Was Public Interest Served?*, N.Y. TIMES, Aug. 3, 1986, at S2.

¹⁰⁵ Selig, *supra* note 73, at 278.

¹⁰⁶ Tomlinson, *supra* note 20, at 295–96.

¹⁰⁷ There have been eight franchise relocations in the NFL, while MLB has totaled eleven. Mitchell Nathanson, *The Irrelevance of Baseball’s Antitrust Exemption: A Historical*

1958, MLB expands or relocates a team on average every eight years.¹⁰⁸ While the numbers themselves rebut Selig's contention that baseball uses its exemption to promote franchise stability, what also seems to be clear from the evidence is that MLB does not actually use its antitrust exemption for fear of losing it.¹⁰⁹

Without ever using the exemption in its negotiations, MLB is able to employ it as a sword against those to whom it still applies to force them into complying with MLB's wishes.¹¹⁰ This function vastly overstates the exemption's value, because MLB is unlikely to ever employ the exemption. The exemption retains the value of threatened use, but nothing more. In fact, in *Major League Baseball Properties, Inc. v. Salvino*,¹¹¹ a merchandise manufacturer sued MLB Properties, the licensing arm of MLB, for violating the Sherman Act. MLB Properties did not attempt to use its antitrust exemption as a basis for dismissing the case, but rather moved for judgment on the merits. In doing so, the MLB acknowledged that the presumed antitrust exemption in fact does not protect the licensing of their intellectual property.¹¹² The first time MLB uses the exemption to force an adverse party into an undesirable result may be the end of the exemption as the Court may step in and limit the exemption or even reverse *Federal Baseball* and its progeny. As the Court and Congress have already started to whittle down the exemption to a few select functions, there is reason to believe that, after *American Needle*, the Court will remove the exemption entirely.

V. AMERICAN NEEDLE

An analysis of *American Needle* must begin with the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*,¹¹³ a decision on which the Court relied in *American Needle*. The *Copperweld* Court held that a parent and its wholly owned subsidiary "are incapable of conspiring with each other for purposes of [Section] 1 of the Sherman Act."¹¹⁴ The

Review, 58 RUTGERS L. REV. 1, 24 (2005).

¹⁰⁸ Phil Rogers, *Relocating a Team to Portland Makes Sense*, ESPN.COM (Jan. 12, 2007), http://sports.espn.go.com/mlb/hotstove06/columns/story?columnist=rogers_phil&id=2727901.

¹⁰⁹ Tomlinson, *supra* note 20, at 295. See also Nathanson, *supra* note 107, at 25–43 (giving comprehensive accounts of some of baseball's failed attempts to block relocation).

¹¹⁰ See, e.g., *Salerno v. Am. League of Prof'l Baseball Clubs*, 429 F.2d 1003 (2d Cir. 1970) (upholding MLB's antitrust exemption in its dealings with umpires). As a result, MLB has been able to impose more favorable terms on umpires in negotiations.

¹¹¹ 542 F.3d 290 (2d Cir. 2008).

¹¹² See Grow, *supra* note 9, at 620–622.

¹¹³ 467 U.S. 752 (1984).

¹¹⁴ *Id.* at 777.

Court came to this conclusion due to a parent and a wholly owned subsidiary having “a complete unity of interest [whose] objectives are common, not disparate[;] their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one.”¹¹⁵

On May 24, 2010, the Supreme Court held that, in their intellectual property licensing, NFL teams acting collectively cannot be considered a “single entity” and are therefore not immune from antitrust scrutiny.¹¹⁶ The unanimous opinion, authored by Justice Stevens, overturned decisions by a district court and the Seventh Circuit that had enabled the NFL to escape potential antitrust liability for its granting Reebok an exclusive merchandising license that prevented American Needle from making NFL-branded headwear. The case has been remanded and the NFL will be subject to antitrust scrutiny on the collective action of its teams.¹¹⁷

A. District Court Opinion

American Needle, Inc. is a headwear designer, manufacturer, and seller¹¹⁸ that manufactured and sold NFL team logo headwear for over twenty years prior to 2000. In December 2000, the NFL and its member teams authorized NFL Properties to grant exclusive intellectual property licenses to different vendors.¹¹⁹ NFL Properties subsequently granted Reebok International Ltd. a ten-year exclusive license to manufacture NFL branded uniforms, fitness equipment, sideline apparel, and headwear. As a result, American Needle lost its ability to produce NFL headwear.¹²⁰

