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American Needle v. NFL: An Opportunity To Reshape Sports Law

ABSTRACT. In *American Needle v. National Football League*, the U.S. Supreme Court will decide whether, and to what extent, section 1 of the Sherman Antitrust Act regulates a professional sports league and its independently owned franchises. For the first time, the Court could characterize a league and its teams as a single entity, meaning that the league and its teams are not able to "conspire" because they share one "corporate consciousness," and thus cannot violate section 1 through even the most anticompetitive behaviors. Such an outcome would run counter to the sports league-related decisions of most U.S. Courts of Appeals, which have generally rejected the single entity defense because teams often do not pursue common interests. It would, however, prove consistent with the views of the Seventh Circuit, which in 2008 determined in *American Needle* that the National Football League and its teams constitute a single entity for purposes of apparel sales.

This Feature provides a substantive analysis of *American Needle*, the relationship between antitrust law and professional sports, and the merits and weaknesses of the single entity defense for professional sports leagues and their teams. The Feature also projects how *American Needle* may influence the legal strategies and business operations of other sports associations.

The Feature discourages the Court from recognizing the NFL and similar leagues as single entities, and recommends that Congress consider targeted, sports-related exemptions from section 1.

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INTRODUCTION

This Feature will explore *American Needle, Inc. v. National Football League*[1] and its potential impact on professional sports in the United States. In August 2008, the United States Court of Appeals for the Seventh Circuit held that the National Football League (NFL) and its teams operate as a "single entity" for purposes of apparel sales.[2] Because a single entity cannot conspire with itself, it cannot violate section 1 of the Sherman Act, which prohibits concerted action that unreasonably restrains trade.[3] The U.S. Supreme Court recently granted a writ of certiorari and will review *American Needle* in its 2009 Term.[4]

As this Feature will detail, *American Needle* presents the most meaningful sports law controversy in recent memory.[5] For the first time, a U.S. court of appeals has expressly recognized that in certain settings of collusive behavior, a professional sports league and its independently owned franchises may function as a single entity. *American Needle* offers the Supreme Court an opportunity to settle a longstanding source of confusion: how should antitrust law regulate the peculiar, perhaps incomparable, business entity known as a professional sports league?

The stakes could not be higher. If the Supreme Court agrees with the Seventh Circuit or, as the NFL hopes, furnishes an even more sweeping recognition of single entity status, professional sports leagues could be shielded from section 1 in a bevy of decisionmaking contexts that have traditionally been subject to section 1 scrutiny. Particularly when compared to their past treatment, leagues could become uniquely sovereign and commanding.[6]

This Feature will begin by describing the litigants in *American Needle* and the underlying relationship between antitrust law and the NFL. The Feature

1. 538 F.3d 736 (7th Cir. 2008).

2. *Id.* at 743-44.

3. Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2006); *see* 538 F.3d at 744.

4. Am. Needle, Inc. v. Nat'l Football League, 129 S. Ct. 2859 (2009) (mem.).

5. Other prominent sports law cases, which help form a foundation from which to study *American Needle*, include: *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984); *National Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005); *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002); *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996); and *North American Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir. 1982).

6. As single entities, leagues would remain subject to other sources of antitrust law, most notably section 2 of the Sherman Act, which prohibits monopolistic behavior. Sherman Antitrust Act § 2, 15 U.S.C. § 2 (2006). Single entity status would nonetheless prove meaningful since antitrust actions brought against leagues are typically based on section 1.

will then turn to a substantive analysis of *American Needle* and its implications for the NFL and other organized sports associations, including the National Basketball Association (NBA), Major League Baseball (MLB), the National Hockey League (NHL), and the National Collegiate Athletic Association (NCAA). Single entity recognition may benefit these organizations when they negotiate television contracts, restrain players' salaries and employment autonomy, and execute exclusive contracts with sponsors and licensees, among other pursuits traditionally subject to section 1 scrutiny. This Feature will conclude with a recommendation that the Court reject the NFL's single entity defense on the grounds that it would belie legal precedent and mistakenly characterize league operations. The recommendation, however, will leave open the door for leagues to pursue, and for Congress to consider, targeted exemptions from section 1.

I. AN OVERVIEW OF *AMERICAN NEEDLE V. NFL*, RELATED ANTITRUST PRINCIPLES, AND APPLICATIONS TO THE NFL AND PROFESSIONAL SPORTS

A. American Needle *and Its Parties*

Although *American Needle* illuminates deep tensions between professional sports league behavior and customary expectations of antitrust law, it concerns a mere contractual dispute over caps, visors, and other headwear.

The plaintiff, American Needle, Inc., is an apparel corporation with a lengthy record in sports. Since 1918,[7] American Needle has attracted customers ranging from sports apparel retailers to ballpark concessionaires and has served as a licensee of MLB and the NHL.[8] It has also served as a licensee of the NFL.[9] From the late 1970s to 2000, American Needle maintained a nonexclusive license to design and manufacture headgear bearing logos and names of the NFL and its franchises. During that time, American Needle competed with other licensees that sold similarly licensed NFL headgear.[10]

7. *See* Am. Needle & Novelty, Inc. v. Drew Pearson Mktg., No. 92 C 6649, 1993 U.S. Dist. LEXIS 161, at *1 (N.D. Ill. Jan. 13, 1993) (stating that American Needle was founded in 1918).

8. *See* Am. Needle & Novelty, Inc. v. Drew Pearson Mktg., 820 F. Supp. 1072, 1074 (N.D. Ill. 1993) (furnishing background on American Needle).

9. *Id.*

10. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 738 (7th Cir. 2008).

American Needle's principal defendant, the NFL, is more familiar. Since 1920, it has existed as an unincorporated 501(c)(6) association of separately owned and operated franchises (more commonly referred to as "teams") of varying legal types (franchises are generally corporations, partnerships, or sole proprietorships) that compete in games and in ancillary components of those games, such as the hiring of players, coaches, and staff.[11] Although the NFL has periodically competed with rival professional football leagues,[12] it unquestionably represents the dominant professional football league across the globe.[13]

The NFL would not exist but for its teams, of which there are now thirty-two. These teams must compete in order to generate competitive football. Less obviously, they necessarily collaborate, too. They agree on game rules, for instance; if teams disagreed as to whether a first down requires ten yards or fifteen yards of advancement, they could not play each other.[14]

NFL teams also agree on matters that may not require collaboration but nonetheless yield greater efficiencies through collaboration. Intellectual

11. *See* Mid-S. Grizzlies v. Nat'l Football League, 720 F.2d 772, 775 (3d Cir. 1983) (identifying the NFL as a not-for-profit business that qualifies for federal income tax exemption under § 501(c)(6) of the Internal Revenue Code); *see also* Lee Goldman, *Sports, Antitrust, and the Single Entity Theory*, 63 TUL. L. REV. 751, 756-57 (1989) (explaining the basic characteristics of the NFL and NFL franchises).

12. *See* Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 407-08 (discussing the NFL's rivals). The United Football League (UFL), which began play in fall 2009, may present a new rival, though its aspirations appear relatively modest, with an apparent interest in pursuing ex-NFL players and those unable to gain NFL employment. *See* Doug Haller, *Upstart League Moves Forward*, ARIZ. REPUBLIC, June 17, 2009, at C7. U.S. professional football leagues that have succeeded financially have avoided direct competition with the NFL; the Arena Football League, at least until recent financial woes, was the paradigmatic example. *See* Michael Arace, *Misguided Ideas Led to Sad Demise of AFL*, COLUMBUS DISPATCH, Aug. 8, 2009, at C1.

13. *See* Clarett v. Nat'l Football League, 369 F.3d 124, 126 (2d Cir. 2004) (providing additional background on the NFL's dominance); U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1343-45 (2d Cir. 1988) (recounting the history of professional football leagues). Empirical data also capture the NFL's market dominance. The NFL nets more from the sale of broadcasting rights than the NBA, NHL, MLB, and the National Association for Stock Car Auto Racing (NASCAR) combined. *See* Peter Grant & Adam Thompson, *Gridiron Clash: NFL Network Gets Blocked as Cable Takes Tough Stance*, WALL ST. J., Aug. 20, 2007, at A1. More starkly put, the NFL nets more in the sale of broadcasting rights than over fifty countries produce annually in Gross Domestic Product. *See* Ross C. Paolino, *Upon Further Review: How NFL Network Is Violating the Sherman Act*, 16 SPORTS LAW. J. 1, 3 (2009).

14. Technically, teams could play each other in spite of such disagreement, but the rules for each game would have to be separately negotiated, which would presumably impose unworkable transaction costs.

property is one such matter. Although each team preserves separate ownership of its team-based intellectual property (also known as "club marks," which include team names, logos, helmet designs, uniform insignias, and identifying slogans) and retains limited autonomy to license such property for game day promotions and local advertising,[15] the teams otherwise collaborate.[16]

Specifically, since 1963, NFL teams have utilized National Football League Properties (NFLP), a separate entity entrusted with the development, production, and contracting of teams' intellectual property rights.[17] Each NFL team owns an equal share in NFLP and appoints one of its board of directors' thirty-two members, with NFLP action usually contingent upon a majority vote.[18] Although teams' intellectual properties generate varying levels of sales, NFLP income is evenly distributed among the teams.[19] This distribution is technically made by the NFL Trust, a separate entity which was created by NFL owners and which possesses an exclusive licensing agreement with NFLP.[20] Essentially, the NFL Trust receives the NFLP's licensing revenue, distributes some of it to charities, subtracts fees and expenses, and distributes to each team an equal share of the net profits.[21]

NFLP was formed during an evolutionary era for the NFL during which NFL teams became more synergetic.[22] Pete Rozelle, commissioner of the NFL from 1960 to 1989, shepherded the league through this transformative period. Rozelle surmised that the NFL's future depended on every NFL owner—from

15. *See* MARK CONRAD, THE BUSINESS OF SPORTS: A PRIMER FOR JOURNALISTS 270 (2006).

16. *See* Brief for United States as Amicus Curiae at 2, Am. Needle, Inc. v. Nat'l Football League, 129 S. Ct. 2859 (2009) (No. 08-661), 2009 WL 1497823; *see also* Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or* Fait Accompli*?*, 54 EMORY L.J. 461, 472 n.41 (2005) (discussing the creation of National Football League Properties (NFLP) in the broader context of merchandising rights).

17. This basic arrangement was reaffirmed in 1983, when the teams entered into a trust agreement, which provided that each team transfer the exclusive right to use its club marks. The trust in turn licensed those rights to NFLP. *See* Nat'l Football League Props., Inc. v. Dallas Cowboys Football Club, Ltd., 922 F. Supp. 849, 851 (S.D.N.Y. 1996).

18. *See* Oakland Raiders v. Nat'l Football League, 93 Cal. App. 4th 572, 579 (2001).

19. *See* CONRAD, *supra* note 15, at 270.

20. *See Nat'l Football League Props.*, 922 F. Supp. at 851.

21. *See* ECON. RESEARCH ASSOCS., ECONOMIC AND FISCAL IMPACTS FOR THE PROPOSED NFL STADIUM IN ARLINGTON, TEXAS 27 (2004), *available at* http://www.ci.arlington.tx.us/pdf/ERA%20Study%20Final.pdf.

22. The willingness of NFL owners to entrust their club marks partly reflected fear of the American Football League. *See* Stephen F. Ross, *Antitrust Options To Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 CASE W. RES. L. REV. 133, 162 (2001).

the wealthiest and most profitable to the neediest and most owing—perceiving his or her equity stake as vitally interconnected, with one team's economic failure threatening all others.[23] In time, Rozelle persuaded owners that the NFL would be most prosperous if significant portions of teams' resources were collectivized and if significant portions of their profits were equally distributed.[24]

A national television contract, whereby the NFL would bundle all teams' broadcasting rights into one contract, the fruits of which would be equally distributed among the teams, served as the hallmark of Rozelle's ideology.[25] Despite vast differences in local television ratings and corresponding television revenue, Rozelle convinced owners that through a national contract, they would ultimately obtain more revenue.[26] By any logical measure, the last forty-five years have proven Rozelle categorically correct, both in terms of television revenue[27] and of his central thesis that sharing would benefit teams.[28]

23. *See* David Harris, *Pete Rozelle: The Man Who Made Football an American Obsession*, N.Y. TIMES, Jan. 15, 1984, § 6 (Magazine), at 12 ("[Rozelle] persuaded his employers that the key to marketing the N.F.L.'s product was maintaining a consistently high level of competition among all the clubs, a goal that could best be reached by limiting the clubs' competition off the field. If each franchise were left to shift for its financial self, Rozelle argued, the ensuing division into rich and poor would give a few teams enormous advantages. This would create a corresponding imbalance on the field, greatly lessening the attractiveness of the league as a whole. In the long run, that would cost everyone money.").

24. *See* Clay Moorhead, Note, *Revenue Sharing and the Salary Cap in the NFL: Perfecting the Balance Between NFL Socialism and Unrestrained Free-Trade*, 3 VAND. J. ENT. & TECH. L. 641, 642-43 (2006).

25. *See* Gary R. Roberts, *The Legality of the Exclusive Collective Sale of Intellectual Property Rights by Sports Leagues*, 3 VA. J. SPORTS & L. 52, 56-57 (2001).

26. *See* John Helyar, *Labor Peace Threatened by Rift Between Owners*, ESPN.COM, Mar. 6, 2006, http://sports.espn.go.com/nfl/news/story?id=2354095; *see also* Harris, *supra* note 23 (describing how Rozelle convinced owners that in the long run, a "division into rich and poor [owners] . . . would cost everyone money").

27. Consider that in 1962, CBS agreed to pay the NFL $4.65 million per year for the bundled package of all NFL games. *See* Moorhead, *supra* note 24, at 647-48. This would equate to roughly $33 million in today's dollars. *See* Purchasing Power of Money in the United States from 1774 to 2008, MEASURINGWORTH.COM, http://www.measuringworth.com/ppowerus (last visited Nov. 9, 2009). Currently, the NFL generates more than $3 billion a year from broadcasting rights, which comprise more than half of the league's total revenue. *See* Ethan Flatt, Note, *Solidifying the Defensive Line: The NFL Network's Current Position Under Antitrust Law and How It Can Be Improved*, 11 VAND. J. ENT. & TECH. L. 637, 639 (2009). In addition, the NFL's net worth of approximately $12.8 billion is nearly double that of Major League Baseball, the league with the second-highest worth. *Id.*

28. *See, e.g.*, ECON. RESEARCH ASSOCS., *supra* note 21, at 20 (describing the considerable increase in franchise values since 1974).

By collectively licensing teams' intellectual property in bundled packages, NFLP could have taken a similar approach to the national television contract. For many years, however, NFLP opted for a more dispersed mode of distribution. Indeed, until 2001, NFLP sold nonexclusive licensing rights to multiple apparel companies, including American Needle.[29] In some cases, these apparel companies would work with individual teams on the design of apparel.[30] The approach generated substantial profits for NFLP in the 1980s, but struggled in the mid-to-late 1990s, when more companies entered the sports apparel market and the Dallas Cowboys sought licensing independence from NFLP.[31]

Amid NFLP's struggles, the NFL hired apparel expert Chuck Zona to restructure NFLP's approach to licensing, including in the context of apparel. Zona concluded that NFLP had executed licensing agreements with too many apparel companies, which in turn sold too many products to too many stores, thereby creating an "inventory glut," with NFL-licensed apparel lacking a core identity.[32] Put another way, NFL-licensed apparel did not seem special.

To rectify itself, NFLP needed to—as Zona put it—"create the dynamic of supply and demand,"[33] meaning, in effect, price and produce like a monopolist rather than like a competing firm. To achieve that, NFLP awarded its apparel license to one company, Reebok, which paid $250 million in 2002 for an exclusive ten-year contract.[34] NFLP believed the exclusive contract would strengthen NFLP control over apparel sales and offer enhanced opportunities for long-term business strategies.[35] It would also remove opportunities for idiosyncratic arrangements between individual teams and nonexclusive companies.[36]

NFLP's relationship with American Needle ended when NFLP entered into the exclusive contract with Reebok. Four years later, American Needle filed a

29. Am. Needle, Inc. v. New Orleans La. Saints, 385 F. Supp. 2d 687, 689 (N.D. Ill. 2005) ("For many years, American Needle and other clothing manufacturers were licensed by the NFLP to use NFL teams' trademarks on their headwear and apparel.").

30. *See* MARK YOST, TAILGATING, SACKS, AND SALARY CAPS 128 (2006) (describing how each NFL team worked with a licensee "on uniforms, practice wear, and sideline apparel").

31. *Id.* at 126; Christine Brennan, *Cowboys' Jones Sues League, NFL Properties for $750 Million*, WASH. POST, Nov. 7, 1995, at D6 (discussing legal efforts by Dallas Cowboys' owner Jerry Jones to extricate Cowboys' licensing from NFLP requirements).

32. YOST, *supra* note 30, at 126-27.

33. *Id.* at 127.

34. *Id.* at 128.

35. *Id.* at 128-29.

