The Time Has Come: Ending The Antitrust Non-Enforcement Policy in Professional Sports

INTRODUCTION

In the area of federal antitrust regulation professional sports have been granted special allowances unheard of in other industries.[1] While the Sherman Antitrust Act has prevented numerous businesses from restraining trade, the business of professional sports has enjoyed a general policy of non-enforcement.[2] The industry of professional sports is financially strong,[3] and should not be permitted to engage in unfair trade practices.

This comment analyzes why the courts and Congress should discontinue the general policy of non-enforcement of the antitrust laws in the sport industry.[4] It will further address how the policy of non-enforcement adopted by the courts and Congress in the antitrust area has denied the professional athlete the ability to negotiate free of trade restraints.[5]

In various professional sports, player trade restraint practices,[6] which contradict the purpose of antitrust laws, have been used to

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1. Jerome F. Leavell and Howard L. Millard, *Trade Regulation and Professional Sports*, 26 MERCER L. REV. 603 (1975).

2. *Id.* at 603.

3. W. John Moore, *Collision Sport*, NAT'L J., Dec. 1, 1990, at 2909. Moore emphasizes that the sports industry has thrived as a business due to its near invulnerability to antitrust challenges. Moore noted the following figures: "The NFL's revenues last year reached $1.4 billion, according to Stanford University economist, Roger C. Noll. Major League Baseball's [revenues] hit $1.3 billion; the NBA's [revenues], $500 million; and the NHL's [revenues], $250 million. Professional sports is roughly the same size as the canned-fruit and vegetable industry. . . ." *Id.*

4. This comment will not attempt to fully discuss all possible antitrust aspects of the sport industry.

5. Some commentators even suggest that the non-enforcement policy violates athletes' equal protection rights. *See* James F. Foley, Comment, *Antitrust and Professional Sport: Does Anyone Play by the Rules of the Game?*, 22 CATH. U.L. REV. 403, 425 (1975). Foley contends that the application of the antitrust laws to professional sports should be equal to the enforcement of those laws in other industries. *Id.* at 426. This comment does not necessarily argue that professional athletes should make more money, but rather, that athletes should be permitted to negotiate their contracts under a free market system like employees of other industries. Under such a system athletes may finally have some choice as to where they will work and have their salaries determined in a competitive market.

6. Player trade restraint practices operate to restrict player movement between teams within the professional sports leagues. *See* Mackey v. National Football League, 543 F.2d 606

keep athletes' salaries down, while profits remained up.[7] Professional sports leagues and associations implement player trade restraints through assorted types of player reservation systems, under which the exclusive rights to negotiate with a player are given to a specific team.[8] Due to the policy of non-enforcement of antitrust laws, the professional athlete is rarely successful in challenging questionable trade practices of sports governing bodies. The professional sports of baseball, football and boxing will be reviewed as examples of how the non-enforcement attitude of the courts and Congress have led to the exploitation of athletes.[9] Although the organizational process in professional sports differs from traditional type industries,[10] Supreme Court precedent, in the context of antitrust litigation, does not suggest that the unique nature of the sports industry warrants this pol-

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(1976). A specific example of a player restraint device used by the sports leagues is the old Rozelle Rule in football. *Id.* at 609. The "Rozelle Rule" provided that when a player's contract with a team expired and he signed with a different team, the signing team must give compensation to the player's former club. *Id.* The rule restricted players' ability to move from team to team and significantly depressed player salaries. *Id.* at 615. The court held that the "Rozelle Rule" constituted an unreasonable restraint of trade in violation of the Sherman Antitrust Act and enjoined its enforcement. *Id.* at 623.

7. Roger C. Noll, *The Economics of Sports Leagues, in* LAW OF PROFESSIONAL AND AMATEUR SPORTS § 17.03, at 17-1, 17-23 (G. Uberstine ed. 1988). Several economic studies have led Professor Noll to the conclusion that player restraint practices significantly reduce player salaries. *Id.* at 17-23.

8. *Id.* at 17-21 to 17-22. Some general features of player reservation systems are as follows:

Rookie draft: The rookie draft provides a team with exclusive rights to negotiate with a player who first enters into a professional career. *Id.* at 17-21.

Waiver rules: When a player is released by one team, other teams can pick up the exclusive rights of his contract at a predetermined fixed price. Thus, players who may be in a position to negotiate a higher salary after being released are prevented from receiving more money than the predetermined waiver price. *Id.* at 17-21 to 17-22.

Salary cap: The total amount in salaries on a given team may not exceed a certain predetermined amount set by the governing league body. *Id.* at 17-22.

Free agent compensation: When a veteran free agent signs a contract with a new team, the new team may be required to provide the former team with some type of compensation. *Id.*

Right of first refusal: When a veteran free agent is offered a contract from a new team, the player's former team may maintain exclusive rights to the player if it matches the terms of the new contract. *Id.*

9. *See* Foley, *supra* note 5, at 426.

10. J. WEISTART & C. LOWELL, THE LAW OF SPORTS § 5.07, at 594-95 (1979). The courts have reviewed competition in the sports industry with a lower level of judicial scrutiny than other industries because of the concept that the professional sports industry's economic viability depends on its ability to control competition. *Id.* The concept of controlling competition is examined in the section of this comment discussing the unique nature of the sports industry. *See infra* notes 142-148 and accompanying text.

icy of non-enforcement.[11] Commentators contend that professional sports should receive the level of antitrust scrutiny that courts have imposed on most industries in the United States.[12]

Application of Antitrust Laws to Professional Sports

Federal antitrust law is designed to promote competition.[13] Specifically, sections 1 and 2 of the Sherman Antitrust Act govern most antitrust disputes.[14] In so doing, section 1 condemns conspiracies designed to restrain trade in interstate commerce.[15] Section 2 eliminates the monopolization of trade amongst the states.[16] In addition, the Sherman Act proposes that economic competition should be un-

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11. The Supreme Court has consistently disapproved the notion that naked restraints of trade should be tolerated because they allegedly protect or promote competition. *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127, 146 (1966) (holding concerted refusal to deal to be a per se illegal restraint of trade despite General Motors' claim that the refusals to deal were based on the need to maintain their system for distributing automobiles); United States v. Masonite Corp., 316 U.S. 265, 276 (1942) (holding price-fixing arrangement to be a per se illegal restraint of trade despite the claim that the arrangement promoted competition); Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457, 464 (1941) (holding conduct of the Fashion Originators' Guild to be an illegal combination to restrain trade, albeit the primary purpose of the conduct was meant to protect the competition between members of the organization).

12. Leavell and Millard, *supra* note 1, at 616; Foley, *supra* note 5, at 426.

13. United States v. Topco Assocs., 405 U.S. 596, 610 (1972). Topco was an association of regional supermarket chains whose bylaws provided for an "exclusive" category of territorial licenses. *Id.* at 602. The Supreme Court held that the agreement between the Topco members to divide territories to minimize competition was a horizontal restraint, and, therefore, a per se violation of the Sherman Act. *Id.* at 612. The Court emphasized the importance of the Sherman Act by announcing:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill]of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete— to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.

Id. at 610.

14. 15 U.S.C. §§ 1, 2 (1982).

15. Section 1 of the Sherman Act provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy in the restraint of trade of commerce among the several states . . . is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished.

