BASEBALL AS AN ANOMALY: AMERICAN MAJOR LEAGUE BASEBALL ANTITRUST EXEMPTION - IS THE AUSTRALIAN MODEL A SOLUTION?

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I. INTRODUCTION

American Major League Baseball (MLB) is subject to the anomalous position of being similarly situated as all other American professional sports but treated extremely different on the basis of its antitrust exemption. Historically, the exemption has enabled the owners to operate as a monopoly, allowing them to make collective decisions about players' salaries and careers, the number and location of franchises, broadcasting agreements and the minor leagues without fear of litigation from those who perceived they have been wronged.[2] The scope of this exemption has been unclear since 1922, when the United States Supreme Court first recognized baseball's immunity from antitrust laws in *Federal Baseball Club v. National League of Professional Baseball Clubs*.[3] Since this case, the 1972 landmark decision of

2. Alison Muscatine, *Baseball, Congress Not Exempt From Conflict*, THE WASHINGTON POST, Jan. 4, 1993, at D2. Muscatine states, "[a]n antitrust exemption granted to Major League Baseball by the U.S. Supreme Court in 1922 has become the battleground for what promises to be a rare and potentially ugly collision between two powerful forces: Congress and baseball team owners." *Id.*

3. 259 U.S. 200 (1922).

Flood v. Kuhn affirmed this antitrust exemption, which is still in effect today.[4]

The Major League Baseball exemption issue has lain dormant for many years, but the combination of the owners' threat of a salary cap, which resulted in a cancellation of fifty-two games, and the formation of the United League, has thrown this precedent into a tailspin. The promulgation of the strike was the MLB owners' proposal of a new collective bargaining agreement. This new agreement provided for a salary cap, a 50-50 split of industry revenues between the twenty-eight teams and the players, and a new free agency system which would eliminate salary arbitration.[5]

The question to be answered is what the antitrust exemption of MLB should encompass, if any exemption should exist at all. MLB should be subject to antitrust laws and should be analyzed on an individual case basis in order to ensure fair dealing and labor freedoms for the employees of this business.[6] This type of analysis would allow MLB owners to regulate the business but only to the extent that is reasonable to achieve legitimate business purposes and their regulations would be judicially scrutinized to ensure fairness to the players. The test to determine the fairness will be one of a balancing nature, in determining whether the owner's interest of a successful business within the league prevails over the player's interests of having the opportunity to solicit employment on his own account, resist an unjust limitation upon his power to earn, and to choose a place of residence for his family.[7]

Unlike the antitrust exemption enjoyed by MLB in the United States, Australia implements a system of judicial review of issues in the "restraint of trade" doctrine[8] with regard to sports. The regulations imposed by the Australian Football League (AFL) can be challenged and a judicial determination is made based on whether an agreement is a "restraint of trade," and if so, whether it is unlawful. Australian sports have not been granted exemption from application of the "restraint of trade" doctrine, and it should be noted that salary

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4. 407 U.S. 258 (1972).

5. Player's Meeting, COMPUTER INFORMATION NETWORK: THE SPORTS NETWORK, Nov. 1, 1994.

6. WALTER T. CHAMPION, JR., SPORTS LAW 470 (1990).

7. *Id.* Champion states, "[t]his test takes into account all of the circumstances that determine whether the restrictions afford fair protection to the employer without imposing undue hardship on the employee or interfering with the public interest, and then balances these equities." *Id.*

8. "Restraint of Trade" in Australia is the same concept as antitrust in the United States.

caps, standard contracts, and reserve clauses exist in their system.

Part I of this note analyzes the development of the baseball antitrust exemption in the United States and the injustice perpetuated throughout the past 72 years. Parts II and III describe the Australian system, suggesting this as a model for the United States. Australia is a good model example of how antitrust can be applied to professional sports to achieve a balance between the regulation desired by the owners and the freedom desired by the players, while maintaining the aura of excitement and competitiveness in the sport. Part IV explains the new implications in Baseball's exemption. Parts V and VI review the differing perspectives of the exemption along with a capsule of the antitrust issues in other major league sports. Finally, the article concludes with suggestions on how to repair baseball's troubled industry.

II. PROFESSIONAL BASEBALL AND ANTITRUST

The business of professional sports is unique in that the clubs cannot be regarded as normal distinct business competitors, because each club has a financial interest in the success of the other clubs, unlike most other industries.[9] Because of this unique relationship between "competitors," there have been many disputes regarding the legality of the control and regulation that Organized Baseball has imposed on the players.

Federal antitrust laws are embodied in the Sherman Act[10] and the Clayton Act.[11] The Sherman Act intended to declare any unreasonable restraint of trade and competition illegal.[12] The Sherman Anti-Trust Act states that any combination in the form of a conspiracy in the restraint of commerce is illegal, and that anyone participating in

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9. Mackey v. National Football League, 543 F.2d 606, 616 (8th Cir. 1976).

10. 15 U.S.C. §§ 1-7 (1890).

11. 15 U.S.C. §15 (1890). Regarding monopolistic activities, the Clayton Antitrust Act, § 15(a), states:

> any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interests on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances.

Id.

12. WARREN FREEDMAN, PROFESSIONAL SPORTS AND ANTI-TRUST 4 (1987).

the forming of a monopoly is guilty of a felony.[13] According to the "rule of reason," a violation of the Sherman Act occurs when an unreasonable restraint of trade suppresses or destroys competition, rather than promotes it.[14] This statute is the basis for dispute of whether the National Agreement of MLB and other MLB practices are unfair trade practices.

A. Historical Analysis of Baseball's Antitrust Exemption

In order to determine the least restrictive alternative needed to secure the goal of perpetuating the excitement of competitive baseball, the historical perspective and development of this monopolistic entity must be analyzed. In 1913, the American League and the National League entered into the "National Agreement," which provided that each League would respect the players contracts with the other league.[15] Both leagues would play important roles in the development of baseball's antitrust exemption.

1. The Federal League

In 1914, the Federal League was formed and they recruited players not under contract with the American and National Leagues. They attempted to become a member of the "National Agreement," but the American and National Leagues denied entry claiming that the United States was not large enough for three major leagues.[16] The Federal

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13. 15 U.S.C. §§1, 2. Section 1 states, in relevant part:
[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is 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 by fine not exceeding $10,000,000 if a corporation, or if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id.

Section 2, declares:
[e]very person who shall monopolize, or attempt to monopolize, or combine or 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, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id.

14. FREEDMAN, *supra* note 12, at 4.

15. LIONEL S. SOBEL, PROFESSIONAL SPORTS & THE LAW 1 (1977).

16. *Id.* at 2. Sobel describes, that in response:

League succeeded in extracting American and National League players and had a successful season in every way except financially.[17]

In 1915, the Federal League instituted the first antitrust lawsuit in baseball. They sought a declaration that the National Agreement was illegal and that Organized Baseball player contracts were void.[18] This lawsuit ended with a "Peace Agreement," in which the American and National Leagues would pay the Federal League $600,000 to dissolve, and the owners of certain Federal teams were permitted to purchase American or National League teams.[19] The Baltimore Federal owners were interested in purchasing the St. Louis Cardinals, but were excluded from the deal. The Baltimore Federals instituted a suit contending that the American and National League player contracts restrained trade and commerce of baseball in violation of Section 1 of the Sherman Act.[20]

In *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore*,[21] the jury agreed with the plaintiff's contention that their demise was the result of the reserve clauses and blacklisting techniques of the player contracts, and the buyout of the Federal League.[22] However, the District of Columbia Circuit Court of Appeals reversed this order, finding that the Sherman Act applied

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> ... the Federal League declared war. It systematically sought to raid American, National, and minor league teams of their best players. Organized Baseball, as these affiliated leagues had come to be known, responded by threatening its players with blacklisting if any jumped to the Federal League and reinforced those threats with increased salary offers. Nonetheless, of the 264 baseball players who performed in the Federal League during the 1914 and 1915 seasons, 18 had broken American or National League contracts, 25 had broken minor league contracts, 63 had ignored American or National league reserve clauses, and 115 had ignored minor league reserve clauses. Only 43 had not been under contract to any club in Organized Baseball at the time then signed with the Federal League.