36. *Id.*

lawsuit against the NFL, NFLP, and Reebok, asserting that the defendants' exclusive contract violated section 1.[37] American Needle's core claim was straightforward: because each NFL team preserved ownership of its intellectual property, the defendants violated section 1 by conspiring, through NFLP, to restrict the ability of vendors such as American Needle to obtain licenses in teams' intellectual property.[38]

After limited discovery, the NFL persuaded U.S. District Judge James Moran to grant summary judgment.[39] Judge Moran reasoned that NFLP, the NFL, and NFL teams "have so integrated their operations [with respect to intellectual property rights] that they should be deemed to be a single entity."[40]

A three-judge panel on the Seventh Circuit unanimously affirmed, with Judge Michael Kanne drafting the opinion.[41] In concluding that the NFL and its teams constitute a single entity for the limited purpose of licensing, Judge Kanne highlighted the voluntary choice of teams to assign the licensing of their club marks to the league-controlled NFLP. Judge Kanne declined to expressly limit the scope of single entity recognition to the NFL's licensing, however, meaning that the NFL, as well as other professional leagues and possibly the NCAA, could potentially enjoy single entity status in nonlicensing activities, such as regulating franchise relocation, using league-owned cable channels to control viewership of games, and instituting salary scales and salary limits for players.[42]

In a unique stroke, both the losing American Needle *and* the prevailing NFL requested that the Supreme Court grant review.[43] Successful appellants seldom seek Court review, yet the NFL believed the Court would supply a farther-reaching decision in its favor. Other leagues felt similarly: both the

37. Reebok initially responded to the lawsuit by questioning American Needle's decision to wait four years to file a claim. *See* Steve Adams, *Suit Calls NFL, Reebok Deal a Monopoly*, PATRIOT LEDGER, Jan. 27, 2005, at 35. It is unclear why American Needle waited four years, though it was within its statutory rights to do so.

38. There was a second claim based on section 2 of the Sherman Act. This Feature does not address the second claim, which is outside the scope of the single entity defense.

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

40. *Id.* at 943.

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

42. *See id.* at 742.

43. American Needle filed a petition for a writ of certiorari, while the NFL's request came in its brief in response to American Needle. Reebok—the other defendant—waived its opportunity to file a brief.

NBA and the NHL filed amicus briefs in support of the NFL.[44] The Court showed interest, inviting then-Acting Solicitor General Ed Kneedler to file a brief expressing the views of the United States.[45] Kneedler was replaced by Elena Kagan when she was confirmed as Solicitor General, and Kagan filed the requested brief, recommending that the Court decline certiorari. Kagan surmised that while the Seventh Circuit's reasoning "is in some tension with this Court's precedents . . . its holding does not conflict with any decision of this Court or another court of appeals."[46] The Court nonetheless granted certiorari, setting the stage for a landmark decision.

B. Core Antitrust Principles Underpinning the NFL

The Supreme Court will decide whether, and to what extent, the NFL comprises a single entity. As a single entity, a professional sports league and its independently owned franchises would obtain a complete exemption from section 1. Section 1 is widely considered one of the most important tools of U.S. federal antitrust law, a body of law born during the Industrial Revolution as a means to curb anticompetitive combinations of powerful competitors[47] and primarily designed to maximize total societal wealth, efficiency, and consumer welfare.[48] Section 1 principally aims to prevent competitors from combining

44. *See* Brief of Amici Curiae Nat'l Basketball Ass'n & NBA Props. in Support of the NFL Respondents' Response, Am. Needle, Inc. v. Nat'l Football League, 129 S. Ct. 2859 (2009) (No. 08-661), 2009 WL 164243; Brief for Amicus Curiae the Nat'l Hockey League in Support of the NFL Respondents, *Am. Needle*, 129 S. Ct. 2859 (No. 08-661), 2009 WL 164244.

45. Am. Needle, Inc. v. Nat'l Football League, 129 S. Ct. 1400 (2009).

46. Brief for United States as Amicus Curiae, *supra* note 16, at 14.

47. *See* Eleanor M. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 N.Y.U. L. REV. 554, 563-66 (1986) (noting that the Sherman Act, 15 U.S.C. § 1 (2006), was the first of three key pieces of federal antitrust legislation, with the Clayton Act in 1914, ch. 323, 38 Stat. 730 (codified as amended at 15 U.S.C. §§ 12-27 and 29 U.S.C. §§ 52-53), and the Celler-Kefauver Amendment to the merger section of the Clayton Act in 1950, Act of Dec. 29, 1950, ch. 1184, 64 Stat. 1125 (codified as amended at 15 U.S.C. §§ 18, 21), serving as the other two pieces); *see also* J. Gordon Christy, *A Prolegomena to Federal Statutory Interpretation: Identifying the Sources of Interpretive Problems*, 76 MISS. L.J. 55, 81-82 (2006) (discussing the limitations of congressional foresight as to how the Sherman Act would be applied by courts). *See generally* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966) (discussing the political dynamics that led to passage of the Sherman Act).

48. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 107 (1984); *see also* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 702 (1991) (noting the existence of social, economic, and distributive purposes of federal antitrust law); Elbert

their economic power in ways that unduly impair competition or harm consumers, be it in terms of increased prices, diminished quality, limited choices, or impaired technological progress.[49]

The NFL has a fifty-year history of defending section 1 claims,[50] with litigated topics including the league's capacity to prohibit NFL owners from relocating their franchises without league approval[51] and to financially dissuade NFL teams from signing players whose contracts with other teams had expired.[52] Pending *American Needle*'s ultimate resolution, the NFL currently remains susceptible to section 1 challenges in many of its business endeavors. Any challenge would prompt one of two standards of review.

Per se analysis, the more common standard for certain kinds of section 1 violations,[53] is a streamlined approach for when a restraint reveals a "predictable and pernicious anticompetitive effect."[54] Such a restraint is

L. Robertson, *A Corrective Justice Theory of Antitrust Regulation*, 49 CATH. U. L. REV. 741, 782 (2000) (acknowledging that efficiency-based analysis serves as a leading paradigm for contemporary antitrust regulation). The Sherman Act's legislative history suggests secondary rationales, including concern that American democracy would be threatened by one business obtaining too much power. *See, e.g.*, Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 478.

49. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768-69 (1984); Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1050 (9th Cir. 1983); *see also* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 50-56 (1978) (outlining the economic implications of the primary goals of section 1); Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971) (discussing the relationship between the goals of antitrust law and professional sports).

50. The modern era of section 1 litigation for the NFL began with *United States v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953), which prohibited league restrictions on television and radio broadcasts of games.

51. *See, e.g.*, L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381 (9th Cir. 1984).

52. *See, e.g.*, Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976) (invalidating as anticompetitive the "Rozelle Rule," which required any NFL team that signed a player who was previously employed by another NFL team to financially compensate the previously employing team).

53. Price-fixing agreements, for instance, are normally considered per se illegal. *See In re* Baby Food Antitrust Litig., 166 F.3d 112, 118 (3d Cir. 1999).

54. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997); *see also* Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 290 (1985) (noting that a group boycott is a per se violation of the Sherman Act); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 351 (1982) (finding fee agreements among physicians to be price fixing).

presumed to violate section 1 and illegality follows regardless of procompetitive effects or motives.[55]

Rule of reason analysis, in contrast, involves a fact-intensive inquiry whereby an agreement or restraint is deemed unlawful only if it causes an anticompetitive injury that outweighs procompetitive effects.[56] The balancing of anticompetitive and procompetitive considerations usually requires a court to scrutinize the degree of collusion associated with the restraint as well as the restraint's rationales, history, and impact on the relevant market.[57] Rule of reason is favored for certain types of restraints, including joint ventures.[58]

Considering that per se analysis tends to advantage plaintiffs while rule of reason typically favors defendants,[59] professional sports league defendants, when subjected to section 1 analysis, prefer rule of reason. In most section 1 cases, they have received it. Courts have repeatedly adopted rule of reason for scrutinizing restraints imposed by professional sports leagues, in part because of a general trend toward such analysis and away from per se condemnation,[60] and in part because those leagues and their independently owned franchises have been viewed, at least until *American Needle*, as joint ventures.[61]

The concept of joint venture is crucial to understanding the controversy and significance of *American Needle*. Joint ventures are associations of "two or more persons formed to carry out a single business enterprise for profit for

55. *Maricopa County Med. Soc'y*, 457 U.S. at 351.

56. *See* Gordon H. Copland & Pamela E. Hepp, *Government Antitrust Enforcement in the Health Care Markets: The Regulators Need an Update*, 99 W. VA. L. REV. 101, 106-07 (1996).

57. *See* Five Smiths, Inc. v. Nat'l Football League Players Ass'n, 788 F. Supp. 1042, 1045 (D. Minn. 1992) (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)).

58. *See* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 338 (2d Cir. 2008).

59. *See* Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 826-29 (1987) (discussing how per se analysis advantages plaintiffs); Recent Cases, 110 HARV. L. REV. 523, 527 (1996) ("[R]ule of reason analysis heavily favors defendants . . . .").

60. *See* Keith N. Hylton, *Fee Shifting and Predictability of Law*, 71 CHI.-KENT L. REV. 427, 458 (1995); Glen O. Robinson, *Explaining Vertical Agreements: The* Colgate *Puzzle and Antitrust Method*, 80 VA. L. REV. 577, 605 (1994) (discussing the history of the application of rule of reason and per se analysis).

61. *See, e.g.*, Sullivan v. Nat'l Football League, 34 F.3d 1091, 1099 (1st Cir. 1994); L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1389 (9th Cir. 1984); N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1252 (2d Cir. 1982); Smith v. Pro Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978); Levin v. Nat'l Basketball Ass'n, 385 F. Supp. 149, 150 (S.D.N.Y. 1974). Courts' unfamiliarity with sports practices may also explain their unwillingness to apply per se analysis. *See* Richard E. Bartok, Note, *NFL Free Agency Restrictions Under Antitrust Attack*, 1991 DUKE L.J. 503, 507 n.27.

which purpose they combine their property, money, effects, skill, and knowledge."[62] Examples of joint ventures include professional associations, stock exchanges, and credit card networks.[63]

In applying rule of reason to a joint venture, courts typically assess the extent to which the joint venture deprives the marketplace of the independent decisionmaking normally demanded by competition and, conversely, the extent to which the joint venture improves market efficiencies.[64] Courts usually have found joint ventures to satisfy rule of reason analysis on the basis that rather than harming consumers' interests, joint ventures often provide consumers with new product offerings that otherwise would not have been produced or would not have been produced as efficiently.[65]

Until *American Needle*, the NFL had repeatedly been regarded as a joint venture of individually owned football franchises and thus subjected to rule of reason.[66] This reasoning makes sense. The product of NFL football necessarily requires multiple NFL teams and therefore requires agreement between teams on how NFL football should be produced. Teams work together to create, define, and limit the means of competition in order to advance themselves and the league. When acting in concert or "jointly," teams also reserve power over the league itself. For instance, the highest-ranking league official—the commissioner—must be approved by twenty-two of the thirty-two ownership groups and can be removed from office by those same owners.[67]

62. 46 AM. JUR. 2D *Joint Ventures* § 1 (2006).

63. *See* Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 IOWA L. REV. 1137, 1173 (2001).

64. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) (describing the evolution of the rule of reason and explaining the rule's focus on the competitive significance of a restraint); *see also* Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77 (applying the rule of reason to price variations among industries).

65. *See* Derek Devgun, *Crossborder Joint Ventures: A Survey of International Antitrust Considerations*, 21 WM. MITCHELL L. REV. 681, 690-91 (1996) (discussing how joint ventures may capitalize off of economies of scale and other constructs to supply a more competitive market); F. Scott Kieff & Troy A. Paredes, *Engineering a Deal: Toward a Private Ordering Solution to the Anticommons Problem*, 47 B.C. L. REV. 111, 135 (2007) (noting the success of joint ventures under rule of reason).

66. *See, e.g.*, N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1257 (2d Cir. 1982) (expressly labeling the NFL and its franchises as a "joint venture"); *cf.* Mackey v. Nat'l Football League, 543 F.2d 606, 619 (8th Cir. 1976) ("[T]he NFL assumes *some* of the characteristics of a joint venture . . . .").

67. *See* Morris v. N.Y. Football Giants, Inc., 575 N.Y.S.2d 1013, 1016 (Sup. Ct. 1991) (citing NFL CONST. art. VIII, § 8.1) (noting that NFL owners "shall select and employ the Commissioner and shall determine his period of employment and his compensation"); Alan

While necessarily collaborators for purposes of supplying competitive football, NFL teams, like those in the NBA, MLB, and NHL, remain distinct legal entities with individualized ownerships. In their individualized capacities, teams enjoy autonomy over ticket prices, stadium leases, and equipment purchases.[68] Within agreed-upon settings, most notably with regard to a salary floor and salary cap on team payrolls, teams also possess autonomy over personnel and salary decisions concerning players, coaches, and administrators.[69] Also, while they share approximately ninety percent of their total revenue,[70] teams do not share all forms of revenue,[71] just as they do not share their profits, losses, or tax obligations.[72] Teams retain revenue generated by local advertising, local radio, televised broadcasts of preseason games, stadium naming, luxury boxes, club seats, and other increasingly lucrative, location-specific sources.[73] Not surprisingly, teams generate considerably different amounts of annual revenue and likewise possess varying net worth.[74]

Though teams act jointly to regulate the NFL, they also agree to partially insulate the NFL from themselves. For instance, the NFL's central office (or "headquarters")—which consists of officials employed by the NFL and not by

Abrahamson, *Goodell Is Chosen as NFL Chief*, L.A. TIMES, Aug. 9, 2006, at D1 (noting the voting process for election of the commissioner).

68. Goldman, *supra* note 11, at 763.

69. *Id.*

70. *See* Comment, *Leveling the Playing Field: Relevant Product Market Definition in Sports Franchise Relocation Cases*, 2000 U. CHI. LEGAL F. 245, 254 n.48.

71. *See* Ian Dobson, *The Wrong Gameplan: Why the Minnesota Vikings' Failure To Understand Minnesota's Values Dooms Their Proposal for a New Stadium and How the Team Can Improve Its Future Chances*, 33 WM. MITCHELL L. REV. 485, 491-92 (2006).

72. *See* L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1390 (9th Cir. 1984) (discussing how teams do not share profits or losses); Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1, 30 (1983) (noting the tax consequences of teams' separate profits and losses).

73. *See* Helyar, *supra* note 26; *see also* Mark Curnutte, *The 'Haves' vs. the 'Have-Mores,'* CINCINNATI ENQUIRER, Feb. 25, 2007, at C10 ("The higher rate of growth in unshared revenue generated by teams with new stadiums in larger markets has created disparity."); Kurt Badenhausen, Michael K. Ozanian & Christina Settimi, *The Richest Game*, FORBES.COM, Sept. 10, 2008, http://www.forbes.com/2008/09/10/nfl-team-valuations-biz-sports-nfl08_cz_kb_mo_0910nfl_land.html (describing the loss of stadium-related revenue for teams unable to secure new stadiums).

74. *See NFL Team Valuations*, FORBES.COM, Sept. 2, 2009, http://www.forbes.com/lists/2009/30/football-values-09_NFL-Team-Valuations_Value.html (indicating values of all thirty-two franchises, with the Dallas Cowboys ($1.65 billion) and the Oakland Raiders ($797 million) as the franchises with the highest and lowest values, respectively).

any individual team or teams—sets policies, enforces rules, and regulates team ownership, among other responsibilities delegated to it by teams.[75] The office also takes primary responsibility for assorted business and legal activities, including the employment and supervision of referees, the scheduling of games, the disciplining of players, and the bargaining of labor agreements.[76] As many have observed, the NFL and similarly designed professional sports leagues are unique creatures without clear parallels in the market of goods and services.[77] Nonetheless, in attaching the joint venture label to league restraints, courts have generally focused on teams' independent identities and necessary mix of competitive and collaborative behavior.

C. The Legality of NFL Actions Under Section 1

In applying rule of reason analysis to restraints agreed to by NFL teams and similar sports ventures, courts have usually regarded collaboration and agreement on game rules, such as field dimensions and scoring methods, as essential in order to play legitimate games.[78] In contrast, courts have typically deemed off-field horizontal restraints on competition—such as player movement restrictions,[79] entry drafts,[80] and analogous devices designed to maintain on-field competitive balance—as predominantly anticompetitive.[81]

75. *See* Darryll M. Halcomb Lewis, *After Further Review, Are Sports Officials Independent Contractors?*, 35 AM. BUS. L.J. 249, 252 n.7 (1998) (noting that NFL officials are employees of the NFL).