In response, American Needle sued the NFL, its member teams, NFL Properties, and Reebok, asserting, among other things, that the exclusive license was an antitrust violation under Section 1 of the Sherman Act.¹²¹ Before a federal district court in the Northern District of Illinois, the NFL asserted that in licensing intellectual property, the teams were promoting the league and functioning as a “single entity” that should be immune from antitrust liability since a single entity cannot make agreements with itself.¹²²

¹¹⁵*Id.* at 771.

¹¹⁶ *Am. Needle Inc. v. Nat’l Football League*, 130 S. Ct. 2201, 2217 (2010).

¹¹⁷*Id.*

¹¹⁸ AMERICAN NEEDLE, <http://shop.americanneedle.com/pages/about> (last visited March 6, 2011).

¹¹⁹ *Am. Needle, Inc. v. New Orleans La. Saints*, 496 F. Supp. 2d 941, 942 (N.D. Ill. 2007). NFL Properties is the licensing agent of the NFL and its teams.

¹²⁰*Id.*

¹²¹*Id.*

¹²² Memorandum in Support of the NFL Defendants’ Motion for Summary Judgment (Single Entity) at 7, *American Needle, Inc. v. New Orleans Louisiana Saints*, 496 F.Supp. 2d 941(N.D. Ill. 2007) (No. 1:04CV07806), 2005 WL 6087988.

The court had to determine whether the 32 NFL teams could create and be bound by the decisions of a common actor, NFL Properties, regarding their intellectual property rights.¹²³ In response to the NFL's motion for summary judgment, the district court held that the teams were acting as a single entity because "in that facet of their operations they have so integrated their operations" that the teams had gone beyond the level of a joint venture acting cooperatively.¹²⁴ Therefore, the NFL was immune from antitrust liability and the court granted summary judgment to the league and its member teams.

B. Seventh Circuit Appeal

After losing at the district court, American Needle appealed to the Seventh Circuit.¹²⁵ The court reviewed the motion for summary judgment *de novo* and identified the primary issue as whether "the conduct in question deprives the marketplace of the independent sources of economic control that competition assumes."¹²⁶ The Seventh Circuit affirmed the district court grant of summary judgment.¹²⁷ The court reasoned that NFL teams share a single source of economic interest in creating NFL football because actual games can happen solely by the collective action of the individual teams.¹²⁸ The court noted that it could find no case law supporting the proposition that a sports league cannot be a single entity.¹²⁹ The court concluded that the NFL teams share a common economic interest in promoting the game of football and act as a single entity in licensing activities that further that objective.¹³⁰ The court noted that the NFL has acted as a single source of economic power in licensing since 1963¹³¹ and found that nothing in Section 1 of the Sherman Antitrust Act "prohibits the NFL teams from cooperating so the league can compete against other entertainment providers."¹³² Accordingly, the Seventh Circuit held that the NFL, as a single entity for licensing purposes, was immune from Sherman Act Section 1 liability and was entitled to summary judgment.

¹²³*Am. Needle*, 496 F. Supp. 2d at 942–43.

¹²⁴*Id.* at 943.

¹²⁵*Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736, 740 (7th Cir. 2008).

¹²⁶*Id.* at 742(citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769–71 (1984)).

¹²⁷*Id.* at 744.

¹²⁸*Id.* at 743.

¹²⁹*Id.* at 742.

¹³⁰*Id.* at 743.

¹³¹*Id.* at 744.

