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Is This the Bottom of the Ninth for Baseball's Antitrust Exemption - A Proposed Removal of the Exemption and Analysis of Player Restraints in an Exemption-Free Environment

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IS THIS THE BOTTOM OF THE NINTH FOR BASEBALL'S ANTITRUST EXEMPTION? A PROPOSED REMOVAL OF THE EXEMPTION AND ANALYSIS OF PLAYER RESTRAINTS IN AN EXEMPTION-FREE ENVIRONMENT

I. INTRODUCTION

"Baseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage. The game is on higher ground; it behooves every one to keep it there."[1] Baseball occupies a special place in American society. Founded by Abner Doubleday in Cooperstown, New York, in 1839, the game of baseball has evolved and engrossed the hearts and souls of every American. The game is an integral part of our heritage.

With every new season, baseball fills the hearts and dreams of millions of fans. Spring training camps open and ballplayers migrate to the warmer climates of Florida and Arizona for the annual ritual of spring training. It is the first harbinger of spring. Baseball then keeps the fans' hearts and hopes riveted

[1] Flood v. Kuhn, 309 F. Supp. 793, 797 (S.D. N.Y. 1970). Judge Cooper also stated that "[M]ajor league professional baseball is avidly followed by millions of fans, looked upon with fervor and pride and provides a special source of inspiration and competitive team spirit especially for the young. Baseball's status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody's business." *Id.*

to the grand old game until the final pitch of the World Series in October. Due to a labor dispute of gigantic proportions in the summer of 1994, the owners were forced to cancel the World Series for the first time since 1904.[2] This strike did something that two world wars and one massive earthquake could not. It forced the cancellation of the fall classic. This labor dispute resulted in the players walking out and beginning their strike on August 12, 1994, in protest of the owners' proposed salary cap.

This labor dispute and the subsequent players' strike cost both the owners and the players tremendous amounts of money. The owners reportedly missed out on an estimated $500 to $600 million in potential revenues, while the players lost about $230 million in would-be income.[3] The biggest losers of the strike, however, were the fans and the game itself. The fans had one of the most exciting seasons in recent memory stripped from them in the midst of several pennant races and the possibility that several long standing records could fall.[4] The baseball strike was especially painful and frustrating for the fans of the Cleveland Indians, who were in contention for their first division title since 1954.

Baseball has also enjoyed a special place in the hearts of Supreme Court Justices since 1922, when Justice Oliver Wendell Holmes stated, in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, that baseball was not interstate commerce, and therefore, not subject to the antitrust laws created under the Sherman Act.[5] The Supreme Court later upheld this special exemption in two subsequent decisions.[6] Although *Toolson v. New York Yankees* and *Flood v. Kuhn* have questioned the correctness of *Federal Baseball*, baseball's exemption from the antitrust laws has survived for seventy-four years.

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[2] 141 CONG. REC. 176 S15, 176 (daily ed. Jan. 4, 1995).

[3] Mark Maske, *Baseball Stops Playing Games but It's Business as Usual*, WASHINGTON POST, Jan. 8, 1995, at D4. Major League owners claim that an industry which turned a $50 million profit in 1993 was projecting a $47 million loss in an uninterrupted 1994 season. *Id.* However, the season was interrupted on August 11, 1994, and later cancelled altogether, due to the labor dispute.

[4] Ken Griffey Jr. of the Seattle Mariners and Matt Williams of the San Francisco Giants were in pursuit of Roger Maris' home run record (61) that was set in 1961. Tony Gwynn of the San Diego Padres was attempting to be the first player to hit over .400 for an entire season since Ted Williams accomplished the feat in 1941.

[5] 259 U.S. 200 (1922).

[6] Toolson v. New York Yankees, 346 U.S. 356 (1953); Flood v. Kuhn, 407 U.S. 258 (1972). The *Flood* opinion begins by demonstrating Justice Blackmun's great passion for the game of baseball and its history. He started with a lengthy introduction of the game and an extensive list of former baseball players including Ty Cobb, Babe Ruth, and Lou Gehrig. *Flood*, 407 U.S. at 262.

Currently, baseball is the only professional sport that enjoys an exemption from the provisions of the Sherman Act.[7] Athletes in other sports are able to bring antitrust actions against the owners and the league to recover any damages resulting from antitrust behavior on the part of the owners or the league.[8] Baseball, however, has been granted a special exemption that has been held not to apply to other professional sports.[9] This ability to bring antitrust suits against the league provides other professional athletes an additional advantage at the bargaining table because those players have the protection of the federal antitrust laws and can sue for violations.

This exemption allowed baseball to flourish without being subjected to the provisions of the antitrust laws that apply to other industries. In the seventy-four years since the *Federal Baseball* decision, baseball has evolved into an enormous industry.[10] Baseball's actions in restraining player movement and in prohibiting teams from moving from city to city have not come under attack, and have allowed baseball a certain degree of stability.[11] The stated reasons and need for the exemption are many. In baseball's early years, the owners needed the exemption to prevent the mass player movement and spiraling salaries that threatened the security of the game. Congress, in a 1952 House Report, stated that "[b]aseball's history shows that chaotic conditions prevailed when there was no reserve clause."[12] Owners also argue that this exemption is needed to

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[7]The other professional sports have been held subject to the provisions of the Sherman Act and have not enjoyed the exemption that has been afforded to baseball. See, Radovich v. National Football League, 352 U.S. 445 (1957) (football); United States v. International Boxing Club of New York, Inc., 348 U.S. 236 (1955) (boxing); Gunter Harz Sports, Inc. v. United States Tennis Ass'n., 665 F.2d 222 (8th Cir. 1981) (tennis); Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973) (golf); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972) (hockey); Washington Professional Basketball Corp. v. National Basketball Ass'n, 147 F. Supp. 154 (S.D. N.Y. 1956) (basketball).

[8]*Id.*

[9]Radovich v. National Football League, 352 U.S. 445, 452 (1957). The *Radovich* Court discussed the exemption created for baseball in *Federal Baseball* and *Toolson* and stated, "we now specifically limit the rule there established to facts there involved, i.e., the business of organized professional baseball." *Id.* The baseball exemption rests on prior decisions and football has never been afforded the exemption. *Id.*

[10]Maske, *supra* note 3, at D4. Baseball is currently a $2 billion-a-year industry. *Id.* A group of investors led by labor lawyer Peter Angelos recently purchased the Baltimore Orioles franchise for a record $173 million. *Id.*

[11]With the exception of the three challenges to the reserve clause in the Supreme Court. *See* Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. New York Yankees, 346 U.S. 356 (1953); Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).

[12]Flood, 407 U.S. at 272, citing STUDY OF MONOPOLY POWER OF THE HOUSE COMMITTEE ON THE JUDICIARY, H.R. Rep. No. 2002, 82d Cong., 2d Sess., 229 (1952). The report concluded that the evidence established baseball's need for some sort of reserve clause to insure the financial stability and continuing vitality of the league. *Id.*

support the minor league system and to allow Major League Baseball to control the movement of teams.[13] Allowing franchises to move to new cities every couple of years would harm the stability and integrity of the game.

The baseball owners and the players' union have a long and dubious history of extreme labor disputes since the formation of the union during the 1960's.[14] Baseball has experienced eight work stoppages over the last two decades, and the last seven times the players and owners have met at the bargaining table a strike or a lock-out resulted. This accounted for more work stoppages than in all the other professional sports combined.[15]

The owners state that the dispute centers on a $2 billion a year industry facing rising players' salaries that threaten to turn small-market teams into non-competitive, unstable franchises.[16] The owners claim that baseball turned a $50 million profit in 1993, but faced a $47 million loss in the uninterrupted 1994 season.[17] The owners now seek to tie player compensation to industry revenues through a salary cap to control their labor costs. In turn, the players want a free market for their services without the restraints a salary cap creates.[18] After failing to reach a collective bargaining agreement, the owners unilaterally imposed their new economic system, including the salary cap, on December 23, 1994.[19] The owners removed the salary cap on February 3, 1995, and admitted that an impasse in bargaining did not occur. The owners then proposed a luxury tax on teams' payrolls.[20] Teams would be forced to pay a tax on each dollar of their payroll that exceeds the average.

Both sides filed numerous unfair labor practice charges with the National Labor Relations Board. The strike finally came to an end on March 31, 1995

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[13]Jim Bunning, *Bunning Takes Mound Against Baseball*, THE PLAIN DEALER, Oct. 4, 1994, at B7. Jim Bunning is a former Major League player and is now a Republican Congressman from Kentucky. Congressman Bunning has been outspoken on his position of wanting Congress to remove baseball's exemption.

[14]*See* JOHN HEYLAR, THE LORDS OF THE REALM, THE REAL HISTORY OF BASEBALL (1994), for an intensive analysis of the relations between the owners and the players in the twentieth century. The book traces the history of the restraints imposed by the owners (The Lords) and the rise and development of the players' union headed by Marvin Miller.

[15]141 CONG. REC. S15,176 (daily ed. Jan. 4, 1995).

[16]*See* Maske, *supra* note 3, at D4. The owners' salary cap provides that players will receive at least fifty percent of league revenues, payrolls cannot exceed the average by more than 110% and cannot be less than 84% of the average. Tracy Ringolsby, *Playing a Whole New Ballgame*, ROCKY MOUNTAIN NEWS, December 24, 1994, at 1B. The owners will implement the plan over four years, and teams that exceed the cap in 1994 must cut their payroll excess by twenty-five each year. *Id.*

[17]*See* Maske, *supra* note 3, at D4.

[18]*Id.*

[19]*Congress Looks At Antitrust Bill*, THE HOUSTON POST, Jan. 6, 1995, at B3.

[20]Hall Bodley, *Owner's Offer New Axes Cap*, USA TODAY, Feb. 2, 1995, at C1.

when United States District Court Judge Sonia Sotomayor issued an injunction that restored the provisions of the expired collective bargaining agreement.[21] The United States Court of Appeals for the Second Circuit denied the owners' request to stay the injunction and later affirmed the lower court's decision.[22] This injunction cleared the way for baseball to resume and begin the 1995 season on April 26, 1995.[23] After the issuance of the injunction, the players offered to return to the field under the terms of the expired collective bargaining agreement and the owners accepted their offer.[24]

This note will describe the creation and development of the antitrust exemption granted to Major League Baseball and the continuing vitality of that exemption with respect to labor relations. Part I will detail the creation of the antitrust exemption, the tests articulated by the Supreme Court to determine whether a particular industry violates the antitrust laws, an application of those tests to baseball, and the possibility of finally removing this exemption through legislation in order to bring the law for the industry of baseball into line with other industries. Part II will discuss how the antitrust laws and labor laws clash with one another and what effects a removal of the exemption would have on the negotiations and future collective bargaining agreements between the owners and players. The discussion will proceed by examining professional basketball and football and their labor disputes, court decisions concerning their activities, and what these decisions mean to baseball. This note will not propose a way to settle the current dispute or to prevent future disputes, but analyze the rights of the two concerned parties and how the courts will likely treat the situation.