Id.

17. *Id.*

18. *Id.* at 3.

19. *Id.* at 4.

20. SOBEL, *supra* note 15, at 5. Section 1 of the Sherman Act declares illegal all contracts, combinations or conspiracies restricting trade or commerce within and among the States. *Id.* at 4, (quoting 15 U.S.C. § 1).

21. 269 F. 681 (D.C. Cir. 1921).

22. *Id.* The Baltimore owners argued that Organized Baseball's acts of tying up all the best playing talent and paying the Federal League to dissolve was a direct violation of Section 2 of the Sherman Act by monopolizing all baseball trade and commerce in the United States. SOBEL, *supra* note 15, at 5. Section 2 of the Sherman Act makes it a crime to monopolize, or attempt to monopolize, trade or commerce within or among the states. *Id.* at 4 (quoting 15 U.S.C. § 2).

The jury returned a verdict for Baltimore in finding that the National and American Leagues engaged in interstate commerce and that they had monopolized baseball, and awarded Baltimore treble damages of $240,000, as provided for in the Clayton Act. 15 U.S.C., *supra* note 10.

only to "trade or commerce" "among the states," and Organized Baseball was not engaged in interstate commerce.[23] The United States Supreme Court affirmed the reversal as Justice Holmes wrote that baseball games "are purely state affairs."[24]

In 1922, baseball was the most popular professional sport, and its interstate impact was relatively slight. Telegraph wires transmitted the games play-by-play, and essentially the only interstate impact was the transportation of players across state lines in order to partake in local exhibitions.[25] Today, baseball still enjoys its anti-trust exemption even though the United States Supreme Court has found that some MLB practices would be a violation of antitrust, and that their complete execution is unjust. The Supreme Court has failed to overturn this ruling due to their belief that change in this area should be instituted through legislation, and it is therefore Congress' job to overturn the baseball exemption.[26]

2. Collusion of Western Hemisphere Leagues

Through the subsequent twenty-five years, Organized Baseball signed up multiple foreign leagues to follow their blacklisting procedures and respect their player contracts.[27] In effect, a blacklisted player from any of these organizations would be banned from baseball in the Western Hemisphere.[28]

3. *Gardella v. Chandler*

The next challenge to these principles was Danny Gardella, who was blacklisted from playing baseball in any league in the Western

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23. *Federal Baseball*, 269 F. at 681.

24. National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, 259 U.S. 200, 208 (1922). Justice Holmes also stated that they are not considered "trade or commerce in the commonly accepted use of the words." *Id.* at 209.

25. Michael Jay Kaplan, J.D., Annotation, *Application of Federal Antitrust Laws to Professional Sports*, 18 A.L.R. 489 (1974).

26. *See* Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949); Toolson v. New York Yankees, 101 F. Supp. 93 (S.D. Cal. 1951); Flood v. Kuhn, 407 U.S. 258 (1972).

27. SOBEL, *supra* note 15, at 10. These teams included the Panama Professional Baseball League, Venezuela Professional Baseball League, Puerto Rico Professional Baseball League, Quebec Provincial League, and Mexican League, which inhibited the mobility and freedom of the professional baseball players even further. *Id.*

28. *Id.* at 10-11. The Mexican League was also neutralized. Don Jorge Pasquel, the league president and his successor, Dr. Eduardo Pitman, after realizing that the Mexican League was not a big draw for the better players, encouraged many Mexican players to join American teams. Finally, in 1949, Dr. Pitman and Commissioner Chandler reached an "oral understanding" that each party would respect any contracts made with players, including any reserve clauses mentioned therein. *Id.* at 11.

Hemisphere because he played in the Mexican League in 1946, while under contract with the Major League of the United States.[29] Gardella instituted a suit contending that he was deprived of his means of a livelihood as a result of his blacklisting.[30]

Circuit Justice Chase stated that the antitrust exemption should be affirmed with the exception of a sale of broadcasting rights for radio and television, mainly because the Supreme Court decision of *Federal Baseball* controls this issue. Justice Chase found that the argument that recent developments in radio and television have an interstate impact on baseball, was insignificant because the only real change was the method of transmission, which did not compel a reversal of the decision that the MLB does not participate in interstate trade or commerce.[31]

Circuit Justices L. Hand and Frank reasoned that the *Federal Baseball* case should be vacated and the antitrust exemption of baseball lifted. Justice L. Hand disagreed that the distinction between transmission by telegraph and by television or radio was simply one of degree.[32] He felt that the transmission of these narratives and moving pictures across state lines, in itself, was interstate commerce, but he was willing to concede and he argued that this "broadcasting" was not just a transmission of sports, rather it was a business of buying and selling transmission rights to corporations which spent considerable sums of money both to install equipment in ballparks for the purpose of taking their product home, and to advertise considerably within the United States.[33] Justice L. Hand defined the question to be answered as whether baseball's connection with these activities made them a part of the "broadcasting" business, and enough of a part of it to color the whole.[34] He answered this question in the affirmative and stated that he found baseball no less interstate commerce than if the state line ran between the diamond and the grandstand, and that the arrangements between organized baseball and these companies could not be considered mere incidents of the business.[35] J u s t i c e

29. *Id.* at 11.

30. *Gardella*, 172 F.2d at 402. The court dismissed the complaint for lack of subject matter jurisdiction, but submitted opinions to be complied with on remand, discussing whether the *Federal Baseball* case should be affirmed or reversed as to its antitrust exemption. *Id.* at 404.

31. *Id.* Justice Chase professed that the Second Circuit Court will rely on *Federal Baseball*, "until and unless, we are advised by competent authority that it is no longer the law we should continue to abide." *Id.* at 405.

32. *Id.* at 407.

33. *Id.*

34. *Id.*

35. *Gardella*, 172 F.2d at 407. Justice Hand held that baseball was undoubtedly engaged

Frank concluded that the case should be reversed and remanded because *Federal Baseball*, decided twenty-seven years ago, has been left an "impotent zombi," through subsequent decisions of the Supreme Court that have completely destroyed *Federal Baseball*.[36] Justice Frank's conclusion was that Organized Baseball did engage in interstate commerce and antitrust laws should wholly apply.

4. Congressional Apathy (1951)

In 1951, Organized Baseball went to Congress for relief, and introduced three bills which would grant complete exemption from antitrust laws to "all professional sports enterprises or to acts in the conduct of such enterprises."[37] "The Subcommittee did not believe that Organized Baseball would continue to enjoy the exemption originally granted by the Supreme Court in *Federal Baseball*."[38] It recognized the impact of significant changes in operations of organized baseball and also in the Supreme Court's interpretation of statutes relied on in *Federal Baseball*.[39]

In conclusion to these factual findings, the Subcommittee disclosed "a substantial possibility that the *Federal Baseball* case would no longer be regarded by the Supreme Court as controlling."[40] Although the Subcommittee did not resolve any of these disputes, they found

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in interstate commerce mainly based on his finding that, "[broadcasting is part] of the business itself, for that consists in giving public entertainments; the players are the actors, the radio listeners and television spectators the audiences; together they form an indivisible unit as do actors and spectators in a theater." *Id.* at 407, 408.

On remand, Justice L. Hand stated the issue as being whether all the interstate activities of Organized Baseball form a large enough part of this business to impress upon it an interstate character. *Id.*

36. *Id.* at 408-09. In rather strong language, but ever-so accurately, Justice Frank stated that, "we have here a monopoly which, in its effect on ball-players like the plaintiff, possesses characteristics shockingly repugnant to moral principles that, at least since the War Between the States, have been basic in America, as shown by the Thirteenth Amendment to the Constitution, condemning 'involuntary servitude,' and by subsequent Congressional enactments on that subject." *Id.* at 409.