¹³²*Id.*

C. Appeal to the Supreme Court of the United States

American Needle subsequently petitioned for,¹³³ and was granted,¹³⁴ a writ of certiorari from the Supreme Court. American Needle not only sought to overturn the lower courts' rulings but also to have the Court expand beyond licensing to find that all joint conduct among the NFL's teams should be subject to rule of reason analysis and antitrust scrutiny.¹³⁵ The NFL supported American Needle's petition.¹³⁶ The league sought to affirm and expand the Seventh Circuit's holding and hoped the Court would hold that the teams were acting as a single entity in licensing and all other facets of the production and promotion of NFL football, and thus protect the league from antitrust liability in all business dealings.¹³⁷ It should be noted that as a single entity immune from Sherman Act antitrust scrutiny, the NFL would no longer have to rely on the nonstatutory labor exemption¹³⁸ that applies to the NFL's collective bargaining relationship with the NFL Players Association.¹³⁹ That nonstatutory labor exemption allows the NFL to escape antitrust scrutiny with regard to many of the conditions imposed on players (such as a salary cap), but it requires that the NFL reach agreements with the NFL Players Association ("NFLPA") to obtain that protection. A broad grant of single entity status would eliminate the need for the nonstatutory labor exemption and would have given the NFL leverage in dealings with the NFLPA.

The NBA and the NHL would also have benefited from a determination that sports leagues can be single entities, and filed briefs in support of the

¹³³ Am. Needle Petition for a Writ of Certiorari, 130 S. Ct. 2201 (2010) (No. 08-661) 2008 WL 4948434.

¹³⁴ Am. Needle, Inc. v. Nat'l Football League, 129 S.Ct. 2859 (Jun. 29, 2009).

¹³⁵ See Brief for Petitioner on Writ of Cert., 2009 WL 3004479 (2009) (No. 08-661). Rule of reason analysis began in 1911 with *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911). Allegedly anticompetitive conduct has only been deemed in violation of antitrust laws if the conduct unreasonably restrains trade. Reasonable restraints on trade are allowed.

¹³⁶ Brief for Respondents on Petition for Writ of Cert. at 4, 130 S. Ct. 2201 (2010) (No. 08-661).

¹³⁷ *Id.*

¹³⁸ The non-statutory labor exemption first came about in two Supreme Court decisions handed down June. 7, 1965: *United Mine Workers v. Pennington*, 381 U.S. 657, and *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676. These two plurality opinions set out the basic structure of the non-statutory labor exemption; namely that where the issues negotiated were mandatory subjects of collective bargaining, the agreements are protected from federal antitrust scrutiny. *Jewel Tea Co.* 381 U.S. at 690.

¹³⁹ See *Brown v. Pro Football*, 518 U.S. 231 (1996); *Powell v. NFL*, 930 F.2d. 1293 (8th Cir. 1989).

NFL's position.¹⁴⁰ Unlike the other major sports leagues, MLB already has an antitrust exemption.¹⁴¹

The Court, rejecting the broad positions of both American Needle and the NFL, reached a narrow decision to overturn the Seventh Circuit's determination that the NFL is a single entity for licensing purposes. The Court stated that any inquiry into joint action by the NFL must focus on whether the NFL is "capable of engaging in a 'contract, combination..., or conspiracy' as defined by § 1 of the Sherman Act."¹⁴² The key question for the Court was whether the alleged joint action was between "separate economic actors pursuing separate economic interests[]" such that the agreement 'deprive[d] the marketplace of independent centers of decision-making,' and therefore of 'diversity of entrepreneurial interests.'¹⁴³ Declining to take a broader look at the NFL, the Court examined how the 32 NFL teams relate to one another solely in the context of intellectual property.¹⁴⁴ The Court determined that each NFL team is "a substantial, independently owned, and independently managed business" with potentially different business objectives.¹⁴⁵ It remarked that while "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."¹⁴⁶

The Court essentially found that although NFL teams have a collective interest in promoting the game, when it comes to licensing intellectual property, each team has unique objectives. Despite the fact that the teams have been working together in this manner for a long time, "a history of concerted activity does not immunize conduct from § 1 scrutiny."¹⁴⁷ The Court stated that an "[a]bsence of actual competition may simply be a manifestation of the anticompetitive agreement itself."¹⁴⁸ Furthermore, the

¹⁴⁰Brief of Amici Curiae Nat'l Basketball Ass'n and Nat'l Basketball Ass'n Props. in Support of Respondents at 3, *Am. Needle Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010) (No. 08-661); Brief for Amicus Curiae the Nat'l Hockey League in Support of Respondents at 4, *Am. Needle Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010) (No. 08-661).

¹⁴¹*See* Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922) (holding that professional baseball is exempt from federal antitrust law).

¹⁴²*Am. Needle, Inc. v. Nat'l Football League*, 130 S.Ct. 2201, 2208 (2010).

