Note

The Penalty Is Declined: The NFL's Exclusive Streaming Agreements and the Limits of Antitrust Law

*William Holt**

The National Football League's (NFL) decision to grant NBCUniversal's Peacock streaming service exclusive rights to carry the 2023–24 wild-card matchup between the Kansas City Chiefs and the Miami Dolphins signaled a major shift in the league's media distribution strategy. Football fans that had long depended on free, over-the-air broadcasts for the most pivotal games of the year suddenly discovered that they had to subscribe to, and pay for, a streaming service they otherwise did not want or need.

The migration of live sports programming away from conventional broadcast networks touches on more than subscription fatigue and rising credit card statements. The advertising dollars generated by high-profile NFL games are critical to the over-the-air broadcasters that provide essential public interest programming such as local news, weather updates, and emergency alerts.

This Note analyzes the NFL's exclusive streaming agreements through the lens of federal antitrust law. It argues that these agreements would probably survive a challenge under section 1 of the Sherman Act. First, the Sports Broadcasting Act's antitrust exemption for "sponsored telecasting" likely encompasses streaming services. Second, the U.S. Supreme Court's 2010 decision in American Needle, Inc. v. National Football League *suggests that the NFL's exclusive streaming agreements would withstand a rule of reason analysis. Finally, the common-*

* J.D. Candidate, 2026, University of Minnesota Law School; Lead Note & Comment Editor, *Minnesota Law Review*, Volume 110. Thanks to my parents, Donna and Bill, for your unwavering support.

law ancillary restraints doctrine provides yet another basis for a court to uphold these agreements.

Given the probable success of the NFL in the event of a challenge brought under section 1, this Note proposes that Congress amend the Sports Broadcasting Act to effectively codify the league's longtime distribution strategy of providing free, over-the-air broadcasts of the games that matter most to fans and broadcasters alike.

INTRODUCTION

When the Kansas City Chiefs and the Miami Dolphins met in the wild-card round[1] of the 2023–24 National Football League (NFL) playoffs, the temperature at Kansas City's Arrowhead Stadium was minus-four degrees Fahrenheit.[2] "[F]ans bundled up in parkas, snow pants, and ski goggles."[3] Chiefs head coach Andy Reid's mustache froze solid as he lumbered along the sideline, and quarterback Patrick Mahomes's helmet cracked from a hit in the third quarter.[4]

But the fourth coldest game in NFL history[5] was notable for something besides the bitter temperature. For football fans living outside the media markets of the two competing teams, it marked the first time they had to pay a streaming service to watch the playoffs.[6] NBCUniversal's Peacock had paid the league approximately $110 million for exclusive rights to carry the game.[7] Viewers, in turn, had to pay a $5.99-per-month

1. The NFL playoffs feature seven teams from each of the two conferences: the four division winners and three wild-card teams, which are the top remaining teams by win-loss record. Ayrton Ostly, *NFL Playoff Format Explainer: Your Guide to Each Round of the NFL Postseason*, USA TODAY (Jan. 10, 2025), https://www.usatoday.com/story/sports/nfl/2025/01/10/nfl-playoff-format-explainer-wild-card-super-bowl/77554333007 [https://perma.cc/VHD8-KR9L]. The playoffs have four rounds: the wild-card round, the divisional round, the conference championships, and the Super Bowl. *Id.*

2. Dave Skretta, *Chiefs and Dolphins Play Fourth-Coldest Game in NFL History at Minus-4 Degrees*, ASSOCIATED PRESS (Jan. 13, 2024), https://apnews.com/article/chiefs-dolphins-bills-steelers-nfl-playoffs-cold-snow-weather-b49dba3f4fdeeae8f023a7408b53296e [https://perma.cc/T6VM-JMLZ].

3. *Id.*

4. Dave Skretta, *Patrick Mahomes Leads Chiefs to 26-7 Playoff Win over Dolphins in Near-Record Low Temps*, ASSOCIATED PRESS (Jan. 14, 2024), https://apnews.com/article/dolphins-chiefs-score-playoffs-mahomes-e3a23736da0c791ff4ec2067fc5a9ff2 [https://perma.cc/VY8Y-VFLJ].