37. SOBEL, *supra* note 15, at 20, (citing ORGANIZED BASEBALL: REPORT OF THE SUBCOMMITTEE ON THE STUDY OF MONOPOLY POWER OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, H.R. REP. NO. 2002, 82ND CONG., 2D SESS. 1 (1952)[hereinafter ORGANIZED BASEBALL]).

38. ORGANIZED BASEBALL, H.R. REP. NO. 2002, 82nd Cong., 2d Sess. 1 (1952).

39. SOBEL, supra note 15, at 20. Since 1922, baseball has developed in many ways, which may possibly extend its arm to reach the concept of interstate commerce. First, baseball is now being played through the medium of television, as opposed to telegraph, which gives it an interstate character. Also, the extensive growth of farm systems might tend to fall within the definitions of interstate commerce because major league clubs now exercise control over several minor league teams that extend through several states. *Id.*

40. *Id.* at 21. *See also* ORGANIZED BASEBALL, H.R. REP. NO. 2002, 82nd Cong., 2d Sess. at 135.

that many aspects of the dealings of Organized Baseball border on being illegal and if this is determined to be the case, "the courts must enforce the law even though they may believe that organized baseball cannot exist without the reserve clause."[41] The Subcommittee left the testing of the reserve clauses to the courts.[42]

5. *Toolson v. New York Yankees*

Of the eight lawsuits that instigated the introduction of these bills to Congress, three made it to the United States Supreme Court, and were decided together in *Toolson v. New York Yankees*.[43] The plaintiffs were professional baseball players who brought suit against the owners of professional baseball clubs, contending violations of federal antitrust laws. The United States Supreme Court was to determine the applicability of these statutes to professional baseball with regard to the 1922 exemption. The court denied the plaintiffs' relief because it accepted Organized Baseball's argument that the rule of reason analysis was not applicable because baseball was not engaged in interstate commerce, as per *Federal Baseball*.[44] On appeal, the Supreme Court affirmed their finding that change in this area should come through legislation.[45] The court based its decision, not on whether or not baseball is engaged in interstate commerce, but on the fear that chaos would follow any reversal of *Federal Baseball*.

In other words, neither Congress nor the Supreme Court seems to be willing to take the step that is compelled by developments in the baseball industry. Congress did not pass a bill proposing baseball's complete exemption from antitrust laws because of the inherent illegality in some of the practices of Organized Baseball, and stated that

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41. *Id.* at 22. *See also* ORGANIZED BASEBALL, H.R. REP. NO. 2002, 82nd Cong., 2d Sess. at 139.

As Justice Frank put it, "no court can predict whether baseball can survive without the reserve clause, but in any event, the answer is that the public's pleasure does not authorize the courts to condone illegality, and that no court should strive ingenuously to legalize a private (even if benevolent) dictatorship." *Gardella*, 172 F.2d at 415.

42. *Id.* at 24. Interestingly, Sobel surmised that the last section of the report should be noted: "While Organized Baseball was assuring the Subcommittee 'that the legality of the reserve clause will be tested by the rule of reason,' Organized Baseball was arguing to several judges that the rule of reason was irrelevant to the reserve clause, because baseball was not interstate trade or commerce and was thus entirely exempt from the antitrust laws." *Id.*, (citing Toolson v. New York Yankees, 101 F. Supp. 93 (S.D. Cal. 1951); Kowalski v. Chandler, 202 F.2d 413 (6th Cir. 1953); Corbett v. Chandler, 202 F.2d 428 (6th Cir. 1953)).

43. 101 F. Supp. 93 (1951).

44. *Toolson v. New York Yankees*, 346 U.S. 356, 356-57 (1953).

45. *Id.* The court stated, "[w]e think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation." *Id.* at 357.

pending litigation on these issues would analyze the exemption using the rule of reason analysis. However, once this litigation ensued, the court found the rule of reason analysis to be inapplicable based on the *Federal Baseball* holding of antitrust exemption, and upheld the Supreme Court's holding in *Federal Baseball.* The Court held that changes needed to be instituted through legislation, due to the significant lapse of time since judicial review.

6. *Toolson* Criticized

Three specific problems arise from the *Toolson* decision. First, contrary to the Supreme Court holding that Congress has not seen fit to bring baseball under antitrust laws, it seems that the Subcommittee Report and Congress' refusal to enact the proposed legislation gave the court express grounds to override *Federal Baseball.*[46] Second, the *Toolson* court falsely stated that *Federal Baseball* determined that Congress had no intention of including the business of baseball within the scope of the Federal Anti-Trust laws.[47] *Federal Baseball* in no way made this determination, it simply found that baseball was not engaged in interstate commerce given the present laws and circumstances.[48] Third, the *Toolson* court ignored any and all subsequent reversals of opinions on which the court in *Federal Baseball* relied, which made *Federal Baseball* an "impotent zombi," according to Judge Frank.[49] However and unfortunately, the *Toolson* decision was put in the books and subsequently left Organized Baseball in peace for many years.

7. Continued Congressional Apathy

Starting in 1957, an influx of legislative bills plagued Congress for eight years.[50] In 1957, the Celler bill and the per se doctrine were introduced to the 85th Congress, along with three other types of bills.[51] The House of Representatives took no action on these bills,

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46. SOBEL, *supra* note 15, at 28.

47. *Id.*

48. *Federal Baseball*, 269 U.S. at 681. *See* SOBEL, *supra* note 15, at 28.

49. *Gardella*, 172 F.2d at 408-09.

50. SOBEL, *supra* note 15, at 38. Sobel states that the reason for the legislative proposals was in part, due to the fact that "[f]ootball executives did find the *Radovich* decision to be unrealistic, inconsistent and illogical, and they immediately did as the Supreme Court suggested. They went to Congress, hoping and probably expecting that its processes would be 'more accommodative.'" *Id.*

51. *Id.* The first type, similar to the 1952 Organized Baseball Report, proposed complete antitrust exemption for professional sports and all of their activities. The second type, sub-

but they did pass the Celler bill.[52] The Celler bill was then sent to the Senate late in the session for approval, but it was tabled and effectively killed without any further action prior to the 85th Congressional adjournment.[53]

In 1959, several more bills were introduced to the 86th Congress.[54] However, due to much dissatisfaction with the entirety of any one bill and widespread disparity of feelings about the baseball exemption issue, no professional sports bill emerged from the 86th Congress.[55]

Once again, numerous bills were introduced in the 87th Congress, but none emerged.[56] The 88th Congress followed suit in its killing of fifteen proposed professional sports bills.[57] But needless to say, Congress took no action in the professional sports - antitrust issue and baseball stood completely exempt, and football, basketball, and hockey were subject to the antitrust laws[58] emerging from the 89th Congress in 1965.[59]

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jected all sports to antitrust laws, but enabled courts to determine whether the particular facts and circumstances of each case were reasonable and thus legal restraints of trade. The third type also placed all professional sports under antitrust regulations, but expressly exempted certain practices. *Id.*

52. H.R. REP. NO. 1720, 85th Congress (1958). "The Celler bill subjected the professional team sports of baseball, football, basketball, and hockey to the requirements of the antitrust laws, but expressly exempted activities which were 'reasonably necessary' to equalized competitive playing strengths, to grant exclusive franchise territories, and to preserve public confidence in the honesty of professional sports." SOBEL, *supra* note 15, at 39.