¹⁴³*Id.* at 2212 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984); *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 57(1st Cir. 2002)).

¹⁴⁴*Id.* at 2213.

¹⁴⁵*Id.* at 2212.

¹⁴⁶*Id.* at 2213.

¹⁴⁷*Id.*

¹⁴⁸*Id.* at 2213–14 (quoting *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1149 (9th Cir. 2003)).

Court held that “[t]he justification for cooperation is not relevant to whether that cooperation is concerted or independent action.”¹⁴⁹ As Justice Stevens opined, “a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to [antitrust scrutiny].”¹⁵⁰

Therefore, the Supreme Court overruled the Seventh Circuit, holding that the NFL was not a single entity in its merchandising capacity.¹⁵¹ As a result, summary judgment was inappropriate and the case was remanded for a trial on the merits of American Needle’s antitrust violation claim. Although the Court chose not to address whether the NFL’s actions would survive a rule of reason analysis, its rhetoric implied a view that much of the NFL’s conduct should not constitute an antitrust violation. For example, the Court observed that there are areas where the teams can and must work in concert, such in as scheduling games;¹⁵² collective action likely will survive rule of reason analysis where “restraints on competition are essential if the product is to be available at all.”¹⁵³ The Court suggested that the NFL may ultimately win on the merits, but it held that “the conduct at issue in this case is still concerted activity under the Sherman Act that is subject to § 1 analysis.”¹⁵⁴ On remand, the court will have to engage in a full rule of reason analysis in order to determine whether the NFL’s exclusive license with Reebok constituted an antitrust violation.

While American Needle prevailed in defeating the NFL’s motion for summary judgment, the ultimate outcome of this case is still yet to be determined. The Supreme Court decision creates the potential for additional antitrust challenges to the NFL, but the extent to which this decision will impact the NFL, and other professional sports leagues, outside the realm of intellectual property licensing is uncertain.

VI. ADJUSTING THE STREAM: ON APPLYING AMERICAN NEEDLE TO FUTURE CASES AND REMOVING THE EXEMPTION

Some would consider sports leagues single entities, and therefore

¹⁴⁹*Id.* at 2214. As the Court points out in a footnote to the cited passage, “necessity of cooperation is a factor relevant to whether the agreement is subject to the Rule of Reason. See *NCAA*, 468 U.S. at 101, 104 S.Ct. 2948 (holding that NCAA restrictions on televising college football games are subject to Rule of Reason analysis for the ‘critical’ reason that ‘horizontal restraints on competition are essential if the product is to be available at all’).”

¹⁵⁰*Id.*

¹⁵¹*Id.* at 2217.

¹⁵²*Id.* at 2216.

¹⁵³*Id.* (quoting *NCAA*, 468 U.S. at 101).

¹⁵⁴*Id.*

incapable of antitrust attack, because, while they compete on the field, they do not compete economically.¹⁵⁵ In fact, Major League Soccer (“MLS”) was held to be a single entity in 2002.¹⁵⁶ The competition between the teams, then, is just incident to the complete package the leagues present to the consumers. It is true that, in order to survive, professional sports teams have to collaborate on some aspects of their business, such as the rules of the game, but must remain independent in other aspects, such as remaining competitive on the field and in their pursuit for the best players.¹⁵⁷ This distinction requires an understanding on the part of all parties that baseball must not be subject to antitrust laws on all fronts.¹⁵⁸ This argument is intellectually compelling because it seems to reflect what fans see every day on television, but it ultimately misses the mark. Teams compete for players, coaches, fans, sponsors, and possibly even things like real estate if the team is moving into an already occupied territory.¹⁵⁹ Indeed, “granting a sports league single-entity status would inappropriately provide a blanket exemption from the application of [Section] 1 [of the Sherman Act].”¹⁶⁰

If the Court would have accepted the NFL’s single entity defense and expanded its reach to all aspects of the NFL’s business, it could have affected MLB as well, even though baseball already has an antitrust exemption. As discussed above, the exemption does not apply to labor negotiations with the union because of the Flood Act. However, if MLB could claim to be a single entity, it would not have to bargain with the players’ association in order to secure the shelter of the non-statutory labor exemption. MLB could theoretically unilaterally impose terms on the players with no repercussions other than the players going on strike. It could have also had effects on the steroid scandal that has plagued the

¹⁵⁵ *San Francisco Seals, Ltd. v. Nat’l Hockey League*, 379 F. Supp. 966, 969 (C.D. Cal. 1974).