5. *Id.*

6. Patience Haggin, *Chiefs-Dolphins Playoff Game on Peacock Sets Records for U.S. Streaming and Internet Usage,* WALL ST. J. (Jan. 14, 2024), https://www.wsj.com/business/media/chiefs-dolphins-playoff-game-on-peacock-sets-u-s-streaming-and-internet-usage-records-c81a9980 [https://perma.cc/LUX8-HBYN].

7. Joe Flint & Jessica Toonkel, *Peacock to Carry One NFL Playoff Game Exclusively Next Season*, WALL ST. J. (May 15, 2023), https://www.wsj.com/articles/peacock-to-carry-one-nfl-playoff-game-exclusively-next-season-fb339027 [https://perma.cc/B2EU-CDFH].

subscription fee for something they had once been able to access on free, over-the-air television.[8]

For some observers, the NFL's decision to sell exclusive telecasting rights to Peacock immediately entered "the Hall of NFL Infamy,"[9] earning a spot next to the Tuck Rule[10] and the Heidi Game.[11] But the same people complaining also expressed a sense of resignation. While columnist Jason Gay described "the Peacock Game" as "perhaps the most single-handedly disenchanting programming decision in league history," he acknowledged that

8. Brad Adgate, *With the Success of Peacock, Expect More Playoff Games to Be Streamed*, FORBES (Jan. 16, 2024), https://www.forbes.com/sites/bradadgate/2024/01/16/with-the-success-of-peacock-expect-more-playoff-games-to-be-streamed [https://perma.cc/9P6L7GUT]. Over-the-air television is conveyed by "[b]roadcast stations [that] radiate electromagnetic signals from a central transmitting antenna." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 627 (1994). It is free to "any television set within the antenna's range." *Id.*

9. Jason Gay, *'Peacock Game': The NFL's Digital Buttfumble*, WALL ST. J. (Jan. 15, 2024), https://www.wsj.com/sports/football/peacock-game-chiefs-dolphins-mahomes-5b453cba [https://perma.cc/YQJ7-PTVY] ("Here was a marquee Wild-Card weekend playoff contest, walled off from the nonpaying public, all because the NFL sold the game to a mega media conglomerate, NBCUniversal, which wanted to use it to attract new subscribers for Peacock, its paid streaming service featuring French bike racing and 19 zillion reruns of 'Law &Order.'"); *see* Emily Barr, *Broken Connections: Americans Will Lose if Streamers Monopolize Live Sports*, THE HILL (Feb. 1, 2024), https://thehill.com/opinion/technology/4442241-broken-connections-americans-will-lose-if-streamers-monopolize-live-sports [https://perma.cc/2RW5-TP5C] (calling the decision to put an NFL playoff game behind a paywall "shameful"); John Cassillo, *Peacock's NFL Playoff Exclusive Worked. But at What Cost?*, TVREV (Jan. 17, 2024), https://www.tvrev.com/news/peacock-playoff-exclusive-cost-pay-per-view-nfl-tv [https://perma.cc/PK4M-Y2ZN] ("Many fans felt exploited . . . . [W]hat used to be a free over-the-air playoff game every year to-date turned into a pay-per-view transaction.").

10. *See* Ice Cube, O'Shea Jackson Jr., & Donnie Wahlberg, *2001 – Raiders vs. Patriots: AFC Divisional Playoff – "The Tuck Rule"*, NAT'L FOOTBALL LEAGUE: 100 GREATEST GAMES, https://www.nfl.com/100/originals/100-greatest/games-15 [https://perma.cc/AES8-J36E] (describing a controversial call by NFL referee Walt Coleman that ultimately sent the New England Patriots to the 2001 American Football Conference (AFC) Championship Game over the Oakland Raiders).