II. THE CREATION OF BASEBALL'S ANTITRUST EXEMPTION

A. Sherman Act

Congress enacted the Sherman Act in 1890[25] to prevent any unreasonable restraints on trade and to promote competition.[26] The Act contains two provisions which would restrict the behavior of baseball owners, commonly referred to as Sherman I and Sherman II.[27] Sherman I states that "every contract,

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[21] Silverman *ex rel.* NLRB, 880 F. Supp. 246 (S.D. N.Y. 1995), *aff'd* 67 F.3d 1054 (2d Cir. 1995).

[22] Silverman *ex rel.* NLRB, 67 F.3d 1054 (2d Cir. 1995).

[23] Mark Maske, *Baseball Strike Ends; Season Opens April 26*, WASHINGTON POST, Apr. 3, 1995, at A1.

[24] *Id.*

[25] 15 U.S.C. §§ 1-7 (1988).

[26] *See* Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, 473 U.S. 614, 635 (1985).

[27] Latour Rey Lafferty, *The Tampa Bay Giants and the Continuing Vitality of Major League Baseball's Antitrust Exemption: A Review of Piazza v. Major League Baseball*, 21 FLA. ST. U. L. REV. 1271, 1273 (1994).

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 declared to be illegal."[28] Sherman II states that every person who monopolizes or attempts to monopolize any part of the trade or commerce is guilty of a felony.[29]

The courts have long recognized that the provisions of the Sherman Act cannot be interpreted and enforced exactly as they read because doing so would outlaw the entire body of contract law.[30] The Supreme Court has developed two tests analyzing whether a specific restraint on competition violates the Sherman Act.

The first of these tests focuses on those agreements whose nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality.[31] Certain relationships are per se violations of the Sherman Act and are strictly prohibited without a need to analyze the reasonableness of the restraints.[32] In *Northern Pacific Rail Road Co. v. United States*, Mr. Justice Black stated, "[t]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[33]

The second test analyzes those agreements whose effects on competition can only be evaluated by analyzing the facts specific to that industry, the history of the restraint, and the reasons why it was imposed.[34] This test is commonly referred to as the "rule of reason test". The Supreme Court articulated the rule of reason test in *Board of Trade of Chicago v. United States;* the inquiry mandated by the Court is whether the challenged agreement promotes or suppresses

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[28]15 U.S.C. § 1 (1988).

[29]15 U.S.C. § 2 (1988). The statute provides that

> [e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment no exceeding three years, or by both said punishments, in the discretion of the court.

Id.

[30]National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978). Congress did not intend the Sherman Act "to delineate the full meaning of the statute or its application in concrete situations." *Id.* The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad meaning by drawing on common-law tradition. *Id.*

[31]*Id.* at 692.

[32]Northern Pac. R.R. Co. v. United States, 356 U.S. 1, 5 (1958).

[33]*Id.* at 5.

[34]Board of Trade of Chicago v. United States, 246 U.S. 231 (1917).

competition.[35] The true test of legality is whether the imposed restraint is one that merely regulates or even promotes competition, or is one that may suppress or even destroy competition.[36] In *Board of Trade*, the Court first considered the nature of the rule imposed and what restraints were created. The Court then considered the scope of the rule and how large a part of the industry does the restraint apply. Finally, the Court examined the effects of the rule and determined that the restriction imposed by the employers was not unreasonable and the employer should not be subjected to antitrust violations.[37]

B. Establishing Baseball's Exemption

The exemption Major League Baseball enjoys from the antitrust laws was created in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.[38] The plaintiff in that case belonged to a rival league of the defendants, Federal League of Professional Baseball Clubs, formed in 1913 to host baseball exhibitions during World War I and to compete against the defendants.[39] The plaintiff alleged that the defendants destroyed the Federal League by purchasing all the other teams. The plaintiff attempted to establish four assertions demonstrating that the defendants violated the antitrust laws. They attempted to show that the defendants were engaged in interstate commerce and that the interstate relationship among the clubs was predominant, that baseball was seeking a profit, that the gate receipts were divided between the home and visiting team, and that the business of baseball should be distinguished from the mere playing of games for exercise.[40] The jury returned a verdict in favor of the plaintiff for $80,000. The Court of Appeals, however, found that the defendants were not within the scope of the Sherman Act because baseball exhibitions were not interstate commerce.[41]

In this landmark decision, Justice Holmes, speaking for a unanimous Court, stated that baseball is in business to give exhibitions of baseball and that these exhibitions were purely state affairs and not interstate commerce as required

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[35] *Id.* at 238.

[36] *Id.*

[37] *Id.*

[38] 259 U.S. 200 (1922).

[39] *See* Lafferty, *supra* note 28.

[40] Flood v. Kuhn, 407 U.S. 256, 269 (1972); see also Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200, 201-06 (1922).

[41] *Federal Baseball*, 259 U.S. at 209. Justice Holmes viewed the business of baseball as merely exhibitions which are purely state affairs. *Id.* at 208. Furthermore, the fact that the games were transported across the states was merely incidental and not essential. "That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place." *Id.* at 209.

by the Sherman Act.[42] Therefore, the Supreme Court viewed baseball as not constituting interstate commerce, and thus, not subject to the provisions of the Sherman Act. Although the correctness of this opinion has been criticized on many occasions, it has been generally accepted as the controlling authority for Major League Baseball's antitrust exemption.[43]

The Supreme Court next visited the issue of baseball's antitrust exemption in 1953 in *Toolson v. New York*.[44] In *Toolson*, the Court recognized the precedential effect of *Federal Baseball* and that, for thirty years, baseball developed the belief that the existing antitrust laws did not apply to baseball.[45] Therefore, the Court concluded that the issue of removing the judicially created exemption for Major League Baseball should be left to the legislature rather than the judiciary: "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation."[46]

The Supreme Court demonstrated its desire to leave the issue to the legislature rather than overruling their prior 1922 decision in *Federal Baseball* and changing the way the antitrust laws applied to baseball. The legislature has failed to remove baseball's exemption in the seventy-four years following the *Federal Baseball* decision.

The Supreme Court last visited the issue of baseball's antitrust exemption in *Flood v. Kuhn*. Curt Flood, a ballplayer who refused to play baseball for Philadelphia in 1970 following a trade from St. Louis, challenged baseball's reserve clause and charged that baseball had violated the antitrust laws by forcing him to play for Philadelphia.[47] The *Flood* Court examined the history of the exemption including the two prior Supreme Court decisions, and restated the reasons for the *Toolson* decision.[48] The Court affirmed *Toolson* based on three decades of Congressional inaction despite awareness of the decision in *Federal Baseball*, the fact that baseball has been left alone to develop with the exemption, a reluctance to overrule with the consequent retroactive effect, and

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[42] *Id.*

[43] *See* Corbett v. Chandler, 202 F.2d 428 (6th Cir. 1953); Portland Baseball Club, Inc. v. Baltimore Baseball Club, Inc., 282 F.2d 680 (9th Cir. 1960); Niemiec v. Seattle Rainer Baseball Club, Inc., 67 F. Supp. 705 (W.D. Wash. 1946). *See also* State v. Milwaukee Braves, Inc., 31 Wis. 2d 699, 144 N.W. 2d 1, *cert. denied*, 385 U.S. 990 (1966).

[44] *See* Toolson v. New York Yankees, 346 U.S. 356 (1953).

[45] *Id.* at 357.

[46] *Id.*

[47] *See* 407 U.S. at 258 (1972). Curt Flood was a professional baseball player who began his major league career in 1956 when he signed to play for the Cincinnati Reds. The Reds later traded Flood to St. Louis and Flood blossomed as a major league ballplayer. In 1969 Flood was traded to the Philadelphia Phillies. He refused to play for Philadelphia and petitioned the Commissioner (Bowie Kuhn) to make him a free agent. Bowie Kuhn denied the request and Flood then instituted this antitrust action. *Id.* at 264-65.

[48] *Flood*, 407 U.S. at 258.

a professed desire that any needed remedy emanate from the legislature rather than the courts.[49]

Justice Blackmon concluded the *Flood* opinion by stating eight principles which now apply after the *Flood* decision.[50] The Court held that professional baseball is a business that is engaged in interstate commerce, that baseball's exemption is an exception and an anomaly, and that *Federal Baseball* and *Toolson* have become an aberration confined strictly to baseball.[51] This aberration, however, has been present for nearly half a century (at the time of the *Flood* opinion) and thus, it is subject to the benefit of stare decisis, and any changes should come by legislative action rather than judicial order.[52]

Thus, *Flood* recognized that baseball is indeed interstate commerce and that, in *Federal Baseball*, Justice Holmes was wrong in stating that baseball is not engaged in interstate commerce. Baseball's exemption must now be premised on something other than the fact that it is not interstate commerce. The *Flood* Court continued to recognize and uphold the result of *Federal Baseball*. However, after *Flood*, the legal justification for the exemption is much weaker. The only factors keeping the exemption alive are stare decisis and the fact that Congress has yet to act with any legislation that would remove the exemption.[53]

The Supreme Court has discussed the issue of baseball's exemption in ruling on the application of the antitrust laws to the other professional sports.[54] In *Radovich v. NFL*, the Supreme Court stated, that if it was considering the issue of application of the antitrust laws to baseball, it would have no doubt that the laws would apply, but that *Federal Baseball* had held the business of baseball outside the scope of the Act.[55] The Second Circuit also indicated its disapproval of *Federal Baseball* in ruling on another baseball challenge, by acknowledging its belief that *Federal Baseball* was not one of Mr. Justice Holmes'

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[49] *Id.* at 273-74.

[50] *Id.* at 282.

[51] *Id.* at 282-83.

[52] *Flood*, 407 U.S. at 282. The Court also noted that the other professional sports were not so exempt from the antitrust laws. *Id.* at 283. Furthermore, the Court expressed its concern about the confusion and retroactivity problems that would result from a judicial rather than a legislative overturning of *Federal Baseball*. *Id.*

[53] *Id.* at 282-83.

[54] Radovich v. National Football League, 352 U.S. 445 (1957).