15 U.S.C. § 1 (1982).

16. Section 2 of the Sherman Act provides in relevant part:

restrained because competitive forces provide for the best distribution of our economic resources.[17] Thus, the Sherman Act serves as a deterrent to restraints on competition that are harmful to the general public.[18]

The courts follow two standards when judging restraints of trade under the Sherman Act: "the rule of reason" and the "per se" doctrine.[19] Under the rule of reason standard, courts balance the procompetitive and anti-competitive effects of a particular trade restraint.[20] In contrast, the per se doctrine treats certain practices, that restrain trade, as unlawful without inquiry.[21]

The statutory language of section 1 of the Sherman Act implies that every combination among the states in restraint of trade is illegal.[22] However, in *Standard Oil Co. v. United States*,[23] the United States Supreme Court determined that the Sherman Act only prohibited unreasonable restraints of trade.[24] Under this standard, the court must make a thorough inquiry into whether the challenged restraint merely acts to regulate and promote competition, or whether it restrains trade to the extent of suppressing and destroying competition.[25] In accord with this rule of reason approach, the court is urged to consider such factors as: the business involved; the nature and ef-

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Every person who shall monopolize, or attempt to monopolize, or combine to conspire with any other
person or persons, to monopolize any part of the
trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony,
and upon conviction thereof, shall be punished.

15 U.S.C. § 2 (1982).

17. Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958). In *Northern Pacific*, the Supreme Court held "tying arrangements" to be unlawful as unreasonable restraints of trade. The Court defined tying arrangements as agreements of a party to sell a product but only on the condition that the buyer purchases a tied product. *Id.* at 5. The Court concluded that tying arrangements severely suppressed competition and ran contrary to the basic premise of the Sherman Act "that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Id.* at 4.

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

19. *See* LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST, at 166 (1977).

20. *Standard Oil*, 221 U.S. 1.

21. *Northern Pacific*, 356 U.S. at 5.

22. *Standard Oil*, 221 U.S. at 65.

23. 221 U.S. 1 (1911).

24. *Id.* at 65-66. The Court concluded that Congress intended the Sherman Act to prohibit only unreasonable restraints of trade because every contract restrains trade in some way. *Id.*

25. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

fect of the restraint; the reason the restraint is imposed and, the purpose to be obtained.[26] The rule of reason entails making extensive factual inquiries and subjective policy judgments which require legislative-type determinations.[27]

Alternatively, certain restraints of trade are so contrary to public policy that they have been classified by the Court as illegal per se.[28] For example, some arrangements that are deemed illegal per se are group boycotts,[29] price fixing,[30] and concerted refusals to deal.[31] In *Northern Pacific Railway v. United States*,[32] the Supreme Court held that a per se violation of the Sherman Act would be found only where a conspiracy had "a pernicious effect on competition and lack[ed] any redeeming virtue."[33] These two factors have been described by the Court as "demanding standards" to prove in order for a business practice to be found illegal per se.[34]

Moreover, these standards are particularly difficult to satisfy in the context of professional sports because the business practice can

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26. *Id.* The rule of reason analysis involves a balancing of the pro-competitive and anti-competitive effects of the challenged restraint:

> [T]he court must ordinarily consider the facts peculiar to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id.

27. *See* Linseman v. World Hockey Ass'n, 439 F. Supp 1315 (D. Conn. 1977); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971). In choosing the per se standard to strike down league practices, both courts noted that the rule of reason analysis involved the disadvantage of lengthy factual inquiries more suited to legislative investigation. *Linseman*, 439 F. Supp. at 1320; *Denver Rockets*, 325 F. Supp. at 1063. In *Linseman*, the court held that a World Hockey Association ("WHA") regulation prohibiting persons under the age of twenty to play hockey in the WHA constituted a per se illegal concerted boycott under the antitrust laws. 439 F. Supp. at 1322. Similarly, in *Denver Rockets*, the court held that by laws of the National Basketball Association ("NBA") prohibiting a player from negotiating with an NBA team until four years after his high school class graduation, constituted a per se illegal group boycott under the antitrust laws. 325 F. Supp. at 1066.

28. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958)

29. Klor's Inc. v. Broadway-Hale Stores, Inc. 359 U.S. 207, 212 (1959) (holding that a combination among businessmen to boycott a single merchant was per se illegal).

30. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) (holding that agreements to control or fix prices of articles moving in interstate commerce are illegal per se).

31. Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 43 (1930) (holding that combinations among parties refusing to deal, or to deal only upon satisfaction of certain conditions are illegal restraints of trade).

32. 356 U.S. 1 (1958).

33. *Id.* at 5.

34. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977).

arguably have some redeeming value.[35] The per se rule applies only where courts have had enough experience with the challenged trade practice to conclude that the arrangement is so unreasonable that no further inquiry is needed.[36] Due to the unique nature of the professional sports industry and the courts' general inexperience with it, courts are reluctant to apply the per se rule.[37] Thus, the general refusal on the part of the courts to apply the per se standard to player restrictions has left antitrust plaintiffs in sport cases with an inadequate arsenal with which to challenge trade restraints.[38]

Courts have continuously struggled over the appropriate test to apply when examining professional sports' business practices under the federal antitrust laws.[39] Choosing to apply the per se or rule of

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35. *See generally* WEISTART & LOWELL, *supra* note 10, § 5.07, at 594-95. Sports leagues argue that the per se rule should not apply to their trade restraint practices because the restraints promote competition in a way that makes the league product more attractive to the fans thereby giving the practices some redeeming value. *Id.*

36. *See* SULLIVAN, *supra* note 19, at 186-92. In addition, the Supreme Court has recognized an exception to the rule that certain trade restraint practices, such as group boycotts, are per se illegal. Silver v. New York Stock Exchange, 373 U.S. 341 (1963). In *Silver*, the Court acknowledged that a "justification derived from the policy of another statute or otherwise" might rescue a group boycott from per se rule of illegality. *Id.* at 348-49. In order to demonstrate that the *Silver* exception should apply to a group boycott, the courts have indicated that three factors must be satisfied. First, the collective action must have a legislative mandate for self regulation "or otherwise." Denver Rockets v. All-Pro Management, 325 F. Supp. 1049, 1064 (C.D. Cal. 1971). Second, the collective action must be (a) "intended to accomplish an end consistent with the policy justifying self-regulation, (b) reasonably related to that goal, and (c) no more extensive than necessary." *Id.* at 1065. Third, the group restraining trade provides procedural safeguards which ensure that the restraint "is not arbitrary and which furnishes a basis for judicial review." *Id.* Some courts conclude that the *Silver* exception precludes them from subjecting the cooperative activities of governing sports bodies to the per se rule of illegality. *See* Brenner v. World Boxing Council, 675 F.2d 445 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982); Deesen v. Professional Golfers' Ass'n, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846, *reh'g denied*, 385 U.S. 1032 (1966).

37. *See, e.g.*, Smith v. Pro Football, Inc., 593 F.2d 1173, 1177-81 (D.C. Cir. 1978); Mackey v. National Football League, 543 F.2d 606, 618-19 (8th Cir. 1976). In *Smith* and *Mackey*, the D.C. and Eighth Circuits rejected the district courts' finding below that the challenged NFL player restraint rules should be governed by a per se rule. *Smith*, 593 F.2d at 1181; *Mackey*, 543 F.2d at 620. The circuit courts held that the unique business situation of the NFL did not warrant application of the per se rule. *Smith*, 593 F.2d at 1181-82; *Mackey*, 543 F.2d at 619. The Eighth Circuit noted that the NFL was unique because each member team has a stake in the success of other teams. *Mackey*, 543 F.2d at 619.