¹⁵⁶ *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002). “MLS has, to say the least, a unique structure, even for a sports league. MLS retains significant centralized control over both league and individual team operations. MLS owns all of the teams that play in the league (a total of 12 prior to the start of 2002), as well as all intellectual property rights, tickets, supplied equipment, and broadcast rights. MLS sets the teams’ schedules; negotiates all stadium leases and assumes all related liabilities; pays the salaries of referees and other league personnel; and supplies certain equipment.” *Id.* at 53. The First Circuit held that this unique structure was sufficient for MLS to be considered a single entity.

¹⁵⁷ Michael A. McCann, *Justice Sonia Sotomayor and the Relationship Between Leagues and Players: Insights and Implications*, 42 CONN. L. REV. 901, 919 (2010).

¹⁵⁸ As discussed below, this does not require baseball to have an antitrust exemption. Rather, antitrust laws may not apply based on a rule of reason analysis.

¹⁵⁹ Hurst, *supra* note 73, at 290.

¹⁶⁰ *Id.* at 292–93.

League over the last decade.¹⁶¹

Nonetheless, while the Court refused to accept the NFL's single entity defense, *American Needle* does more than preserve the status quo.¹⁶² In the context of professional baseball, it is probably most important as a signal of the Court's willingness to address antitrust issues in professional sports, and to do so with a heavy handedness that has not been seen since *Federal Baseball*. *American Needle* has made the Court's position on antitrust in professional sports more clear than it has been at any time since *Federal Baseball*. After all, *American Needle* is the "first decision in some time that effectively broadens, rather than reduces, the scope of the Sherman Act."¹⁶³ As mentioned above, courts were attempting to draw distinctions between things that were part and parcel of baseball and those that were just incident to the game.¹⁶⁴ Congress really gutted this strategy and removed any sense of a principled approach in applying the exemption by passing the Flood Act.

A. Removing the Exemption

American Needle seems to be the next logical step in the right direction after *Flood* and the Flood Act.¹⁶⁵ The court is now willing to hold unanimously that a major sports league, the NFL, is not exempt from antitrust laws and, as a result, their actions must be analyzed under the rule of reason.

As the Court has progressed thus far by monotonically decreasing the breadth of the exemption, it is logical to assume that the Court will continue along this path in the future, and it is right to do so. Given the exemption's already anemic existence and its lack of principled application, the Court

¹⁶¹ Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 772–74 (2010).

¹⁶² Cf. Wm. David Cornwell, Sr., *A Hail Mary Falls Incomplete: The American Needle Decision's Impact on Collective Bargaining in the NFL*, THE HUFFINGTON POST, May 24, 2010, http://www.huffingtonpost.com/wm-david-cornwell-sr/a-hail-mary-falls-incompl_b_587770.html ("It is rare that a Supreme Court decision is considered a 'landmark' decision when it does little more than preserve the status quo, but today's decision may have its greatest impact because it did not alter the playing field between the NFL and the NFLPA.").

¹⁶³ Judd Stone & Joshua D. Wright, *Antitrust Formalism is Dead! Long Live Antitrust Formalism!: Some Implications of American Needle v. NFL*, 2009-2010 CATO SUP. CT. REV. 369, 395 (2010).

¹⁶⁴ See *supra* text accompanying notes 62–63.

¹⁶⁵ *American Needle* itself does not deal with MLB's antitrust exemption, and it does not hold that the NFL violated antitrust laws. However, the Court did hold that the NFL is subject to the rule of reason analysis under the antitrust laws when it comes to licensing merchandise. 130 S.Ct at 2207.

should take the next opportunity to end the antitrust exemption.¹⁶⁶ MLB is no longer the league it was in 1922 when *Federal Baseball* was decided. It is not even the same league that it was in 1972 when *Flood* was decided. There is no principled way to apply the exemption based on *stare decisis* because either *Federal Baseball* was wrongly decided in the first instance, or the facts of baseball have changed so much that the assumptions underlying that decision are no longer applicable. In addition, the Court has already admitted, in *Flood*, that baseball is engaged in interstate commerce.¹⁶⁷