[55] *Id.* at 452. *Radovich* was an action brought to obtain treble damages and injunctive relief from the National Football League (NFL) under § 4 of the Clayton Act. *Id.* at 446. The petitioners alleged that the NFL owners entered into a conspiracy to monopolize and control organized professional football in the United States. *Id.* at 447. Radovich was a former player of a rival league (All-American Conference) who was boycotted by the owners from playing in another league. *Id.* The Court concluded that *Federal Baseball* and *Toolson* did not control the disposition of this case. *Id.* at 448.

happiest days,[56] that the rationale of *Toolson* is extremely dubious, and that the distinction between baseball and other professional sports is unrealistic, inconsistent and illogical.[57]

C. Application of Antitrust Laws to Baseball

Had Major League Baseball not been granted the exemption from antitrust laws in 1922, the courts would be forced to analyze the industry by using either the per se test articulated in *National Society of Professional Engineers*, or the rule of reason test established in *Board of Trade of Chicago*. Therefore, the courts must make a determination of which rule is applicable to the industry of baseball. Due to the history of the courts in analyzing the other professional sports for antitrust violations, the courts would likely reject the per se violations and proceed to analyze baseball under a rule of reason test.[58]

In *Mackey v. National Football League*, the court viewed professional football as having some of the characteristics of a joint venture because the teams have a stake in the success of other teams.[59] Therefore, the analysis proceeded under a rule of reason test:[60] "although businessmen cannot wholly evade the antitrust laws by characterizing their operation as a joint venture, we conclude that the unique nature of the business of professional football renders it inappropriate to mechanically apply per se illegality rules".[61]

Under the reasoning and analysis provided in *Mackey*, Major League Baseball would likely be analyzed under the rule of reason test. Major League Baseball can also be considered a joint venture, similar to professional foot-

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[56]Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971), (citing Radovich v. National Football League, 352 U.S. 445, 452 (1957)).

[57]*Id. Salerno* involved a challenge to baseball by a group of former umpires in the American League of Professional Baseball Clubs. *Id.* at 1004. The Supreme Court should retain the exclusive privilege of overruling its own decisions, and they are not certain that the Supreme Court is willing to overrule *Federal Baseball* and *Toolson*. *Id.* at 1005.

[58]*See* Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). For a rule of reason application to professional sports see, e.g., United States v. International Boxing Club of New York, Inc., 348 U.S. 236 (1955); McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979).

[59]Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

[60]*Mackey*, 543 F.2d at 620. The court reiterated the test established by Chicago Board of Trade v. United States, 246 U.S. 231 (1918), of whether the restraint imposed is justified by legitimate business purposes, and is not more restrictive than necessary. *Id.* Football is a joint venture and no one club is interested in driving another team out of business, since if the League fails, no one team can survive. *Id.* at 619; see also United States v. National Football League, 116 F. Supp. 319, 323 (E.D. Pa. 1953).

[61]*Mackey*, 543 F.2d at 619.

ball.[62] Although the twenty eight teams in the league compete against one another every year on the field and in the market for players, they depend on one another for the continuing stability of the league. The teams want to beat one another and become the best in the league. The goal of the teams is not, however, to drive each other out of business because the whole league would suffer. No team wants to seriously damage the financial status and stability of any other team. They all depend on one another for the continued existence of the league.[63]

Next, the factors the courts have used in applying the rule of reason test to alleged antitrust violations must be examined along with a discussion of their possible application to Major League Baseball. A court would be forced to examine the nature of the restraint, the scope of the restraint, and to how large of a part of the industry the restraint applies. Other factors the courts have articulated in evaluating the reasonableness of a restraint include the existence of less restrictive alternatives to realize legitimate, pro-competitive objectives;[64] the history, purpose and effect of the restraint;[65] and the balance of the pro-competitive and the anti-competitive effects of the restraint.[66]

The major restraint on labor used by Major League Baseball owners through the years and challenged in the three Supreme Court cases[67] is the reserve clause. Although the effects of this clause have been minimized through collective bargaining, an analysis of its effects and application to the antitrust laws is beneficial. The owners created and implemented this clause in 1879 to combat the large economic losses they faced if they allowed the talented players to leave their teams and pursue more money from other teams.[68] This clause allowed the owners to retain a player's service in perpetuity and prevent the player from playing for any other team.

Since the rise to power of the Major League Baseball Players' Association (MLBPA) in the late 1960's, the players have had limited success in challenging

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[62] *See* Jeffrey E. Levine, *The Legality of the National Basketball Association Salary Cap*, 11 CARDOZO ARTS & ENT L. J. 71, 79 (1992).

[63] *Id.* at 80 n.57. According to Judge Robert Bork, "the members of a league cannot compete in the way that members of other industries can. It is neither in the interests of the members of the league nor of the public generally that the more efficient teams should drive out the less efficient. If one team goes out of business, all are endangered. This suggests that the concept of business competition may be irrelevant as applied to the relationships between members of a league." *Id.* (citing United States v. National Football League, 116 F. Supp. 319, 323 (E.D. Pa. 1953)).

[64] Smith v. Pro Football, Inc., 593 F.2d 1173 (D. D.C. 1978).

[65] National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978).

[66] Board of Trade of Chicago v. United States, 246 U.S. 231 (1918).

[67] Flood v. Kuhn, 407 U.S. 258 (1972); Todson v. New York Yankees, 346 U.S. 356 (1953); Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).

[68] *See* Lafferty, *supra* note 27, at 1279.

and limiting the reserve clause.[69] The MLBPA, through the collective bargaining agreements reached with the owners, has been successful in attainting free agency for the players after six years of service, and allowing those free agents to market their services to other teams more willing and able to meet their salary demands.[70] The owners, however, have now proposed a system (either the salary cap or the luxury tax) that threatens to seriously curtail, and possibly eliminate, all the gains the union has enjoyed through the years of collective bargaining.

Placing Major League Baseball's original reserve clause which bound a player to a team for life under antitrust scrutiny would likely result in the courts finding violations similar to the ones found in the other professional sports.[71] Applying the factors stated previously to the reserve clause, the courts would likely find that the reserve clause suppresses competition in the labor market by forcing players to stay with their original teams, and therefore, violates the Sherman Act as an unreasonable restraint on competition. The original clause was exceedingly broad and applied to the whole industry. This may have been appropriate in the early years of baseball to nurture the game in its infancy and to prevent escalating salaries when the revenues generated by the game could not keep pace.

Due to the enormous growth in both popularity and revenue that the industry has enjoyed in the seventy-four years since *Federal Baseball*, however, Major League Baseball no longer needs this judicially created protection. The owners no longer need to rely on the reserve clause or the antitrust exemption to limit the movement of players and can now limit player movement through legitimate means arrived at through collective bargaining agreements negotiated with the players' union.

In *Smith v. Pro Football, Inc.*, the court stated that a factor to be considered in applying the rule of reason test is the existence of less restrictive alternatives to realize legitimate objectives.[72] Preserving the game and controlling salaries are clearly legitimate objectives for the owners to protect the profitability of baseball. However, alternatives to the reserve clause do exist and have been created through the collective bargaining agreements between the owners and players. The effect of the original reserve clause was to bind the professional ballplayer to one team and to allow that team to enjoy his services as long as he plays the game. Through collective bargaining the players have been

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[69] *Id.* at 1281.

[70] *See* HEYLAR, *supra* note 14.

[71] *See* Radovich v. National Football League, 352 U.S. 445 (1957) (football); United States v. International Boxing Club of New York, Inc., 348 U.S. 236 (1955) (boxing); Gunter Harz Sports, Inc. v. United States Tennis Ass'n, 665 F.2d 222 (8th Cir. 1981) (tennis); Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973) (golf); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972) (hockey); Washington Professional Basketball Corp. v. National Basketball Association, 147 F. Supp. 154 (S.D. N.Y. 1956) (basketball).

[72] Smith v. Pro Football, Inc., 593 F.2d 1173, 1187-89 (D.C. 1978).

successful in achieving free agency after six years of service in baseball. No other industry in our capitalistic society has been able to keep their workers in perpetuity, preventing them from working for any other company in that field.

Individuals in this country have the benefit of marketing their special services to any potential employer. The result of the reserve clause is exactly the result that *Board of Trade of Chicago* attempted to prevent in its true test of legality.[73] This clause had the effect of destroying the ability of the players to market their services to other teams. The players should not lose this basic freedom enjoyed by the rest of the country simply because they have chosen to play professional baseball.

A second restraint that requires examination under the antitrust laws is the salary cap, or in the alternative, the luxury tax which has similar effects on the labor market. This analysis begins by discussing the salary caps currently in place in other professional sports. Both the National Basketball Association (NBA) and the National Football League (NFL) have a salary cap in place that limits the amount any team can spend on their players. The NBA salary cap agreement has been in place since the Collective Bargaining Agreement of 1983.[74] The salary cap is a mechanism through which the owners can limit the amount that any one team can spend to field its team, while also limiting the earning potential of the players. These restraints are implemented by establishing a ceiling on team payrolls while guaranteeing the players fifty-three percent of the league's defined gross revenues.[75]

Leon Wood, a player who refused to accept an offer from the team that held his draft rights, challenged the NBA's salary cap in 1984.[76] Wood alleged that the salary cap would force him to sign for an amount far below his value on the open market absent a salary cap.[77] The Court of Appeals stated that the salary cap was not the product solely of an agreement among competitors in a league but was "embodied in a collective agreement between employers and a labor organization reached through procedures mandated by federal labor

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[73] *Board of Trade of Chicago*, 246 U.S. at 238-39.

[74] *See* Levine *supra* note 62.

[75] *Id.* at 74. This article provides an intensive review of the NBA's salary cap and its possible violations of federal antitrust law. The NBA's salary cap does not violate antitrust laws, and the cap has been an integral part of the success the NBA experienced during the 1980s. *Id.* at 98. "The salary cap has been the most important factor in helping stabilize the NBA financially. Because the salary cap has had the effect of keeping the NBA's best players somewhat evenly distributed throughout the league, NBA games are now more competitive and exciting." *Id. See also*, Scott J. Foraker, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157 (1985). This article comes to the opposite conclusion and states that the salary cap should be subject to the antitrust laws. *Id.* at 180.

[76] Wood v. National Basketball Ass'n, 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987).

[77] *Id.* at 527.

legislation."[78] Therefore, because they reached the collective bargaining agreement through a process of collective bargaining, the court did not find that the salary cap agreement violated antitrust law.[79] The salary cap clearly imposes a restraint on player movement and earning potential for the players. The players' union however, agreed to the salary cap. The proposed luxury tax would also contain the same restraints on player movement that are contained in the salary cap because it would seriously dissuade teams from pursuing any high-priced free agent.

Any restraint on player movement that may be implemented by the owners absent a collective bargaining agreement with the players could not enjoy the protection the NBA salary cap enjoyed in the *Wood* decision. As the court pointed out, the NBA salary cap was the product of a collective bargaining agreement reached by the owners and the players' union.[80] This is not the case in Major League Baseball. The baseball owners attempted to negotiate with the players to reach a collective bargaining agreement that would allow the owners to control their labor costs. These negotiations failed and the parties were not able to reach an agreement. Therefore, if the antitrust exemption is removed, the owners will be forced to find an alternative way of sustaining their proposals by bargaining with the players' union. The analysis of the implementation of any new restraint in an environment where the antitrust exemption for Major League Baseball has been removed will be discussed at length later in this note.