76. *See* NAT'L FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT pmbl. (2006), *available at* http://www.nflplayers.com/user/template.aspx?fmid=181&lmid=231&pid=358 ("[The] National Football League Management Council . . . is recognized as the sole and exclusive bargaining representative of present and future employer member clubs of the National Football League . . . ."); 1 AARON N. WISE & BRUCE S. MEYER, INTERNATIONAL SPORTS LAW AND BUSINESS 151 (1997) (listing the powers of the commissioner as inclusive of the power to discipline players); Richard J. Hunter, Jr., *An "Insider's" Guide to the Legal Liability of Sports Contest Officials*, 15 MARQ. SPORTS L. REV. 369, 408-09 n.130 (2004) (discussing the NFL as the employer of referees); Peter King, *Sched-Ache*, SPORTS ILLUSTRATED, Sept. 19, 2005, at 120 (noting how the NFL configures its schedule).

77. *See, e.g.*, Valley Bank of Nev. v. Plus Sys., Inc., 914 F.2d 1186, 1192 (9th Cir. 1990) (describing professional sports leagues as "unique").

78. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101 (1984) ("'[Some] activities can only be carried out jointly. Perhaps the leading example is league sports.'" (quoting BORK, *supra* note 49, at 278)).

79. *See, e.g.*, Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976).

80. *See, e.g.*, Smith v. Pro Football, Inc., 593 F.2d 1173, 1188-89 (D.C. Cir. 1978).

81. *See, e.g.*, N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1257 (2d Cir. 1982) (noting that the league prohibition on owners making or retaining capital investment in

The NFL and its teams have nonetheless implemented some of those restraints through collective bargaining with the National Football League Players' Association (NFLPA). Such collective bargaining is protected by the so-called "nonstatutory labor exemption," which generally exempts collectively bargained restraints from section 1 if they primarily affect "mandatory subjects of bargaining"—namely, in the professional sports context, players' wages, hours, and other employment conditions.[82] The nonstatutory labor exemption follows from a series of Supreme Court decisions[83] and is premised on the belief that employees' working conditions are likely to be enhanced when they negotiate together instead of individually.[84] By negotiating together, employees are thought to gain leverage in their bargaining with employers and to ultimately obtain better working conditions.[85] The exemption from section 1 also provides an incentive for employers to negotiate with collective groups of employees, as restraints instead imposed unilaterally would risk section 1 scrutiny.[86] As a result of the nonstatutory labor exemption, blatantly anticompetitive but collectively bargained restraints, such as an artificial ceiling on players' salaries, are exempt from section 1.

The NFL and its teams would naturally prefer to adopt policies without the give-and-take of collective bargaining, but also without the threat of section 1. To that end, and for almost forty years, NFL executives have posited that

another professional sports league produced more anticompetitive injury than procompetitive effects).

82. *See* cases cited *infra* note 83; *see also Mackey*, 543 F.2d at 623 (referencing the connection between mandatory subjects of bargaining and the nonstatutory labor exemption). For a discussion of the mandatory subjects of bargaining in the sports context, see, for example, Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19, 89-90 (1986).

83. *See* Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965); United Mine Workers v. Pennington, 381 U.S. 657, 664-65 (1965); *see also* Roberts, *supra* note 82, at 58-63 (discussing the legal history of the nonstatutory labor exemption).

84. *See, e.g.*, Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975) ("The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws.").

85. *Cf.* Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 186 (2001) (suggesting that professional baseball players have historically received significantly higher compensation, relative to other workers in the economy, when bargaining as a union rather than individually).

86. *See* Michael A. McCann & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE. W. RES. L. REV. 731, 738 (2006).

courts misunderstand their business model. More precisely, they bristle at the characterization of their franchises as independent economic competitors engaged in a joint venture.

The NFL has expressed this disapproving sentiment toward the joint venture characterization in defending multiple antitrust claims. Perhaps most notably, in *McNeil v. NFL*,[87] then-commissioner Paul Tagliabue asserted that "the business relationship among the NFL member clubs is not that of independent economic competitors but rather that [of] co-owners engaged in a common business enterprise, the production and marketing of professional football entertainment."[88] In other words, by positioning itself and its franchises as co-owners of the same endeavor—NFL football—rather than distinct, sometimes competing owners in the same joint venture, the NFL would like to escape antitrust scrutiny for *any* restraint, even one that poses significant anticompetitive effects and that has not been subject to the collective bargaining process.

D. The NFL, Copperweld*, and Single Entity Status*

Realizing the logical challenge of arguing that distinct teams, with distinct ownerships and distinct players, all of which compete in myriad ways, are actually components of the same organ, the NFL has turned to the single entity defense. The single entity defense is available to distinct entities that possess a shared corporate consciousness, meaning they act, behave, and choose as one and thus their collaborations do not deprive the market of any independent sources of economic power.[89] Because of a single entity's structure and its unilateral mode of behavior, its restraints cannot pose the anticompetitive risks contemplated by section 1. In fact, by enabling distinct entities to compete more effectively with other actors in the marketplace, the entities' actions as a single entity are thought to promote market competition.[90]

The single entity defense draws principally from the U.S. Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*[91] In *Copperweld*, the Court deemed a parent corporation and its wholly owned subsidiary

87. 790 F. Supp. 871 (D. Minn. 1992).

88. *Id.* at 878.

89. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 770-73 (1984).

90. *See* Ryan P. Meyers, Comment, *Partial Ownership of Subsidiaries, Unity of Purpose, and Antitrust Liability*, 68 U. CHI. L. REV. 1401, 1406 (2001).

91. *See id.*

constitutive of a single entity. As a single entity, "they"—the corporation and its wholly owned subsidiary—act with a "complete unity of interest":

> Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. . . . If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.[92]

Following the Court's logic, a parent-wholly owned subsidiary relationship is readily distinguishable from a joint venture, since the former is viewed as "unilateral" rather than "concerted," meaning its actions do not implicate section 1.[93] More precisely, while a wholly owned subsidiary only has one parent entity, whose interests the subsidiary exclusively serves, joint ventures, by definition, involve multiple participants (or "parents") that engage in a collaborative effort for a particular goal, but which remain distinct and thus subject to section 1 scrutiny.[94]

The Court recognized an obvious point: parents and wholly owned subsidiaries are not monolithic. They are, after all, distinct corporate entities, often featuring different personnel and separate implementations of shared goals.[95] Parents and wholly owned subsidiaries, under the legal "fiction" of corporate law, are also independent legal persons with separate and distinct legal rights and standing to enter into contracts, and to sue and be sued.[96] Wholly owned subsidiaries and their parent firms nonetheless compose a single *economic* entity for antitrust purposes, incapable of collaborating,

92. *Copperweld*, 467 U.S. at 771.

93. *Id*. at 771-74.

94. *See* Zenichi Shishido, *Conflicts of Interest and Fiduciary Duties in the Operation of a Joint Venture*, 39 HASTINGS L.J. 63, 71-75 (1987) (addressing the differences between joint ventures and single-parent subsidiaries); Michael D. Beasley, Comment, *The Vatican Merger Defense—Should Two Catholic Hospitals Seeking To Merge Be Considered a Single Entity for Purposes of Antitrust Merger Analysis?*, 90 NW. U. L. REV. 720, 741 (1996) (noting that unlike a wholly owned subsidiary and its parent, joint ventures are subject to section 1 scrutiny).

95. *See, e.g.*, Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct* (pt. 1), 55 LA. L. REV. 217, 313 (1994) (discussing case law concerning parents and wholly owned subsidiaries that feature different personnel, offices, and oversight procedures).

96. *See* Eric J. Gouvin, *Resolving the Subsidiary Director's Dilemma*, 47 HASTINGS L.J. 287, 323 (1996).

agreeing, or conspiring with itself, the Court reasoned, since the economic resources of the subsidiary firms exist only to serve its parents' interests and since parents, if they so choose, can take control of those resources entirely.[97] Put another way, it would not make sense to prohibit a parent and subsidiary from coordinating activities on an antitrust basis, when it would be perfectly fine under antitrust law for the parent to engage in the identical activity via an internal division.

The Court reached the same conclusion with respect to groups and individuals within parents and subsidiaries: internally divergent interests do not automatically defeat single entity status. For instance, while employees or divisions within a firm compete over monetary compensation and other self-interested ends, they remain members of the same firm. Their collaboration thus does not implicate concerns of antitrust law; indeed, in order for the firm to better compete in the marketplace, the firm *expects* coworkers and codivisions to collaborate.[98] Similarly, owners or stockholders may disagree about their firm's strategies, but they are presumed to behave as one in seeking to maximize the firm's profits or financial wherewithal.[99]

The *Copperweld* Court explicitly limited its holding to the setting of a corporate parent and its wholly owned subsidiary.[100] Such a limitation would seemingly prove problematic for the NFL, since it does not enjoy any parent-subsidiary relationship with its separately owned teams. The Court, on the other hand, has not addressed whether professional sports leagues and independently owned teams—members of a relationship that leagues and teams routinely characterize as "special"[101]—might nonetheless qualify for single entity recognition.

Prior configurations of the Court have offered signals. Writing for the majority in *Brown v. Pro Football, Inc.*, Justice Breyer opined that in part

97. *Copperweld*, 467 U.S. at 771-72. Under the corporate law of most states, a wholly owned subsidiary (or any subsidiary owned ninety percent by a parent) can be merged with its parent without a vote of the subsidiary's board of directors or shareholders. This statutory "short form merger" gives a parent corporation discretion to eliminate entirely the separate legal status of its subsidiary by simple action of the parent board. *See, e.g.*, DEL. CODE ANN. tit. 8, § 253 (2009).

98. *Copperweld*, 467 U.S. at 770-71; *see also* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 1 (1984) ("Antitrust law permits, even encourages, cooperation within a 'firm,' for such cooperation is the basis of economic productivity.").

99. *See Copperweld*, 467 U.S. at 771-72.

100. *Id.* at 767 ("We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.").

101. *See, e.g.*, Brown v. Pro Football, Inc., 518 U.S. 231, 248 (1996).

because "they depend upon a degree of cooperation for economic survival," the NFL and its teams resemble an undefined "single bargaining employer."[102] Justice Breyer, however, carefully limited his observation to collective bargaining activity and, just as meaningfully, did not connect single bargaining employer status to *Copperweld* or single entity status.[103] Although *Brown* appears to amplify the NFL's preferred notion that NFL teams necessarily cooperate for economic survival, it does so in conditional verbiage and in the context of labor relations, which are not directly at issue in *American Needle*.

Additional insight may be gained from Justice Stevens's opinion in *NCAA v. Board of Regents of the University of Oklahoma*.[104] That case concerned the NCAA and its member schools agreeing to a restraint whereby those member schools refrained from competing in the sale of television rights and entrusted the NCAA to execute a national television contract, the fruits of which would be shared by the same schools. The NCAA's policy limited the right of individual schools to negotiate separate or additional television appearances for its teams. The restraint was challenged under section 1 by several colleges with popular football teams. The Court held that because they competed in various ways (for instance, on the field, when appealing to fans, in recruiting prospective student-athletes, etc.), the schools were competitors.[105] The NCAA's restraint, which bore a resemblance to the NFL's national television contract,[106] was thus subject to section 1 scrutiny.[107]

Board of Regents offers limited precedential value for examining whether a professional sports league and its independently owned teams comprise a single entity. In crucial ways, the NCAA operates differently from the NFL and similar professional sports leagues. Foremost, the NCAA consists of individual colleges and universities that use it to organize and promote athletic events between student-athletes; unlike NFL teams, which exist only because there is an NFL, those colleges and universities would continue to exist, and would continue to compete in other ways (for instance, with regard to admissions), without the NCAA.[108] Still, in *Board of Regents*, the Court unambiguously held

102. *Id.* at 248, 249.

103. *Id.* at 248-249.

104. 468 U.S. 85 (1984).

105. *Id.* at 99.

106. *See supra* Section I.A.

107. The restraint was deemed to violate section 1. *Bd. of Regents*, 468 U.S. at 113-20.

108. *See* Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 To Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219, 244-45 (1984).

that a market restraint on sporting events reflected the behavior of separate, competing entities that lacked a complete unity of interest.[109]

Decisions by lower courts also lend insight as to whether the NFL and its teams comprise a single entity. In applying *Copperweld*, some courts have reasoned that business relationships less intimate than that of a parent and its wholly owned subsidiary can nevertheless evince a complete unity of interest.[110] That can be true of corporate relationships that lack *any* shared ownership. In *Williams v. Nevada*,[111] for instance, the U.S. District Court for the District of Nevada identified a single entity between a fast food franchisor and its separately owned franchisees.[112] The court identified the commonality of economic objectives between franchisors and franchisees, the contractual control of franchisors over franchisees, and the matching operations of franchisees as corroborative of unified interest.[113] While many courts have rejected what could be termed single entity creep,[114] some have expanded the scope of single entity status far beyond *Copperweld*'s confines.

More germane to the NFL, while no circuit court prior to *American Needle* had explicitly found a professional sports league and its independently owned franchises to be a single entity, several circuit courts have intimated support for single entity recognition. In his majority opinion in *Chicago Professional Sports Ltd. Partnership v. NBA*,[115] Judge Frank Easterbrook suggested that single entity analysis *could* be appropriate for certain aspects of league behavior, such as "when selling broadcast rights to a network in competition with a thousand other producers of entertainment," but not for other actions, such as those implicating players' employment opportunities.[116] He reasoned that when soliciting bids for bundled packages of NBA games, the NBA acted as a single

109. *Cf.* Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 338 (2007) (noting that, in *Board of Regents*, "the Supreme Court implicitly determined that the NCAA is not a single entity").

110. *See, e.g.*, Novatel Commc'ns, Inc. v. Cellular Tel. Supply, Inc., No. C85-2674A, 1986 U.S. Dist. LEXIS 16017, at *25-26 (N.D. Ga. Dec. 23, 1986) (holding that single entity status should depend on the capacity of the parent to legally control the subsidiary rather than on the mere presence of complete ownership).

111. 794 F. Supp. 1026 (D. Nev. 1992).

112. *Id.* at 1031.

113. *Id.*; *see also* Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1035 (9th Cir. 2005) (identifying a single entity in the context of a dog breeding club and its separately owned regional cooperatives).

114. *See* Meyers, *supra* note 90, at 1407-08.

115. 95 F.3d 593 (7th Cir. 1996).

116. *Id.* at 600.

bargaining employer which competed not with individual NBA teams, but rather with myriad other providers of entertainment.[117]

In *Mid-South Grizzlies v. NFL*,[118] the Third Circuit also intimated support. While carefully resisting the NFL's preferred conclusion that its teams not be subject to section 1, the court nonetheless surmised that NFL teams do not resemble economic competitors and thus their restraints may not be suitable for antitrust scrutiny.[119]

In spite of these intimations, it is worth reiterating that until the Seventh Circuit's opinion in *American Needle*, not one U.S. Court of Appeals had expressly recognized a professional sports league and its independently owned franchises as a single entity. In fact, U.S. Courts of Appeals for the First,[120] Second,[121] Sixth,[122] Ninth,[123] and D.C.[124] Circuits have categorically rejected such a characterization. In their view, teams with independent value, with separate identities on and off the field, and which compete for players, coaches, fans, and media attention, cannot share a "corporate consciousness," at least not as originally conceived by *Copperweld* or even as more loosely imagined by other courts.[125] Too often, in those circuit courts' view, teams possess unaligned motives and routinely do *not* pursue the common interests of the whole.

Courts, in fact, have even refused to extend the single entity defense to a professional sports league that *purposefully* organized as a single entity. In

117. *Id.*

118. 720 F.2d 772 (3d Cir. 1983).

119. *Id.* at 786-87.

120. *See* Sullivan v. Nat'l Football League, 34 F.3d 1091, 1099 (1st Cir. 1994); *see also* Marc Edelman, *Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891, 893 n.11 (2008) (discussing courts' rejection of the single entity defense for professional sports leagues).

121. *See* N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1257 (2d Cir. 1982).

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

123. *See* L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1388-90 (9th Cir. 1984).

124. Smith v. Pro Football, Inc., 593 F.2d 1173, 1177 n.11 (D.C. Cir. 1978) (implicitly rejecting the argument that the NFL is a single entity); *see also* Daniel E. Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 FORDHAM L. REV. 157, 169 n.49 (characterizing the D.C. Circuit's opinion in *Smith* as implicitly rejecting the argument that the NFL is a single entity).

125. *See, e.g.*, *L.A. Mem'l*, 726 F.2d at 1390 (noting that in the NFL, "profits and losses are not shared, a feature common to partnerships or other 'single entities'").

Fraser v. MLS,[126] the First Circuit rejected the attempt of Major League Soccer (MLS) to obtain classification as a single entity. Cognizant of case law that characterized the "big four" leagues[127] as joint ventures, organizers of MLS thought they could devise a league that would be more compatible with single entity status.[128] This would allow the league to implement, without collective bargaining, regressive pay scales and limitations on free agency that might otherwise run afoul of section 1.