When analyzing whether to remove baseball's antitrust exemption, more than the needs of the owners, players, or the league must be analyzed. Antitrust law is concerned with the market, and hence, the needs of the consumers.¹⁶⁸ The final decision, then, should be more about protecting the rights of another stakeholder, the fans of baseball.¹⁶⁹ "The laws are concerned with efficiency: whether the market activity enhances competition, which is ultimately good for the consumer, or hurts competition, which injures the consumer."¹⁷⁰

As mentioned above, some anti-competitive restraints are ultimately good for the consumer, like the agreement among Major League teams upon the rules of the game, which is central to the business of giving baseball exhibitions. League rules define everything from runs and outs to the equipment used during games.¹⁷¹ Without agreement upon rules, two teams could not play a game of baseball. Such a lack of agreement would obviously be fatal to the game, so it is not something that should logically fall outside an antitrust exemption. However, other leagues have fared well in this regard absent an exemption. It is fair to say that agreement on League rules would be upheld under a rule of reason analysis. The agreement is necessary to promote competition, and any anti-competitive effects of agreement on rules seem to be negligible.

However, when it comes to licensing, MLB has refused to use its

¹⁶⁶ Justice B. Hill, *Loss for NFL Should Lead to Loss for MLB, Too*, REALCLEARSPORTS.COM, May, 26, 2010, http://www.realclearsports.com/blognetwork/justice_is_served/2010/05/loss-for-nfl-should-lead-to-loss-for-mlb-too.html ("Pro baseball has no more right to an antitrust exemption than Exxon-Mobil, Microsoft or Wal-mart, and the public should question why it still does. The league should operate under the same business principles and antitrust laws as other professional sports.").

¹⁶⁷ *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

¹⁶⁸ Chester, *supra* note 104.

¹⁶⁹ Larry C. Smith, *Beyond Peanuts and Cracker Jack: The Implications of Lifting Baseball's Antitrust Exemption*, 67 U. COLO. L. REV. 113, 137 (1996).

¹⁷⁰ Chester, *supra* note 104.

¹⁷¹ Grow, *supra* note 9, at 605–06.

exemption presumably because of the assumption that it does not apply to such activities.¹⁷² By extension, since baseball does not view its licensing activities as eligible for the exemption, it is not a stretch to say that baseball views itself no differently than the NFL on this matter. As such, if a case similar to *American Needle*, but against MLB, were to come before the Supreme Court, the Court would be correct to refuse to apply the exemption in the case, since there is nothing unique about baseball's licensing activities, and baseball has admitted as much by refusing to use its exemption. In this case, the Court would be relying on nothing more than *stare decisis*,¹⁷³ more specifically its decision in *American Needle*, in holding that MLB is not a single entity for purposes of licensing. As discussed above, such a defense of the exemption is untenable. If MLB were brazen enough to raise the exemption as a defense to such a suit in the Supreme Court, the Court would be right to strike it down and should take the opportunity to remove the exemption entirely.

B. Effects of Removing the Exemption

If the Court were to repeal baseball's antitrust exemption, there may be a few interesting results in the two areas that seem to be most obviously under the purview of the exemption, the reserve clause as applied to minor league players and franchise relocation. The reserve clause as then conceived was upheld in *Flood*. However, that reserve clause was effectively struck down in the Messersmith arbitration, when arbitrator Peter Seitz determined that the reserve clause's one-year language meant one year.¹⁷⁴ The original reserve clause allowed one team to keep a player under contract indefinitely. The current, collectively-bargained clause allows a team to keep a player under contract for six years, during which time the player cannot sell his services to the highest bidder.¹⁷⁵ Of course, since this version of the reserve clause is collectively-bargained between the

¹⁷²See *supra* notes 111–112 and accompanying text.

¹⁷³As discussed above, the Court has had no qualms using *stare decisis* as a rationale to continue the exemption.