38. *See Brenner*, 675 F.2d at 454. (describing the reluctance of courts to apply the per se rule to cooperative activities of sports organizations).

39. *See supra* notes 26-38 and accompanying text. Most courts apply the rule of reason standard because they feel that business of professional sports is too unique a business to apply the per se rule. *See Mackey*, 543 F.2d at 618-19. However, some courts will subject certain trade restraint practices to the per se rule of illegality because the trade practices are overly restrictive. *See* Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1322 (D. Conn. 1977).

reason standard is an important decision which will undoubtedly affect the outcome of a case.[40] The rule of reason standard allows for a more thorough inquiry into a business practice.[41] However, this standard forces the courts to undergo extensive investigation and weigh pro-competitive features and anti-competitive harms in a manner more suited to the legislature.[42] In contrast, the per se rule promotes business certainty and judicial efficiency,[43] but disallows any inquiry into possible pro-competitive justifications for the challenged activity.[44]

Most courts conclude that the rule of reason analysis should govern the legality of player restraints in professional sports.[45] Sports governing bodies favor the rule of reason standard due to the likelihood that courts will defer to the reasonableness of the restraint.[46] In applying the less stringent rule of reason standard, courts must be prepared to conduct an extensive factual inquiry, which balances the pro-competitive and anti-competitive effects of the player restraint involved.[47] Only where the restraint is the least restrictive means of achieving legitimate pro-competitive goals should it be upheld under antitrust scrutiny.[48]

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40. *Denver Rockets*, 325 F. Supp. at 1055. The two different standards represent opposite approaches in the application of antitrust laws. *Id.*

41. *See supra* notes 22-26 and accompanying text. The inquiry will examine the history and the purpose of the restraint and weigh the pro-competitive and anti-competitive effects. *Smith*, 593 F.2d at 1188-89.

42. *See supra* note 27 and accompanying text.

43. United States v. Topco Assocs., 405 U.S. 596, 609 (1972). Per se rules give aid to businessmen in predicting what courts will find to be legal and illegal under the antitrust laws. *Id.* Moreover, per se rules help solve the problem courts have with their limited resources with which to examine difficult economic problems. *Id.* at 610.

44. *See* Thane N. Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729, 740 (1987). Rosenbaum argues that the per se rule does not consider legitimate business justifications of the challenged restraint. *Id.*

45. *See Smith*, 593 F.2d at 1182-83 (applying rule of reason to the National Football League ("NFL") draft); Mackey v. National Football League, 543 F.2d 606, 618-20 (8th Cir. 1976) (applying rule of reason to the NFL Rozelle rule); Deesen v. Professional Golfers' Ass'n, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966) (applying rule of reason to Professional Golfers' Association tournament entry restrictions); Kapp v. National Football League, 390 F. Supp. 73, 81 (N.D. Cal. 1974) (applying rule of reason to NFL draft and Rozelle rule), *aff'd in part and appeal dismissed in part as moot*, 586 F.2d 644 (9th Cir. 1978); Philadelphia World Hockey Club v. Philadelphia Hockey Club, 351 F. Supp. 462, 503 (E.D. Pa. 1972) (applying rule of reason to National Hockey League (NHL) reserve clause).

46. WEISTART & LOWELL, *supra* note 10, § 5.07, at 595.

47. *Smith*, 593 F.2d at 1188-89.

48. *See Mackey*, 543 F.2d at 622. The Eighth Circuit struck down the NFL Rozelle Rule because it was more restrictive than necessary to accomplish any legitimate business goals. *Id.*

Some courts, however, have departed from the rule of reason analysis and applied the per se rule of illegality to restraints designed to restrict an athletes' ability to negotiate with professional sports teams.[49] Although the rule of reason may be appropriate in analyzing certain sport cases, courts have applied the per se rule to cases involving egregious player restrictions that amount to naked restraints of trade in violation of players' rights.[50] Specifically, trade restraint practices which limit the capability of professional athletes to decide where they will work or from negotiating contracts in a competitive market free of restraints should be subjected to the per se standard.[51]

POLICY OF NON-ENFORCEMENT

While all major sports except for baseball have been held subject to antitrust laws,[52] a policy of non-enforcement has been applied to the numerous unfair trade practices which occur in professional sports.[53] As a result, professional athletes have endured significant problems.[54] Professional team sports of baseball and football and the individual sport of boxing exemplify the courts' stance of non-enforcement. Initially, the non-enforcement policy began in baseball

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49. *See* Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971) (applying the per se rule of illegality to NBA's eligibility rule preventing Spencer Haywood from playing basketball until four years after his high school graduation); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1320 (D. Conn. 1977) (applying per se rule of illegality to WHA regulation prohibiting persons under the age of twenty to play hockey); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1063 (D.C. Cal. 1971) (applying per se rule of illegality to NBA bylaw prohibiting teams from negotiating with players until four years after high school graduation).

50. *See Linseman*, 439 F. Supp. at 1320-21; *Denver Rockets*, 325 F. Supp. at 1066.

51. *See, e.g., Linseman*, 439 F. Supp. at 1321. The court described the harms resulting to the plaintiff attempting to enter the WHA as a result of the alleged group boycott. *Id.* First, the victim was precluded from entering a market he desired to enter. *Id.* Second, the competition in the market that he desired to enter suffers (other hockey players in the WHA). *Id.* "Third, by pooling their economic power, the individual members of the WHA have substituted their own private government for the rule of the marketplace." *Id. See also*, Noll, *supra* note 7 for a discussion on the various features of player reservation systems. Under a player reservation system a league will allocate the exclusive rights to a player to a specific team, thereby eliminating competition among teams for athletes' services. *Id.*

52. *Haywood*, 401 U.S. 1204 (1971) (basketball); Radovich v. National Football League, 352 U.S. 445 (1957) (football); United States v. International Boxing Club, 348 U.S. 236 (1954) (boxing); Gunter Harz Sports, Inc. v. United States Tennis Ass'n., 511 F. Supp. 1103 (D. Neb.), *aff'd per curiam*, 665 F.2d 222 (8th Cir. 1981) (tennis); Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (D. Ga. 1973) (golf); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972) (hockey).

53. Leavell and Millard, *supra* note 1, at 603.

54. *See supra* notes 5-9 and accompanying text.

with its antitrust exemption.[55] Subsequently, football became an example of how collective bargaining and the nonstatutory labor exemption have recently been used by professional league team owners to protect themselves from antitrust attack.[56] Finally, boxing provides an example of an individual professional sport which has been held subject to antitrust laws, but where no antitrust enforcement has occurred.[57]

Baseball and the Beginning of Non-enforcement

The policy of non-enforcement is in large part attributable to the Supreme Court's decisions rendering baseball exempt from antitrust laws.[58] In 1922, the Supreme Court first addressed the question of whether to apply the antitrust laws to a professional sport in *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*.[59] In *Federal Baseball*, the Supreme Court found that the business of giving baseball exhibitions did not fall within the reach of the antitrust laws.[60] The Court based its conclusion on two main factors. First, the Court found that the business of giving baseball exhibitions was not interstate commerce because it constituted "purely state affairs."[61] Second, the Court found that the exhibitions were not trade or commerce because "personal effort not related to production, is not a subject of commerce."[62]

The Court extended the exemption of baseball from the antitrust laws more than thirty years later in *Toolson v. New York Yankees, Inc.*[63] In *Toolson*, the Court reaffirmed the idea that Congress did not

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55. *See* Flood v. Kuhn, 407 U.S. 258, 259 (1972).