The next step in the analysis is to determine where the antitrust exemption now stands. Because the Supreme Court originally granted the exemption because it did not view baseball as interstate commerce, the exemption must now stand upon another justifiable ground.[81] That ground has become the precedent set by *Federal Baseball*. As stated previously, the Court has recognized that if baseball had a clean slate, the exemption would not be granted and the restraints imposed by the baseball owners would be subject to antitrust scrutiny.[82]

In a dissenting opinion in *Flood*, Justice Marshall addressed the issue of stare decisis by stating that *Flood* is a difficult case because the court is torn between the principle of stare decisis and the knowledge that the decisions in *Federal Baseball* and *Toolson*, which establish the exemption, contradict more recent and reasoned cases.[83] Now that baseball is considered interstate commerce, a re-examination of the antitrust exemption would require that Major League

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[78] Wood v. National Basketball Ass'n, 809 F.2d 954, 959 (2d Cir. 1987).

[79] *Id.*

[80] *Id.*

[81] Flood v. Kuhn, 407 U.S. 258, 282 (1972) (finding that baseball is fully entitled to the benefit of stare decisis).

[82] Radovich v. National Football League, 352 U.S. 445 (1957).

[83] Flood v. Kuhn, 407 U.S. 258, 290 (1972) (Marshall, J., dissenting).

Baseball be brought within the coverage of the antitrust laws.[84] Justice Marshall urged for an overturning of the exemption. While Justice Marshall recognized that past decisions cannot be lightly overruled, he asserted that when errors deny substantial federal rights, like the right to compete freely as guaranteed by the antitrust laws, the Court must admit its error and correct it.[85]

The *Flood* Court admitted that Justice Holmes was wrong in stating that baseball was not interstate commerce.[86] The Court, however, refused to overturn the exemption and sustain the exemption for Major League Baseball. The Court should not continue to hold onto the exemption merely because of a precedent which the Court freely admits was mistaken in its fundamental belief as to why baseball was exempt from the Sherman Act. The Supreme Court has on previous occasions admitted its error and reversed a previous decision.[87]

After analyzing *Flood* and the other opinions dealing with the antitrust exemption for professional sports, it becomes strikingly clear that the Supreme Court and the Courts of Appeals have become skeptical of the decision in *Federal Baseball* and, as pointed out in *Radovich*, the exemption would never have been created by a modern court.[88] However, it is also clear that the Supreme Court has absolutely no intention of removing the exemption. It has failed to do so in the seventy-four years since *Federal Baseball*, although it had the perfect opportunity to do so in *Flood*, when it destroyed the premise of the exemption created in *Federal Baseball*. Thus, the remedy will likely have to emanate from Congress. Furthermore, the Supreme Court has expressed that the congressional processes are more accommodating, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike, and not have the retroactive effect of a judicial decision.[89]

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[84] *Id.* at 291.

[85] *Id.* at 293. Justice Marshall, referring to Blonder-Tongue Laboratories, Inc. v. University of Illinois Found., 402 U.S. 313 (1971) and Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 241 (1970), points to two instances where the Court reversed a prior decision.

[86] 407 U.S. at 282.

[87] *See* Blonder-Tongue Laboratories, Inc. v. University of Illinois Found., 402 U.S. 313 (1971); Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 241 (1970).

[88] Radovich v. National Football League, 352 U.S. 445, 452 (1957).

[89] *Id.* The orderly way to remedy the antitrust exemption problem with Major League Baseball is by legislation rather than judicial decree. *Id.* The scope of congressional action would be known by the parties in advance and effective dates for the legislation could be set, thereby removing any surprise *Id.* Therefore, congressional action would afford both interested parties, owners and players, notice to prepare for the new effects that an end to the antitrust exemption would precipitate.

D. Proposed Legislation to Remove the Exemption

The 104th Congress has before it several proposed bills that would eliminate or restrict the antitrust exemption for Major League Baseball, including a bill sponsored by Utah Senator Orrin Hatch.[90] An additional bill has been proposed by New York Senator Daniel Patrick Moynihan and referred to committee.[91] This proposed bill, known as The National Pastime Preservation Act, would repeal the antitrust exemption from Major League Baseball by amending the antitrust laws to reverse the results of *Federal Baseball*, *Toolson*, and *Flood*.[92]

Senator Moynihan points out that this proposed bill would not cure all of baseball's troubles, but that it is an essential step that is long overdue.[93] The proposed bill has also received support from Senator Graham, who also believes that it is time to subject baseball to the same laws of competition that apply to other industries in this country.[94] Senator Moynihan has asserted that the exemption allows Major League owners to "act as a cartel."[95] The implementation of the salary cap is directly attributable to a misuse of the antitrust exemption.[96]

The House of Representatives has also sent several proposals to remove Major League Baseball's antitrust exemption to the Committee on the Judi-

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[90]S. 627, 104th Cong., 1st Sess. (1995). The bill is entitled "Major League Baseball Antitrust Reform Act of 1995." The bill would amend the Clayton Act to make the antitrust laws applicable to the business of Major League Baseball. *Id.* The bill provides that nothing in it will affect the applicability of antitrust laws: (1) to professional baseball's amateur draft, the minor league reserve clause, the Professional Baseball Agreement, or any other matter relating to the minor leagues; (2) to any restraint by professional baseball on franchise relocation; or (3) to the Sports Broadcasting Act of 1961. *Id.* The bill was referred to the Senate Judiciary Committee on March 27, 1995, and reported favorably out of committee on August 3, 1995. 141 CONG. REC. S 982 (1995).

[91]141 CONG. REC. S 15, 176 (daily ed. Jan. 4, 1995). The proposal by Senator Moynihan is called the National Pastime Preservation Act. Senator Moynihan recognizes that the Flood decision laid responsibility for Major League Baseball's antitrust exemption on Congress. *Id.* The Senator also believes that the proposed bill may not solve all of baseball problems, however, it is long over due since the business of baseball has become big business. *Id.* Furthermore, the proposed bill contains a specific provision that the antitrust laws will not apply to conduct that occurred before the enactment of this bill. *Id.*

[92]141 CONG. REC. S 15, 176 (dailey ed. Jan. 4, 1995).

[93]*Id.*

[94]141 CONG. REC. § 518 (daily ed. Jan. 5, 1995). Senator Graham announced his support of the National Pastime Preservation Act. *See supra* note 81. He urges the other members of the Senate to restore "our national pastime" by considering removal of the antitrust exemption. 141 CONG. REC. § 518 (1995).

[95]141 CONG. REC. § 15, 176 (daily ed. Jan. 4, 1995).

[96]141 CONG. REC. § 518 (daily ed. Jan. 5, 1995).

ciary.[97] One of the proposals, H. R. 106, is co-sponsored by former Major League Baseball player and now Congressman Jim Bunning. Congressman Bunning has stated, "[t]here's no need for the exemption. If they (Major League Baseball owners) were coming to Congress now and asking for one, they wouldn't be granted this exemption. The Supreme Court has said Congress should look at it."[98] Speaker of the House Newt Gingrich, however, does not see the urgency in Congress acting on the issue and sees it as a dispute between "millionaire owners and millionaire players who play in stadiums provided by taxpayers."[99]

E. Recent Judicial Interpretation of the Exemption

In *Piazza v. Major League Baseball*, the court limited Major League Baseball's antitrust exemption to the reserve clause previously described.[100] A group of investors who attempted to purchase the San Francisco Giants and move the franchise to Tampa Bay brought the antitrust action because their offer was rejected by the owners.[101] The ownership committee, who reviews potential baseball franchise owners, attempted to elicit offers to keep the team in San Francisco and eventually accepted a bid that was $15 million less than the offer by the Tampa Bay group.[102]

The *Piazza* court stated that the *Flood* decision made it clear that the antitrust exemption granted in *Federal Baseball* only applied to baseball's reserve clause, and that application of stare decisis simply permits no alternative way to interpret *Flood* other than confining the precedential value of *Federal Baseball*

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[97] 141 CONG. REC. § 163 (daily ed. Jan. 4, 1995). H.R. 45 is a bill by Mr. Conyers to apply the antitrust laws of the United States to Major League Baseball. H.R. 45 104th Cong., 1st Sess. (1995). H.R. 105 is a bill by Mr. Biliarakis to amend the Act of September 30, 1961, "to exclude Major League Baseball from the antitrust exemption applicable to certain television contracts." H.R. 105, 104th Cong., 1st Sess. (1995). H.R. 106 is a bill by Mr. Bilirakis to provide that Major League Baseball teams be subject to the antitrust laws. H.R. 106, 104th Cong., 1st Sess. (1995). H.R. 120 is another bill also by Mr. Bilirakis to apply the antitrust laws to baseball. H.R. 120 104th Cong., 1st Sess. (1995).

[98] Murray Chass, *Halls of Congress Fill With New Lobbyists*, N.Y. TIMES, Jan. 9, 1995, at § 8, at 10. Congressman Bunning stated that his own feeling on the situation is that Congress is waiting for the players and the owners to reach a collective bargaining agreement without interference from Congress. *Id.* He feels that, "Congress will act on three conditions: [o]ne, there is no commissioner in the job; two, there is no labor agreement in hand and three, the major leagues open camps to anyone who desires to enter." *Id.* These three conditions seem very likely given the current climate in baseball. *See supra* notes 13-18 for previous discussion on current labor dispute. The owners have shown no desire to hire a permanent commissioner to replace acting commissioner Bud Selig (Milwaukee Brewers' owner).

[99] *Id.* Murray Chess, *Halls of Congress Fill With New Lobbyists*, Jan. 9, 1995, § 8, at 10.

[100] 831 F. Supp. 420 (E.D. Pa. 1993). For an intensive review of this decision and its effects on Major League Baseball's antitrust exemption see Lafferty, *supra* note 28.

[101] *Id.* at 422.

[102] *Id.* at 423.

and *Toolson* to the precise facts involved.[103] The court concluded that, in *Flood*, the Supreme Court exercised its discretion to invalidate the rule of *Federal Baseball* and *Toolson*; therefore, lower courts are not bound to those prior decisions as a matter of stare decisis.[104] To buttress their point, the court cites to *Group Life & Health Insurance Co. v. Royal Drug Co.*, a Supreme Court decision stating that it is well settled law to narrowly construe exemptions from the antitrust laws.[105] Therefore, this decision specifically limits the antitrust exemption to the reserve clause.[106]

The advent of federal labor laws and collective bargaining between employers and employees has diminished the application of the antitrust laws to agreements between the employers and employees. The second part of this note will examine the conflicting goals of antitrust and labor law, and will analyze how the courts may handle the restraints imposed by the baseball owners.