At its inception in 1994, MLS owned all of the league's franchises, executed employment contracts between it and each player, assigned players to franchises, controlled the league and franchise intellectual property rights, centrally planned licensing and merchandise strategies, and assumed teams' liabilities, among other centrally executed behaviors.[129] Franchises, which were operated by MLS employees known as "operator-investors," enjoyed only a few autonomous privileges and duties, such as the hiring of coaches and administrative staff, as well as the payment of local promotional costs.[130] Franchise "owners" actually invested in the MLS limited liability company itself, and acquired limited control over a single team, but had no ownership stake in the team per se. Naturally, franchises competed on the soccer field. Performance incentives, whereby operator-investors of successful franchises would receive higher pay, further encouraged inter-team competition.[131]

Despite MLS's common ownership arrangement and largely centralized operations, the First Circuit declined to regard it as a single entity. Highlighting the mixed incentives for operator-investors, who are MLS employees but also seem to have a greater stake in one franchise's success, the court characterized the MLS as "a hybrid arrangement, somewhere between a single company . . . and a cooperative arrangement between existing

126. 284 F.3d 47 (1st Cir. 2002).

127. Courts have distinguished the NFL, NBA, MLB, and NHL as "major professional sports leagues." *See, e.g.*, N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1253 (2d Cir. 1982).

128. *See* Edelman, *supra* note 120, at 901-02 (discussing the origins of MLS); *see also* Joshua D. Wright, *MasterCard's Single Entity Strategy*, 12 HARV. NEGOT. L. REV. 225, 230 (2007) (noting that in addition to MLS, the Continental Basketball Association, the Women's National Basketball Association, and the American Basketball League all attempted to organize themselves as single entities in hopes of obtaining protection from *Copperweld*).

129. *See* Matt Link, *MLS Scores Against Its Players:* Fraser v. Major League Soccer, LLC, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 76, 76-77 (2003); *see also* Edelman, *supra* note 120, at 901-02 (supplying additional detail on the formation of MLS).

130. Link, *supra* note 129, at 76-77.

131. Wright, *supra* note 128, at 231.

competitors."[132] Such a hybrid arrangement was deemed to be within the scope of section 1 and thus outside the classification of a single entity. *Fraser* posited a dim outlook for the configuration of a franchise-based professional sports league that could evade section 1.

E. American Needle *and the Sports Broadcasting Act of 1961: A Contextual Comparison*

Whatever its legal merits, the NFL's pursuit of single entity status is rational. An exemption from section 1 would insulate the NFL's business strategies from section 1 and, less obviously, the considerable legal expenses often associated with defending section 1 claims.[133]

Through the Sports Broadcasting Act of 1961[134] (SBA), the NFL, along with the NBA, MLB, and the NHL, already know of the possible benefits: the SBA exempts the four leagues from violating section 1 in their national television contracts. The SBA reflected a legislative response to a federal court's decision in *United States v. NFL*,[135] where the pooling of NFL teams' broadcasting rights into one package, which eliminated competition for local broadcasting rights, was deemed to violate section 1.[136] Until the NFL successfully lobbied Congress for passage of the SBA,[137] *United States v. NFL* had threatened Rozelle's plan to utilize shared television revenue as a means of maintaining competitive balance.[138]

Like the SBA, which exempts the NFL from violating section 1 in the confined context of national television contracts, *American Needle* exempts the NFL from violating section 1 in the confined context of apparel sales. Indeed, in *American Needle*, the Seventh Circuit found that section 1 did not apply to the

132. Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 58 (1st Cir. 2002).

133. To illustrate, the NFL reportedly spent $50 million in legal fees and settlement costs in *Los Angeles Memorial Coliseum Commission v. NFL*, 726 F.2d 1381 (9th Cir. 1984). Marc D. Oram, *The Stadium Financing and Franchise Relocation Act of 1999*, 2 VA. J. SPORTS & L. 184, 190 (2000).

134. 15 U.S.C. §§ 1291-1295 (2006). The Act provided the NFL, along with the NBA, the MLB, and the NHL, with an exemption for purposes of a national television contract over sponsored broadcasting.

135. 196 F. Supp. 445 (E.D. Pa. 1961).

136. *Id.* at 447.

137. *See* Phillip M. Cox II, Note, *Flag on the Play? The Siphoning Effect on Sports Television*, 47 FED. COMM. L.J. 571, 574 (1995) (discussing the SBA's history).

138. *See* Roberts, *supra* note 25, at 56-57 (discussing the NFL's ambitions to utilize television broadcasts as an equalizing device).

NFL's decision, through NFLP, to license each team's intellectual property rights exclusively to Reebok.[139]

As this Feature will explore in Part II, the Seventh Circuit's analysis was relatively straightforward, if at times cursory, surmising that because teams voluntarily assign the licensing of their club marks to the league-controlled NFLP, they share one consciousness with NFLP. In response to clear evidence that teams compete in many other ways, Judge Kanne, citing Judge Easterbrook from *Chicago Professional Sports*, rejected as "silly" the notion that a single entity can exist only if teams refrain from competition in all contexts.[140] According to the Seventh Circuit, the NFL and its teams may constitute a single entity for a limited purpose and remain a joint venture for other purposes.

Although the SBA and *American Needle* are similar in supplying situation-specific exemptions from section 1, they are different in an important way: *American Needle* suggests that the NFL and other leagues may also enjoy exemption in other, albeit unspecified, circumstances.[141] Judge Kanne, quoting Judge Easterbrook in *Chicago Professional Sports*, obliquely noted that courts should address the merits of leagues' proposed single entity defenses "one league at a time [and] one facet of a league at a time."[142] As will be discussed in Part IV, the Supreme Court can provide the clarity eschewed by Seventh Circuit jurists.

II. UNRAVELING *AMERICAN NEEDLE*

There are competing perspectives from which to assess the *American Needle* controversy. As will be explored in this Part, advocates of single entity recognition for professional sports leagues tend to portray the often symbiotic structure of league operations as not only compatible with single entity recognition, but also essential for league survival. Opponents, on the other hand, typically rely on apparent flaws in the legal reasoning necessary for a league to obtain single entity recognition.

139. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 744 (7th Cir. 2008).

140. *Id.* (citing Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d 593, 598 (7th Cir. 1996)).

141. *Id.* at 742.

142. *Id.* (quoting Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d 593, 600 (7th Cir. 1996)).

A. *Arguments in Favor of Recognizing the NFL as a Limited or Complete Single Entity*

First, *American Needle* reflects an arguably logical approach to understanding the NFL's business operations and is consistent with a gradual expansion of the single entity defense. The logic of the Seventh Circuit's opinion can be found in the collective manner in which the NFL and its teams choose to operate. Although teams agree to retain ownership in their intellectual property rights and preserve the capacity to negotiate independent intellectual property agreements,[143] they entrust the licensing of most of their rights to the league-run NFLP, which, through the NFL Trust, equally distributes net profits. By choosing to engage in collective action, teams thus lack economic incentive to compete with one another over the sale of their NFLP-licensed intellectual property rights. While certain teams, such as those particularly reliant upon licensing revenue or those uniquely disadvantaged by NFLP's egalitarian sharing, may be inclined to exert undue influence on NFLP policies, NFLP is structurally designed to promote a unity of interest between the NFL, NFLP, and NFL teams. Most notably, each of the thirty-two NFL teams owns an equal share in NFLP and appoints one member of the NFLP's thirty-two member board, which typically acts by a majority vote.[144] This symbiotic arrangement exists because the NFL and its teams concluded that it maximizes their business interests and promotes the league's sustainability. Put differently, at least in terms of apparel sales, NFLP, the NFL, and NFL teams appear, by design, to act with a shared consciousness.

For that reason, the separately owned and frequently competitive nature of NFL teams could be considered irrelevant for determining whether NFL teams act as a single entity in the context of intellectual property. In other words, single entity analysis for a pro sports league may be best conducted on a micro-level, with assessments of specific behaviors undertaken by the league and its teams, rather than on a macro-level, where the mere presence of separate franchise ownerships or of various competitions and collaborations might, for some jurists, automatically preclude single entity recognition.

Seventh Circuit Judge Richard D. Cudahy alluded to this line of reasoning in his *Chicago Professional Sports* concurrence. Cudahy observed no inherent difference between teams that are separately owned and those owned by a common entity:

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143. *See infra* Section II.B. (discussing the settlement between the Dallas Cowboys and the NFL that enabled NFL owners to negotiate intellectual property contracts for their own teams).

144. *See* Oakland Raiders v. Nat'l Football League, 93 Cal. App. 4th 572, 579 (2001) ("[NFLP] [a]ction generally requires a majority vote."); CONRAD, *supra* note 15, at 270.

> [A] league of independently-owned teams, if it is no more likely than a single firm to make inefficient management decisions, should be treated as a single entity. The single entity question thus would boil down to "whether member clubs of a sports league have legitimate economic interests of their own, independent of the league and each other."[145]

Sports law commentator Dean Gary Roberts emphasizes a similar point in advocating for recognition of the NFL and its teams as a single entity. Dean Roberts contends that in spite of the separate ownership of franchises, the "self-contained, wholly-integrated" nature of U.S. sports leagues like the NFL and its franchises is compatible with single entity status.[146] More precisely, a team cannot generate profits in the absence of at least one other team; in a league of one team, no games would be played and fans would presumably be indifferent toward such a team and any licensed merchandise. From that vantage point, separate ownership of franchises more accurately reflects joint ownership of the same company.[147]

A similar inference can be drawn from teams' retention of significant portions of their revenue.[148] Although such an arrangement, which conflicts with the league's predominant emphasis on sharing, might ostensibly undermine the NFL's pursuit of single entity recognition, in actuality, it may engender the opposite effect. By ensuring that teams maintain selfish economic incentives, fans are more likely to receive a competitive product, which would attract their interest and dollars.[149] At the same time, by ensuring that teams share most of their revenue, the NFL can better achieve competitive balance, which attracts fans' interest and dollars to the NFL. As it is designed, therefore, the NFL's sharing/preservation amalgam maximizes total wealth for the NFL. Teams, in that light, better resemble instruments of the NFL than discrete entities.

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145. Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d 593, 603 (7th Cir. 1996) (quoting Gary R. Roberts, *The Antitrust Status of Sports Leagues Revisited*, 64 TUL. L. REV. 117, 127 (1989)).

146. *See* Roberts, *supra* note 25, at 65-66.

147. *See* Gary R. Roberts, *The Single Entity Status of Sports Leagues Under Section 1 of the Sherman Act: An Alternative View*, 60 TUL. L. REV. 562, 572 (1986). *But see, e.g.*, Goldman, *supra* note 11, at 763-75 (criticizing Roberts as offering a view that is inconsistent with precedent and that overstates the necessary level of cooperation by teams).

148. *See supra* notes 68-70 and accompanying text.

149. *See* J. Scott Hale, *Jerry Jones Versus the NFL: An Opportunity To Apply Logically the Single Entity Defense to the NFL*, 4 SPORTS LAW.J. 1, 8 (1997).

A second possible justification for *American Needle* lies in its structural compatibility with the SBA.[150] By recognizing that the NFL may *need* to act as a single entity in certain business endeavors, the SBA's legislative history could be construed as offering similar reasoning to that enunciated in *American Needle*.[151] Such a need is based on the sustainability of revenue-disadvantaged teams "whose economic survival is essential to the continued operation of the league itself."[152] The endurance of the SBA suggests this recognition remains. On the other hand, and as Part IV will assert, the SBA may suggest that Congress, rather than the courts, is best equipped to supply a section 1 exemption: Congress passed the SBA because there would have otherwise been a section 1 violation.

Third, *American Needle* is arguably consistent with economic theories that have gained traction in antitrust law.[153] Consider, for instance, the writings of economists Edward Chamberlin and William Fellner, both of whom concluded that in the absence of unnaturally high prices or other indicia of collusive activity, antitrust law should permit cooperation between economic entities that share pursuits.[154] In other words, the focus of antitrust law should rest on consumer effects, not producer means.[155] Their views are congruent with some official commentaries on the appropriate role of antitrust law for the NFL. For instance, when assessing the bill that would later become the SBA, the House Judiciary Committee reasoned that "the public interest in viewing professional sports warrants" a limited exemption from section 1.[156]

150. *See supra* Section I.E.

151. *See* Nat'l Collegiate Athletics Ass'n v. Bd. of Regents, 468 U.S. 85, 104 n.28 (1984) ("The legislative history of [the SBA] demonstrates Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act . . . .").

152. *Telecasting of Professional Sports Contests: Hearing on H.R. 8757 Before the Antitrust Subcomm. of the H. Comm. on the Judiciary*, 87th Cong. 1 (1961) (statement of Hon. Emanuel Celler, Chairman, Antitrust Subcomm. of the H. Comm. on the Judiciary); *see also* Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463, 468-71 (1990) (discussing the SBA's legislative history).

153. *See, e.g.*, Dean Harvey, *Anticompetitive Social Norms as Antitrust Violations*, 94 CAL. L. REV. 769, 776 (2006) ("Courts substantially rely upon evolving economic theory to discern whether there is an agreement under section 1 of the Sherman Act.").

154. *See* WILLIAM FELLNER, COMPETITION AMONG THE FEW 130-33 (1949); E.H. Chamberlin, *Duopoly: Value Where Sellers Are Few*, 44 Q.J. ECON. 63, 83-84 (1929).

155. FELLNER, *supra* note 154.

156. H.R. REP. NO. 87-1178, at 3 (1961) (describing comments from the House Judiciary Committee).

Although anecdotal and constrained by limited discovery in *American Needle*,[157] available empirical evidence of consumer effects presents a mixed account. In its petition for certiorari, American Needle cited comments from a Reebok executive who, in 2006, mused that "because of the price pressures," caps which previously sold for $19.99 were selling for $30.00.[158] The comments appear consistent with the aforementioned goals of Chuck Zona, who, in attempting to equip NFL-licensed apparel with a "core identity," recommended a reduction in inventory and licensees.[159] While such a reduction would seemingly disadvantage consumers, the experiences of retailers may suggest otherwise: by 2005, retailers noticed a significant increase in the sales of NFL-licensed apparel, a phenomenon they partly attributed to consumers perceiving Reebok's apparel as "special."[160] The higher price may thus have reflected intensified demand for superior products as much as, if not more than, diminished supply of inferior ones. The exclusive contract between Reebok and NFLP also arguably benefited consumers by facilitating collaborations with other Reebok product lines.[161] Of course, as American Needle would argue, an analysis of quality, choice, and price goes to the heart of section 1 scrutiny, which single entity recognition removes.[162]

Consumer wealth maximization theory, which posits that consumers are rational actors and respond to disfavored products by no longer purchasing them, may also corroborate *American Needle*.[163] Since businesses are motivated to adjust operations or risk losing business, several sports law scholars maintain that pro leagues should receive broad autonomy to restrain competition: if sports fans are dissatisfied with the quality of play offered by a professional league (or the quality of its connected products), they can readily

157. It should be noted that American Needle was only afforded discovery for the single entity question. The discovery did not extend to whether the contract's purpose or effect may have violated section 1. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 739 (7th Cir. 2008) (providing a summary of American Needle's discovery limitations).

158. Petition for Writ of Certiorari at 4, Am. Needle, Inc. v. Nat'l Football League, 129 S. Ct. 2859 (2009) (No. 08-661).

159. *See supra* Section I.A.

160. *See* Thomas J. Ryan, *Feeling the Heat: Licensed Outerwear Creates New Sparks of Innovation and Demand*, SPORTING GOODS BUS., Jan. 2005, at 56, 56-57.

161. *See Fashion Forward: What Should You Buy?*, GOLF WORLD BUS., Aug. 1, 2002, at 11 (discussing the placement of NFL team logos on Reebok Golf products).

162. *See supra* Section I.B.

163. *See* Grauer, *supra* note 72, at 7-9.

turn to substitute entertainment products.[164] Dissatisfied fans can follow a different league, for instance, or embrace another form of entertainment. Then again, NFL football and other leagues which dominate the professional playing of their sports may be incomparable and devoid of substitutes, even if lesser leagues or other forms of entertainment are available.[165]

To be sure, recent findings in behaviorism and behavioral law and economics deeply challenge the rational actor model.[166] These critiques seem particularly salient when observing alleged market manipulation of consumers' subconscious attitudes and motivations.[167] Nonetheless, the core premise that consumers do not purchase what they consciously dislike seems fairly certain, if not incontrovertible.[168]

164. *Id.* at 34 n.156; *see also* Roberts, *supra* note 108, at 238-60 (distinguishing a sports league from other forms of business organization, including joint ventures); Nathaniel Grow, Note, *There's No "I" in "League": Professional Sports Leagues and the Single Entity Defense*, 105 MICH. L. REV. 183, 191-96, 198 (2006) (arguing that single entity leagues benefit consumers since the leagues operate more efficiently, thus producing a more attractive product).

165. The U.S. Court of Appeals for the Ninth Circuit has reasoned that continuous sell-outs of NFL games, despite expensive ticket prices, and the extraordinary numbers of persons who watch the Super Bowl suggest that the NFL has "limited substitutes" for consumers. L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1393 (9th Cir. 1984); *see also* Lock, *supra* note 12, at 404 (arguing that NFL fans do not possess a substitute for their desired product).