56. *See* Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976).

57. *See infra* notes 125-141 and accompanying text.

58. *See* Weistart & Lowell, supra note 10, § 5.01, at 477; *Flood*, 407 U.S. 258; Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953); Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).

59. 259 U.S. 200 (1922). In *Federal Baseball*, a baseball club of the rival Federal League brought a civil action against the Professional Baseball Leagues. *Id.* at 207. The plaintiff claimed that the defendant had conspired to monopolize baseball by purchasing several teams in the Federal League and by inducing others to leave the league. *Id.*

60. *Id.* at 209.

61. *Id.* at 208-9. The Court reasoned that the transport of players across state lines "is a mere incident, not the essential thing." *Id.*

62. *Id.* at 209. The Court stated that although baseball was an exhibition that made money, it was not trade or commerce in the traditional sense. *Id.*

63. 346 U.S. 356 (1953). In *Toolson*, the plaintiff was a pitcher who refused to report to the New York Yankees' farm team after his contract had been assigned to them. Toolson v. New York Yankees, Inc., 101 F. Supp. 93 (S.D. Cal. 1951), *cert. granted*, 345 U.S. 963 (1953). Afterwards, he was declared "ineligible" and not permitted to play for any other professional

intend to include baseball within the scope of the antitrust laws.[64] The Court affirmed the baseball exemption because Congress had allowed the exemption to exist for over thirty years.[65] In addition, the Court noted that baseball had developed during those thirty years with the understanding that it was exempt from antitrust legislation.[66] Furthermore, the Court was concerned with retroactivity problems that would result from overruling *Federal Baseball*.[67] Thus, the Court concluded that any changes in the exemption should come from the legislature and not the judiciary.[68]

In *Flood v. Kuhn*,[69] the Supreme Court affirmed the baseball exemption by overruling part of the holding of *Federal Baseball*. In doing so, the Court found that baseball was a business involved in interstate commerce.[70] This finding destroyed the reasoning upon which the baseball exemption was constructed.[71] The Court expressly recognized that *Federal Baseball* and *Toolson* were aberrations confined to baseball, and that the anomaly was entitled to the benefit of *stare decisis*.[72] The Court based its rationale upon the *Toolson* decision, which posited that Congress's failure to act had indicated an intention to approve the baseball exemption.[73] The time has come for Congress to place baseball on equal footing with other sports and destroy the complete antitrust exemption which baseball has enjoyed for almost seventy years.[74] Most commentators are in agreement that

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team. *Id.* at 93. The merits of the plaintiff's antitrust claims were never considered and simply dismissed under the authority of *Federal Baseball*. *Toolson*, 346 U.S. at 357.

64. *Toolson*, 346 U.S. at 357. "Without reexamination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball*, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the antitrust laws." *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. 407 U.S. 258 (1972).

70. *Id.* at 282.

71. WEISTART & LOWELL, *supra* note 10, § 5.02, at 486.

72. *Flood*, 407 U.S. at 259.

73. *Id.* at 284-85. The Court again stated that it would not assume a policy-making role and that any changes must come from Congress. *Id.*

74. Congress has considered the baseball exemption issue many times. *See, e.g., id.* at 281. For example, between the decision in *Toolson* affirming the baseball exemption in 1953 and the decision in *Flood* in 1972, the Court noted the significant number of bills that had been introduced in Congress relating to the applicability or nonapplicability of the Sherman Act to baseball. *Id.*

the baseball exemption must end.[75] The Court has reiterated that it would not overrule *Federal Baseball* and dispose of the exemption.[76] Arguably, the Court has left responsibility for changing baseball's antitrust exemption with Congress.[77] Congress should follow this judicial mandate and take action to abolish the baseball exemption.[78] In disposing of the exemption, team owners in all sports could take notice of the judicial and legislative unwillingness to tolerate the blatant antitrust violations practiced in the world of sports today.[79]

Football and the Trend Toward Protection Provided by the Nonstatutory Labor Exemption

In 1957, the Supreme Court limited the antitrust exemption exclusively to the business of baseball and held that professional football came within the scope of the Sherman Act.[80] In *Radovich v. National Football League*,[81] the National Football League (NFL) had blacklisted Radovich, an NFL player, for failing to fulfill his obligations to his former NFL team.[82] Radovich brought an action against

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75. *See* Weistart & Lowell, *supra* note 10, § 5.02, at 486-87; Robert C. Berger, *After the Strikes: A Reexamination of Professional Baseball's Exemption from the Antitrust Laws*, 45 U. Pitt. L. Rev. 209 (1983); C. Paul Rogers, *Judicial Reinterpretation of Statutes: The Example of Baseball and the Antitrust Laws*, 14 Hous. L. Rev. 611 (1977); Barton J. Menitove, Note, *Baseball's Antitrust Exemption: The Limits of Stare Decisis*, 12 B.C. Ind. & Comm. L. Rev. 737 (1971); Richard D. Blackwell, Note, *Baseball's Antitrust Exemption and the Reserve System, Reappraisal of an Anachronism*, 12 Wm. & Mary L. Rev. 859 (1971).

76. *Flood*, 407 U.S. at 285; Toolson v. New York Yankees, Inc., 346 U.S. 365, 357 (1953).

77. Berger, *supra* note 75, at 221. Berger contends that the Court has clearly left exclusive responsibility for destroying the baseball antitrust exemption with Congress. *Id.*

78. *Id.* at 222.

79. The baseball exemption has caused the antitrust non-enforcement policy to spread throughout the sports industry. *See generally* Weistart & Lowell, *supra* note 10, § 5.01, at 477. If the exemption were ended, courts may begin to stop granting professional sports special treatment in the antitrust area. *Id.*

80. Radovich v. National Football League, 352 U.S. 445 (1957).

81. *Id.* The Court justified its reasoning for placing football, and not baseball, within the purview of the Sherman Act on the basis that if the Court were considering the baseball issue for the first time it would "have no doubts" that the antitrust laws would be applied to baseball. *Id.* at 452.

82. *Id.* at 448. Radovich was a professional football player with the Detroit Lions, a National League team. *Id.* He asked for a transfer to a team in Los Angeles because of the illness of his father. *Id.* Because the Lions would not give Radovich a transfer, he broke his player contract and signed to play for the 1946 and 1947 seasons with the Los Angeles Dons, an All-America Conference team. *Id.* In 1948, the San Francisco Clippers, a team affiliated with the National League, offered Radovich a player-coach position. *Id.* However, the National League informed all teams that Radovich was a blacklisted player and penalties would be imposed if any club signed him. *Id.* The Clippers then withdrew their offer to Radovich. *Id.* The blacklisting prevented him from playing organized professional football in the United States. *Id.*

the league, claiming the NFL had violated sections 1 and 2 of the Sherman Act.[83] The district court dismissed the complaint and the Ninth Circuit affirmed the dismissal on the grounds that *Federal Baseball* and *Toolson* were controlling.[84] The Supreme Court reversed, specifically holding that the antitrust exemption would only apply to the business of organized professional baseball.[85] In *Radovich*, the Court emphasized that any error or discrimination created by the baseball exemption must be corrected by Congress.[86] The Court stated that "[c]ongressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation."[87] Furthermore, the Court noted that the product of congressional processes would better protect the industry and the public.[88]

Despite being held subject to antitrust laws by the courts, the NFL and team owners have shielded themselves from antitrust attacks through the nonstatutory labor exemption.[89] The nonstatutory labor exemption immunizes from antitrust scrutiny certain agreements reached between employers and labor unions in the collective bargaining process.[90] The Supreme Court has established the exemption to alleviate the conflict between the congressional policy favoring collective bargaining under the labor laws and the federal antitrust policy favoring unfettered competition.[91] The nonstatutory labor ex-

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83. *Id.* at 447.