III. CLASH BETWEEN ANTITRUST AND LABOR LAW

Simply removing the antitrust exemption from Major League Baseball will not solve the labor dispute between the owners and players. The players' union and the owners must reach a collective bargaining agreement before the current dispute will end. Simply removing the antitrust exemption may facilitate an agreement but will not guarantee it. To satisfy federal labor policy, a collective bargaining agreement between the parties must be reached. Certain aspects of labor law, as well as its intersection with antitrust law, must be understood in order to grasp what the removal of the antitrust exemption from Major League Baseball would mean.

Therefore, an analysis of the labor dispute with the proposed removal of the antitrust exemption must follow. This note will analyze and forecast the issues that may arise if baseball is subjected to the antitrust laws. This analysis will begin first by discussing the conflicting goals of antitrust and labor law and how unions by their very nature restrain trade. Additionally, the imposition of any restraint, that is not a part of a collective bargaining agreement, by the owners will be discussed, and the restraints potential for remaining a part of a subsequent collective bargaining agreement.

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[103] *Id.* at 437.

[104] *Piazza*, 831 F. Supp. at 438.

[105] *Id.* See Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979), for a case that narrowly construes the application of an exemption from the antitrust laws.

[106] *See* Lafferty, *supra* note 27. The Latour article suggests that the antitrust exemption is now limited to apply only to the reserve clause in Major League Baseball. Id. at 1292. *Piazza* successfully restricted the Major League Baseball antitrust exemption to apply only to the reserve clause, and adhered to the binding Supreme Court precedent established in *Federal Baseball*, *Toolson*, and *Flood*. *Id.*

A. History of Labor Law

The federal labor laws[107] demonstrate a Congressional policy favoring collective bargaining between management and their employees as the best means of settling labor disputes.[108] Labor laws encourage employees to form unions to act as their bargaining representatives and place a duty on both the union and management to bargain in good faith to reach an agreeable settlement.[109] Furthermore, federal labor law discourages judicial intervention in labor relations and encourages the parties involved to solve their own differences at the bargaining table without intervention from the courts or the federal government.[110]

"Unions by their very nature are combinations of individuals that seek to restrain an employer's ability to deal with its employees on an individual basis."[111] Therefore, because of their restraint on employers, unions should also be subject to the antitrust laws created in the Sherman Act. The original Act contained no language that specifically exempted unions from coverage. Employee groups strenuously argued that unions should enjoy an exemption from the antitrust laws and that applying antitrust laws to their behavior would seriously jeopardize their future.[112]

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107 *See* Clayton Act § 6, 15 U.S.C. § 17 (1988); Clayton Act § 20, 29 U.S.C. § 52 (1988); Norris LaGuardia Act §§ 1-15, *Id.* §101-115; National Labor Relations Act §§ 1-19, *Id.* §§ 151-169; Labor Management Relations Act §§ 1-503, *Id.* §§ 141-197, *cited in* Note, *Releasing Superstars From Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 HARV. L. REV. 874, 876 (1991).

108 Note, *Releasing Superstars From Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 HARV. L. REV. 874, 876 (1991) [hereinafter *Releasing Superstares*]. The Note argues that union consent must be given before the parties have the opportunity to avail themselves to the benefit of the nonstatutory exemption from labor that will be discussed at length later. *Id.* at 875. It further proposes a standard by which to decide when union consent to a particular labor restraint being enforced by an employer is no longer valid to protect the restraint. *Id.* The exemption should expire with the collective bargaining agreement to give the courts bright-line guidance in enforcing. *Id.* at 891.

109 *Id.* at 875.

110 *Id.* at 876.

111 Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption In Professional Sports*, 94 COLUM. L. REV. 1045, 1048 (1994). "Strikes and boycotts, the most obvious forms of union collective action, restrict the ability of individual employees to negotiate a deal with the employer. Such collective action not only restricts the movement of labor, but directly results in restraints on the movement of the employer's goods." *Id.* at 1048. *See also* John C. Weistart & Cym H. Lowell, *The Law of Sports* 528 (1979).

112 *See* Corcoran, *supra* note 111. This article examines whether the nonstatutory labor exemption should continue to apply to a player restraint after the expiration of a collective bargaining agreement, and if so, for how long. *Id.* at 1045.

In response to this union protest, Congress enacted two measures exempting union activities from the antitrust laws.[113] The Clayton Act, enacted in 1914, declared that "[the] human being is not a commodity or article of commerce," and that antitrust laws, therefore, should not be construed to prohibit the formation and operation of labor unions.[114] However, the Supreme Court construed the Clayton Act narrowly, making further legislation necessary to protect union activity and to nurture their growth.[115]

Congress then enacted the Norris-LaGuardia Act in 1932 to provide unions with expanded protection and to declare a federal policy in favor of the organization of labor.[116] Together, the Clayton Act and the Norris-LaGuardia Act create the statutory labor exemption and shield a broad range of union activities from antitrust scrutiny."[117] The courts have subsequently been granted more guidance than these early statutes by the passage of the National Labor Relations Act of 1935 (Wagner Act) and the Labor Management Act of 1947 (Taft-Hartley Act).[118]

Congress passed these Acts to promote the collective bargaining process and found that

> the protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.[119]

The NLRA stated that it will be the policy of the United States to encourage the practice and procedure of the collective bargaining process and to protect the formation of worker associations (unions).[120]

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[113] *See* Clayton Act, codified at 15 U.S.C. § 12-27, 44, 29 U.S.C. § 52-53 (1988); Norris-LaGuardia Act, codified at 29 U.S.C. § 101-115 (1988). To combat the union complaints about the application of the Sherman Act in the labor context and the use of injunctions to stop labor strikes, Congress passed these two pieces of legislation to create the nonstatutory labor exemption. *See* Corcoran, *supra* note 111, at 1049.

[114] 15 U.S.C. § 17 (1988).

[115] *See* Corcoran, *supra* note 111, at 1049. *See also* Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

[116] 29 U.S.C. § 102 (1988). "It is necessary that [the individual unorganized worker] have full freedom of association, self-organization, and designation of representatives . . . to negotiate the terms and conditions of his employment. . . ." *Id.*

[117] *See* Corcoran, *supra* note 111, at 1049-50.

[118] 29 U.S.C. § 151-169 (1988); 29 U.S.C. § 141-144 (1988).

[119] 29 U.S.C. § 151 (1988).

[120] *Id.*

B. Statutory and Nonstatutory Exemptions for Labor Unions

To deal with the convergence of labor and antitrust laws and to further the goals of labor law, the courts have recognized a statutory and a nonstatutory exemption for labor unions and collective bargaining agreements.[121] The statutory exemption protects certain agreements that are essential to the structure and economic welfare of the collective bargaining process.[122] Congress created this statutory exemption to insulate legitimate collective activity by employees, which is inherently anti-competitive but is favored by federal labor policy, from application of the antitrust laws.[123]

The second exemption, commonly referred to as the "nonstatutory exemption", immunizes certain results of the collective bargaining process and protects the agreements from antitrust scrutiny.[124] In order to properly accommodate the congressional policy of favoring free competition in business markets with the congressional policy of favoring collective bargaining, certain employer-union agreements must be granted a limited nonstatutory exemption from antitrust sanctions.[125] As the Supreme Court stated in *Connell Constr. Co. v. Plumbers Local Union No. 100*, "the nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions."[126] The remainder of this note will focus on this nonstatutory exemption as it applies to the current labor dispute between the Major League owners and the players' union. The nonstatutory exemption may be asserted to immunize, any restraints imposed

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[121] *Releasing Superstars, supra* note 108, at 876 n10.

[122] *Id.*

[123] *See* Mackey v. National Football League, 543 F.2d 606, 611 (8th Cir. 1976); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940). This statutory exemption extends to legitimate union activities unilaterally undertaken in furtherance of its own interests. The exemption does not extend to concerted action or agreements between unions and employers. *Mackey*, 543 F.2d at 611.

[124] *Releasing Superstars, supra* note 108, at 877. "The nonstatutory exemption is essentially the corollary of the statutory exemption: it would be illogical to immunize the labor war while scrutinizing every labor restraint that it produces." *Id.*

[125] *See* Connell Constr. Co. v. Plumbers Local Union No. 100, 421 U.S. 616 (1975) (union's agreement with employer is not entitled to the nonstatutory exemption from federal antitrust laws that was recognized in Meat Cutters v. Jewel Tea); Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965) (exemption of union-employer agreements from the coverage of the Sherman Act is a matter of accommodating that Act to the policy of the labor laws).

[126] *Connell*, 421 U.S. at 622. The goals of federal labor policy could never be realized if their effects on business competition were held to be a violation of the antitrust laws. *Id.* Labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions that would never be acceptable outside the labor relationship. *Id.* The Court held that a direct market restraint on labor will only be exempted from the federal antitrust laws when the restraint is necessary to protect fundamental employee interests. *Id.* at 623.

by the owners under a collective bargaining agreement or, after the expiration of one, from antitrust scrutiny.

The Supreme Court first articulated the nonstatutory labor exemption in *Amalgamated Meat Cutters v. Jewel Tea Co.*[127] The Court noted that the restraints on management imposed by the employees, that were attained through the collective bargaining agreement process, were still subject to antitrust attack and that this fact undermined the effectiveness of the congressional policy of favoring collective bargaining.[128] By weighing the respective interests involved that the national labor policy expressed in the NLRA, certain union-employer agreements on when and how long employees must work must be placed beyond the reach of the Sherman Act.[129] An agreement concerning mandatory elements of a collective bargaining agreement between the union and the employers is not illegal under the Sherman Act.[130]

The Court has limited this nonstatutory exemption to parties within the bargaining relationship and to matters of fundamental employee interest.[131] Furthermore, courts have also held that the benefits of the exemption extend to both parties of the collective bargaining agreement.[132] Therefore, either the Major League owners or the players' union may assert the protection of this nonstatutory exemption.

The nonstatutory exemption, of collective bargaining agreements from antitrust scrutiny, created by the courts is an attempt to balance the concerns of the federal antitrust and labor laws.[133] The availability of the exemption turns on a determination of whether the federal labor interest in collective bargaining supersedes the federal antitrust interest in free competition under

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[127]381 U.S. 676 (1965).

[128]*Id.* at 689; *see* Corcoran, *supra* note 111, at 1051. A restraint that involved a matter of mandatory bargaining under the NLRA, although it has adverse effects on competition, was exempt from the Sherman Act. *Id.*

[129]*Meat Cutters*, 381 U.S. at 691. An agreement on the subjects of mandatory bargaining between the union and the employers in a bargaining unit is not illegal under the Sherman Act, nor is the union's unilateral demand for the same contract of other employees in the industry. *Id.*

[130]*Id.*

[131]*See* Corcoran, *supra* note 111, at 1052.