166. *See, e.g.*, Kent Greenfield, *Using Behavioral Economics To Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581 (2002); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741 (2008); Jerry Kang & Kristin Lane, *A Future History of Implicit Social Cognition and the Law* (UCLA School of Law Research Paper, No. 09-26, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1458678.

167. *See, e.g.*, Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L.J. 499 (2008); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 724 (1999).

168. *See* Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 U. CHI. L. REV. 249, 251-56 (2006) (asserting that consumers, while commonly susceptible to cognitive biases, should not have their capacity to make financial decisions restricted by government actors); Alfred C. Yen, *Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace*, 17 BERKELEY TECH. L.J. 1207, 1239 (2002) (describing consumer rationality in purchasing domain names); Todd J. Zywicki, Debra Holt & Maureen K. Ohlhausen, *Obesity and Advertising Policy*, 12 GEO. MASON L. REV. 979, 1011 (2004) (arguing that consumers possess the decision-making capacity to choose to purchase their preferred foods).

B. Arguments Against the Seventh Circuit's Reasoning in American Needle

A principal objection to *American Needle* rests in the Seventh Circuit's legal reasoning. The court crafted its logic around an unsettled proposition: *because* NFL teams voluntarily assign the licensing of intellectual property rights to the league-controlled NFLP, teams *must* share consciousness with NFLP.

In an attempt to validate this proposition, Judge Kanne curiously championed as "most important" the forty-six year history of NFL teams choosing to become one source of economic power for purposes of intellectual property licensing.[169] The opinion does not cite *Copperweld* or any other case to support placing such significance on either the choice of NFL teams to collude or on the continuous length of time they have done so. In fact, as noted by the Solicitor General in opposing certiorari, a continued choice to refrain from competing is hardly dispositive as to whether the activity complies with antitrust law.[170]

More vexing, Judge Kanne's proposition arguably belies the attention paid by *Copperweld* to whether a restraint deprived a relevant market of independent sources of economic power. A key rationale for the Court in *Copperweld* rested on the conceptual impossibility of a parent "joining" its already wholly owned (and controlled) subsidiary. After all, the *Copperweld* Court reasoned, a parent and wholly owned subsidiary are always one for purposes of assessing economic power, meaning, logically, they cannot join hands at any time or in any way.[171] Judge Kanne addresses the matter of independent sources of economic power by wryly asking, "Who wins when a football team plays itself?,"[172] but his question overlooks the possibility that teams, unlike a parent and its wholly owned subsidiary, *could* compete over the sale of apparel and thus *could* join hands in anticompetitive ways. Indeed, a wholly owned subsidiary lacks the functional ability to act independently and contrary to its parent's economic interests; by contrast, an individual NFL team with, for instance, a highly marketable team logo could certainly choose to sign with a rival apparel maker and compete directly with the central NFL apparel licensee.

Uncovering the presence of independent sources of economic power also need not be fashioned as a hypothetical or, to borrow Judge Kanne's parlance, a "Zen riddle."[173] Although Judge Kanne largely ignored this point, teams

169. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 744 (7th Cir. 2008).

170. Brief for United States, *supra* note 16, at 18-20.

171. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771-73 (1984).

172. *Am. Needle*, 538 F.3d at 743.

173. *Id.*

competed over intellectual property sales prior to formation of NFLP in 1963.[174] Moreover, as highlighted in the Solicitor General's brief, the Dallas Cowboys successfully sued the NFL and NFLP in the mid-1990s in order to *not* share merchandise revenue with other NFL teams.[175] Less directly related, though still illuminating, is the fact that other sports associations, such as the NCAA, feature individual team management of apparel sales.[176] By failing to examine the fact that NFL teams have competed, and could still complete, with one another, the Seventh Circuit declined to consider whether, through NFLP, NFL teams "join" their economic power, and thus whether NFLP's exclusive contract with Reebok adversely impacted market competition and consumer interests.

American Needle is similarly inattentive to precedent and the unwillingness of federal circuit courts to characterize a professional sports league and its independently owned franchises as a single entity.[177] While the Seventh Circuit need not follow other circuits, *American Needle* pays scant attention to other circuit courts' analyses and may unwittingly create incentives for forum shopping. In addition, although the Supreme Court has not spoken on whether a professional sports league can obtain single entity status, its analysis in *Board of Regents* seemed unwelcoming of the idea.[178] The Seventh Circuit declined to address either the reasoning or conclusion in *Board of Regents*, let alone substantively compare the purported presence of a single entity in the NFL with the absence of one in the NCAA.[179]

As another source of criticism, the Seventh Circuit could have, and likely would have, reached the same result under rule of reason. In applying rule of reason to NFLP's exclusive contract with Reebok, a court would weigh its procompetitive effects and anticompetitive effects. To the NFL's advantage, courts have typically regarded pooled licensing arrangements of the sort

174. *See* YOST, *supra* note 30, at 122-23 (discussing how prior to the creation of NFLP, NFL teams individually entered into apparel contracts, for their own economic benefit, with the NFL possessing little control over teams' apparel choices or the ramifications of their choices on league competitiveness).

175. *See* Brief for United States, *supra* note 16, at 11 n.3; *infra* notes 191-195 and accompanying text.

176. In the NCAA, schools manage their own apparel and merchandise sales. *See* C. Knox Withers, *Sine qua Non: Trademark Infringement, Likelihood of Confusion, and the Business of Collegiate Licensing*, 11 J. INTELL. PROP. L. 421, 434-36 (2004).

177. *See supra* Section I.D.

178. *See supra* Section I.D.

179. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 743 (7th Cir. 2008) (noting with approval the Court's reasoning in *Board of Regents* that some activities can only be carried out jointly, but omitting mention of the Court's disposition).

present between NFL teams and Reebok as enhancing competition.[180] The pooling of license rights is thought to create a bundle that can be sold more efficiently than separately marketed rights.[181]

Additionally, the NFL could establish that NFLP facilitates collaboration and coordination, which in turn enhances NFLP products and strengthens the capacity of the league and its teams to compete with other sports apparel producers. In fact, as noted by the Solicitor General, much of the Seventh Circuit's comfort with the single entity characterization is motivated by the efficiency enhancing characteristics of the NFL's licensing arrangement.[182]

In applying rule of reason analysis, a court would also consider the anticompetitive effects of the exclusive contract. By refraining from competing over apparel sales, the teams may have denied the marketplace of competition that would benefit consumers. An exclusive contract causing a diminution in competition would seem particularly possible in the apparel market, which features low barriers to entry for potential competitors[183] (in contrast to media and broadcast markets—the subject of *Chicago Professional Sports*—which are characterized by high startup and fixed costs[184]). Available data concerning the NFL's exclusive contract with Reebok, however, does not reveal obvious consumer injuries.[185] Moreover, so long as procompetitive effects outweighed them, anticompetitive effects would be acceptable under rule of reason.

Thus, through *American Needle*, the Seventh Circuit may have unnecessarily extended single entity status to professional sports leagues and their independently owned franchises, even though joint NFL licensing may have survived rule of reason analysis anyway. Such an extension runs contrary to broader trends in antitrust law, which, in many ways, has become more scrutinizing in recent years.[186] Indeed, while the Seventh Circuit identified an

180. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 5.5, at 28 (1995), *available at* http://www.usdoj.gov/atr/public/guidelines/0558.htm.

181. *See, e.g.*, Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979).

182. Brief for United States, *supra* note 16, at 8-9.

183. *See* Kim Clark, *Apparel Makers Move South*, FORTUNE, Nov. 24, 1997, at 62. *But see supra* Section II.A. (discussing consumer benefits from the exclusive contract in the context of professional football).

184. *See, e.g.*, Michelle I. Seelig, *Survey of General Managers Perceptions of Technology*, FEEDBACK, Mar. 2005, at 34, 41 (noting that many recent innovations in the media industry require high startup costs).

185. *See supra* Section II.A.

186. *See* Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383, 1446 (1998) (discussing the Justice Department's increased

exemption from section 1 for the NFL, other courts have narrowed existing section 1 exemptions.[187] Even more problematic, by furnishing limited guidance as to the contours of the NFL-based single entity defense, the Seventh Circuit could have unintentionally invited other types of businesses to claim the defense.

A third core objection to single entity recognition of the NFL relates to the ownership structure of franchise intellectual property. Namely, if the NFL's licensing of intellectual property constitutes single entity action—and thus the independently owned franchises operate with a shared "corporate consciousness"—why do the franchises bother to retain ownership in their intellectual property?

Taken together, the league could maintain its egalitarian interests while more clearly resembling a single entity if it, or NFLP, obtained teams' intellectual property rights and then distributed licensing revenue as currently achieved through NFLP and the NFL Trust. The record, however, reveals no effort by the league to obtain those rights or willingness of the teams to dispose of them. Although the Seventh Circuit regarded it as incidental, teams' continued ownership of intellectual property might prove far more suggestive: even in the relatively narrow context of apparel sales, teams may not view themselves as a single entity.

History may be corroborative of this critique. While the Seventh Circuit is correct that NFL teams have employed NFLP since 1963, they have clearly not shared a corporate consciousness for the entire ride, and their behavior suggests that cooperation between NFL teams is not required for the NFL to secure an apparel contract. Consider the litigious relationship between NFLP and Jerry Jones, owner of the Dallas Cowboys and longtime NFLP critic.[188]

During the early to mid-1990s, the Cowboys accounted for one-fifth of NFL merchandise revenue and twice as much as the second highest revenue-producing team.[189] Seeking to profit from his team's popularity, Jones entered into licensing and sponsorship contracts with various companies. Some of those companies competed with NFLP-licensed companies. Jones, for instance,

efforts in enforcing antitrust regulations); *see also* Maria Kantzavelos, *Forecast for Legal Work Under Obama*, CHI. LAW., Jan. 2009, at 26 (discussing the likelihood of increased antitrust scrutiny under President Obama).

187. *See, e.g.*, Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007) (supplying an overview of recent limitations of antitrust exemptions).

188. *See* John Helyar, *Ride 'Em Cowboy: Desperate To Revive America's Team, Jerry Jones Swallowed His Pride, Hired a Tuna, and Became a Team Player*, FORTUNE, Sept. 29, 2003, at 58.

189. *See* Richard Sandomir, *Dollars and Dallas: League of Their Own?*, N.Y. TIMES, Sept. 24, 1995, at F1.

entered into a contract with Nike to provide Cowboys coaches with sideline apparel even though NFLP enjoyed an exclusive contract with Reebok for that service.[190] Predictably, NFLP disapproved of Jones's licensing contracts, especially when another owner, Robert Kraft of the New England Patriots, followed Jones's model by reaching similar arrangements for his team.[191]

In 1995, the philosophical chasm between Jones and NFLP led to mutual lawsuits. Among other claims, the NFLP asserted tortious interference and misappropriation of property,[192] while Jones argued that NFLP's centralized exclusive license policy constituted a violation of section 1.[193]

The parties reached a settlement before their claims were adjudicated.[194] The settlement affirmed NFLP's collective authority but also freed NFL owners to negotiate intellectual property contracts for their own teams.[195] The Cowboys, for instance, could continue to use Pepsi as its official soft drink, while Coca-Cola could remain the NFL's official soft drink.[196] With team-based exceptions from NFLP licensing and sponsorship contracts, the economic value of the NFLP contracts plummeted. Coca-Cola, for example, paid $14 million a year to secure the NFL's official soft drink license prior to the Jones-NFLP settlement, but only $4 million following the settlement.[197]

At a minimum, the Cowboys-NFLP litigation reveals that, contrary to the Seventh Circuit's logic, NFL teams do not necessarily act as one for licensing

190. *See* Sanjay Jose Mullick, *Browns to Baltimore: Franchise Free Agency and the New Economics of the NFL*, 7 MARQ. SPORTS L.J. 1, 35 (1996).

191. *See* MICHAEL ORIARD, BRAND NFL: MAKING AND SELLING AMERICA'S FAVORITE SPORT 151 (2007).

192. Complaint, NFL Props., Inc. v. Dallas Cowboys Football Club, Ltd., 922 F. Supp. 849 (S.D.N.Y. 1996) (No. 95 Civ. 7951).

193. Dallas Cowboys Football Club, Ltd. v. Nat'l Football League Trust, No. 95-9426, 1996 WL 601705 (S.D.N.Y. Oct. 18, 1996).

194. *See NFL/Jerry Jones Drop Legal Claims*, SPORTSBUSINESS DAILY, Dec. 16, 1996, http://www.sportsbusinessdaily.com/article/42952.

195. *See* Mark Kass, *Score Another Victory for Jerry Jones' Dallas Cowboys*, BUS. J. MILWAUKEE, Dec. 20, 1996, *available at* http://www.bizjournals.com/milwaukee/stories/1996/12/23/newscolumn2.html; Richard Sandomir, *Jones-N.F.L. Lawsuits May End in a Draw*, N.Y. TIMES, Dec. 10, 1996, at B17.

196. *See* ORIARD, *supra* note 191, at 151-52.

197. *Id.*

matters.[198] Indeed, as Jones himself argued, NFL teams clearly do not "need" the NFLP for the sale of merchandise and apparel.[199]

The litigation also highlights the routinely factionalized network of NFL owners and suggests that the individualized ownership structure of the thirty-two NFL teams may be poorly designed for single entity status. While *Copperweld* and its progeny indicate that internally divergent interests do not automatically defeat single entity status and that unified "corporate consciousness" can extend to varying types of business relationships, NFL owners unquestionably clash about league policies, and they often subscribe to conflicting philosophies about the desired relationship between franchises and the league.

After all, Jones's tensions with other owners represents just one of several ideological chasms. Owners of "big market" teams and those of "small market" teams, for instance, are known to differ on league rules for player salaries.[200] Similar differences are apparent among owners who paid hundreds of millions of dollars to obtain their teams and those who inherited them and thus did not incur acquisition costs.[201]

These and other factions meaningfully impact the NFL's operations. The selection of an NFL commissioner is illustrative.[202] A person nominated to become commissioner must receive a vote from two-thirds of the thirty-two ownership groups. In the most recent election, which occurred in 2006, five rounds of balloting were required before a caucus of owners supporting Deputy Commissioner Roger Goodell prevailed over one supporting Goodell's principal opposition, attorney Gregg Levy.[203] The rivalry represented far more than different preferences about two individuals. Peter King, a prominent commentator on the NFL, described the owners as "fractious" because of assorted policy disagreements and grievances, most notably over the gap between teams in their unshared revenue.[204]

198. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 743 (7th Cir. 2008).

199. *See* Sandomir, *supra* note 189. In calling for the end of NFLP in 1995, Jones mused, "You don't have to be a rocket scientist to do better than [NFLP]." *Id.*

200. *See* Rick Gosselin, *Share & Share Alike? Revenue Distribution Among Clubs a Key Topic in NFL These Days*, DALLAS MORNING NEWS, May 29, 2005, at 5C.

201. *See* LISA PIKE MASTERALEXIS, CAROL A. BARR & MARY A. HUMS, PRINCIPLES AND PRACTICE OF SPORT MANAGEMENT 208-09 (2009).

202. Morris v. N.Y. Football Giants, Inc., 575 N.Y.S.2d 1013, 1016 (Sup. Ct. 1991) (citing NFL CONST. art. VIII, § 8.1).

203. *See* Len Pasquarelli, *Goodell Led Voting Wire to Wire*, ESPN.COM, Aug. 9, 2006, http://sports.espn.go.com/nfl/news/story?id=2544277.

204. Peter King, *A Man Born for the Job*, SPORTS ILLUSTRATED, Aug. 21, 2006, at 52, 52.

The 2006 commissioner election was not a singular manifestation of the deep divisions among NFL owners. In fact, correlative factions will likely emerge in 2010 as the NFL and NFLPA attempt to negotiate a new collective bargaining agreement.[205] Probable disagreements include revised configurations for sharing revenue and assistance for owners saddled with debt.[206] Particularly, as some owners struggle to bankroll their teams in the midst of a recession, and as unshared, location-specific revenue sources grow in value for some teams but not others, owners may become less collaborative on economic matters and thus bear less resemblance to a single entity.[207]

III. IMPLICATIONS OF SINGLE ENTITY STATUS FOR THE NFL, OTHER LEAGUES, AND THE NCAA

If affirmed by the Supreme Court, *American Needle* would bestow upon professional sports leagues a status coveted by, though typically unattainable for, U.S. businesses. If the Court further interpreted single entity status to include mandatory subjects of bargaining, *American Needle* would also result in a massive diminution in bargaining power for players' associations.[208]

The potential thrust of *American Needle* rests in its indefiniteness. The Seventh Circuit opined that the availability of the single entity defense should be addressed on a league-by-league, matter-by-matter basis.[209] Save for implying that labor matters would be inappropriate for single entity treatment,[210] the Seventh Circuit neither signaled any limits nor suggested any discrete criteria for understanding the appropriate place of single entity status.

205. In May 2008, NFL owners voted unanimously to end their current collective bargaining agreement with the NFLPA in 2011. *See* Jarrett Bell, *NFL Owners End Labor Deal; Questions Abound*, USA TODAY, May 21, 2008, at C1.