84. 231 F.2d 620 (9th Cir. 1956), *rev'd*, 352 U.S. 445 (1957).

85. *Radovich*, 352 U.S. at 451. The Court expressly refused to extend the antitrust exemption to any other sport but baseball:

> It seems that this language would have made it clear that the Court intended to isolate these cases by limiting them to baseball, but since *Toolson* and *Federal Baseball* are still cited as controlling authority in antitrust actions involving other fields of business, we now specifically limit the rule there established to the facts there involved, i.e., the business of organized baseball. As long as the Congress continues to acquiesce, we should adhere to — but not extend — the interpretation of the Act made in those cases.

Id.

86. *Id.* at 452.

87. *Id.*

88. *Id.* Since the decision in *Federal Baseball*, the Court continually asserts its belief that Congress is the more appropriate body to create order in the antitrust area of professional sports. *See id.* at 451-52; Flood v. Kuhn, 407 U.S. 258, 284-85 (1972); Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953).

89. *See* Daniel C. Nester, Comment, *Labor Exemption to Antitrust Scrutiny In Professional Sports*, 15 S. ILL. U. L.J. 123 (1990).

90. Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 622 (1975).

91. *Id.* The Supreme Court has recognized that in certain limited areas labor policy can only be effectuated if antitrust policy is superseded. *Id.*

emption has led to a modern trend in professional sports of removing many significant antitrust issues from court review.[92]

In *Mackey v. National Football League*,[93] the court addressed the nonstatutory labor exemption in deciding a player's challenge to the NFL's reserve rules.[94] The Eighth Circuit set forth a three pronged test to determine whether a bargaining agreement is eligible for antitrust immunity under the nonstatutory labor exemption.[95] Under this test, the nonstatutory labor exemption applies to immunize the agreement if three elements are satisfied: (1) the restraint on trade primarily affects only the parties to the agreement; (2) the agreement concerns a mandatory subject of collective bargaining and, (3) the agreement is the product of bona-fide arms length bargaining.[96]

The *Mackey* test has been continuously employed to resolve labor exemption issues in cases involving player restraints.[97] As long as players' unions and professional leagues sit down at the bargaining table and an agreement is reached in good faith, the labor exemption will preclude courts from reviewing the agreed upon terms under the antitrust laws.[98] The court in *Mackey* articulated a test for when a collective bargaining agreement will come under the nonstatutory labor exemption,[99] however, it left open the question of whether the labor exemption continued after the collective bargaining agreement expires.

Recently, the Eighth Circuit has answered this question and decided that the nonstatutory labor exemption extends after the collec-

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92. WEISTART & LOWELL, *supra* note 10, § 5.01, at 478. The authors express the view the nonstatutory labor exemption will cause the antitrust laws to have a more diminished role in the world of sports. *Id.*

93. 543 F.2d 606 (8th Cir. 1976). *See supra* note 6 for a discussion of *Mackey*.

94. *Mackey*, 543 F.2d at 609.

95. *Id.* at 614.

96. *Id.*

97. *See, e.g.* McCourt v. California Sports, Inc., 600 F.2d 1193, 1203 (6th Cir. 1979) (holding that under the *Mackey* test the NHL's restrictive reserve clause was protected from antitrust review due to the nonstatutory labor exemption); Zimmerman v. National Football League, 632 F. Supp. 398, 403-04 (D.D.C. 1986) (holding that under the *Mackey* test the NFL "supplemental draft" was protected from antitrust review due to the nonstatutory labor exemption); Wood v. National Basketball Ass'n, 602 F. Supp. 525, 528 (S.D.N.Y. 1984), *aff'd on other grounds*, 809 F.2d 954 (2d Cir. 1987) (holding that under the *Mackey* test the NBA college draft, team salary limitations and bans on player corporations were all entitled to the protection of the nonstatutory labor exemption).

98. *See* WEISTART & LOWELL, *supra* note 10, § 5.01, at 478.

99. *Mackey*, 543 F.2d at 614.

tive bargaining agreement expires.[100] In *Powell v. National Football League, (Powell I)*,[101] the National Football League Players Association (NFLPA) brought an antitrust action challenging the system in the NFL of restricting players' ability to sign with other teams.[102] The Eighth Circuit found that the labor exemption continues beyond a deadlock in negotiations for a new collective bargaining agreement, usually called an impasse.[103] The court reasoned that its decision promoted collective bargaining and that antitrust policy should sometimes yield to national labor policy.[104] The result of the *Powell I* decision provides that "once a union agrees to a package of player restraints, it will be bound to that package forever unless the union forfeits its bargaining rights."[105]

Professional sports leagues and owners are in a stronger position than players to begin with in the collective bargaining relationship.[106]

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100. Powell v. National Football League (*Powell I*), 888 F.2d 559 (8th Cir. 1989), *cert. denied*, 111 S. Ct. 711 (1991).

101. *Id.*

102. *Id.* at 561. The player restraint practice at issue was the Right of First Refusal/ Compensation system. The system provides the following:

> [T]hat a team could retain a veteran free agent by exercising a right of first refusal and by matching a competing club's offer. If the old team decided not to match the offer, the old team would receive compensation from the new team in the form of additional draft choices.

Id.

103. *Id.* at 568. *But see Mackey*, 543 F.2d at 614. The court enunciated that "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 bona fide arm's length bargaining." *Id.* In *Mackey*, the Eighth Circuit did not decide when the exemption expires, but implied that protection of illegal restraints lasts as long as the restraints are the result of good faith negotiations. *Id. See also* Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960 (D.N.J. 1987) (holding that the nonstatutory labor exemption should continue only as long as the exemption fostered collective bargaining).

104. *Powell I*, 888 F.2d at 567. The court observed that labor law provides an extensive array of remedies to the union after impasse and that the dispute between labor and management should be resolved without resort to intervention by the courts. *Id.*

105. *Id.* at 574 (Heaney,J., dissenting). Judge Heaney dissented from the majority, arguing that the labor exemption should end at a standstill in negotiations - an impasse. *Id.* at 569 (Heaney, J., dissenting). He asserted that any unilateral restraints imposed after impasse should not be binding because the restraints were not the product of good faith negotiations. *Id.* at 570 (Heaney, J., dissenting). He further reasoned that any unilateral restraints put in place after an impasse should no longer be afforded protection from the antitrust laws. *Id.* (Heaney, J., dissenting). In his dissent Judge Heaney stated, "[i]n practical terms the majority has eliminated the owners' fear of the antitrust lever; therefore, little incentive exists for the owners to ameliorate anti-competitive behavior damaging to the players." *Id.* at 571 (Heaney, J., dissenting).

106. Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 354.