[132]Mackey v. National Football League, 543 F.2d 606, 611 (8th Cir. 1976). Non-labor groups may also avail themselves to the protection from the antitrust laws granted under the labor exemption. *See Meat Cutters*, 381 U.S. at 729-30 (opinion of Justice Goldberg).

[133]Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 965 (D. N.J. 1987). *Bridgeman* involved a suit by a group of basketball players who filed a class action suit against the league and the owners alleging antitrust violations. *Id.* at 961. The contested player restraints were the college player draft, the salary cap, and the right of first refusal, which allowed a team to retain a veteran free agent's services indefinitely by matching offers received by that player from other NBA teams. *Id.* at 961-62.

the circumstances of a particular case.[134] That is, does the federal policy of favoring collective bargaining take preeminence over the antitrust laws? The exemption is designed to encourage substantive, good faith bargaining on crucial issues of labor concern and guard against unilateral imposition of terms as to which there is no agreement.[135]

C. Application of the Nonstatutory Exemption to Professional Sports

The first judicial review of the nonstatutory exemption for professional sports came in *Mackey v. NFL*, when NFL owners attempted to assert the exemption to protect their modified reserve clause, known as the "Rozelle Rule", named for former NFL commissioner Pete Rozelle.[136] A group of current and former professional football players initiated the action, alleging that enforcement of the NFL's Rozelle Rule constituted an illegal combination and conspiracy in restraint of trade and denied professional football players the right to contract freely for their services.[137] The district court found that the "enforcement of the Rozelle Rule constituted a concerted refusal to deal and a group boycott, and was therefore a per se violation of the Sherman Act."[138]

The Rozelle Rule resembled the reserve clause in baseball. Under the Rule, a player who signs with a team is bound to play for that team and no other team for the length of the contract, plus one additional year at the option of the team.[139] At the end of the contract and the additional option year, the player may elect to become a free agent and attempt to sign with another team in the league.[140] However, the owners severely limited this free agency. The commissioner of the league could award the player's former team one or more players from the acquiring team as compensation for the lost player.[141] This system, while granting players free agency which the professional baseball players did not enjoy until 1976, severely dissuaded teams from signing free agents for fear of losing players as compensation, and therefore, was an alleged restraint of trade in violation of the Sherman Act.

134*Id.* at 965. *See* Connell Constr. Co. v. Plumbers Local Union No. 100, 421 U.S. 616 (1975); Local Union No. 189, 381 U.S. 676 (1965); *Mackey*, 543 F.2d 606.

135*Bridgeman*, 675 F. Supp. at 965.

136*Mackey*, 543 F.2d. 606.

137*Id.* at 609.

138*Id.*

139*Mackey*, 543 F.2d at 610; Once a player signs a standard contract with any NFL team he is bound to that team for a minimum of two years. He may become a free agent by playing out his option year. A player playing out his option is subject to a ten percent salary cut during that option year. *Id.*

140*Id.*

141*Id.* at 610. Prior to 1963, a team which signed a free agent from another team was not obligated to pay any compensation to the player's former team. *Id. See* Corcoran, *supra* note 111, at 1058.

The United States Court of Appeals for the Eighth Circuit began its analysis of the Rozelle Rule by determining whether the nonstatutory exemption immunizes the NFL's enforcement of the Rozelle Rule from antitrust liability as asserted by the owners and, if not, whether the Rule and the manner in which it has been enforced violate the antitrust laws.[142] Therefore, the court must first determine whether the NFL owners can assert protection of the Rozelle Rule through the nonstatutory exemption. As stated previously, the availability of the nonstatutory exemption for a particular agreement turns upon "whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case."[143]

Mackey then articulated and established a three part test to determine whether the federal labor policy favoring collective bargaining may be given preeminence over the antitrust laws.[144] First, labor policy will only be favored over antitrust laws when the restraint on trade primarily affects only the parties to the collective bargaining relationship.[145] Second, the exemption will only apply when the agreement sought to be exempted concerns mandatory subjects of collective bargaining.[146] "Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of a bona fide arm's length bargaining."[147]

The court then applied the above-mentioned test to the facts presented and determined that the Rozelle Rule clearly only affects parties to the agreements sought to be exempted and thereby, satisfied the first principle.[148] The Rozelle Rule also satisfied the second principle because it concerned mandatory subjects of collective bargaining.[149] However, the Rozelle Rule did not satisfy the third principle because there was no *bona fide* arm's length bargaining before the implementation of the Rule, due to the fact that the owners unilaterally promulgated the Rule in 1963.[150] Therefore, the agreements

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[142] *Mackey*, 543 F.2d at 609.

[143] *Id.* at 613. *See* Connell Constr. Co v. Plumbers Local Union No. 100, 421 U.S. 616 (1975); Local Union No. 189 Amalgamated Meat Cutters v. Jewel Tea, 381 U.S. 676 (1965); Mine Workers v. Pennington, 381 U.S. 657 (1965).

[144] *Mackey*, 543 F.2d at 614.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Mackey*, 543 F.2d at 615. Clearly, the Rozelle Rule will only affect the owners and the players.

[149] *Id.* at 615; On its face, the Rozelle Rule did not deal with wages, hours and other terms or conditions of employment that are required under the NLRA. However, the court found that the Rule restricts a player's ability to move from one team to another and has a tendency to suppress player salaries. *Id.*

[150] *Id.* at 616. The court denied a claim by the owners that the players derived a benefit from the Rozelle Rule. The owners claimed the Rule was a *quid pro quo* for increased

between the clubs and the players embodying the Rozelle Rule do not qualify for the labor exemption by way of the nonstatutory labor exemption.[151]

Applying the *Mackey* rule to the current labor dispute and the implementation of any restraint by the owners leads to a determination that Major League Baseball should not be granted the benefit of the nonstatutory labor exemption. As in *Mackey*, a new restraint implemented by the owners will only affect the parties to the collective bargaining agreement. Therefore, the first principle articulated in *Mackey* will be satisfied in analyzing the possible exemption for baseball.[152] The second principle, that the exemption will only exist when the agreement sought to be exempted concerns mandatory subjects of collective bargaining, is also satisfied. Under section 8(d) of the NLRA mandatory subjects of bargaining are those pertaining to "wages, hours, and other terms and conditions of employment."[153] In *Silverman*, the court found that reserve/free agency systems are mandatory, not permissive, subjects of bargaining.[154]

Finally, the last principle of *Mackey* is violated by Major League owners because any restraint that the owners would implement absent a collective bargaining agreement is not the part of a *bona fide* arm's length transaction as required by *Mackey*.[155] The players have indicated that there is absolutely no possibility of them accepting any proposal of the owners that includes a salary cap of any form.[156]

The *Mackey* test for determining whether a certain agreement is subject to the nonstatutory exemption has been the test applied by the courts.[157] However, there comes a time in labor negotiations when the parties realize that

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pension benefits and the right of players to individually negotiate their own salaries. *Mackey*, 543 F.2d at 616. The district court found that no *quid pro quo* existed, and the circuit court affirmed. *Id.* Furthermore, the union's acceptance of the status quo of the Rozelle Rule in the initial collective bargaining agreements does not serve as to immunize the Rule from antitrust scrutiny. *Id.*

151 *Id.*

152 *Id.* at 614.

153 29 U.S.C. § 158(d) (1988).

154 Silverman *ex rel.* NLRB, 880 F. Supp. 246, 256 (S.D. N.Y. 1995), *aff'd* No. 95-6048, 1995 U.S. App. LEXIS 27744 (2d Cir. September 29, 1995).

155 *Mackey*, 543 F.2d at 606.

156 Jim Molony, *Bagwell Calls Owners' Salary Cap "Slavery" Compared to Old System*, THE HOUSTON POST, Jan. 14, 1995, at B11. Jeff Bagwell, player for the Houston Astros and 1994 National League Most Valuable Player, stated, "[t]his salary cap is not going to fly; there's no way." *Id.*

157 *See* Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991); Bridgeman v. National Basketball Ass'n., 675 F. Supp. 960 (D.N.J. 1987); Brown v. Pro Football Inc., 782 F. Supp. 125 (D. D.C. 1991), *rev'd*, Brown v. Pro Football Inc., 50 F.3d 1041 (D.C. Cir. 1995); National Basketball Ass'n v. Williams, 857 F. Supp. 1069 (S.D.N.Y. 1994).

there is no longer a reasonable prospect of attaining a settlement. Thus, a determination must be made as to whether the employer may implement a plan without the consent of the union after the negotiations between the parties have failed to produce a collective bargaining agreement.

The point at which there is no longer a reasonable prospect of attaining a settlement is called an impasse.[158] In *Bridgeman v. National Basketball Ass'n.*, the court found that the moment at which the parties reach an impasse in their negotiations is significant because an employer may then make unilateral changes that are reasonably contained in the pre-impasse proposals.[159] After impasse, either party is free to decline to negotiate further.[160] Therefore, under *Bridgeman*, Major League Owners are permitted to unilaterally impose salary cap proposals, or other player restraints, as long as the court agrees that an impasse has occurred.[161] However, the owners removed the salary cap because they feared that the NLRB would sustain an unfair labor practice charge that the players' union filed.[162] The players argue that the imposition of the salary cap exhibits a bad faith negotiation on the part of the owners who implemented the cap before an impasse had occurred.[163]

Therefore, it becomes imperative for the courts to make a determination of when an impasse occurs in the negotiation process. The Supreme Court defines impasse as a temporary deadlock or break in negotiations which is eventually broken, through either a change of mind or the application of economic force.[164] An impasse is a recurring feature in the bargaining process and one which is not sufficiently destructive of group bargaining to justify unilateral withdrawal.[165]

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158 *Bridgeman*, 675 F. Supp. at 966.

159 *Id.* *See* American Fed'n of Television and Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

160 *Bridgeman*, 675 F. Supp. at 966. *See* Cheney California Lumber Co. v. NLRB, 319 F.2d 375, 380 (9th Cir. 1963).

161 *See* Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991); Bridgeman v. National Basketball Ass'n., 675 F. Supp. (D.N.J. 1987); Brown v. Pro Football Inc., 782 F. Supp. 125 (D. D.C. 1991), *rev'd*, Brown v. Pro Football Inc., 50 F.3d 1041 (D.C. Cir. 1995); National Basketball Ass'n v. Williams, 857 F. Supp. 1069 (S.D.N.Y. 1994).