11. *See 1968 – Jets vs. Raiders: Week 11: "The Heidi Game"*, NAT'L FOOTBALL LEAGUE: 100 GREATEST GAMES, https://www.nfl.com/100/originals/100-greatest/games-41 [https://perma.cc/2PYL-RPBE] [describing NBC's decision to interrupt its broadcast of the final seconds of a riveting game between the New York Jets and the Oakland Raiders with a scheduled broadcast of a children's movie about a pigtailed orphan girl in the Swiss Alps).

this was the "new reality" of live sports.[12] Others grumbled that the decision generally "fit" with how the NFL has diced up media markets over the years.[13]

For the NFL and Peacock, the game was an unmitigated success. Fewer than twenty-four hours after the final whistle, NBCUniversal announced that the "first-ever exclusively live streamed playoff game" was "the most-streamed live event in U.S. history," consuming thirty percent of internet traffic and driving internet usage to a single-day record high.[14] Meanwhile, the NFL had increased its viewership by six percent from the previous year's primetime wild-card match-up between the Los Angeles Chargers and the Jacksonville Jaguars.[15] The league decided to replicate the model in the 2024–25 season, announcing nearly a year in advance that Prime Video would have

12. Gay, *supra* note 9 ("You're *already* paying Amazon if you've been watching Thursday Night Football, Sunday Ticket is off to YouTube, and as cable continues to bleed subscribers, more streaming games are sure to follow." (emphasis added)).

13. *See* Cassillo, *supra* note 9 ("Sunday afternoons expanded to Monday Night Football in the 1970s, and then Sunday Night Football in the 1990s. Thursday nights were tacked on in the last decade or so. And all of these have been their own separate media packages to increase payouts for the league.").

14. *Peacock Exclusive AFC Wild Card Game Is Biggest Live-Streamed Event in U.S. History & Drives Internet Usage to Single Day U.S. Record*, NBCUNIVERSAL (Jan. 15, 2024), https://www.nbcuniversal.com/article/peacock-exclusive-afc-wild-card-game-biggest-live-streamed-event-us-history-drives-internet-usage [https://perma.cc/7359-LLR4].

15. *Id.* One could reasonably speculate that the relatively low viewership for the previous year's AFC wild-card match-up resulted in part from a lack of real-life Chargers fans. *See Do Chargers Fans Actually Exist??*, REDDIT: R/AFCWESTMEMEWAR, https://www.reddit.com/r/AFCWestMemeWar/comments/17esk9k/do_chargers_fans_actually_exist [https://perma.cc/WX3W-B82N] (questioning whether Chargers fans even exist). The existence of a bona fide Jaguars fanbase remains somewhat questionable, too. Until recently, many observers speculated that the team would move from Jacksonville to London. *See* Mike Florio, *With Jaguars Staying in Jacksonville, London Might Not Get Its Own Team Any Time Soon*, NBC SPORTS: PRO FOOTBALL TALK (June 26, 2024), https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/with-jaguars-staying-in-jacksonville-london-might-not-get-its-own-team-any-time-soon [https://perma.cc/WR6W-UBHE] (noting that before the Jaguars reached a deal with the city of Jacksonville to renovate their stadium, the Jaguars were the most likely of the NFL's thirty-two franchises to move to London).

exclusive rights to a wild-card game in 2025.[16] Some fans have begun to wonder whether a pay-per-view Super Bowl might be next.[17]

NFL Executive Vice President of Media Distribution Hans Schroeder framed the decision to livestream another playoff game as a matter of meeting consumers where they are.[18] In a statement that announced the agreement, Schroeder claimed that the successes of Thursday Night Football on Prime Video and of the wild-card game on Peacock provided strong indications that the NFL's streaming distribution was resonating with fans.[19] But Schroeder also made sure to clarify that Prime Video's wild-card game would be available on "free, over-the-air broadcast television" in the local markets of the competing teams, an option that he described as consistent with "long-standing NFL policy."[20]

The addendum was telling, if not entirely accurate: The 2024 wild-card game between the Chiefs and the Dolphins constituted a *break* from long-standing NFL policy, marking the first time that most Americans had to pay to watch the

16. *See NFL Announces Two Exclusive Streaming Games for 2024 Season, Including One Postseason Game*, NAT'L FOOTBALL LEAGUE: AROUND THE NFL (Mar. 26, 2024) [hereinafter *NFL Announces*], https://www.nfl.com/news/nfl-announces-two-exclusive-streaming-games-for-2024-season-including-one-postseason-game [https://perma.cc/U36Y-NDF2] ("The viewership success of both Thursday Night Football on Prime Video and the historic Wild Card game on Peacock last season are strong indicators our streaming distribution is resonating with our fans.").