53. SOBEL, *supra* note 15, at 41.

54. *Id.* The first bill, the Hennings Bill, was virtually identical to the tabled bill of the year before. The second bill, the Kefauver bill, provided for a list of severely limited exempted activities, but also stipulated that these exemptions would only apply to any professional baseball team that controlled eighty or more players at one time. *Id.* at 42. Kefauver introduced two more bills, the first dealing with team sports except baseball, and the second consisted of two parts, the second part of which pertained to baseball. *Id.* at 43. Title II of Kefauver's third bill provided that antitrust laws would apply to baseball, but were exempted in activities to the extent that they relate to "equalization of competitive playing sports, to the employment, selection, or assignment of player contracts, to exclusive franchise territories to the preservation of public confidence in the honesty of sports, and to certain agreements or practices relating to radio and television broadcasting." *Id.* at 44. This bill also, in addition to these exemptions, provided that, "all baseball players with four or more years of professional experience, who were directly or indirectly owned or controlled by a major league team would be subject to an unrestricted draft, every year after the World Series, by any other Major League team, except for forty players which each team could reserve for itself." *Id.*

55. *Id.*

56. *Id.* at 48.

57. *Id.* at 50.

58. *See infra* Part V.

59. SOBEL, *supra* note 15, at 54.

8. *Flood v. Kuhn*

Starting in 1969, disputes once again emerged in full force after a significant period of peace for professional baseball. The next significant case to challenge the professional baseball exemption was *Flood v. Kuhn*.[60] This case was filed by a professional baseball player, Curt Flood, who challenged the reserve clause because he was traded to another club without his consent or knowledge and his request to be a free agent was denied.[61]

Flood began playing for the St. Louis Cardinals in 1958, at age 20. He rose to fame in St. Louis for the next twelve years.[62] In 1969, eleven years later, St. Louis transferred Flood to the Philadelphia club. Flood never came to an agreement with the Phillies, and consequently never played for them.[63] The rights to Flood were sold to the Washington Senators, who came to an agreement with Flood and he finally rejoined the ranks of professional baseball.[64] However, shortly thereafter, he quit because he was dissatisfied and, subsequently, never played professional baseball again.[65]

Flood argued that although some restrictions on players were necessary to the organization of baseball and its success, the present system was needlessly restrictive and suggested that the bonds could be loosened without sacrifice to the game.[66] The Supreme Court, however, again upheld the long-standing exemption.[67] The Court did not

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60. 407 U.S. 258 (1972).

61. *Id.*

62. SOBEL, *supra* note 15, at 59 (citing C. FLOOD, THE WAY IT IS 185 (1971)). Flood maintained a batting average of .293, playing in the 1964, 1967, and 1968 World Series, winning seven Golden Glove awards, and acting as co-captain of his team from 1965 to 1969. *Flood*, 407 U.S. at 264. Needless to say, Flood established considerable ties to his ballpark, fans, friends and personal business interests in St. Louis. Flood later recapped this turn of events by saying, "it violated the logic and integrity of my existence. I was not a consignment of goods. I was a man, the rightful proprietor of my own person and my own talents." SOBEL, *supra* note 15, at 59 (citing C. FLOOD, THE WAY IT IS 185 (1971)).

63. *Flood*, 407 U.S. at 265.

64. *Id.* at 266.

65. *Id.*

66. SOBEL, *supra* note 15, at 55.

67. Flood, 407 U.S. at 273-74. The Court's decision was based on *Toolson* and affirmed that decision for four reasons:

1. Congressional Awareness for three decades of the Court's ruling in *Federal Baseball*, coupled with congressional inaction.
2. The fact that baseball was left alone to develop for that period upon the understanding that the reserve system was not subject to existing federal antitrust laws.
3. A reluctance to overrule *Federal Baseball* with consequent retroactive effect.
4. A professed desire that any needed remedy be provided by legislation rather than by court decree.

consider the merits of whether the reserve system was illegal, instead, they simply stated that baseball was exempt from antitrust.[68] The Court reiterated to Flood what was said to Federal Baseball in 1922, and to Toolson in 1953, that his "remedy, if any is mandated, is for congressional, not judicial, action."[69]

9. Modern Day Congressional Apathy

The most recent congressional consideration of the baseball exemption was in 1976, when the House Select Committee on Professional Sports concluded that exempting baseball from antitrust statutes was unwarranted. But, once again, no action was taken.[70] Although the exemption is highly scrutinized by judges and politicians, it lives on without interference. This is essentially a reflection of deep rooted disagreement regarding the effect of such a decision on the sport and its fans. After the Supreme Court repeatedly rejected challenges to the baseball exemption and Congress repeatedly condemned the system but refused to act, the players deemed the effort for judicial and congressional remedies to be futile, and turned toward arbitration.

B. Arbitration

Through arbitration, the reserve clause was destroyed in the decision of Messersmith-McNally by Peter Seitz.[71] Messersmith, a player for the Dodgers, refused to sign his renewed contract because it did not contain a "no trade clause" or "right of refusal of any trade" clause. He played the following season without a contract, and, subsequently, declared himself a free agent. Arbitrator Seitz held that the reserve clause was poorly worded, but that it meant that a player could become a free agent by giving notice to his team one year before the expiration of his contract.[72] Basically, Messersmith was free to put himself up for auction to the highest bidder. Baseball owners fired Seitz within hours of this decision.[73] The era of free agency emerged.

Id.

68. SOBEL, *supra* note 15, at 64.

69. *Flood*, 407 U.S. at 285.

70. Muscatine, *supra* note 2, at 102.

71. Kevin A. Rings, *Baseball Free Agency and Salary Arbitration*, 3 OHIO ST. J. ON DISP. RESOL. 243, 250 (1987).

72. *Id.* at 250 (citing In Re Professional Baseball Clubs, 662 Ab. Arb. (BNA) 101 (Seitz, Arb.)).

73. *Id.*

C. Free Agency

Based on the Messersmith-McNally decision, players who wished to be free agents at the end of their present contract must declare such one year prior to the expiration of their current contract term. Owners feared that quality players would gravitate to the stronger teams, and strip baseball of its competitiveness.[74] However, the opposite effect occurred when weaker teams offered larger salaries.[75] The result was free agents moving toward struggling teams, which enhanced League competition.[76]

Free agency also sparked the law of supply and demand. As weak teams picked up free agents, other teams attempted to keep pace with competitors and engaged in the free agency market. This struggle to keep up stimulated the demand of free agents, which drove up their prices.[77]

In 1985, owners combated this economic phenomena by engaging in what has been termed finance restraint, fiscal sanity, or collusion.[78] The Players' Association filed a grievance in 1987, and arbitrator Thomas T. Roberts ruled that the owners acted in collusion to restrict the movement of free agents.[79] This decision afforded the players nine years of escalating salaries and control of their liveli-hood.[80]

D. Salary Arbitration

These continually escalating salaries promulgated salary arbitration. The salary arbitration system consisted of a submission of a proposed salary by both player and management, a hearing conducted by the arbitrator allotting 1-1/2 hours of restricted testimony by each party,

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74. *Id.* at 251.
75. *Id.*
76. Rings, *supra* note 71, at 251.
77. *Id.* Rings states:

> [t]his movement was both unexpected by management and beneficial to the game. Baseball, as any other organized sport, does not operate on a laissez-faire marketplace system. The object of various teams is not to put the others out of business. Instead, baseball operates on the theory that the League is only as strong as its weakest team. Therefore, the migration of talent to the weaker 'links of the chain' actually strengthened the League as a whole by making every team more competitive. In this respect, free agency is a boon to the League, especially to its weaker members.

Id.

78. *Id.* at 252.
79. *Id.* (citing Major League Baseball Players' Association v. The Twenty-Six Major League Baseball Clubs, Major League Baseball Association Panel, Grievance No. 86-2 (Sept. 21, 1987)(Roberts, Arb.)).
80. *Id.* at 253.

and then choosing one or the other salary which is implemented for the upcoming season.[81]

Arbitration provides players with a stronger voice in the determination of their salaries and free agency allows for freer movement between teams,[82] but management complains that this combination skyrockets salaries based on supply and demand as opposed to skill and accomplishment.[83] However, several factors considered by the arbitrator deal with the player's career performance, and if an arbitrator is consistent, then similarly situated players will have similar salaries. It would also only seem fair that as a club's revenues increase, so should players salaries, for it is the *players* that the fans come to see, and this should not be taken for granted by management.