162 Paul Hoynes, *Baseball Owners Scrap Salary Cap*, THE PLAIN DEALER, Feb. 4, 1995, at A1.

163 *Id.*

164 Charles D. Bonanno Linen Service, Inc. v. NLRB, 454 U.S. 404 (1982). An impasse may be brought about intentionally by one or both parties as a device to further the bargaining process. *Id.* "Suspension of the process as a result of an impasse may provide time for reflection and a cooling of tempers; it may be used to demonstrate the depth of a party's commitment to a position taken in the bargaining; or it may increase economic pressure on one or both sides, and thus increase the desire for agreement." *Id.*

165 *Id.*

Under the NLRA, impasse exists when the parties have exhausted the "prospects of concluding an agreement and further discussions would be fruitless."[166] The NLRB has summarized the factors to be considered in determining if an impasse exists. They have stated that whether a bargaining impasse has occurred is a matter of judgment.[167] "The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining existed."[168] Whether an impasse has occurred in the stalled baseball negotiations will be left for a judicial determination.

D. Does the Exemption Expire with the Agreement?

If the courts determine that an impasse has occurred in the bargaining of Major League Baseball owners and the players' union, the owners may have legal justification to implement their own plan. However, a line of cases has emerged finding that when the nonstatutory exemption ends, any collective bargaining agreements may be subject to antitrust scrutiny.[169] After the expiration of a collective bargaining agreement, there may come a time in the negotiations when the nonstatutory exemption ends and any restraints imposed by the owners will be subject to antitrust scrutiny.[170] The next part of the analysis will discuss the various points at which the courts have seen fit to end the exemption, the effects of removal of the nonstatutory exemption, and a suggested solution to the problems.

In *Bridgeman*, the court addressed the issue of when the nonstatutory exemption ends.[171] The NBA argued that antitrust immunity continues after

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166*Bridgeman*, 675 F. Supp. at 966 n.5.

167*Id.* at 966.

168*Id. See Taft Broadcasting Co.*, 163 N.L.R.B. 475 (1967).

169Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991); Brown v. Pro Football Inc., 782 F. Supp. 125 (D. D.C. 1991), *rev'd*, Brown v. Pro Football Inc., 50 F.3d 1041 (D.C. Cir. 1995); National Basketball Ass'n v. Williams., 857 F. Supp. 1069 (S.D.N.Y. 1994).

170*See* Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960 (D.N.J. 1987); *see also* Taft Broadcasting, Inc., 163 N.L.R.B. 475 (1967).

171*Bridgeman*, 675 F. Supp. at 966. The NBA players commenced their first challenge on antitrust grounds in 1970 where they challenged, inter alia, the college player draft and the reserve clause. Robertson v. National Basketball Ass'n., 389 F. Supp. 867 (S.D.N.Y. 1975). The parties reached a settlement agreement in 1976 which modified the college player draft and the right of first refusal for free agents. *Id.* When this agreement was adopted the owners and the players began collective bargaining and entered into an agreement incorporating the provisions of the settlement. *Id.* This agreement expired in 1979, and the parties entered a new agreement in 1980, that ran through 1982, and the owners then sought the first time to introduce their salary cap to control team payrolls in a financially struggling league. *Bridgeman*, 675 F. Supp. at 962. The players

the expiration of the collective bargaining agreement as long as the league continues to apply the player restrictions that were included in the previous agreement.[172] Under this argument, the owners could continue the status quo until a new agreement can be reached. The players' union, on the other hand, asserted that the nonstatutory exemption expires the moment the previous collective bargaining agreement expires.[173] The court rejected both the owners' and the players' arguments and ruled that the restraints in a previous agreement do not lose their antitrust exemption immediately upon expiration of the collective bargaining agreement.[174] The court believed that adopting the players' approach would severely hinder the collective bargaining relationship and be contrary to the purpose of the nonstatutory exemption.[175]

The court refused to adopt the position of the owners because of the federal labor policy of favoring collective bargaining.[176] The court found that, after the expiration of a collective bargaining agreement, a point in time will come when the restraints that were a part of a previous agreement can no longer be said to exist because the exemption no longer applies to the expired agreement.[177] The court fails to articulate whether all the players in the league become free agents after the nonstatutory exemption ends.

Bridgeman stated that the exemption for a certain restraint will continue only as long as the employer continues to impose that restraint unchanged and reasonably believes that the restraint or a close variation, will be incorporated into the next collective bargaining agreement.[178] When the employer has no reasonable belief that the restraint will be incorporated into the next agreement, the nonstatutory exemption for that restraint end, and the restraint can no longer be considered the product of a bona fide arm's length transaction as

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responded by filing a lawsuit that was later settled and the parties reached a new collective bargaining agreement containing a salary cap that would remain in effect until 1987. *Id.* at 962-63. Following the expiration of this agreement, the players filed an unfair labor practice charge with the NLRB and this lawsuit. *Id.*

[172] *Bridgeman*, 675 F. Supp. at 964-65. The owners contend that the protection from the antitrust laws afforded to the parties under the nonstatutory exemption should continue to shield their player restraints from scrutiny under the antitrust laws. *Id.*

[173] *Id.* at 964. The players contend that the expiration of the collective bargaining brings an end to the nonstatutory exemption because the players have not consented to any of the restraints beyond the running of the collective bargaining agreement. *Id.* The players point out that the courts have generally only applied the nonstatutory exemption when the challenged practices are part of a collective bargaining agreement. *Bridgeman*, 965 F. Supp. at 965. *See also* Smith v. Pro Football Inc., 420 F. Supp. 738, 742 (D. D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

[174] *Bridgeman*, 675 F. Supp. at 965-66.

[175] *Id.* at 965.

[176] *Id.* at 966.

[177] *Bridgeman*, 675 F. Supp. at 966.

[178] *Id.* at 967.

required by *Mackey*.[179] The restraint will then become subject to antitrust attack.[180]

Applying *Bridgeman* to the negotiations in Major League Baseball leads one to conclude that the owners unilateral implementation of a plan will not withstand an antitrust attack by the players. The court makes clear that only those restraints included in the expired agreement will continue.[181] The salary cap, or any other restraint imposed by the owners that is not the part of any previous collective bargaining agreement and represents a substantial new restraint, cannot be considered part of a bona fide arm's length transaction. The owners may continue to impose those restrictions on player movement that were present in the previous collective bargaining agreement[182] until there is no reasonable belief that they will become a part of the next collective bargaining agreement.[183]

Some degree of restraint on player movement from team to team is virtually certain to be included in any collective bargaining agreement. However, *Bridgeman* articulates only one potential point at which to end the nonstatutory exemption for a player restraint after the expiration of a collective bargaining agreement. Subsequent decisions in other courts have taken the position that the exemption continues past the point suggested in *Bridgeman*.[184]

Powell v. NFL forced the Eighth Circuit to decide when the nonstatutory exemption ended after the expiration of the NFL collective bargaining agreement.[185] Here, the players attempted to argue that the exemption expires

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[179] *Id.* at 967. If an employer then changes a restraint that was permitted under the expired agreement, then the exemption ends until the new restraint is contained in a new collective bargaining agreement. *Id.* It is of no consequence whether the owners reasonably believe that this new restraint will be incorporated into the subsequent collective bargaining agreement. *Bridgeman*, 675 F. Supp. at 967.

[180] The restraint will be subjected to the three part test adopted by the Eighth Circuit in Mackey v. National Football League, 543 F.2d 606, 614 (8th Cir. 1976).

[181] *Bridgeman*, 675 F. Supp. at 967.

[182] *See* HEYLAR, *supra* note 14.

[183] *See* Lafferty, *supra* note 27, at 1279. The owners clearly will not concede on this reserve clause entirely and allow the players to become free agents immediately upon the expiration of a contract and give up on the restraints they have fought for bitterly in past labor disputes.

[184] *See* Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991); Brown v. Pro Football Inc., 782 F. Supp. 125 (D. D.C. 1991), *rev'd*, Brown v. Pro Football Inc., 50 F.3d 1041 (D.C. Cir. 1995).

[185] *Powell*, 930 F.2d at 1295. Nine former and current NFL players brought this antitrust claim against the league and the owners to challenge the college draft and the league's adherence to its uniform Player Contract restraints. *Id.* The owners and players entered into a collective bargaining agreement in 1977 which contained a first refusal/compensation system, whereby, a team had the option to match any offer one of their players received. *Id.* This agreement ended in 1982 and was followed by a fifty-seven day strike, after which a new agreement was entered into. *Id.* at 1296 This new agreement then expired in 1987 and was followed by another strike over free agency

when the parties reach an impasse in negotiations.[186] The district court (Powell I) agreed with the players and found that once the parties reach an impasse concerning player restraints those restraints lose their immunity and further imposition of those conditions may result in antitrust liability.[187] However, the Eighth Circuit (Powell II) found that the exemption did not expire provided that a collective bargaining environment still existed.[188]

The *Powell II* court recognized that when a collective bargaining relationship exists, the remedies available to the players should come through the remedies provided under labor law rather than antitrust law.[189] To allow the players to pursue an action for treble damages under the Sherman Act would undermine the careful balance between antitrust and labor law established by Congress.[190] Therefore, after a collective bargaining agreement expires, an employer is under a duty to bargain with the union before making any unilateral changes in the agreement. After the declaration of an impasse, an employer may make unilateral changes that are reasonably connected to their pre-impasse proposals.[191]

The court held that as long as "there is a possibility that proceedings may be commenced before the Board (National Labor Relations Board), or until final resolution of Board proceedings and appeals therefrom, *the labor relationship continues and the labor exemption applies.*"[192] Therefore, under *Powell II*, the

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and other issues. *Powell*, 930 F.2d at 1296. The strike ended during the 1987 season without a new agreement and the players filed this lawsuit. *Id.* The players attacked the league's continued adherence to the expired 1982 collective bargaining agreement. *Id.*

[186] *Id.* at 1296. The players asserted that the league's continued imposition of the restraint of the first refusal/compensation system was not protected under the nonstatutory exemption for antitrust violations because the exemption expired with the expiration of the collective bargaining agreement. *Powell*, 930 F.2d at 1296.

[187] Powell v. National Football League, 678 F. Supp. 777, 789 (D. Minn. 1988). The court recognized the fact that the restraint must still violate the Sherman Act. *Id.*

[188] *Powell*, 930 F.2d at 1303-04.

[189] *Id.* at 1301. The Supreme Court has recognized that disputes over employment terms and conditions are not the central focus of the Sherman Act. *Id.* See Associated Gen. Contractors of Cal. v. California State Council of Carpenters, 469 U.S. 519, 539-40 (1983).

[190] *Powell*, 930 F.2d at 1302.