17. Barr, *supra* note 9 ("For decades, virtually every community in America has counted on free over-the-air broadcast stations to deliver local news and weather programming, popular network content and 'must-see' events like professional sports, especially the NFL. Even as the NFL moved some of its regular season games to cable, when it came to the playoffs, nearly every American household was assured access to every game through one of their local broadcast stations. Sadly, this is no longer true.").

18. *See NFL Announces*, *supra* note 16 (highlighting the NFL's efforts to provide games where fans spend their time).

19. *Id.* ("As media consumption habits evolve, the NFL continues to work with our partners to put our games on digital platforms where our fans are increasingly spending their time.").

20. *Id.*; *see Judge Overturns $4.7 Billion Verdict in "Sunday Ticket" Case Against NFL*, CBS NEWS (Aug. 1, 2024), https://www.cbsnews.com/news/nfl-sunday-ticket-lawsuit-judge-overturns-verdict [https://perma.cc/AD75-W7M4] ("We believe that the NFL's media distribution model provides our fans with an array of options to follow the game they love, *including local broadcasts of every single game on free over-the-air television*." (emphasis added)).

playoffs.[21] At the same time, Schroeder's deliberate use of the phrase "free, over-the-air television" merits scrutiny.[22] These words carry a distinct significance in the context of the NFL's media distribution strategy, evoking a sixty-five-year history of telecasting[23] agreements, changing technologies, and challenges under the antitrust laws.[24]

The NFL's pooled-rights agreements and the activities of professional sports leagues more generally have been scrutinized under section 1 of the Sherman Antitrust Act of 1890, which declares "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . to be illegal."[25] Although a literal interpretation of section 1 would seem to outlaw any agreement among competitors, courts have interpreted this provision as prohibiting only restraints that a factfinder determines to be "unreasonable."[26] The Sports Broadcasting Act of 1961 (the SBA) created a partial exemption from the Sherman Act that allows the member teams of professional sports leagues including the NFL to pool their telecasting rights for purposes of "sponsored telecasting."[27] No court has decided whether that exemption applies to the NFL's exclusive agreements with streaming platforms like Prime Video and Peacock. But an earlier pooled-rights agreement between the NFL and satellite provider DirecTV was met with skepticism, and some courts have concluded

21. Haggin, *supra* note 6.

22. *NFL Announces*, *supra* note 16.

23. This Note uses "telecast" as an umbrella term for all video distribution platforms, including cable, satellite, and streaming.

24. *See, e.g.*, U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1343–47 (2d Cir. 1988) (describing early legal challenges the NFL's efforts to pool teams' broadcasting rights); *In re* Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1147–49 (9th Cir. 2019) [hereinafter *In re* Sunday Ticket] (describing legal challenges to those efforts in the context of cable and satellite).

25. 15 U.S.C. § 1; *see infra* Parts I.A–I.B.

26. *See, e.g.*, Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 343 (1982) ("[This] requires the factfinder to decide whether . . . the restrictive practice imposes an unreasonable restraint on competition."); *see also infra* Part I.A.