III. AUSTRALIA AS A MODEL

Australian sports have come under scrutiny, similar to the United States, regarding their League Regulations. This section of the article will focus on the development and applicability of the restraint of trade doctrine on professional sports in Australia. Initially, descriptions of selected rules and regulations of the governing bodies will be

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81. Rings, *supra* note 71, at 253. When deciding, an arbitrator takes into account the following factors:

1. the quality of the player's contribution to his club during the past season (including performance, leadership and public appeal);
2. length and consistence of a player's career performance;
3. the player's past compensation;
4. comparative baseball salaries;
5. the existence of physical or mental defects affecting performance; and
6. the clubs recent performance.

Id. at 255 (citing Grebey, *Another Look at Baseball's Salary Arbitration*, 38 ARB. J. 24, 26 (Dec. 1983)).

82. *Id.* In 1986, of 109 cases submitted for arbitration, eighty-three were settled prior to arbitration, and twenty-six were settled through arbitration, of which sixteen in favor of management and ten for players. The last best offer method encourages players and managers to submit reasonable proposals since the arbitrator must pick between the two. This method, in concert with an evidentiary background to substantiate the reasonableness of the proposal, ensures equal protection to both player and management. *Id.*

83. *Id.* at 255. Rings explains:

> [b]aseball's arbitration process is based on the 'last best offer' principle. Under this system, the parties bargain to impasse on the topic of salary. Once it is determined that continued negotiations would be fruitless, both management and player submit one proposed salary figure to the arbitrator. The arbitrator then holds hearings, allotting one and one half hours for each side to present their evidence. The arbitrator must choose one figure or the other, either the player's or management's and award the player with that salary for the next season . . . This process, . . . is a no-lose situation for the player. He either receives the figure offered by the team (the figure he would have been forced to accept before arbitration) or the higher figure he submits.

Id. (citing Grebey, *Another Look at Baseball's Salary Arbitration*, 38 ARB. J. 24, 24-30 (Dec. 1983).

discussed, along with the different approaches to challenging these League Regulations. Finally, a historical approach will be undertaken to examine the revolutionary trend from "sport as not a form of employment" to "athletes as keepers of their own destiny."

A. Rules and Regulations of the Australian Football League

Victoria, New South Wales and South Australia were parceled up into zones by agreement between twelve Victorian Football League clubs ("V.F.L.").[84] The club a man was allocated to was determined by his place of birth or residence at a certain stipulated age.[85] If a player declined to join the club in his zone, he could not play at all.[86] His assigned club may, if they chose, release him or grant him a transfer. If neither of these occur, a disgruntled player may play for the club in his zone, or give up the game for 36 months, after which he could play for any club he liked, with League approval.[87]

The League Regulations provide for a League Appeal Board to which a disgruntled player may direct grievances.[88] When a player seeks a transfer, the club denies it, and it is taken to the Appeal Board. The Board in rendering its decision considers the player's age, length of service, value to his club and any hardship to the player should the transfer be declined.[89]

This approach should be adopted by the American Major League Baseball Association. This system of individual case analysis used to determine the fairness of the rule or regulation at hand, would provide for equal protection of owner and player interests.

B. Approaches to Challenging League Regulations

Opponents to the present League Regulations base their challenges on three grounds. The first approach examines the League Regulations based on restraint of trade and argues that the zoning system, retain and transfer system, and the like, are in restraint of trade and, therefore, unenforceable. The second approach is that the right to

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84. G.M. KELLY, SPORT AND THE LAW 274 (1987). The League Regulations provided that "every male in the state was residentially encumbered - obliged, if he ever played V.F.L., to play for the club whose zone he lived." *Id.*

85. Hayden Opie & Graham Smith, *The Withering Individualism*, 15 UNIV. NEW S. WALES L. J. 313, 334 (1992).

86. KELLY, *supra* note 84, at 274.

87. *Id.*

88. *Id.* at 275.

89. *Id.* at 276.

work is infringed upon when a player's employment is dictated to him. Finally, the third approach takes the position that the club's retaining of a player in opposition to the player's wishes is in violation of the Trade Practices Act.

1. Restraint of Trade Doctrine

The first approach uses the restraint of trade doctrine, which has been the subject of much sport litigation.[90] But if one of the parties to the agreement wishes to escape from the restraint, it may be held to be unenforceable.[91] The burden of proof lies with the plaintiff to prove the existence of a restraint. A finding of sufficient proof of a restraint carries with it the presumption that the restraint is void.[92] However, the defendant then rebuts that presumption by offering proof that the restraint is reasonable.[93] Two further qualifications must be met in order to uphold a restraint. First, the restraint must be expressed specifically and not in vague or general terms. Second, the employer's legitimate interest in need of protection must have a community benefit, in addition the courts do not protect against the normal business risk of threatening competition.[94]

2. Right to Work Doctrine

The second approach using the right to work doctrine has been approved by the court in player situations. However, the court has never decided a case on this issue, because they have always relied on the restraint of trade doctrine in their decisions.[95] But, the right to work argument will be addressed along side the restraint of trade argument whenever regulations or agreements impede sport employment.[96] It has been suggested, however, that there are advantages to pleading the right to work doctrine. This doctrine is not subjected to the test of reasonableness, as is the restraint of trade pleading. This area is still unchartered by the courts, and only the future will tell

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90. *Id.* at 269. "An agreement in restraint of trade is not, in general, unlawful." *Id.*

91. KELLY, *supra* note 84, at 269. *See also* Buckley v. Tutty, 125 C.L.R. 353 (Austl. 1971).

92. *Id.* at 269.

93. *Id.* The defendant proves reasonableness by meeting the following requirements: (1) there must be a legitimate interest being protected, (2) the restraint must be reasonable in the interest of all parties, and (3) the restraint must be in the public interest. *Id.* at 270.

94. *Id.* at 271. *See* D.W. Greig, *Reciprocity, Proportionality, and the Law of Treaties*, 35 VA. J. OF INT'L L. 259 (Winter 1994).

95. *Id.*

96. KELLY, *supra* note 84, at 280.

whether this argument will assist a player in his quest for individualism.[97]

These two approaches are similar to the American baseball player's argument, articulated by Curt Flood after his undesirable transfer. Flood argued that he was not a consignment of goods, but a man who has the right to control his own destiny. This approach, if adopted by the American Major League Baseball Association, would abolish the per se exemption to antitrust laws and instill a more equitable and fair resolution system, in which both owner and player have grievance avenues.

3. Trade Practices Act

The final approach to challenging the League Regulations is using the Trade Practices Act. Once again, the intended destination of this argument has not been reached through the courts, but has been raised as an issue.[98]

The Trade Practices Act[99] outlaws a wide range of anti-competitive practices affecting the supply of goods and services.[100] The def-

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97. KELLY, *supra* note 84, at 293.

98. R. v. Federal Court of Australia; Ex parte Western Australian National Football League, 143 C.L.R. 190 (Austl. 1977).

The two following questions need to be answered when determination of the applicability of this Act to sports reaches the court: (1) whether a body that is founded as a sporting club may, by engaging in commercial activity, become a "trading corporation" subject to the *Trade Practices Act of 1974* (Cth); and (2) if so, whether Part IV of that Act is available to prevent a controlling body from retaining a player under its rules in opposition to the player's own wishes. KELLY, *supra* note 84, at 280.

99. TRADE PRACTICES ACT, 1974 AUSTL. C. ACTS 51, Part IV - Restrictive Trade Practices. The Australian Trade Practices Act, (TPA), is similar to the American Antitrust Laws in that they both promote competition and outlaw anti-competitive business tactics. However, the TPA does not cover services rendered through contract, whereas the antitrust laws do not discriminate on business, but simply outlaws any business practice that is in restraint of interstate trade. Although Australia has not found this argument effective as a legal basis for disallowing player restraints, the American antitrust argument is much stronger because it is not restricted to non-service contracts. *Id. See* Tony D'Aloisio, *Franchising in Australia*, 58 ANTITRUST L. J. 949 (1989). D'Aloisio describes:

> [a]ntitrust breaches can be the subject of injunctions and damages and penalties. Unlike the United States, however, Australia does not have the concept of treble damages. The Trade Practices Commission carries responsibility for the enforcement of the Trade Practices Act. However, for injunctions and damages, private actions can be brought. The common law doctrine of restraint of trade also applies in Australia. Restraints will, therefore, also need to be assessed against that doctrine.