Allowing the nonstatutory labor exemption to extend beyond impasse gives professional sports leagues and owners more of an unfair advantage in the collective bargaining process.[107] Once an impasse in bargaining occurs, an employer can unilaterally implement new or different employment terms without fear of antitrust liability.[108] This result gives employers a strong incentive to generate impasse.[109] Extending the labor exemption beyond impasse forces professional athletes to either give up their union representation in order to pursue antitrust claims, or keep their union in place and live with the player restraints.[110]

As a result of *Powell I*, NFL players have been forced to abandon their union representation through the NFLPA in order to pursue their antitrust claims.[111] In *Powell v. National Football League, (Powell II)*,[112] the district court held that decertification of the NFLPA permitted the players to individually pursue their antitrust rights.[113] Although the NFL employers became exposed to antitrust liability, decertification of the union as the sole means to accomplish this end has been criticized as inhibiting the collective bargaining process.[114] Decertification hurts the players tremendously because the

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107. Nester, *supra* note 89, at 128. Owners maintain the advantage in the collective bargaining process. *Id.* The players' union experiences a lack of cohesiveness and commonality of interests. *Id.* While all professional players collectively want more money and better contracts, athletes continue to be in strong competition for jobs, thus causing a conflict of interests. *Id.* at 128-29. Also, the comparatively short career of the professional athlete results in players' unions having short institutional memories. *Id.* at 129. For example, the NFLPA experiences a twenty-five percent turn over rate per year. *Powell I*, 888 F.2d at 570-71 n.8 (Heaney,J., dissenting)

108. *Mackey*, 543 F.2d at 615. In *Mackey*, the court concluded that after impasse, employment terms could be modified as long as they "are reasonably contemplated within the scope of their pre-impasse proposals." *Id.*

109. *See* Nester, *supra* note 89, at 138-39. Nester explains that employers will be motivated to generate impasse because they can then unilaterally implement terms of employment without fear of antitrust liability. *Id.* Furthermore, the employer has no incentive to continue in an attempt to bargain with employees to change conditions after impasse. *Id.* at 139.

110. *See Powell I*, 888 F.2d at 570-71 (Heaney,J., dissenting).

111. *See* Powell v. National Football League (*Powell II*), 764 F. Supp. 1351, 1354 (D. Minn. 1991).

112. *Id.*

113. *Id.* at 1358. Decertification occurred when the players officially terminated their union representation through the NFLPA. *Id.* at 1356. The NFLPA notified the NFL that it would not continue to engage in collective bargaining or act as representative of players in grievances. *Id.* Sixty-two percent of the active players signed petitions revoking the NFLPA's authority to engage in collective bargaining on their behalf. *Id.*

114. *See* Nester, *supra* note 89, at 139. Nester expresses the view that the decision in *Powell I* extending the nonstatutory labor exemption beyond a breakdown in negotiations between the NFL and NFLPA is a bad result. *Id.* It forced the NFLPA to decertify, thus destroy-

NFL employers may now unilaterally change conditions without having to notify the NFLPA.[115]

Commentators suggest that the court in *Powell I* should have concluded that the labor exemption ended with the expiration of the collective bargaining agreement,[116] or at least at a breakdown in negotiations for a new one - an impasse.[117] Now, the players have been forced to give up substantive bargaining rights in order to bring antitrust claims.[118]

BOXING AND THE COMPLETE FAILURE OF REGULATION

After baseball had been declared exempt, the first sport to be held within the scope of the federal antitrust laws was boxing.[119] In *United States v. International Boxing Club*,[120] the Supreme Court reasoned that although a boxing match is a "local affair," the business of promotion of those matches occurs interstate, and therefore falls under the purview of the Sherman Act.[121] The Court held that "the promotion of professional championship boxing contests on a multi-state basis, coupled with the sale of rights to televise, broadcast, and film the contests for interstate transmission — constitutes 'trade or commerce among the several States' within the meaning of

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ing any chance at any further collective bargaining between the NFL and NFLPA. *Powell II*, 764 F. Supp. at 1358.

115. *Powell II*, 764 F. Supp. at 1359. As a result of the decertification of the NFLPA, the NFL has already unilaterally changed insurance benefits and made the season longer without having to negotiate with the NFLPA. *Id.*

116. Lock, *supra* note 106, at 418. Professor Lock contends that ending the labor exemption with the expiration of the bargaining agreement "would foster collective bargaining without completely subverting federal antitrust policy." *Id.* at 418-19.

117. *See* Nester, *supra* note 89, at 144. Nester asserts that ending the labor exemption at impasse accommodates the competing federal antitrust and labor policies because neither the owners or players will gain an undue advantage in the bargaining relationship. *Id.*

118. *Powell II*, 764 F. Supp. at 1354. Since decertification of the NFLPA, other football players have also begun to file individual antitrust suits. *See* McNeil v. National Football League, 777 F. Supp. 1475 (D. Minn. 1991); Brown v. Pro Football, Inc., 1991 Trade Cas. (CCH) ¶ 69,454 (D.D.C. 1991).

119. United States v. International Boxing Club, 348 U.S. 236 (1954).

120. 348 U.S. 236 (1954). *International Boxing* involved a civil antitrust action brought by the United States to restrain alleged violations of the Sherman Act. *Id.* at 237. The defendants were professional boxing promoters accused of restraining and monopolizing the trade of promoting professional championship contests. *Id.* at 239. The government's complaint alleged that the defendants had promoted, "or participated in the promotion of, all but two of the 21 championship matches held in the United States between June 1949 and the filing of the complaint in March 1952." *Id.* at 240.

121. *Id.* at 241.

the Sherman Act."[122] The Court rejected the argument that *Federal Baseball* and *Toolson* immunized all businesses of an athletic nature.[123] Instead, the Court found that the decision to exempt all professional sports from antitrust laws must be resolved by Congress.[124]

While boxing is subject to the antitrust laws, the virtual nonexistence of regulation in boxing has lead to exploitation of the professional boxer.[125] Most professional sports are governed by a rigid league structure[126] and maintain players' associations which help to protect the professional athlete.[127] Professional boxing is left to regulate itself and boxers have no representative association to provide them with protection from abuse.[128]

Over the years, private international boxing organizations have governed boxing.[129] These organizations, however, are more concerned with collecting fees for sanctioning championship contests than promoting the welfare of the professional boxer.[130] The major private world boxing organizations are empowered to set rules for boxing matches, rank boxers under their control and proclaim their own champions.[131] Critics charge that these organizations give higher

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122. *Id.* at 240.

123. *Id.* at 242. The Court noted that Congress had recently rejected bills attempting to forbid the application of antitrust laws to all professional sports. *Id.* at 243.

124. *Id.* at 243.

125. *See Boxing Fair Labor Standards Act: Hearing On H.R. 2398 Before the Subcomm. on Labor Standards of the House Education and Labor Comm.*, 101st Cong., 2d Sess. 4 (1990) [hereinafter *Boxing Fair Labor*] (testimony of Congressman Pat Williams with respect to the lack of regulation in boxing).

126. For instance, professional football is governed by the NFL, and professional basketball is governed by the National Basketball League. *See* Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976); Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960 (D.N.J. 1987).

127. Athletes in other sports are represented by some type of collective players association. For example, professional basketball players are represented by the National Basketball Players Association and professional football players are represented by the National Football League Players Association. *See Mackey*, 543 F.2d 606; *Bridgeman*, 675 F. Supp. 960.

128. *Boxing Fair Labor, supra* note 125, at 4 (testimony of Congressman Pat Williams). Congressman Williams testified on the urgent need for federal legislation in boxing to provide some protection for the professional boxer. *Id.*

129. The three major boxing organizations are the World Boxing Council, the World Boxing Association, and the International Boxing Federation.