27. 15 U.S.C. § 1291 ("The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.").

that the SBA's exemption covers only broadcasts on free, over-the-air television.[28]

The NFL's decisions to grant exclusive telecasting rights to Peacock[29] and Prime Video[30] suggest that the league will continue to put some of its most important programming behind digital paywalls, effectively increasing the cost of viewership.[31] But these decisions affect more than the diehard sports fans complaining about having to sign up for another streaming service. For traditional, over-the-air broadcasters, NFL games are critical to building the audiences that can sustain essential business operations.[32] In fact, NFL programming generates nearly five billion dollars in advertising revenue for the league's network partners, accounting for roughly fifteen percent of the total national television advertising market.[33] These advertising dollars

28. *See, e.g.*, Shaw v. Dall. Cowboys Football Club, Ltd., 172 F.3d 299, 302 (3d Cir. 1999) ("[T]he NFL obtained in [the SBA] an expressly limited exception to the normal prohibition on monopolistic behavior; one which permitted it to sell pooled rights to sponsored telecasters and which expressly did *not* apply to subscription television." (internal quotations omitted)); Chi. Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 808 F. Supp. 646, 650 (N.D. Ill. 1992) ("[P]rior and subsequent legislative history demonstrates that 'sponsored telecasting' as used in the SBA is limited to free commercial television as opposed to cable.").

29. Haggin, *supra* note 6.

30. *NFL Announces*, *supra* note 16.

31. *See* Andrew Beaton & Rosie Ettenheim, *The NFL Is Back—and It's Never Cost More to Watch*, WALL ST. J. (Sept. 6, 2024), https://www.wsj.com/sports/football/eagles-packers-brazil-peacock-streaming-netflix-b55de642 [https://perma.cc/A9WQ-KWKU] ("Being a football nut in 2024 means having to shell out for a bevy of streaming platforms that until recently have never had exclusive rights to games."). In 2024, Netflix reportedly paid the NFL $75 million apiece for the rights to two regular-season games that aired on Christmas Day of that year, suggesting that deep-pocketed streaming suitors will play a significant role when the NFL's media deals come up for renewal in 2033—if not earlier. Alex Weprin, *Netflix Spikes the Football: Behind Its NFL Megadeal*, HOLLYWOOD REP. (May 22, 2024), https://www.hollywoodreporter.com/business/business-news/netflix-nfl-megadeal-1235905666 [https://perma.cc/3A7S-CT9B].

32. *See* Barr, *supra* note 9 ("Most Americans are unaware of the thread connecting high-profile sports and live events, like the NFL playoffs, and the operation of local newsrooms. For local broadcasters, these events are a critical part of building an audience that can sustain the business and enable the delivery of the critical and life-saving news, weather updates and emergency alerts that millions of Americans across the nation rely on to keep them safe and informed.").

33. Tony Bilotta, *The NFL Is the Undisputed King of Advertising*, REAL ECON. BLOG (Feb. 10, 2025), https://realeconomy.rsmus.com/the-nfl-is-the-undisputed-king-of-advertising [https://perma.cc/WVC3-6S4R].

fund the public interest programming on which millions of Americans depend, including local news, weather updates, and emergency alerts.[34] The loss of this programming will have a dramatic impact on the entire television industry, but its effects will be especially acute for local broadcast stations.[35]

This Note analyzes the NFL's exclusive streaming agreements through the lens of federal antitrust law. After the United States Supreme Court's 2010 decision in *American Needle, Inc. v. National Football League*, it seems increasingly likely that courts will find these agreements to be lawful.[36] Although the *American Needle* Court held that the NFL had violated federal antitrust laws by pooling individual teams' intellectual property rights in logos and merchandise, it left open the possibility that other types of pooled-rights agreements could withstand scrutiny.[37] Justice Stevens's opinion for the Court specifically acknowledged that "'the interest in maintaining a competitive balance' among 'athletic teams is legitimate and important'"[38] and that such an interest "may well justify a variety of collective decisions by the teams."[39] This opinion also contained echoes of the common-law ancillary restraints doctrine, which provides yet another basis for upholding the NFL's pooled-rights streaming agreements.[40]

More recently, Justice Kavanaugh has interpreted *American Needle* to mean that NFL teams do not have to compete

34. Barr, *supra* note 9.

35. *See* Shelly Palmer, *How the NFL's New Media Deal Could Hurt Local TV Stations*, ADWEEK: THINK ABOUT THIS (Mar. 22, 2021), https://www.adweek.com/convergent-tv/how-the-nfls-new-media-deal-could-hurt-local-tv-stations [https://perma.cc/7RQP-Z8PL] (predicting that the NFL's decision to stream more games will hurt broadcast television).