Id. at 963.

100. Opie and Smith, *supra* note 85, at 324. Opie and Smith state that:

> [a]lthough the Act outlaws a wide range of anti-competitive practices affecting, *inter alia*, the supply of goods and services, the definition of 'services' does not include the performance of work under a contract of service, that is, an employment

inition of "services" does not include the performance of work under a contract of service (an employment contract).[101] This exclusion of employment contracts has been the major stumbling block for professional players to be able to challenge the League Regulations based on the Trade Practices Act.[102]

Although the second and third approach to challenging the League Regulations are sketchy because the courts have not made determinations of these issues, the restraint of trade approach has been wholly effective. The sports industry in Australia has been subjected to the restraint of trade regulations since 1971. Utilizing Australia as a model would provide American Major League Baseball with a solution acceptable to all interested parties, namely the players, owners, and fans, in the success and fair dealing in all aspects of baseball.

C. Historical Analysis of These Challenges

1. Origination of Challenges from England in *Eastham v. Newcastle*

Challenges to league rules began in *Eastham v. Newcastle United Football Club, Ltd.*,[103] in which the court held that a professional soccer player was engaged in trade and that the retain and transfer rules of the English professional soccer leagues infringed the restraint of trade doctrine.[104] The *Eastham* decision was landmark because it made an occupational extension of "trade" to include professional sports.[105]

2. Australian Application of *Eastham* in *Buckley v. Tutty*

Australia followed suit from *Eastham* in an extended line of Australian cases, starting with *Buckley v. Tutty*.[106] The retain and transfer system of Australia was virtually identical to that of England. For

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contract. So far this has been the major stumbling block to Act-based challenges to league rules concerning transfers and the draft. The significance of this factor is highlighted by [cases] where unusual circumstances meant the relationship between club and athlete was one of principal and independent contract - not employer and employee - with the ultimate result that the Act was successfully invoked by the player.

Id. at 324-25.

101. TRADE PRACTICES ACT, 1974 AUST. C. ACTS 51, Part IC § 4(1).
102. Opie and Smith, *supra* note 85, at 325.
103. 3 All E.R. 139 (Ch. 1963).
104. Opie and Smith, *supra* note 85, at 335.
105. KELLY, *supra* note 84, at 270.
106. 125 C.L.R. 353.

this reason the High Court of Australia, in *Buckley*, held that these League Rules of retain and transfer were in restraint of trade.[107]

3. *Hall v. Victorian Football League*

The next test for the applicability of the restraint of trade doctrine in the sports field was *Hall v. Victorian Football League.*[108] Hall chose to begin his career in professional league football with the South Melbourne Club, based on family tradition.[109] The problem was encompassed within the League Regulations, which provided for the allocation of players to clubs to be regulated by geographic zoning rules.[110] In Hall's case, he was "residentially encumbered" to the Collingwood club, who refused to grant him a release or transfer.[111] Hall contested the system and argued that it was a restraint of trade. The League, familiarly, argued that the V.F.L. had to maintain a system of twelve clubs with reasonably even competition, and without the zoning system, the weaker clubs would go under within three to five years.[112] The court in denying the argument that the zoning system was the only way in which "chaos may be avoided" held that the zoning system was an unreasonable restraint.[113] The court granted an injunction against the V.F.L. forbidding them from using these rules in preventing the plaintiff from playing with the club of his choice.[114]

Utilizing this analysis in our present system, antitrust exemption is not the only way in which "chaos may be avoided" and therefore a more fair system should be implemented that compromises by both avoiding chaos and granting occupational freedom. Namely, the Australian restraint of trade system would implement these goals effectively.

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107. KELLY, *supra* note 84, at 273. The court however, conceded that some element of restraint upon professional players was reasonable. *Id.* The Club and League vehemently argued that these rules were imperative to ensure the stability of the clubs, well-matched competition and the support of the public. *Id.* In the courts analysis, it found the retention system to be too drastic considering the legitimate objectives sought. *Id.* The arguments articulated by the League in this case are identical to those of the American baseball owners. This court was able to provide a system that protected the legitimate owner's interests, all the while granting the players control of their occupation through the use of a grievance procedure. *Id.*

108. V.R. 64 (1982).

109. KELLY, *supra* note 84, at 274.

110. Opie and Smith, *supra* note 85, at 334.

111. Kelly, *supra* note 84, at 274.

112. *Id.*

113. KELLY, *supra* note 84, at 274 (citing *Hall*, V.R. at 71).

114. *Id.* at 275.

4. *Foschini v. Victorian Football League*

The *Foschini*[115] case challenged the methods of the Appeals Board.[116] The court, in this case, found the decision of the Appeal Board to be an unreasonable restraint and found for Foschini.[117] Justice Crockett "thought that the best solution for sports clubs if they were to seek some form of security tenure over their players, was to move toward a contract system."[118]

Following the *Hall* and *Foschini* decisions, revised appeal procedures were introduced, but they too must overcome the burden to prove that they go no further than to protect the V.F.L.'s legitimate interest. It is not acceptable in Australia or the United States to allow an employer to utilize restraining practices that go beyond protecting their legitimate interest, and baseball should not be an exception.

From *Eastham* to *Foschini*, the trend was toward legal individualism of players as opposed to collective interest of professional leagues. Free agency was popular for those willing to threaten their previous club with legal action alleging that their restrictive league rules were a restraint of trade. Due to the sporting associations' fear of courts holding their regulations to be a restraint of trade, most of these cases were settled out of court in favor of the player.[119]

This trend is also seen in the American MLB situation where the owners and players come to some agreement regarding their dispute. However, this lasts only for a few years at which time the vicious circle starts all over again with League threatening restraints, players threatening strikes, and owners threatening replacements. The American MLB needs to look toward the future and settle their dispute resolution method problem once and for all so that baseball can continue in harmony forever. Implementing Australia's restraint of trade doctrine would provide a grievance procedure that would provide equitable and fair resolutions for all parties concerned and get away from the vicious threat and strike circle that leaves fans disgusted and players and owners disgruntled.

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115. Unreported Supreme Court of Victoria, J. Crockett, April 15, 1983. *See also* KELLY, *supra* note 84, at 276.

116. KELLY, *supra* note 84, at 276 (citing *Foschini*, unreported). The court found this system to be an "employer system" and concluded that, "it cannot be assumed that an Appeal Board decision will always and necessarily ensure that the restraint imposed by the rules is no more than a court would consider reasonable." *Id.*

117. KELLY, *supra* note 84, at 276.

118. Opie and Smith, *supra* note 85, at 335 (quoting J. Crockett in *Foschini*, unreported).

119. Opie and Smith, *supra* note 85, at 336.

5. The Trend Today

Since *Foschini* and its drift toward individualism, the trend has significantly reverted back toward collectivism of the clubs interests.[120] First, the Standard Form Contracts emerged in 1980, which were required to be signed by each player. In the United States, the standard contract issued as a starting point from which players negotiate individual contracts, whereas in Australia, the terms are almost a code not to be varied, except for remuneration and duration.[121] Second, a salary cap has been imposed on the AFL, NSWRL, and the National Basketball League.[122] The goal is to eliminate "check book warfare." This practice is highly criticized by AFL clubs and players as "football socialism."[123] Lastly, a player could previously terminate his contract with the existing club and sign with a new club, in only leaving their prior club with the remedy of suing for damages.[124] However, since the late 1980's the courts have looked to compel compliance with the contracts.