¹⁷⁴David Greenberg, *Baseball's Con Game: How Did America's Pastime Get an Antitrust Exemption?*, SLATE, July 19, 2002, <http://www.slate.com/id/2068290/> (“In 1975, pitcher Andy Messersmith's contract with the Los Angeles Dodgers expired, and although the Dodgers and Major League Baseball insisted the Dodgers alone had the option to re-sign him, Messersmith claimed otherwise. The parties took the case before an arbitrator hired by the owners, Peter Seitz, who ruled for Messersmith. (Seitz was immediately fired.) The owners lost an appeal in federal court, and thereafter players enjoyed a limited right to free agency.”).

¹⁷⁵Adam Fleisher, *What Moneyball Missed*, THE AMERICAN, Apr. 3, 2009, <http://www.american.com/archive/2009/april-2009/what-moneyball-missed>.

league and MLBPA,¹⁷⁶ it evades antitrust scrutiny under the non-statutory labor exemption, so antitrust scrutiny would not affect it.¹⁷⁷

The minor league system, however, would be vulnerable to attack absent the exemption. It is unclear whether the current minor league system would survive if the court repealed the antitrust exemption.¹⁷⁸ In fact, the system may never be challenged in the first place because minor league players “want to ingratiate themselves with, not alienate themselves from, MLB.”¹⁷⁹ If a minor league ballplayer were to sue, some commentators argue that baseball may actually win because the minor league reserve clause allows “teams to draft and develop their own young minor-league talent [which] gives small and mid-market teams a better chance to compete with large-market teams with much larger payrolls, and competitive balance benefits the league and the public as a whole.”¹⁸⁰

If a suit were to succeed, major league teams would probably have to sever their ties with the minor leagues, but this consequence would not necessarily lead to the disappearance of the minor leagues.¹⁸¹ Instead, MLB clubs would use the draft to take players from the minor leagues, rather than high schools or colleges, which would increase competitive balance among major league teams because the players would be more developed and easier to scout, resulting in a proven talent pool from which MLB could draw.¹⁸² Allowing players to develop in college and in the minor leagues provides owners a costless way to assess talent before taking on any expense. While Major League owners would have to spend more on those players, they would save on the salaries and expenses of players that will never contribute to their success in the Major League. As the testimony of former Major and Minor League player Dan Peltier illustrates, “only one out of every ten players drafted even gets one day in the majors. Only one out of every hundred actually has a career in the majors.”¹⁸³ Owners are spending a great deal on players who languish in these leagues when they could be spending it on players and teams that will contribute to the league and community in which they live and work. Regardless, Major League teams would no longer be able to draft players and keep them on a minor

¹⁷⁶ Major League Baseball Collective Bargaining Agreement 2007–2011, Article XX – Reserve System, 69.

¹⁷⁷ See *supra* note 138.

¹⁷⁸ Grow, *supra* note 9, at 610.

¹⁷⁹ ZIMBALIST, *supra* note 81, at 26.

¹⁸⁰ Tomlinson, *supra* note 20, at 296–97.

¹⁸¹ ZIMBALIST, *supra* note 81, at 26.

¹⁸² *Id.* at 26–27.

¹⁸³ *Major League Baseball Antitrust Reform: Hearing Before the Subcomm. on the Judiciary*, 105th Cong. 14 (1997) (statement of Dan Peltier).

league team with no chance of changing teams or earning more money.

Were the Supreme Court to remove baseball's immunity, however, it would likely be felt most in franchise relocation. Without the exemption, it would be more difficult for MLB to prevent owners from moving their franchises. If MLB tried to restrain a franchise's movement, there is virtually no doubt that the club's owner would sue MLB for unreasonable restraint of trade.¹⁸⁴ MLB would then probably be subject to rule of reason analysis. MLB could theoretically come out victorious by proving that, on balance, it is better for competition within baseball that baseball keeps the team from relocating. As argued above, the League should have reason to worry when it comes to losing its exemption in this respect because of the numerous anti-competitive arguments owners could make about the exemption.

There would also be the likelihood that rival leagues would develop in an attempt to draw players and fans from MLB. Of course, this competition may not be bad for baseball. The NFL has faced competition from no less than eight leagues over the past ninety years.¹⁸⁵ This competition includes the United Football League ("UFL"), which began play in 2009, after founder Bill Hambrecht determined it "was illogical that NFL teams would be leaving two of the largest and best growth markets in the country."¹⁸⁶ From a marketing angle, he knew there was room for more football teams."¹⁸⁷ The UFL then fills the void that the NFL has refused to fill in the market for football.