206. *See* Jason Cole, *CBA Figures To Be Hot Topic During Meetings*, YAHOO! SPORTS, May 19, 2008, http://sports.yahoo.com/nfl/news?slug=jc-cbaandowners051908 (discussing dissension among specific owners regarding revenue sharing).

207. For a discussion of location-specific revenue sources, see *supra* notes 72-74 and accompanying text.

208. Some advocates of recognizing professional sports leagues and their independently owned teams as single entities believe single entity status should not extend to labor matters. *See, e.g.*, Grow, *supra* note 164, at 188 ("The same unity of interest does not exist among all teams in labor disputes.").

209. *See* Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 742 (7th Cir. 2008).

210. *See id.* at 741-42 ("[I]ndividuals seeking employment with any of the league's teams would view the league as a collection of loosely affiliated companies that all have the independent authority to hire and fire employees. That being said, we have nevertheless embraced the

As will be explored in Part IV, the Supreme Court could and, in my view, should furnish limiting characteristics to single entity recognition of professional sports leagues and their teams. If the Court instead were to affirm the Seventh Circuit's less bounded conception, it would open the door for professional sports leagues to pursue single entity protection for a wide range of business activities. The Court could procure a similar effect by adopting a rigid but nonetheless expansive interpretation of the single entity defense.

If affirmed, *American Needle* may thus prove as consequential for the NBA, MLB, NHL, and other sports associations as it is for the NFL. As the following analysis explores, those associations would undoubtedly benefit from single entity recognition, though it would arrive with potential complications.

A. NFL

As a respondent, the NFL would be an obvious beneficiary of the Court affirming *American Needle*. In addition to obtaining immunity from section 1 scrutiny of NFLP's exclusive contract with Reebok, the NFL could obtain immunity for other endeavors susceptible to section 1 challenges.

The NFL Network, an NFL-owned cable and satellite channel that exclusively broadcasts a limited number of NFL games and related content, is one such endeavor.[211] The Network has been subject to much controversy, most notably because it limits the viewership of televised games, charges cable subscribers a relatively high price, and, until recently, was the subject of litigation with Comcast over the channel's placement on basic cable or a premium tier.[212]

The Network lacks protection from the SBA, which applies only to "[s]ponsored broadcasting," a "term of art which . . . [means only] free

possibility that a professional sports league *could* be considered a single entity under *Copperweld*." (internal citation omitted)).

211. *See* Paolino, *supra* note 13, at 5-6, 28-29 (supplying details about the NFL Network, which is distributed through satellite providers and cable providers, normally as a premium—as opposed to basic—channel and which broadcasts twenty-four hours a day, seven days a week, though of its 26,760 hours of annual programming, only eight live games, which comprise roughly twenty-six hours of programming, are broadcast). Games broadcast on the NFL Network are also broadcast in teams' local markets. *See* YOST, *supra* note 30, at 99.

212. *See* NFL Enters. LLC v. Comcast Cable Commc'ns, LLC, 841 N.Y.S.2d 220 (Sup. Ct. 2007); *see also* James J. LaRocca, *No Trust at the NFL: League's Network Passes Rule of Reason Analysis*, 15 UCLA ENT. L. REV. 87, 88 (2008) (supplying a cogent background on the NFL Network's revenue distribution); Richard Sandomir, *Comcast and NFL Network Agree to 9-Year Deal*, N.Y. TIMES, May 20, 2009, at B19 (discussing settlement of the dispute between Comcast and the NFL Network).

network television."[213] As a result, the Network appears vulnerable to antitrust challenges. Some commentators assert that because NFL franchises use the Network to restrict the televised availability of games and to impose prices for viewing games that were previously available on free television, the Network violates section 1.[214] Interestingly, in March 2009, U.S. Senator Arlen Specter, an ardent critic of the NFL, expressed apprehension that the NFL will use the single entity defense to shelter the Network from potential section 1 scrutiny.[215] To be fair, the Network might satisfy such scrutiny. By providing a national broadcast (albeit on fee-based cable or satellite systems) of a game that would otherwise be broadcast regionally, the Network arguably expands viewership. As to concerns about consumer prices, games aired on the Network are simultaneously broadcast on free television of the participating teams' local markets.[216] With single entity protection, however, these types of arguments would be rendered unnecessary; the Network would be exempt from section 1 scrutiny.

Single entity recognition would also insulate the NFL and the NFLPA from section 1 scrutiny of their exclusive contract with video game publisher Electronic Arts, maker of the popular game *Madden NFL*. In 2004, Electronic Arts reportedly paid $400 million for an exclusive five-year license to produce games using NFL players, images, teams, logos, trademarks, and statistics.[217] The license, which was later extended to 2012,[218] eliminates competition from

213. 133 CONG. REC. S13,220 (daily ed. Sept. 30, 1987) (statement of Sen. Specter).

214. *See, e.g.*, Paolino, *supra* note 13, at 28-29.

215. *Answers to Questions for the Record, Confirmation Hearing of Christine A. Varney Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (question from Sen. Specter, Member, S. Comm. on the Judiciary), *available at* http://www.legaltimes.typepad.com/files/specter-to-varney.pdf. *But see* Dave Zirin, *The Senator from Comcast?: Arlen Specter and SpyGate*, POL. AFFAIRS, Mar. 4, 2008, http://www.politicalaffairs.net/article/articleview/6559 (arguing that Senator Specter's views partly reflect contributions from Comcast).

216. *See* Paolino, *supra* note 13, at 34-35. Fans living outside of those local markets who do not pay for the Network cannot watch those games.

217. A.H. Rajani, Note, Davidson & Associates v. Jung*: (Re)interpreting Access Controls*, 21 BERKELEY TECH. L.J. 365, 367 (2000) (noting the $400 million figure); Troy Wolverton, *Electronic Arts Lands an NFL Exclusive*, THESTREET.COM, Dec. 13, 2004, http://www.thestreet.com/story/10198835/electronic-arts-lands-an-nfl-exclusive.html (supplying additional details of the exclusive contract between Electronic Arts, the NFL, and the NFLPA).

218. Bryan Intihar, *EA Extends NFL Exclusivity Deal: Madden Remains the Only Game in Town Through 2012*, 1UP.COM, Feb. 12, 2008, http://www.1up.com/do/newsStory?cId=3166155.

Electronic Arts' rivals, including Sega, which had marketed a competing and popular line of NFL video games at a significantly lower retail price.[219]

Although Electronic Arts' NFL games have sold well since 2004, they have attracted criticism for lacking innovation.[220] Prices for *Madden NFL* games have also risen in the absence of competition from other NFL games.[221] Those and other consequences underscore a central concern of section 1: an absence of competition will lead to an inferior market.[222] The exclusive Madden contract is also the subject of *Pecover v. Electronic Arts*,[223] a class action lawsuit recently brought by disenchanted video game players. The suit contains a number of claims, including those based on the Sherman Act.[224] While neither the NFL nor the NFLPA is a party to the litigation, their exclusive contract with Electronic Arts could eventually face a section 1 challenge similar to the one confronted by the NFL in *American Needle*. Plaintiffs in such a claim would likely assert that interactive football video game software is a sufficiently discrete product market—a proposition supported by the U.S. District Court for the Northern District of California in *Pecover*.[225] With some level of persuasion in light of the aforementioned data on prices and commentary on innovation, the plaintiffs could also maintain that Electronic Arts's exclusive

219. Blake Snow, *Football Gamers Sue EA over 'Anticompetitive' Madden*, GAMEPRO, June 16, 2008, http://www.gamepro.com/article/news/192688/football-gamers-sue-ea-over-anticompetitive-madden.

220. Scott Jones, *Madden NFL 10*, A.V. CLUB, Aug. 17, 2009, http://origin.avclub.com/articles/madden-nfl-10,31670 (criticizing John Madden Football games for appearing very similar year-after-year); Anthony Palazzo, *Electronic Arts Says 'Madden,' Industry Sales Drop (Update 3)*, BLOOMBERG.COM, Sept. 10, 2009, http://www.bloomberg.com/apps/news?pid=20601087&sid=aDZhBC6EPGa4 (discussing the disappointing sales of Madden 2010, which was released in August 2009, but noting that preceding years' versions of the game sold well and industry sales on the whole were down).

221. *See* Snow, *supra* note 219 (noting how Electronic Arts dropped the price of Madden 2005 from $49.95 to $29.95 because of competition from NFL 2K5, which was priced at $19.95, and also how in the absence of competition in the following year, Electronic Arts raised the price of Madden 2006 by seventy percent).

222. On the other hand, Electronic Arts could argue that it still competes with football games that lack the NFL/NFLPA license and, more generally, with other video games and entertainment products.

223. Complaint, Pecover v. Elec. Arts Inc., 633 F. Supp. 2d 976 (N.D. Cal. 2009) (No. C08-02820).

224. *Id.* at 7.

225. *See Pecover*, 633 F. Supp. 2d at 980 ("As the court understands these allegations, interactive football software will not sell if it does not use the names, logos and other markers of teams that actually compete in the NFL; . . . there are no substitutes for interactive football software without the markers of actual teams and players.").

contract for NFL video games produces more anticompetitive injury than procompetitive benefit.[226]

An *American Needle* holding in favor of the NFL would also impact the upcoming collective bargaining discussions between the NFL and the NFLPA, and possibly those between the NBA, MLB, and NHL and their respective players' associations. In all four leagues, the respective Collective Bargaining Agreements (CBAs), which, inter alia, regulate mandatory subjects of bargaining, are set to expire within the next two years.[227] While labor issues are the context in which it is least likely that the Court would deem single entity status appropriate for the NFL, any changes to the legal capacity of the NFL to avoid section 1 scrutiny could alter the economic values of rights subject to collective bargaining.

In their negotiations with the NFLPA, NFL owners are poised to demand dramatic changes in player compensation. As currently configured, both the salary cap and salary floor—the maximum and minimum number of dollars teams must spend on player payroll—rise or fall commensurate with "total revenue," a figure which, generally speaking, consists of all teams' shared and unshared revenue.[228] As disparities in teams' unshared revenue have grown, teams with relatively limited unshared revenue have been disadvantaged.[229] Owners are also troubled by the share of revenue enjoyed by NFL players, who receive a higher percentage of revenue than is obtained by players in the NBA, NHL, and MLB.[230] They are likewise distressed by the monetary value of

226. *See* Liron Offir, *Monopolistic Sleeper: How the Video Gaming Industry Awoke To Realize that Electronic Arts Was Already in Charge*, 8 DUQ. BUS. L.J. 91, 114-15 (2006) (arguing that Electronic Arts's exclusive contracts would fail under rule of reason analysis).

227. The CBAs of the NFL and the NBA are set to expire in 2010, while those of MLB and the NHL are set to expire in 2011. *See* Dave Sheinin, *Fehr Resigns from Union*, WASH. POST, June 23, 2009, at D5 (noting the expiration date of MLB's CBA); Amy Shipley, *Economy Will Force Failure of Franchises, Decrease in Salaries, Experts Say*, WASH. POST, Apr. 2, 2009, at D5 (noting the expiration date of the NBA's CBA); Michael Whitmer, *Players Talk About Talks: Smith Holds Q&A About 2010 Season*, BOSTON GLOBE, Oct. 10, 2009, Sports, at 4 (noting the expiration date of the NFL's CBA); Steve Zipay, *Briefs*, NEWSDAY, Sept. 1, 2009, at A48 (noting the expiration date of the NHL's CBA).

228. *See* Al Lackner, *Salary Cap FAQ*, ASKTHECOMMISH.COM, Jan. 19, 2009, http://www.askthecommish.com/salarycap/faq.asp.

229. *See* Curnutte, *supra* note 73 ("[T]he problem with unshared revenue . . . is that it all goes into the league-wide tally that is used to determine the salary cap.").

230. *See* Liz Mullen, *Prime Cut Goes to NFL Players*, SPORTS BUS. J., Mar. 3, 2008, at 1, *available at* http://www.sportsbusinessjournal.com/article/58252.

contracts secured by newly drafted players.[231] Although the current CBA contains a rookie salary cap, rookie contracts can be structured in ways that evade the spirit of that cap.[232]

While the NFLPA may acquiesce to a rookie wage scale, which would limit drafted players' salaries according to their slot in the draft, it could cite *American Needle* as a justification to resist other economic concessions. Through single entity recognition, the NFL would obtain protection for existing and new endeavors that would otherwise be subject to section 1 scrutiny. The NFLPA could thus characterize *American Needle* as supplying NFL owners with a revenue windfall, a significant portion of which owners need not share with players. A victory in *American Needle* for the NFL could thus complicate and potentially hinder its forthcoming CBA negotiations.

B. NBA

Like the NFL, the NBA clearly supports the single entity defense, which would insulate the NBA's exclusive licensing deals from section 1 scrutiny.[233] Single entity status may also benefit the NBA through curbed player salaries. While the Seventh Circuit suggested that the single entity defense would be ill suited for mandatory subjects of bargaining,[234] the Supreme Court need not embrace such a limitation.[235] The NBA would certainly relish the capacity to unilaterally impose restrictions that concern mandatory subjects of bargaining. The league, for instance, could adopt a salary scale that diminishes players' free

231. *See, e.g.*, Paul Domowitch, *Rookie Wage Scale Talk May Affect 2009 NFL Draft*, PHILA. DAILY NEWS, Nov. 7, 2008, Sports, at 3.

232. Best illustrating this point, Matthew Stafford, the first overall pick of the 2009 NFL Draft, signed a contract with the Detroit Lions that will pay him $41.7 million, the most guaranteed dollars in the NFL. *See* Kevin Seifert, *The Madness of the NFL's Rookie Pay Scale*, ESPN.COM, Apr. 24, 2009, http://myespn.go.com/blogs/nfcnorth/0-10-137/The-madness-of-the-NFL-s-rookie-pay-scale.html.

233. The NBA has filed an amicus brief supporting the NFL in *American Needle*. *See* Brief of Amici Curiae Nat'l Basketball Ass'n & NBA Props. in Support of the NFL Respondents' Response, Am. Needle, Inc. v. Nat'l Football League, 129 S. Ct. 2859 (2009) (No. 08-661), 2009 WL 164243.

234. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 741-42 (7th Cir. 2008).

235. The legal capacity to refrain from competing over players has motivated leagues to pursue single entity status. MLS is one such league. *See* Martin Edel et al., *Panel III: Restructuring Professional Sports Leagues*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 413, 435 (2002) ("So why did the MLS owners choose to form a single entity? They did it so that they could claim an exemption from section 1 of the Sherman Act and not have to compete with each other for their players. There is no other reason." (quoting prominent sports lawyer Jeffrey Kessler)).

agency and salary opportunities.[236] Without single entity recognition, such a scale would avoid section 1 scrutiny only if born from collective bargaining with the National Basketball Players Association (NBPA), which would demand considerable concessions.[237]

On the surface, the prospect of the NBA and the other major professional sports leagues unilaterally imposing labor conditions may not seem worrisome. After all, players in the NBA, NFL, MLB, and NHL typically receive salaries that far exceed those enjoyed by most Americans,[238] a fact that has drawn social rebuke.[239] On the other hand, most players' careers are remarkably short, with the average NBA and NFL careers lasting just four and a half years and three and a half years, respectively,[240] and some player contracts lack salary guarantees.[241] Players, moreover, are continuously exposed to occupational health risks that can give rise to career-ending and permanently disabling

236. *See* Lester Munson, *Antitrust Case Could Be Armageddon*, ESPN.COM, July 17, 2009, http://sports.espn.go.com/espn/columns/story?columnist=munson_lester&id=4336261.

237. The nonstatutory labor exemption furnishes antitrust immunity only for collectively bargained terms which concern mandatory subjects and primarily affect the owners and players. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 235-38 (1996). Attempts to curb player salaries would also elicit resistance from players' agents who, while not a member of the collective bargaining unit, are very influential. *See* Richard T. Karcher, *Solving Problems in the Player Representation Business: Unions Should Be the "Exclusive" Representatives of the Players*, 42 WILLAMETTE L. REV. 737, 739-43 (2006).

238. Consider the following average salaries: $5.2 million in the NBA; $2.8 million in the MLB; $2.2 million in the NHL; and $1.8 million in the NFL. *See* Gary Loewen, *Shoot the Puck Already Kaberle*, TORONTO SUN, Nov. 11, 2008, at S7. Median salaries are similarly impressive. In the NBA, for instance, the median salary is $2.75 million, while the NFL median salary is $770,000. *See* Scott Ferrell, *Show Him the Money*, TIMES (Shreveport, La.), Sept. 1, 2008, Sports, at 1 (noting the median NFL salary); Jesse Noyes, *Celtics' Big Three Hold Court in Salary Levels*, BOSTON BUS. J., Dec. 26, 2008, http://boston.bizjournals.com/boston/stories/2008/12/29/story6.html (noting the median NBA salary).