More importantly than whether these new trends have been tested in the courts and passed the test of reasonableness for restraint of trade violations, is the fact that there is no restraint of trade exemption in Australia. Therefore, professional sports' grievances may be taken to the courts on an individual case basis. So, regardless of whether they have implemented the draft system and salary caps, those who feel wronged by the League Rules may seek judicial remedy to attain fairness. An arms reach collective bargaining system would allow the League and the players to obtain an agreement acceptable to all and any unfair practices may then be taken to the courts. The fear of a rush of cases to court is not a compelling reason to allow this monopoly to continue.

IV. MODERN EXEMPTION IMPLICATIONS IN AMERICAN MAJOR LEAGUE BASEBALL

A. Salary Cap

On June 14, 1994, Major League owners proposed a salary cap and a 50-50 split of all industry revenues,[125] which would include li-

120. *Id.*
121. *Id.* at 337.
122. *Id.* at 338.
123. *Id.*
124. Opie and Smith, *supra* note 85, at 338.
125. Hal Bodley, *Owners Expected To Extend Modified Offer to Players*, USA TODAY, Nov.

censing revenues produced by players and clubs to be divided equally between the twenty-eight Major League clubs and the players.[126] This proposal also asks the players to agree to a new free agency system, which would abolish salary arbitration.[127] Chief negotiator Dick Radovitch analyzed club payrolls and stated that the main reason for this proposal was due to the payroll disparity among the Major League clubs, with the Atlanta Braves on top with $52.1 million and the San Diego Padres on the bottom with $15.5 million.[128] Radovitch also analyzed player salaries and concluded that in 1989, players received 42% of baseball revenue.[129] This salary cap proposal allotted an average of $1.2 million for annual player salary, for a total combined players salary of $1 billion.[130]

On August 12, 1994, the players walked-out on the season because no agreement could be met regarding the new proposal. This strike led to the cancellation of the playoffs and World Series for the first time since 1904.[131] On September 8, 1994, the player's union proposed a 1% "luxury tax" on payrolls and revenue from the largest clubs that would be diverted to the smaller clubs.[132]

A new proposal emerged from the owners which withdrew the $1 billion yearly guarantee to players, withdrew the split of licensing revenue because players objected on the grounds that they used that money as strike fund, and opposed minimum salaries ranging from $115,000 for rookies to $500,000 for fourth-year players.[133] The $1 billion guarantee was based on the 1994 revenues of $1.8 billion, and since the strike cut 1994 revenues by $600 million, the owners can no longer make the $1 billion promise.[134]

The animosity from the canceled season and post-season runs deep. The players are still disgruntled about the owners decision to withhold $7.8 million from the player's pension fund prior to the

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10, 1994, at 6C. Bodley states, "[t]he owners made their only proposal June 14, asking for the salary cap, which the players quickly rejected. The union's last proposal was Sept. 8, calling for a 'luxury tax' of about 1% on payrolls and revenue from the largest clubs that would be diverted to the smaller clubs." *Id.*

126. *Player's Meeting*, *supra* note 5.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *House Panel Moves on Baseball Exemption*, PROPRIETARY TO THE UNITED PRESS INTERNATIONAL 1994, Sept. 28, 1994.

132. Bodley, *supra* note 125.

133. *$1 Billion Guarantee Might Be Dropped; But Selig Says Nothing Is Definite*, STAR TRIBUNE, Oct. 23, 1994, at 16C.

134. *Id.*

strike. Players believe that management is trying to break down their union.[135] Owners are frustrated about the player's disbelief in their claims that baseball is in serious financial troubles because of escalating salaries.[136]

The main source of frustration for the players is their lack of bargaining power because the owners may impose whatever provision they choose, leaving the players without any judicial remedy based on the 1922 exemption. The players simply propose that Congress pass a bill lifting the exemption so that if players and management do not reach an agreement and management imposes regulations anyway, the players may seek judicial review of those regulations to attain fairness. Without the application of antitrust laws, the players are left without a bargaining chip. Implementation of the Australian model would curb the owner's strong arm tactics, and the players striking. In the current situation, the parties would have to bargain salary caps that would be acceptable to all parties involved, and then, if still disgruntled, the situation may be presented to the courts for a fair determination through balancing competing interests.

B. United League

The United League management team proposes a system that involves the player in all aspects of the business. This system provides for the inclusion of the player in all of the decision-making, and all of the profit sharing.[137] Curt Flood[138] is at the helm of this innovative League, who has much support from the Players Association due to his career struggle and courage to stand up to the "Lords of Baseball"[139] is at the helm of this innovative league.[140]

Although the League has much support for its approach, the base-

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135. Thom Loverro, *Baseball Mediator Gets Talks Moving; Usery Lays Down New Ground Rules*, THE WASHINGTON TIMES, Oct. 20, 1994, at B1. According to Loverro, Usery spent the beginning sessions "laying some of the ground rules for future discussions so that everyone involved would know what to expect" - which would be negotiation. *Id.*

136. *Id.*

137. Larry Whiteside, *Flood's Gates Open It Up; New League Has True Pioneer at Helm*, THE BOSTON GLOBE, Nov. 8, 1994, at 70.

138. *See supra* notes 46-49.

139. Whiteside, *supra* note 137.

140. *Id.* Whiteside explains:

> [f]or many, Curt Flood was just a face in the crowd the other day. For those who know better, he is still a baseball legend . . . Flood fought and lost a legal battle for freedom in the days when the reserve clause in major league baseball meant everything. But in defeat, he showed others that it was not impossible to dream, and he set in motion the process that would lead to free agency.

Id.

ball exemption, once again, threatens its success. As in the Federal League situation, the American and National Leagues could make their success very difficult, and almost impossible. The American and National Leagues can block their membership to the "National Agreement," utilize blacklisting techniques, and generally ostracize them from the industry. However, by making the American and National Leagues answer to antitrust regulations, the United League would be able to fail or succeed on its own, and be given a fair opportunity to exist in this monopolistic industry. Allowing the antitrust exemption to stand does not protect the best interest of the fans or the players. The fans are hurt by being restrained in their choice of sporting events to attend and are forced to pay ticket prices set by the owners as opposed to being able to choose the League in which they wish to support through their attendance. The players are hurt in a very similar way, in that they are restrained and strong armed into remaining with a league that is not necessarily concerned with their best interest. The players are not able to freely choose and seek their occupational aspirations while the antitrust exemption is still intact.

V. Differing Perspectives on the Baseball Exemption

A. The Owners

The owners contend that "the seventy year old exemption is exercised with great care."[141] Owners firmly state that they have governed baseball well and that they are not to blame for the recent controversies.[142] The owners agreed that lifting the exemption now serves no purpose because of the developments of free agency and salary arbitration.[143]

However, opponents to the exemption, namely the players, point out that the last seven labor negotiations have produced seven work stoppages. If the exemption is lifted, players would be given a bargaining chip to utilize instead of having to threaten a strike every time management makes an undesirable move. Owners are simply trying to preserve the status quo so they can manipulate the players and franchise locations to enhance and inflate the values of their own teams.

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141. Muscatine, *supra* note 2, at D2.

142. *Id.* Muscatine states, "[t]he owners argue that the exemption is necessary because it shields baseball from the ills of other professional sports, particularly from individual owners who can single-handedly dislodge teams from loyal communities without warning." *Id.*

143. *Id.*

B. The Players

The players simply want the opportunity to question the impositions of management, an opportunity that is afforded to every other business in the United States. They want the exemption lifted so that owners are held accountable for their unfair trade practices, and the judiciary can balance the interests in making a determination of what is fair for all parties concerned.