130. Lawrence Laufer, *Uniform Health and Safety Standards For Professional Boxing: A Problem in Search of a Federal Solution?*, 15 COLUM. HUM. RTS. L. REV. 259, 266 (1984). Laufer contends "[w]hatever authority and influence they do possess is limited by a lack of uniformity in their policies and their continuing internecine rivalry. Moreover, certain practices of these organizations seem to belie their recent expressions of concern for the fighters' welfare." *Id.*

131. *Id.* at 265.

rankings to fighters of less caliber in order to control championship fights.[132] Allegations of collusion between the boxing organization and promoters are common.[133] Furthermore, many of the major problems in boxing today derive from the "monopolistic" control exercised by the major promoters.[134] While some critics point to the astronomical salaries that boxers sometimes command, the fact remains that only an infinitesimal percentage of boxers receive the large salaries we read about in the newspapers.[135]

Ironically, since the decision in *International Boxing* declaring boxing as the first sport subject to the antitrust laws more than thirty-five years ago, no successful antitrust challenges against the boxing establishment have been reported at either the federal or

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132. *See, e.g., Boxing Reform: Hearings on H.R. 1778 Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 213-214 (1983) [hereinafter *Boxing Reform*] (testimony of Bert Randolph Sugar, publisher of Ring Magazine). Mr. Sugar testified that the governing bodies in boxing manipulate the ratings of boxers in order to make the fights more fascinating for the public. *Id.* Mr. Sugar was referring specifically to the overrating of Duk Koo Kim, a South Korean boxer who was killed in a match against Ray "Boom Boom" Mancini, the former champion of the lightweight division. *Id.* The fight was an alleged gross mismatch. *Id.*

133. Laufer, *supra* note 130, at 266. Laufer observed that, "[w]eight classes as well as championship titles and sanctioning organizations have proliferated, as promoters seek to increase the popular appeal of otherwise ordinary matches and take advantage of the recent surge in television coverage of boxing matches." *Id.*

134. Lawrence Bershad and Richard J. Ensor, *Boxing in the United States: Reform, Abolition or Federal Control? A New Jersey Case Study*, 19 SETON HALL L. REV. 865, 878 (1989). The authors noted that "[t]his occurs when one promoter controls all the top fighters in one weight classification and dictates the fighters, the location of the event, and what broadcaster is granted the rights to telecast the fight." *Id. See, e.g., State Inquiry On Title Bout*, N.Y. TIMES, Dec. 26, 1986, at D9. In 1986, for example, in a heavyweight championship fight between Tim Witherspoon and James "Bonecrusher" Smith, Don King promoted the fight, and his son Carl King managed both boxers. *Id.* Carl King's management of both boxers violated a New York State Athletic Commission rule preventing a manager from having two fighters in the same match without special permission. *Id.* New York State Athletic Commissioner, Jose Torres, claimed that the Commission was never notified that Carl King was the manager of both fighters. *Id.* Given that this was a championship match, it is difficult to understand how this could be overlooked. *See* Bershad and Ensor, *supra*. New York State Inspector General, Joseph A. Spinelli, expressed his concern and questioned: "[c]an a manager negotiate properly for his fighter when he is also managing that fighter's opponent? And can the manager of both fighters negotiate properly on their behalf when the promoter is a relative of his? These are some of the questions we want to answer." *State Inquiry On Title Bout, supra.*

135. *See Hey, Big Spender*, INSIDE SPORTS, Apr. 1992, at 90. Only a select few of professional boxers who are the top attractions are well paid. *Id.* While other sports leagues operate with salary minimums in place for players, professional boxing offers no such guarantees. *Id.* For example, Michael Dokes, a former heavyweight champion of the world who is no longer in the spotlight, was recently paid a mere 500 dollars for a fight. *Id.* The top attractions are sure to make money, "[m]eanwhile, some of the fighters on their undercards had better remember to take off their thumbless gloves, so they can at least hitchhike home from work." *Id.*

state level. In addition, despite numerous congressional studies and proposals, no federal laws have yet been enacted to regulate boxing.[136] This is unfortunate, considering the alleged antitrust violations in the boxing industry.[137] Although boxing is subject to the Sherman Act, due to professional boxing's "take-it-or-leave-it" system of private non-regulation,[138] the antitrust plaintiff faces an almost impossible task in attempting to prove antitrust violations.[139] Because little hope exists that the courts will be helpful in providing order in the sport, it has been suggested that Congress should attempt to supply at least some minimal regulatory solutions to the problems in boxing.[140] Regulation of those in control of the sport of boxing may prevent the exploitation of the uneducated and naive boxer who puts his life on the line every time he steps in the ring.[141]

The Unique Nature of the Sports Industry Does Not Warrant the Policy of Non-Enforcement

Professional sports leagues justify various trade restraint practices on the ground that they help to maintain a competitive balance

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136. *Boxing Fair Labor, supra* note 125; *Boxing Reform, supra* note 132; *Creation of a Federal Boxing Board: Hearings on H.R. 2726 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 96th Cong., 1st Sess. (1979); *Federal Boxing Commission: Hearings on H.R. 8635, H.R. 8676, H.R. 9140, H.R. 9196, H.R. 9496, H.R. 9633 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 1st Sess. (1965); *Professional Boxing: Hearings on S. 1182 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. (1964) [hereinafter *Professional*]; *Professional Boxing: Hearings on S. 1474 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. (1961) [hereinafter *Professional Boxing*].

137. *See Professional, supra* note 136; *Professional Boxing, supra* note 136.

138. *See* Laufer, *supra* note 130, at 265.

139. *See* Brenner v. World Boxing Council, 675 F.2d 445 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982). In *Brenner*, the court refused to subject the World Boxing Council's (WBC) suspension of a promoter to the per se rule of illegality. *Id.* at 454. Brenner, a boxing promoter, brought an antitrust action alleging that the WBC, the WBC's president and boxing promoter, Don King, conspired to eliminate Brenner as a competitor and had engaged in a group boycott by suspending Brenner from promoting any fights governed by the WBC. *Id.* at 450. Brenner contended, *inter alia*, that the WBC and King had conspired to exclude him in the promotion of a championship match. *Id.* The court held that Brenner had failed to establish a conspiracy to restrain trade. *Id.* at 453. Interestingly, the court pointed out, "when you are attempting to promote a professional championship boxing match, you had better keep your guard up." *Id.* at 447.

140. *See* Bershad and Ensor, *supra* note 134, at 915.

141. *See Boxing Reform, supra* note 132, at 16 (testimony of Floyd Patterson). Floyd Patterson, former heavyweight champion of the world, testified on the need for some sort of minimal regulation in boxing. *Id.* "I think if you cleaned up some of the people outside the ring, like promoters, matchmakers, people that bring . . . bouts together, I think you will have better fights." *Id.* at 16.

between its' member teams.[142] The unique nature of professional sports leagues require some cooperation among its members in order for a league to survive.[143] Professional teams are not economically competitive with other teams in the league.[144] Thus, the teams in a professional league must work together to promote its business.[145] The justification for certain player restraint devices is that they serve to keep the most economically powerful teams from monopolizing all the best players.[146] If this occurred, professional leagues argue that certain teams would continually win, while others would be perpetual losers.[147] As argued, fan interest in the professional sport would diminish causing the league to fail.[148]

However, trade restraint devices claimed by professional franchises to promote competition have been criticized by economists as being relatively ineffective.[149] A system, free of player restraints, may actually create a greater balance of competition.[150] Furthermore, the questionable trade restraint practices used in professional sports today are inconsistent with the basic proposition that naked restraints of trade should not be tolerated, even if they are well in-

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142. United States v. National Football League, 116 F. Supp. 319, 324 (E.D. Pa. 1953). The arguments professional sports leagues put forth to justify trade restraints have no merit in the individual sport of boxing discussed in the previous section. *See supra* notes 117-139 and accompanying text.