239. *See, e.g.*, Steven Pearlstein, *Sports TV's Big-Money Brawl*, WASH. POST, Oct. 8, 2003, at E1 (describing professional athletes' salaries as "ridiculous"); Transcripts: American Morning: Intelligence Reform Winners, Losers; Influenza Fears (Dec. 8, 2004), http://transcripts.cnn.com/TRANSCRIPTS/0412/08/ltm.06.html ("Let's see all of the professional athletes play one complete season for the same salary as a high school teacher or a city firefighter.").

240. *See* Athelia Knight, *Pursuing a Career at a Young Age; Opinion Divided When Non-Seniors Enter Draft*, WASH. POST, June 27, 1995, at C1 (noting the length of an average NBA career); Eriq Gardner, *Rookie Abuse*, SLATE, Apr. 23, 2009, http://www.slate.com/id/2216797 (noting the length of an average NFL career).

241. This is particularly true in the NFL, where contracts are largely comprised of nonguaranteed income. *See* Scott Hollander, Note, *Super Bowl Hero to Bank Account Zero*, 26 CARDOZO ARTS & ENT. L.J. 899, 924 (2009).

injuries. This is particularly true in the NFL, which has drawn scrutiny for the prevalence of neurological injuries manifesting in retired players[242] and for the limitations of its collectively bargained pension and disability policies.[243] The NBA, for its part, has attracted criticism for its disregard for players' individualism, such as players' rights to choose attire for off-court events,[244] and players' privacy interests. Perhaps most notably, in 2005, the Chicago Bulls went so far as to condition the signing of a player's contract on the player subjecting himself to genetic testing.[245] Should leagues receive the capacity to unilaterally impose labor conditions, the players' capacity to bargain for salary and employment protections would surely be diminished.

The NBA could also attempt to use the single entity defense to institute an elevated age eligibility restriction. The league's existing restriction, as collectively bargained and as premised on debatable rationales related to maturity and player development,[246] requires that an amateur player of U.S. origin be at least nineteen years old on December 31 of the year of the NBA draft and that at least one NBA season must have passed between when the player graduated from high school, or when he would have graduated from high school, and the NBA draft.[247] The NBA would like to elevate the age cutoff to at least twenty years of age, a proposition resisted by the NBPA.[248] If,

242. *See* Alan Schwarz, *12 Athletes Leaving Brains to Researchers*, N.Y. TIMES, Sept. 24, 2008, at D1.

243. *See generally* Brett Edwin LoVellette, Comment, "Mortal [K]ombat *in Cleats": An Examination of the Effectiveness of the* National Football League*'s Disability Plan and Its Impact on Retired Players*, 36 PEPP. L. REV. 1101 (2009) (describing limitations of disability and retirement policies for retired NFL players). By squandering their earnings, many players compound the challenges presented by insufficient pension and disability plans. *See* Pablo S. Torre, *How (and Why) Athletes Go Broke*, SPORTS ILLUSTRATED, Mar. 23, 2009, at 90, 92 (noting that "[b]y the time they have been retired for two years, 78% of former NFL players have gone broke or are under financial stress" and "[w]ithin five years of retirement, an estimated 60% of former NBA players are broke"); *see also* Shira Springer, *For Walker, Financial Fouls Mount*, BOSTON GLOBE, Oct. 25, 2009, at A1 (discussing former Boston Celtic Antoine Walker losing nearly all of the $110 million he earned as an NBA player).

244. *See generally* Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895 (2007) (discussing and criticizing the NBA dress code).

245. *See* Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819, 848-49 (2006). The Bulls believed the player, Eddy Curry, suffered from hypertrophic cardiomyopathy (he did not). Curry refused to take the test and was subsequently traded to the New York Knicks. *Id*. at 849.

246. *Id*. at 832-45.

247. *See* NAT'L BASKETBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT art. X, § 1(b)(i) (2005), *available at* http://www.nbpa.com/cba_articles/article-X.php.

248. *See* Howard Beck, *From Preps to the Pinnacle of the N.B.A.*, N.Y. TIMES, May 28, 2009, at B15.

however, the Court holds that the single entity defense extends to mandatory subjects of bargaining, the NBA could unilaterally and without fear of section 1 scrutiny modify the eligibility rule, perhaps even requiring players to complete four years of college to be eligible.

Single entity status may not, however, entirely benefit the NBA, particularly if NBA China were classified as part of the NBA for purposes of intellectual property. NBA China is a new entity owned primarily by the NBA, with minority interests held by ESPN and several financial institutions.[249] China is the NBA's largest market outside of the United States and the NBA hopes that NBA China will generate significant revenue.[250]

NBA players could be entitled to a portion of the revenue generated by NBA China. Under the NBA's CBA, players are entitled to a fixed percentage of the "basketball related income" (BRI) of all NBA teams.[251] BRI expansively includes income received by the NBA, NBA Properties, and NBA Media Ventures, but not "proceeds from the grant of expansion teams" or player fines.[252] The CBA does not contemplate NBA China. If NBA China and the NBA were a single entity, the players would have a stronger basis for receipt of the revenue.

The issue of single entity status for the NBA is made more intriguing still by the rise of international basketball opportunities that, in terms of monetary compensation, are increasingly akin to those in the NBA.[253] In fact, several U.S. players have signed with European teams instead of NBA teams.[254] There is also speculation that European teams, which are not bound by salary caps, will

249. *NBA Announces Formation of NBA China*, NBA.COM, Jan. 14, 2008, http://www.nba.com/news/nba_china_080114.html; *see also* Adam Thompson & Alan Paul, *NBA Uses Local Allure To Push Planned League in China*, WALL ST. J., Jan. 11, 2008, at B1 (providing additional detail on NBA China).

250. Michael Lee, *The NBA in China: Opening a Super Market*, WASH. POST, Oct. 18, 2007, at E1.

251. *See* NAT'L BASKETBALL LEAGUE, *supra* note 247, art. VII, § 2(a)(1), *available at* http://www.nbpa.com/cba_articles/article-VII.php; *see also* THE BUSINESS OF SPORTS 203-04 (Scott R. Rosner & Kenneth L. Shropshire eds., 2004) (supplying background on BRI); Larry Coon's NBA Salary Cap FAQ, http://members.cox.net/lmcoon/salarycap.htm (last visited Nov. 9, 2009) (listing forms of revenue classified as BRI).

252. *See* Larry Coon's NBA Salary Cap FAQ, *supra* note 251.

253. *See, e.g.*, Pete Thamel, *A Top Prospect Picks Europe over High School and College*, N.Y. TIMES, Apr. 23, 2009, at B14.

254. *See* Sekou Smith, *Childress Headed Back to Greece*, ATLANTA J.-CONST., July 15, 2009, at C1 (mentioning Josh Childress and Jannero Pargo).

eventually compete for such superstar U.S. players as LeBron James and Kobe Bryant.[255]

To the extent the NBA competes with bona fide rival leagues, the NBA and its teams would presumably be more inclined to share a corporate consciousness. For that reason, the NBA may be better positioned for single entity recognition than the unrivaled NFL.[256] Such a deduction takes on added legal significance when considering *Fraser*, where the First Circuit, while ultimately rejecting MLS as a single entity, deemed MLS to embody some of the characteristics of a single entity,[257] including the ability of MLS players to obtain comparable or superior employment conditions in other leagues.[258]

C. MLB

An affirmation in *American Needle* could also benefit MLB, which already enjoys a limited exemption from federal antitrust law.[259] The exemption,

255. *See* Marc J. Spears, *Europe Can Reach for Stars: Top NBA Talent May Be Lured over*, BOSTON GLOBE, Aug. 10, 2008, at C6.

256. *See supra* note 12 and accompanying text (discussing the absence of competition for the NFL).

257. *See supra* Section I.D.; *see also* MASTERALEXIS ET AL., *supra* note 201, at 208 (discussing the court's unwillingness to use the phrase "single entity" despite in some ways describing MLS as such); *cf.* D. Daniel Sokol, *The Future of International Antitrust and Improving Antitrust Agency Capacity*, 103 NW. U. L. REV. COLLOQUY 242 (2008), http://www.law.northwestern.edu/lawreview/colloquy/2008/46/LRColl2008n46Sokol.pdf (discussing the increased role for antitrust law in regulating international business activities).

258. Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 59, 63 (1st Cir. 2002); *see also* Heike K. Sullivan, Comment, Fraser v. Major League Soccer*: The MLS's Single-Entity Structure Is a "Sham,"* 73 TEMP. L. REV. 865, 902 (2000) (discussing the superior salary opportunities for soccer players in Europe).

259. MLB enjoyed an expansive exemption from antitrust laws following *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922). The exemption attracted much criticism. *See, e.g.*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 400-01 (1991) (noting the incoherence of MLB, but not other leagues, enjoying exemption from antitrust laws). In 1998, MLB's limited exemption was narrowed by the Curt Flood Act, 15 U.S.C. § 26b (2006). The Act eliminated the antitrust immunity enjoyed by MLB for matters related to the labor of Major League Baseball players, such as those matters impacting mandatory subjects of bargaining. *See* J. Gordon Hylton, *Why Baseball's Antitrust Exemption Still Survives*, 9 MARQ. SPORTS L.J. 391, 391 (1999) (noting that the Curt Flood Act eliminated antitrust immunity for certain labor issues); *see also* Nathaniel Grow, *Reevaluating the Curt Flood Act of 1998*, 87 NEB. L. REV. 747, 751-55 (2009) (discussing the impact of the narrowing of the exemption); Geoffrey Christopher Rapp, *Affirmative Injunctions in Athletic Employment Contracts: Rethinking the Place of the* Lumley *Rule in American Sports Law*, 16 MARQ. SPORTS

however, does not extend to mandatory subjects of bargaining and may not extend to licensing and other matters, meaning an affirmation in *American Needle* could still prove consequential.[260] Even before its final disposition, *American Needle* appears to have emboldened MLB. In August 2008, MLB and Topps announced that Topps, a trading card company, will become the sole licensed producer of MLB baseball cards.[261] The contract, which MLB believes is consistent with *American Needle*, will preclude other trading card companies, including Topps' primary rival, Upper Deck, from utilizing MLB's trademarks and logos.[262]

MLB might also avail itself of the single entity defense to ameliorate the lingering embarrassment associated with the steroids scandal and to diminish the possibility of a similar scandal recurring. While the scope of the scandal remains unknown, many MLB players used illegal steroids and other prohibited performance-enhancers from the mid-1990s until well into the current decade.[263] The scandal has tarnished records and attracted congressional rebuke, among other deleterious consequences.[264]

Propelling the scandal is a purportedly confidential list of 104 names of players who tested positive for steroids in 2003. Pursuant to an agreement between MLB and the Major League Baseball Players Association (MLBPA), the players, who were tested as part of a sample test, were assured their names would be kept confidential and that any implicating materials would be

L. REV. 261, 278-79 (2006) (discussing Flood's efforts to challenge MLB's supremacy over labor). The Act did not expressly limit MLB's antitrust immunity in other ways, though there remains uncertainty as to whether courts might expansively construe the Act. *See* Marc Edelman, *Can Antitrust Law Save the Minnesota Twins? Why Commissioner Selig's Contraction Plan Was Never a Sure Deal*, 10 SPORTS LAW. J. 45, 54 (2003).

260. *See* Curt Flood Act, 15 U.S.C. § 26b(b).

261. *See* Richard Sandomir, *Topps Gets Exclusive Deal with Baseball, Landing a Blow to Upper Deck*, N.Y. TIMES, Aug. 6, 2009, at B16.

262. *Id.* (citing comments by Tim Brosnan, Executive Vice President for Business at Major League Baseball).

263. *See* Tiffany D. Lipscomb, Note, *Can Congress Squeeze the "Juice" Out of Professional Sports? The Constitutionality of Congressional Intervention into Professional Sports' Steroid Controversy*, 69 OHIO ST. L.J. 303, 303-08 (2008).

264. *See, e.g.*, Letter from Tom Davis, U.S. Rep. & Henry Waxman, U.S. Rep., to Allan Selig, Comm'r of MLB & Donald Fehr, Executive Dir. of MLBPA (Mar. 16, 2005), *available at* http://bob.sabrwebs.com/content/steroidhearings/SeligFehrLetter.pdf (characterizing the lack of effective drug testing as a source of shame for both MLB and the Major League Baseball Players Association).

destroyed immediately.[265] The names were accidentally left on a computer seized by the Justice Department. The list has been sealed pursuant to a court order,[266] but the names of seven players—most notably, Alex Rodriguez, Sammy Sosa, Manny Ramirez, and David Ortiz—were leaked in 2009, and much speculation persists as to the identities of the remaining ninety-seven names.[267]

While the court order, as well as fiduciary duty, precludes the MLBPA from releasing the remainder of the list,[268] MLB, which is not subject to the court order, may be able to divulge it. MLB Commissioner Bud Selig could maintain that the "best interests of the game" power, as vaguely contained in MLB's constitution (a document originally drafted in 1921, and most recently updated in June 2005, that was not collectively bargained),[269] accords him sufficient authority. On the other hand, courts have limited the scope of that authority[270] and the CBA itself contains confining language, particularly with regard to mandatory subjects of bargaining like drug testing.[271] In the unlikely scenario

265. *See* Michael McCann, *Will Steroids Report Lead to Perjury Investigation of Sammy Sosa?*, SI.COM, June 16, 2009, http://sportsillustrated.cnn.com/2009/writers/michael_mccann/06/16/sammy.sosa.

266. *See* United States v. Comprehensive Drug Testing, Inc., 513 F.3d 1085, 1090 n.4 (9th Cir. 2008) (noting that the players' names are under seal). In August 2009, the Ninth Circuit held that federal agents lacked the legal authority to obtain the list of 104 names. *See* United States v. Comprehensive Drug Testing, Inc., Nos. 05-10067, 05-15006, 05-55354, 2009 U.S. App. LEXIS 19119 (9th Cir. Aug. 26, 2009). The decision suggests that absent further leaks, the list will remain sealed and confidential. *See* Michael McCann, *Remaining Names on Drug List Likely To Remain Under Seal Indefinitely*, SI.COM, Aug. 26, 2009, http://sportsillustrated.cnn.com/2009/writers/michael_mccann/08/26/mlb.drug.list.ruling.

267. *See, e.g.*, Bob Ryan, *Ortiz's Positive Test Latest Sorry Chapter*, BOSTON GLOBE, July 31, 2009, at C1.

268. *See* McCann, *supra* note 266.

269. *See* MAJOR LEAGUE CONST. art. I, § 2 (2005), *available at* http://www.bizofbaseball.com/docs/MLConsititutionJune2005Update.pdf ("The functions of the Commissioner shall include: . . . (b) To investigate . . . any act, transaction, or practice charged, alleged, or suspected to be detrimental to the best interests of the national game of Baseball, with authority to summon persons and to order the production of documents; and . . . to impose such penalties . . . .").

270. *See* Craig F. Arcella, Note, *Major League Baseball's Disempowered Commissioner: Judicial Ramifications of the 1994 Restructuring*, 97 COLUM. L. REV. 2420, 2429-30, 2438 (1997).

271. The CBA expressly characterizes itself as the primary document for the terms and conditions of MLB players' employment. *See* 2007-2011 MLB BASIC AGREEMENT art. I (2006), *available at* http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf ("The intent and purpose of the Clubs and the Association . . . in entering into this Agreement is to set forth their agreement on certain terms and conditions of employment of all Major League Baseball Players for the duration of this Agreement.").

that the single entity defense extends to mandatory subjects of bargaining or at least to testing, however, Selig would likely have the authority to release the list. Though less likely given the presence of the CBA, Selig may also obtain the requisite authority should the defense extend to matters which damage the integrity of the game.

MLB could similarly employ single entity status to unilaterally impose more stringent drug testing than has been yielded through collective bargaining. Current testing protocols do not test for human growth hormone, a banned performance enhancer which has been linked to players.[272] Additionally, various commentaries have warned about the development of new steroids that will evade collectively bargained testing procedures.[273] Since testing implicates mandatory subjects of bargaining, MLB would only obtain the capacity to unilaterally impose new testing protocols if the Court defined single entity status as at least partially inclusive of those subjects.

D. NHL

The NHL would likewise gain from single entity status, particularly in reining in maverick owners. On the heels of settling a section 1 litigation brought by the New York Rangers over league control of teams' websites,[274] the NHL finds itself fending off a section 1 claim brought by the Phoenix Coyotes franchise. *In re Dewey Ranch Hockey, LLC*[275] centers on the NHL preventing the Coyotes from being sold through a bankruptcy proceeding. The league has nixed the Coyotes' attempt, reasoning that, pursuant to the league's constitution (which each of the thirty teams has ratified), a team can only be purchased if the NHL's Board of Governors, which consists of one

272. *See* Holli N. Heiles, Comment, *Baseball's "Growth" Problem: Can Congress Require Major League Baseball To Test Its Athletes for Human Growth Hormone? A Proposal*, 62 ARK. L. REV. 315, 326-28 (2009).

273. *See, e.g.*, Karen Kaplan & Denise Gellene, *As Testing Gets Better, Dopers Get More Clever*, L.A. TIMES, Dec. 15, 2007, at A23.