[191] *Id.*

[192] *Id.* at 1303-04 (emphasis added). The court noted that this does not mean that once the parties enter into a collective bargaining agreement that management if forever exempt from the antitrust laws. *Id.* at 1303. However, this holding does appear to demonstrate that employers will be given a great deal of latitude in imposing restraint as long as a collective bargaining relationship is maintained, even absent an agreement. The court quoted a previous decision stating that sometimes national labor policy should override antitrust policy. *Powell*, 930 F.2d at 1296. *See* Continental Maritime of San Francisco v. Pacific Coast Metal Trades Dist. Council, 817 F.2d 1391, 1393 (9th Cir. 1987).

nonstatutory labor exemption continues until there is no longer any possibility of proceedings before the NLRB.[193]

Powell differs greatly from *Bridgeman*. Under *Powell*, a new restraint unilaterally imposed by the owners may survive an antitrust claim.[194] If the owners can successfully establish that they reached an impasse at any time, they can legitimately impose a new restraint on the players under *Powell II*.[195] Thus, by extending the nonstatutory exemption until there is no longer any hint of a bargaining relationship, the Eighth Circuit recognized that the labor policies completely supersede antitrust laws in collective bargaining relationships. There would be virtually no opportunity to ever assert an antitrust claim in the collective bargaining environment. Under a literal interpretation of *Powell*, the Major League Baseball players' union would not be able to bring any antitrust claims without first decertifying the union to break the collective bargaining relationship. *Powell* forecloses the players' union's opportunity to pursue an antitrust claim, thereby removing a vital bargaining weapon in the union's somewhat limited arsenal.

In *National Basketball Ass'n v. Williams*, the United States Court of Appeals for the Second Circuit ruled on an attack by the NBA players against the player restraints in the NBA.[196] The court affirmed the decision of the district court stating that the antitrust laws have no application in collective bargaining negotiations between the owners and players.[197] The circuit court followed *Powell II* and found that the nonstatutory exemption continues as long as a collective bargaining relationship exists between the parties.[198] Furthermore, even if the antitrust laws did apply, the restraints challenged by the players—the college draft, right of first refusal, and the salary cap—survive antitrust scrutiny under the rule of reason test.[199]

The court examined the issue of whether the antitrust laws prohibit employers from acting jointly in a multiemployer bargaining unit with the union.[200] Labor laws exhibit an intent on the part of Congress to permit multiemployer bargaining units to bargain hard with unions and use economic force to resolve disputes over terms and conditions of employment.[201]

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193 *Powell*, 678 F. Supp. at 789.

194 *Powell*, 930 F.2d at 1302.

195 *Id.*

196 National Basketball Ass'n, 45 F.3d at 684.

197 *Id.*

198 *Id.* at 686.

199 *Id.* at 685.

200 National Basketball Ass'n, 45 F.3d at 688.

201 *Id.* Multiemployer bargaining has been a feature of collective bargaining since the beginning and that to now hold it illegal would cause a massive change to collective bargaining. *Id.* at 691. Congress expressly considered the multiemployer bargaining unit

Therefore, the antitrust laws cannot be used to prevent multiemployer bargaining units.

The court rejected the claim by the players because doing so would prevent employers in all industries from jointly bargaining hard with a common union.[202] Furthermore, under the players interpretation of the law, if after an expiration of an agreement, a group of employers were to agree to seek to limit wage increases to five percent while the union demanded ten percent, the employers could shield themselves from antitrust liability only by granting the ten percent raise.[203]

This holding is a tremendous victory for the NBA owners as well as the Major League Baseball owners. Under *Powell II*, and now *Williams*, the owners may enforce player restraints even if the antitrust exemption is removed. These decisions render the antitrust exemption for baseball virtually meaningless with respect to labor relations. The owners are no longer required to justify the player restraints on the antitrust exemption, provided that a collective bargaining relationship with the players still exists. Under *Williams*, the owners can continue to impose the restraints contained in the previous collective bargaining agreements, along with the new restraints.

Even a congressional or judicial removal of the antitrust exemption from baseball would not permit the players' union to challenge the salary cap or any other player restraints under the antitrust laws. The players sole remedy is provided in federal labor laws. Both sides filed charges with the NLRB alleging that the other side has committed unfair labor practices by not bargaining in good faith.[204] On March 31, 1995, United States District Judge Sonia Sotomayor ruled in favor of the players and granted an injunction that restored the terms of the previous collective bargaining agreement.[205]

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and concluded that it should be allowed. *Id.* See NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 95-96 (1957).

[202] *Id.* at 692.

[203] *Id.* at 693.

[204] *See* Silverman v. NLRB, 880 F. Supp. 246 (S.D. N.Y. 1995), *aff'd* No. 95-6048, 1995 U.S. App. LEXIS 27744 (2d Cir. September 29, 1995). The players alleged that the owners violated Sections 8(a)(1) and (5) of the NLRA by unilaterally eliminating, before an impasse had been reached, salary arbitration for certain players, competitive bargaining for certain free agents, and the anti-collusion provision of their collective bargaining agreement. *Id.* at 250.

[205] *Id.* Judge Sotomayor ruled that the Owners had violated Sections 8(a)(1) and (5) of the NLRA by unilaterally eliminating, before an impasse had been reached, salary arbitration, competitive bargaining for free agents, and the anti-collusion provision of their collective bargaining agreement. *Id.* at 250. Essential in her holding was the finding that the subjects of bargaining, reserve/free agency system, were mandatory, not permissive subjects of bargaining. *Silverman* at 256.

IV. CONCLUSION

Over the past seventy-four years, Major League Baseball has enjoyed a unique exemption from antitrust laws that no other professional sport enjoys. At one time this exemption served a purpose by providing the game of baseball with stability. This need, however, is absent in today's game. Baseball has evolved into a large industry and no longer needs any protection from the federal government. It should be subjected to the same laws that other industries face. The initial rationale for the exemption, the fact that baseball was not interstate commerce, evaporated with the *Flood* decision in 1972.[206] While our judicial system is based on stare decisis, when the basis for a decision no longer exists, the decision should be overturned and the law brought up to date to meet the demands of a fluid society.

One thing has remained obvious in the seventy-four years since the *Federal Baseball* decision: The Supreme Court has absolutely no desire to reverse the decision. The Court believes that this is a task for Congress. It is now time for Congress to step up to the plate and recognize that the business of baseball should no longer be shielded from antitrust laws. The owners claim that the game would collapse with the removal of the exemption is difficult to swallow considering the enormous success of both the NFL and the NBA.

The effect of a removal of the antitrust exemption will be more symbolic than substantive.[207] This is due to the labor laws of this country and the collective bargaining environment that those laws promote. Once a collective bargaining relationship is established between the employers and employees, the legal ramifications irrevocably change.[208] Since the formation of the players' union, the owners and the players must reach collective bargaining agreements. Therefore, unless a dispute arises, any restraints on players must come through the collective bargaining process rather than unilateral implementation by the owners.

It is now time for a removal of the antitrust exemption from baseball to correct an anomaly that has been in existence for seventy-four years. A removal of the exemption, however, is not the panacea that the players' union thinks it is. Granted, a removal of the exemption would allow the players to bring a lawsuit for antitrust violations. The courts, however, have expressed their belief that the collective bargaining process and the federal labor laws take precedent over antitrust laws.[209] Therefore, any restraints on player movement that are

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

[207]However, that symbolism may prove to be enough to get the players to end their strike and begin playing baseball again. See *Baseball*, THE PLAIN DEALER, Feb. 11, 1995, at D4. Donald Fehr, the leader of the players' union, indicated that if Congress were to repeal the antitrust exemption the players would be back on the field this season. *Id.*

[208]Brown v. Pro Football, Inc., 50 F.3d 1041 (D.C. Cir. 1995).

[209]*See* Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991); National Basketball Ass'n v. Williams, No. 94-7709, 1995 U.S. App. LEXIS 1531 (2d Cir. Jan. 24, 1995).

the product of a collective bargaining process will not be subject to antitrust law. The one area where a removal of the exemption may assist the players is when the owners unilaterally impose conditions that have not been the part of a previous collective bargaining agreement. The players could then bring an antitrust lawsuit against the owners and any restraint imposed would be subject to therule of reason test for antitrust violations.

One other issue must also be resolved: When should the nonstatutory exemption that applies to collective bargaining agreements expire? The owners will attempt to establish that the exemption continues until a new agreement is reached, while the players will counter that the exemption expires with the agreement. To meet labor law's goal of promoting collective bargaining agreements, the nonstatutory exemption should continue after the expiration of an agreement.

This note proposes that the nonstatutory exemption should continue into the future until it becomes unreasonable to believe that any restraint in the old agreement will become part of a new agreement.[210] This policy of extending the exemption gives both sides the motivation to reach a new collective bargaining agreement and prevents the chaos that would follow if the exemption ended with the agreement. Extending the nonstatutory exemption would give the players motivation to negotiate and reach a new agreement rather than simply letting the previous agreement expire. The owners would also be motivated to reach a new agreement knowing they could not continue any particular restraint in perpetuity.

A removal of the nonstatutory exemption when the collective bargaining agreement expires would allow the players to bring an antitrust suit against the owners. Allowing the players protection under the Sherman Act would disrupt the balance of power and give the players a powerful new weapon to assert at the bargaining table.[211] The players would be empowered at the bargaining table and would be able to threaten the owners with an antitrust suit. The players could then use that leverage to obtain a more favorable settlement. The United States Court of Appeals for the District of Columbia Circuit articulated this position for the extension of the nonstatutory exemption recently and stated that injecting antitrust liability into the process for resolving disputes between employers and employees would have the effect of both subverting national labor policy and exaggerating antitrust concerns.[212]

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210 *See* Corcoran, *supra* note 111, at 1075. This note takes a similar position and believes that extending the exemption until it is unreasonable to believe that any prior restraint will be the part of any new agreement best effectuates the policy of promoting collective bargaining agreements. *Id.*

211 Brown v. Pro Football, Inc., 50 F.3d 1041 (D.C. Cir. 1995). In this decision the D.C. Circuit denied the NFL players claim for damages for violations of the Sherman Act and held that when antitrust law and labor law collide the antitrust law must give way. *Id.* at 1056.

212 *Id.*

Therefore, allowing the continuation of the nonstatutory exemption is the best means to effectuate national labor policy and to keep the a level playing field.

After the disastrous events in the fall of 1994, the players and owners finally realized that the game was bigger than their problems and that it needed to continue with or without a collective bargaining agreement. The 1995 season was played and finished with the Atlanta Braves' dramatic victory over the Cleveland Indians in the first World Series since 1993, showing once again that nothing is wrong with the game of baseball as it is played between the white lines. Baseball was able to heal many scars with its exciting 1995 season. Many problems, however, do persist and will not be solved until the players and owners can come to the bargaining table and finally agree to a new long term collective bargaining agreement.

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