143. *See* David G. Kabbes, *Professional Sports' Eligibility Rules: Too Many Players On the Field*, 1986 U. ILL. L. REV. 1233, 1247 (1986).

144. *Id.*

145. *Id.*

146. *National Football League*, 116 F. Supp. at 324.

147. *Id.* at 325.

148. *Id.*

149. *See* Noll, *supra* note 7, at 17-25. Economist Roger C. Noll asserted:

> The competitive balance issue is perhaps the most widely-held sports myth. The unstated and incorrect premises of the argument are that players will tend to flow toward better markets only if there is free agency, and that such a flow is somehow bad for sports. In fact, the player reservation system does not prevent players from moving to better markets . . . .

Id. See also Canes, *The Social Benefits of Restrictions on Team Quality* in GOVERNMENT AND THE SPORTS BUSINESS 106 (1974) (arguing that an open-market situation would operate to evenly distribute player talent just as well as a system where player restraint devices are utilized).

Professional baseball provides an example of the failure of extreme trade restraint devices to promote competition. *See* Richard M. Moss & Leland Macphail, Jr., *Prologue* to LEE LOWENFISH & TONY LOPIEN, THE IMPERFECT DIAMOND 19 (1980). During most of the twentieth century, baseball has operated with its restrictive reserve system in place. *Id.* However, up until 1972 four teams dominated baseball in winning 60% of the pennants. *Id.*

150. *See* Noll, *supra* note 7, at 17-25.

tended or may promote competition.[151] Professional sports leagues and associations should not be given special antitrust treatment due to claims of economic necessity.[152]

Additionally, there existed an early fear that the full application of antitrust laws would lead to the demise of the sports industry.[153] However, critics contend that this fear is no longer justified today.[154] The sports industry will surely not collapse by subjecting it to the same antitrust standards as other major commercial industries.[155] Economic studies reveal that since 1975, revenues per team in baseball, football and basketball have been doubling every five years.[156] The institution of professional sports enjoys more stability today then at its beginning stages of development, and modern changes have made the sports industry financially stronger.[157]

Denying athletes the opportunity to market their services free of restraints, as is permitted of employees of other industries, results in severe injustice and hardship.[158] Removing player restraints from sports would benefit athletes by causing more instances of "free agency."[159] Moreover, the professional athlete is especially suscepti-

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151. United States v. Topco Assocs., 405 U.S. 596 (1972); United States v. General Motors, 384 U.S. 127 (1966); United States v. Masonite Corp., 316 U.S. 265 (1942); Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457 (1941).

152. *See* Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1322 (D. Conn. 1977). The antitrust laws have not admitted exceptions due to claims of economic necessity. *General Motors*, 384 U.S. at 146. In *General Motors*, the Supreme Court emphasized that the "[e]xclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins . . . ." *Id.*

153. *See, e.g.*, Rogers, *supra* note 75, at 620. For example, one of the policy reasons supporting baseball's exemption from the antitrust laws in *Federal Baseball*, was the fear that America's national pastime would collapse under full antitrust regulation. *Id.*

154. *See* Noll, *supra* note 7, at 17-14. "Despite persistent public whining by many owners in sports, the financial health of the industry is generally very strong. One can argue about accounting details, but one cannot seriously claim that financial circumstances are fundamentally bleak in any sport." *Id.*

155. Leavell and Millard, *supra* note 1 at 616. "Professional sports organizations are resourceful, and they will find legal alternatives to their illegal practices if forced to do so." *Id.*

156. *See* Noll, *supra* note 7, at 17-3.

157. Moore, *supra* note 3, at 2909. For example, new changes, such as the advent of high television revenues, have made the industry more financially secure. Professional football is a prime example of increasing television revenues. "Invulnerable to antitrust challenges, the NFL has boomed, its protected television contracts skyrocketing from $4.6 million annually in 1962 to 1990's five year, $3.1 billion package." *Id.*

158. *See* Foley, *supra* note 5, at 625. Foley observed that "athletes because of their profession, have been afforded second class rights." *Id.*

159. *See* Noll, *supra* note 7, at 17-21. Free agency is a circumstance in a player's career in which an athlete is enabled to negotiate with multiple teams. *Id.* By contrast, under the present

ble to being damaged by trade restraints designed to have a negative impact on player salaries and player mobility.[160] Professional athletes possess highly specialized skills that are rarely marketable outside of their professional sport.[161] In addition, athletes' careers are short, therefore they have limited time to make money as a professional athlete.[162] Furthermore, since 1985, despite the increasing financial strength of the sports industry, the fraction of revenues going to professional athletes has remained the same or declined in all professional sports.[163]

Professional athletes are employees of a major industry, and they should be afforded the same rights as employees of other American industries.[164] "[I]f the players are to be regarded as quasi-peons, it is of no moment that they are well paid; only the totalitarian-minded will believe that high pay excuses virtual slavery."[165]

CONCLUSION

The business of professional sports is highly visible and has a tremendous impact, both directly and indirectly, upon the American people. "Newspapers give more space to this relatively small industry - sports - than the business section accords to all other industries."[166] The industry of professional sports does not deserve special antitrust treatment. Full application of antitrust laws will not lead to the demise of the sports industry. Ultimately, the policy of non-enforcement has had the effect of exempting all professional sports from the antitrust laws.[167] This is unfortunate because sports entertainment is

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systems with player restraints in place, exclusive rights to negotiate with the athlete are given to a specific team. *Id.* Therefore, athletes have no choice as to where they will work and are prevented from negotiating contracts in a competitive market. *Id.*

160. *See, e.g.*, Lock, *supra* note 106, at 354-55. Lock discusses the various factors which give owners a clear advantage over professional football players in the bargaining relationship. *Id.* Because management dominates this relationship to begin with, players should not be given a further handicap through management's ability to impose player restraints. *Id.* at 417.

161. *Id.* at 356. For example, the NFL is the only willing buyer of a professional football players' skills. *Id.* If a football player gets cut from a team, he will experience a great drop in income. *Id.* Therefore, players are left vulnerable to pressure from management. *Id.*

162. *Id.* at 355. For example, the NFLPA has reported that the average NFL career lasts less than four years. *Id.*

163. *See* Noll, *supra* note 7, at 17-25.

164. *See* Foley, *supra* note 5, at 426.

165. Gardella v. Chandler, 172 F.2d 402, 410 (2d Cir. 1949). Judge Frank described the harshness of player restraint devices used in professional baseball. *Id.*

166. *See* Noll, *supra* note 7, at 17-1.

167. Foley, *supra* note 5, at 425.

a vital part of the American experience, and the courts and Congress lose respect every time they excuse an illegal trade restraint in professional sports.[168]

The lack of trade regulation in sports has prevented professional athletes from deciding where they will work or from receiving salaries determined in a market free of restraints. The professional sports industry is a commercial activity and should be subjected to normal antitrust standards. Nonetheless, the courts and Congress have generally turned their backs on blatant antitrust violations in professional sports. Some action must be taken to prevent the unfair trade practices present in sports today. Specifically, restraints on both players ability to move between teams and to negotiate contracts determined in a competitive market must be subjected to the utmost antitrust scrutiny. The time has come for professional sports to be placed on equal footing with other industries in our nation and be subject to full antitrust scrutiny.

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168. *See* Leavell and Millard, *supra* note 1, at 616.