C. Congress

Congressional perspectives vary from a complete lift of the exemption to remaining idle and forcing the players and management to settle their own disputes.[144] After hearing extensive testimony from representatives of baseball's varied constituencies about the status of baseball, many congressmen were appalled about the owners abuse of the 70 year exemption.[145]

On the other hand, some senators have suggested to extend the exemption on the condition that the owners appoint a strong and independent commissioner.[146] Two problems arise from this suggestion. The first is what is considered "strong and independent," and the second problem is what exactly a "strong and independent" commissioner would accomplish in the present situation.[147]

Strong feelings against the exemption have seemed to surface when organized baseball turned down the sale of the San Francisco franchise to a Tampa Bay ownership group which had a better offer and better market. It is stated that this was baseball's final opportunity to show that it believed in free markets . . . it failed.[148]

Congress has strong dissension of whether the baseball exemption should be lifted or remain intact. They have had great difficulty coming to terms on this issue and rectifying their differences in the future

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144. *Id.* "Some prominent members of Congress are upset about what they perceive as greed and misuse of power by baseball's top executives in the past year." *Id.*

145. *Id.* Rep. Charles E. Schumber (D-N.Y.) stated that, "they are truly out of control . . . we don't have to sit idly by and allow the owners to fleece and disgrace our national pastime." *Id.* Sen. Howard Metzenbaum (D-Ohio), Sen. Bob Graham (D-FL) and Sen. Connie Mack (R-FL) are in support of lifting the exemption and force owners to answer to the courts. *Id.*

146. Muscatine, *supra* note 141, at D2.

147. Elaine S. Povich, *Senate Panel Takes Aim on Baseball*, CHICAGO TRIBUNE, Dec. 10, 1992, at 3. Senator Connie Mack III, namesake and grandson of baseball great, states that, "the barons of baseball believe the game is theirs - it's not . . . baseball belongs to the fans." *Id.* Senator Howard Metzenbaum (D-Ohio) placed the burden of proof on baseball management to show why the exemption should be upheld. *Id.*

148. *Id.*

will take great strides to accomplish.

VI. ANTITRUST IN OTHER PROFESSIONAL SPORTS OF THE UNITED STATES

Unlike organized baseball, all other professional sports are subject to federal antitrust laws. The Supreme Court expressly held that federal antitrust laws apply to professional football,[149] professional boxing,[150] and professional basketball,[151] and lower courts have applied antitrust laws to professional hockey.[152] Application of antitrust laws to these sports has not doomed their business or taken the excitement or competitive nature out of the sport. Why must baseball be treated so differently?

VII. CONCLUSION

It does not seem that the baseball situation could be bleaker than it was in the 1994 season. A salary cap threat by management forced players to strike, which ultimately cut the season fifty-two games short and canceled post-season playoffs and the World Series.

Management of professional baseball is concerned with revenues, just like any other profit seeking business in the United States, except that baseball management has been permitted to exploit the system through antitrust exemption. Baseball is the *only* business in the United States to be exempt from federal antitrust laws.

Baseball club owners contend that the exemption is necessary to maintain competitiveness in the business and continue public interest and increased revenues. Although it is true that a certain competitive nature must be maintained in baseball to keep fans excited about the sport, it is hardly a justification for federal antitrust exemption, as displayed by professional football, hockey, and basketball. These professional sports are similarly situated with professional baseball,

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

150. United States v. International Boxing Club, Inc., 348 U.S. 236 (1955).

151. Professional basketball is not exempt from federal antitrust laws, but does implement a salary cap. For further discussion, *see* D. Albert Daspin, *Of Hoops, Labor Dupes, and Antitrust Ally-Oops: Fouling Out the Salary Cap*, 62 IND. L.J. 95 (Winter 1986). *See also* Wood v. National Basketball Association, 602 F. Supp. 525 (1984), which found the NBA's salary cap to be legal and exempt from the reach of the Sherman Act because it met the three part test; the cap provision agreement only affected the parties to the collective bargaining, it involved mandatory subjects of bargaining as defined by federal labor laws, and it was the result of a bona-fide arms-length negotiation. *Id.*

152. Lower courts have scrutinized professional hockey regulations using the federal antitrust laws, but the Supreme Court has not yet made a formal ruling for or against an exemption. *See, e.g.*, Peto v. Madison Square Garden Corp., 384 F.2d 682 (2d Cir. 1967).

except for the antitrust exemption, and still have profiting clubs. The exemption should not be retained because it is much too restrictive for the goals it aspires to achieve. It should not be upheld simply because it has been around for a long time and everyone is used to it, or that it would create too many problems to reverse it, even though it is no longer lawful or necessary.

Australia is an example of how the application of antitrust doctrines enable the players to retain as much freedom as possible without sacrificing the sport. The United States should follow this model and deal with each antitrust issue as it comes before them, taking into consideration the balancing test.

This system would entail subjecting professional baseball to federal antitrust laws, like every other business industry in the United States, and analyzing each grievance on an individual case basis in order to determine whether the issue balances in favor of the plaintiff in that the regulation does not implement a compelling industry interest, such that it becomes a violation of antitrust laws. A regulation could be determined to be justified if the balance tips in favor of the legitimate interest that the regulation seeks to protect. In short, the federal antitrust exemption granted to baseball in 1922 should be lifted in order to attain the least restrictive methods of regulating the sport, while still protecting its exciting, competitive nature.

Although the business of professional sports is unique in that each club's success depends upon the success of other clubs, the business interest of maintaining exciting, competitive sports is not sufficient to allow management to perpetuate a dictatorial system, whose authority is self-determined, and is not judged by the judicial system. The courts have made this determination regarding all professional sports, excluding baseball. The main reason for this delay is that there is concern that management will have to revamp all procedures designed in reliance of the exemption. Is not this reason enough to lift the exemption? The exemption should be lifted and each contested regulation should be subjected to the rule of reason analysis that directs all other antitrust issues in the United States, which is similar to the "restraint of trade" doctrine implemented in Australia.

Congress should cease the procrastination in hopes of some settlement of the current issues so that the issue of the antitrust exemption lays dormant for another few years, as they have done for the past seven decades. Congress needs to take a stand and lift the exemption. Congress can no longer hope that the problems in MLB will work themselves out . . they will not! Regardless of how antitrust regula-

tions will effect the current disputes, the exemption is unlawful and unfair to the employees of this business and Congress must be forced into making a change.

After a 232-day strike, Major League Baseball will convene for the 1995 season on Friday, April 7, 1995.[153] The players are to report for three weeks of spring training, and Opening Day for the 144-game 1995 season is set for April 26.[154] Even though the game is "back to normal," the players and owners have still not reached an agreement. After the owners' unilateral rescision of the free-agent bidding, salary arbitration and the anticollusion rules of baseball's expired collective bargaining agreement, U.S. district court judge Sonia Sotomayor granted a preliminary injunction against the owners and ordered them to reinstate these rescinded provisions.[155] Sotomayor found that "when a contract ends, the parties must not alter mandatory subjects of bargaining until a new agreement or a good-faith impasse is reached," neither of which was accomplished here.[156] Unfortunately, the Major League Baseball antitrust exemption persists, and leaves the players with little bargaining power. Since Sotomayor's decision, the owners have been much more willing to negotiate, however, once an impasse is reached the owners may then unilaterally implement or rescind these provisions. Once this occurs, the players will not have any relief for unfairness within the new provisions, other than to, once again, strike and force the owners to renegotiate. However, if the antitrust exemption were to be lifted, the players would start with a bargaining chip, and the owners would be more willing to compromise due to their fear of judicial scrutiny. In essence, if the baseball antitrust exemption is not lifted, we can expect more rocky roads in the future of Major League Baseball.

Through education of the system, fans and supporters of baseball can begin to understand that it is not an issue of a baseball player being paid millions of dollars to complain about his problems, it is an issue of freedom to pursue one's career and market oneself's services, not be bought, sold and traded as a commodity. Fans, supporters and most importantly Congress and the courts should stand behind the players in their aspirations to become equal bargainers in their occupations and be afforded the rights and opportunities that all other citizens of the United States enjoy.

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153. Tom Verducci, *Brushback*, SPORTS ILLUSTRATED, April 10, 1995, at 60-61.
154. *Id.*
155. *Id.* at 62.
156. *Id.*