As mentioned above, it is important to remember that the removal of baseball's exemption is not fatal to any league action, since a plaintiff would have to prove an anti-competitive effect under a rule of reason analysis, which is generally the standard used to judge sports leagues' conduct.¹⁸⁸ Under a rule of reason analysis, courts weigh the anti-competitive effect within the market against pro-competitive benefits of the restraint. If the pro-competitive benefits are significant enough to outweigh anti-competitive effects, the plaintiffs have the opportunity to show that the

¹⁸⁴ This suit would likely be nearly identical to the *Raiders* cases described earlier, *supra* notes 75–78 and accompanying text.

¹⁸⁵ See Smith, *supra* note 169, at 139 n.167.

¹⁸⁶ The Los Angeles Rams' move to St. Louis and the Houston Oilers' move to Nashville.

¹⁸⁷ ABOUT US, UFL, <http://www.ufl-football.com/about-us> (last visited March 29, 2011).

¹⁸⁸ Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 719 (6th Cir. 2003) (quoting *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998)) ("[C]ourts consistently have analyzed challenged conduct under the rule of reason when dealing with an industry in which some horizontal restraints are necessary for the availability of a product' such as sports leagues.").

legitimate objectives can be achieved in a less restrictive manner.¹⁸⁹ This “least restrictive alternative” test is used in order to determine whether challenged conduct is inherently pro- or anti-competitive.¹⁹⁰ If there is a less restrictive restraint than the one used, there is a presumption that the intent of the restraint is not inherently pro-competitive.¹⁹¹ Proof of less restrictive alternatives can be used “in determining the net competitive effects of a restraint . . . where the economic impact is difficult to determine.”¹⁹²

In conclusion, the Court waiting for Congress to act to remove the exemption would be a bad policy choice.¹⁹³ Leagues are “well-positioned to exert disproportionate influence on congressional decisionmaking.”¹⁹⁴ This ability to lobby is not available in the federal courts, where any dispute over the antitrust laws “would presumably be resolved on the merits.”¹⁹⁵ Congress can, and as discussed above, occasionally does, provide antitrust immunity. But while “courts have struggled to assess potential exemptions for professional sports leagues,”¹⁹⁶ it is not clear that “Congress, with its institutional advantages, has established a more capable record.”¹⁹⁷ There is no way to tell whether Congress would support a removal of the exemption at any time. Party affiliation, or ideological leaning in the case of the Supreme Court, is not an accurate predictor of whether a congressional representative or justice will support the repeal of the exemption.¹⁹⁸

VII. CONCLUSION

While the *American Needle* decision is not groundbreaking for the way it treats NFL teams as separate economic entities, it is important as an indication that the Court is more willing than ever to look past the historical

¹⁸⁹ Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 469 (6th Cir. 2005).

¹⁹⁰ 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, 909 (2009).

¹⁹¹ *Id.* at 912–13.

¹⁹² *Id.* at 913–14. See also *id.* at 914–15 for a good example of application of this rule.

¹⁹³ See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 450 (2005) (“The legislative process is untidy and opaque; it gives those with intense and even outlying preferences numerous opportunities to slow or stop legislation and to insist upon compromise as the price of assent.”).

¹⁹⁴ McCann, *supra* note 161, at 780.

¹⁹⁵ *Id.* at 781.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Smith, *supra* note 169, at 133.

aspects of sports leagues as putting forth a single product for consumption. Furthermore, MLB has refused to use its antitrust exemption for fear of losing it, which had rendered it effectively useless. In addition, the Court's argument that Congress should be the body to remove the exemption is meritless. Congress did not generate the exemption, nor has it ever acted broadly on baseball's antitrust exemption. For this reason, it should be the province of the Supreme Court to exercise its discretion in refusing to follow unworkable precedent and ultimately to remove the antitrust exemption that it created nearly ninety years ago. Since the antitrust exemption has been rendered effectively useless and the public interest is better served by free market competition, the Supreme Court should use the next available case that puts forth a reasonable question of whether the exemption applies to remove baseball's antitrust exemption. To let a judicially created antitrust exemption stand based on long outdated facts is an affront, not only to the justice system, but also to true fans of sport everywhere who believe contests should be settled through true competition on the field or court, not in the courtroom.