274. Madison Square Garden, L.P. v. Nat'l Hockey League, No. 07 CV 8455 (LAP), 2008 WL 4547518 (S.D.N.Y. Oct. 10, 2008). *Madison Square Garden* concerned a lawsuit brought by an NHL team against the NHL. The New York Rangers claimed that the NHL violated section 1 by prohibiting the Rangers from operating the team's website. The parties settled their dispute in March 2009, with the NHL largely preserving website control. *See* Stipulation and Order of Dismissal, Madison Square Garden, L.P. v. Nat'l Hockey League, 07 CD 8455 (LAP) (S.D.N.Y. Mar. 23, 2009); *see also* Tripp Mickle & Eric Fisher, *NHL and MSG Winding Down Fight over Web*, STREET & SMITH'S SPORTS BUS. J., Mar. 16, 2009, at 1 (discussing the settlement).

275. 406 B.R. 30 (Bankr. D. Ariz. 2009).

representative from each team, approves the transaction.[276] The Board has refused to approve the sale of the team to the Coyotes' preferred buyer. It appears instead that the NHL will attempt to buy the Coyotes, a transaction which would require approval by a federal bankruptcy judge and would also end the litigation between the parties.[277] The league would then attempt to identify an acceptable buyer.[278]

In arguing that the Coyotes "cannot state an antitrust claim against the NHL," the league notably stresses *American Needle*:

> [T]he League is a single economic entity that is incapable of conspiring with itself. . . . The Seventh Circuit recently applied this "single entity" doctrine to the National Football League, finding that when the thirty-two NFL teams get together to make decisions regarding how to produce, market, and sell their jointly created product called NFL football, they are acting as a single economic entity and are incapable of conspiring in violation of the antitrust laws. *See American Needle, Inc. v. NFL* . . . . The same principle applies to the NHL when its Board of Governors makes decisions regarding how and where to produce their product and who should be admitted to join the venture.[279]

The NHL's use of *American Needle* as persuasive authority is unsurprising and reveals the potential magnitude of the Supreme Court's forthcoming decision.[280] Should the Court affirm the Seventh Circuit's holding, *American Needle* could become the leading authority for leagues when confronted with legal challenges to their autonomy.

276. *Id.*

277. *See* Carrie Watters, *Coyotes Owner Agrees To Sell Team to NHL*, ARIZ. REPUBLIC, Oct. 27, 2009, at 1.

278. *Id.*

279. National Hockey League's Motion To Dismiss or in the Alternative for Summary Judgment at 3, *In re Dewey Ranch Hockey*, 406 B.R. 30, (No. 2:09-bk-09488-RTBP) (emphasis altered).

280. The NHL may have been particularly motivated to use *American Needle* in light of its experience in *Madison Square Garden*. During the litigation, a federal district court declined to endorse the NHL's single entity defense, reasoning that the NHL had failed to plead sufficient information. Madison Square Garden, L.P. v. Nat'l Hockey League, No. 07 CV 8455 (LAP), 2008 WL 4547518, at *13 (S.D.N.Y. Oct. 10, 2008).

E. NCAA

The NCAA is less likely to receive single entity status than professional sports leagues, since, inter alia, it is already the recipient of an adverse Supreme Court ruling in *Board of Regents* and is structurally different from a professional sports league and its independently owned teams.[281] If, however, the Court in *American Needle* endorses the single entity defense in language sufficiently broad so as to encompass the NCAA, the NCAA would certainly welcome single entity recognition,[282] which, in the context of regulating the NCAA Men's Basketball Tournament, it unsuccessfully pursued in *Metropolitan Intercollegiate Basketball Ass'n v. NCAA*.[283]

Like the NFL, the NCAA has agreed to an exclusive licensing contract with Electronic Arts, which publishes the video game *NCAA Football*. As a single entity, the NCAA's exclusive deal with Electronic Arts would gain an exemption from section 1. The NCAA could likewise deploy single entity status to thwart a section 1 claim recently brought by former UCLA star basketball player Ed O'Bannon on behalf of a class of thousands of other former men's basketball and football players.[284] In *O'Bannon v. NCAA*, the NCAA is alleged to have violated section 1, among other sources of law, by profiting from use of the images and likenesses of former NCAA student-athletes and by preventing those persons from negotiating their own licensing deals with television networks, video game companies, and various businesses that receive NCAA licenses.[285] The section 1 claim supposes that if student-athletes could negotiate their own licensing deals after leaving college, more licenses would be sold and that, in turn, would generate a more competitive marketplace.[286] As a single entity, the NCAA would defeat O'Bannon's section 1 claim, since the NCAA would not be subject to section 1.

281. *See supra* Section I.D.

282. Alternatively, *American Needle* could confer single entity status to college conferences, but not the NCAA. For an article advocating that result, see Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of the NCAA's Amateurism Rules*, 6 VA. SPORTS & ENT. L.J. 51 (2006).

283. 337 F. Supp. 2d 563, 570 (S.D.N.Y. 2004).

284. Class Action Complaint, O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. 09-CV-3329 (N.D. Cal. July 21, 2009).

285. *Id.*; *see also* Michael McCann, *NCAA Faces Unspecified Damages, Changes in Latest Anti-Trust Case*, SI.COM, July 22, 2009, http://sportsillustrated.cnn.com/2009/writers/michael_mccann/07/21/ncaa (explaining the lawsuit).

286. *See* McCann, *supra* note 285.

Single entity recognition would nonetheless come with a potential cost for the NCAA. In light of the commercialization of college sports, some commentators have questioned the authenticity of the NCAA's student-athlete mission, just as they have objected to the NCAA's tax-exempt status as an educational institution.[287] To the extent *American Needle* links the NCAA with professional sports leagues, calls for Congress to reconsider the NCAA's favorable legal treatment may gain momentum.

IV. A RECOMMENDATION TO THE UNITED STATES SUPREME COURT

The Supreme Court correctly granted certiorari in *American Needle*. First, and most practically, there now exists a circuit split on the single entity defense for sports leagues and the split may spawn undesirable incentives for forum shopping. Second, the Seventh Circuit's opinion largely omits guidance as to the availability of the single entity defense for other entities, be they sports leagues or other types of businesses, which might attempt to draw parallels to the NFL. Third, the Seventh Circuit's opinion may be inconsistent with the Court's holdings in *Copperweld*, *Board of Regents*, and other decisions.[288]

The Court should reject a general availability of the single entity defense for professional sports leagues. Those leagues, however, should retain an opportunity to obtain exemption from section 1 in limited and carefully defined circumstances.

The suggested rejection is mainly premised on the absence of legal authority. Although legal scholars have, with some persuasiveness, championed economic rationales and logical arguments for characterizing leagues as single entities, such recognition would be flatly inconsistent with *Copperweld* and the views of most, if not all, federal circuits. Also, while it is true that leagues, as complete single entities or as predominantly single entities, would remain subject to other sources of antitrust law, the mere presence of those other sources would not justify exemption from the most

287. *See* W. Burlette Carter, *Responding to the Perversion of* In Loco Parentis*: Using a Nonprofit Organization To Support Student-Athletes*, 35 IND. L. REV. 851, 919 (2002) (opining that NCAA institutions have "abandoned [an] earlier strong commitment to amateurism" and that commercialization has become a primary goal); John D. Colombo, *The NCAA, Tax Exemption and College Athletics*, 2010 U. ILL. L. REV. (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1336727 (discussing criticisms of the NCAA's tax exempt status).

288. *See, e.g.*, Texaco Inc. v. Dagher, 547 U.S. 1, 6 n.1 (2006) (suggesting that the decision to eliminate competition through joint venture behavior would be subject to section 1 scrutiny).

important source—section 1. Indeed, single entity leagues could impose restraints on the salary and employment autonomy of players and coaches and, more generally, endanger the legacy of league-labor relations. In addition, leagues are composed of often combative factions with unaligned economic interests. The notion that behind a warring image rests a core of shared consciousness seems quixotic, if not altogether fanciful.

The more challenging question for the Court is whether professional sports leagues can constitute a single entity for *any* purpose. In *American Needle*, the Seventh Circuit concluded the NFL could constitute a single entity for intellectual property licensing, though as explained in Part II, the court reached its conclusion through questionable logic.

A literal application of *Copperweld* would suggest that leagues cannot behave as single entities. After all, teams, unlike parents and subsidiaries, can in theory compete over any business practice. Their choice to collaborate instead could procure anticompetitive outcomes that defy section 1, such as increased prices or diminished choices.

Then again, as Justice Breyer opined in *Brown*, competing teams can only survive through some level of economic cooperation.[289] The two propositions are reconcilable: while teams could in theory compete in any business practice, they could not compete in *every* business practice. Indeed, without any economic collaboration, teams would be unable to partake in a league; without significant collaboration, teams might forgo opportunities that maximize competition and control costs, thereby leaving fans with a diminished product and a depleted market.

Identifying where courts should permit teams to collaborate presents a challenge. One response would be to preserve the status quo, with restraints, as consummated by teams in a joint venture, subject to section 1 and rule of reason. This response would encourage the Supreme Court to reverse the Seventh Circuit's holding and remand *American Needle* for rule of reason analysis. The status quo would ensure that restraints comply with section 1, and, as noted in Part II, a restraint such as the one found in *American Needle* would likely survive rule of reason analysis.

As a fact-intensive model, however, rule of reason increases the possibility of litigation for matters that may be more correctly handled by the single entity defense. Indeed, certain collaborations between teams may not pose the anticompetitive risks that the Sherman Act was enacted to combat and may not rob the market of the independent sources of economic power that competition necessitates. To the contrary, certain collaborations may promote competition.

289. *See supra* note 102 and accompanying text.

This theme has been recognized by courts when applying *Copperweld* to other business contexts.[290] In the sports context, the prospect for such collaborations would seem amplified by the globalization of professional sports. As certain U.S. sports leagues, such as the NBA and the NHL, increasingly compete with professional leagues located in other countries, concerns about anticompetitive risks will diminish.

A different response from the status quo would be to assign single entity status to specific areas of collaboration that do not pose section 1 concerns. Reconsider *Copperweld*'s shared-consciousness analogy between a driver and his or her horses: "a multiple team of horses draw[s] a vehicle under the control of a single driver."[291] With regard to television rights, for instance, Congress and President Kennedy, through the SBA, implicitly regarded the NFL and its teams as the driver and horses, respectively. In hindsight, their reasoning, which conflicted with that of the federal courts, appears correct. The SBA markedly expanded viewing opportunities for sports fans and enabled the NFL, and to a lesser extent the NBA, MLB, and NHL, to effect necessary revenue parity.

If professional sports leagues and their independently owned franchises should gain issue-specific exemptions from section 1, the question then becomes, which branch of government is best positioned to grant such exemptions: the judicial branch or the legislative branch? Courts have undoubtedly struggled to develop a precedential framework for single entity recognition of sports leagues. While they can easily identify the driver and horses, courts seem to lack the necessary instruments to discern when the horses are, or could be, unhitched or uncooperative.

It may thus be inadvisable for courts to develop a "test" for single entity recognition of professional sports leagues. Instead, Congress, with its enhanced resources and more deliberative process, could better examine the appropriateness of targeted exemptions from section 1.[292] Such an approach would avoid the ambiguities of single entity application to professional sports leagues while retaining, when desired, rule of reason scrutiny of league

290. *See supra* notes 111-114 and accompanying text.

291. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984).

292. *Cf.* Maureen A. O'Rourke, *Striking a Delicate Balance: Intellectual Property, Antitrust, Contract, and Standardization in the Computer Industry*, 12 HARV. J. L. & TECH. 1, 40 (1998) ("Between Congress and the courts, Congress seems better suited from an institutional competence perspective to gather the relevant information and make a reasoned decision.").

restraints. The approach would also comport with a history of legislative exemptions from federal antitrust laws.[293]

The Court deferring to Congress would, however, subject potential exemptions to the federal legislative process, hardly a flawless or egalitarian undertaking.[294] The leagues, which utilize a vast network of government relations specialists, influential lobbyists, and political action committees, are well-positioned to exert disproportionate influence on congressional decisionmaking.[295] Some commentators opine that leagues have a history of Capitol Hill arm-twisting, with passage of the SBA, which was reportedly facilitated by adroit lobbying, as most illustrative.[296] Other businesses, moreover, would likely encourage such lobbying, if not deploy their own lobbyists to advocate on the leagues' behalf, since exemptions for leagues may

293. Section 6 of the Clayton Act, for instance, exempts labor unions and other groups from the Sherman Act. *See* 15 U.S.C. § 17 (2006) ("Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural . . . horticultural organizations . . . or the members thereof . . . .").

294. *See, e.g.*, John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 450 (2005) ("The legislative process is untidy and opaque; it gives those with intense and even outlying preferences numerous opportunities to slow or stop legislation and to insist upon compromise as the price of assent."); Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 969 (2003) (noting that a person's access to the federal legislative process varies depending upon their level of influence).

295. *See* Chris Frates, *NFL Drafts Senate Aide for Lobbying Team*, POLITICO.COM, Sept. 30, 2008, http://www.politico.com/news/stories/0908/14147.html (discussing recent enhancements to the NFL's lobbying efforts, particularly in the context of telecommunications, intellectual property, and antitrust issues); *see also* Tony Castro & Ramona Shelburne, *Flexing Political Muscle; Athletes: Major Sports Figures Are Playing Unprecedented Role in Presidential Campaign*, DAILY NEWS (L.A.), Mar. 2, 2008, at A1 (detailing the nature of political fundraising by officials and players connected with the NBA, NFL, NHL, and MLB). Many commentaries have identified the corrupting influence of political fundraising on democratic ideals. *See, e.g.*, Allan Ides, *The Jurisprudence of Justice Byron White*, 103 YALE L.J. 419, 434 (1993).

296. *See* STEPHEN R. LOWE, THE KID ON THE SANDLOT: CONGRESS AND PROFESSIONAL SPORTS, 1910-1992, at 92-93 (1995); *see also* Robert Holo & Jonathan Talansky, *Taxing the Business of Sports*, 9 FLA. TAX REV. 161, 164 n.6 (2008) (discussing the "intense lobbying efforts" of the leagues for passage of the SBA). Another notable example of arm-twisting by leagues can be found in Major League Baseball's efforts to largely retain its antitrust exemption, which, though narrowed by the Curt Flood Act of 1998, remains operative. *See* Joshua P. Jones, *A Congressional Swing and Miss: The Curt Flood Act, Player Control, and the National Pastime*, 33 GA. L. REV. 639, 649 (1999). Congressman Emanuel Celler, who chaired a subcommittee holding hearings on the proposed Curt Flood Act, opined, "I have never known, in my 35 years of experience, of as great a lobby as that descended upon the House than the organized baseball lobby. . . . They came upon Washington like locusts." *Id.*; *see also supra* note 259 and accompanying text (providing additional background on the Curt Flood Act).

eventually lend credence to exemptions for those businesses.[297] Before a federal court, in contrast, leagues and other businesses would lack the capacity to lobby the decisionmakers and their legal arguments would presumably be resolved on the merits.

Of similar concern, other industries saddled by section 1 may view legislative exemptions for professional sports leagues as justifying additional exemptions. Indeed, should Congress extend targeted exemptions to professional leagues, various industries could aggressively lobby Congress for similarly favorable treatment. If a "slippery slope" of exemptions arises, section 1 could encounter a bevy of exceptions that threaten its primary goals.[298]

A legislative approach to examining the merits of the single entity status of leagues may thus prove far from perfect. Yet in a choice between Congress and the courts, Congress appears superiorly situated. Courts have struggled to assess potential exemptions for professional sports leagues, whereas Congress, with its institutional advantages, has established a more capable record. In addition, while concerns about lobbying by professional sports leagues and other industries are well-founded, various groups, such as players' associations and businesses likely to be shut out by exclusive contracts, would be poised to effectively lobby *against* sweeping changes in section 1's application.

Recognizing the longstanding difficulty of judicially reconciling the unique structure of professional sports leagues with broadly applicable antitrust law, the Supreme Court should reverse *American Needle* and encourage Congress to engage its ultimate authority over statutory antitrust law.

297. *Cf.* F.M. Scherer, *The Political Economy of Patent Policy Reform in the United States*, 7 J. ON TELECOMM. & HIGH TECH. L. 167, 203-04 (2009) (discussing how collaborative lobbying efforts of members of the pharmaceutical and manufacturing industries, among other industries, advance their collective interests in obtaining copyright protection). The incentives for industry actors to collaborate on obtaining legislative exemptions are facilitated by professional incentives for lobbyists, who often attempt to forge long-term relationships with members of Congress. *See* Alan L. Feld, *Congress and the Legislative Web of Trust*, 81 B.U. L. REV. 349, 359 (2001) (describing lobbyists as "long-term players in the legislative process"); Daniel H. Lowenstein, *Voting with Votes*, 116 HARV. L. REV. 1971, 1993 (2003) (book review) (discussing professional challenges faced by lobbyists who are unable to develop lasting relationships with politicians).

298. *See supra* Section I.B.