36. Although the NFL's telecasting agreements could implicate section 2 of the Sherman Act in some instances, this Note will focus exclusively on section 1, which is the primary focus of the SBA.

37. *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 202–04 (2010) ("Football teams that need to cooperate are not trapped by antitrust law. The special characteristics of this industry may provide a justification for many kinds of agreements. The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions." (internal quotations omitted)).

38. *Id.* at 204 (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 117 (1984)).

39. *Id.*

40. *See infra* Part I.A.2.

against each other with respect to telecasting rights,[41] suggesting that the Court would uphold the league's exclusive streaming agreements. In light of the accelerating migration of marquee matchups from free, over-the-air networks to subscription-based streaming services, this Note argues that Congress should amend the SBA to provide fans with continued access to the most important games of the year on conventional broadcast television.

Part I of this Note provides a brief overview of federal antitrust law and explains how that body of law has intersected with the NFL's pooled-rights telecasting agreements. Part II analyzes recent challenges to the NFL's "Sunday Ticket" package with satellite provider DirecTV, which some commentators have adopted as a framework for thinking through the legality of the league's exclusive streaming agreements. Part III argues that the proper framework for analyzing the NFL's streaming agreements is the Court's decision in *American Needle*, which suggests that telecasting agreements would survive a challenge under section 1. Finally, Part IV recommends that Congress amend the SBA to effectively codify the league's longtime distribution strategy of providing free, over-the-air broadcasts of games in the local markets of the competing teams, while ensuring that the playoffs and the Super Bowl also remain available on conventional networks.

I. FEDERAL ANTITRUST LAW AND THE NFL

Section 1 of the Sherman Antitrust Act outlaws "contract[s], combination[s] . . . , or conspirac[ies] . . . in restraint of trade or commerce."[42] This provision has served as one of the primary tools with which courts have regulated the activities of professional sports leagues.[43] Since the 1950s, the NFL's telecasting agreements have faced numerous challenges under section 1, prompting Congress to enact the Sports Broadcasting Act of

41. *See* Nat'l Football League v. Ninth Inning, Inc., 141 S. Ct. 56, 57 (2020) ("[A]ntitrust law likely does not require that the NFL and its member teams compete against each other with respect to television rights." (citing *Am. Needle, Inc.*, 560 U.S. at 202)).

42. 15 U.S.C. § 1.

43. *See* Nathaniel Grow, *Regulating Professional Sports Leagues,* 72 WASH. & LEE L. REV. 573, 580 (2015) ("Federal antitrust law is the primary legal authority regulating the operation of professional sports leagues in the United States.").

1961.[44] Although the Act created an explicit antitrust exemption for pooled-rights agreements in the "sponsored telecasting" of professional sports,[45] the scope of that exemption remains contested.

Section A of this Part provides a brief overview of federal antitrust law, including section 1 of the Sherman Act, the rule of reason test, and the little-used ancillary restraints doctrine. Section B considers the problem of applying core antitrust principles to professional sports leagues. Finally, Section C summarizes the history of the NFL's telecasting agreements and how these agreements have intersected with antitrust laws. Section C also considers the issues that motivated the passage of the SBA and previews some of the controversies that the Act continues to generate.

A. AN OVERVIEW OF FEDERAL ANTITRUST LAW

Federal antitrust law constitutes the primary legal authority regulating the operation of professional sports leagues.[46] This body of law emerged during the Industrial Revolution as a means to curb anticompetitive practices among businesses and to maximize societal wealth, market efficiency, and consumer welfare.[47] Section 1 of the Sherman Act, which declares every contract, combination, or conspiracy, in restraint of trade or commerce to be illegal,[48] is "widely considered one of the most important tools of U.S. federal antitrust law."[49] The provision aims to prevent competitors from combining in ways that harm consumers, whether in the form of increased prices, diminished quality, or limited choices.[50]

44. *See* 15 U.S.C. § 1291.

45. *Id.*

46. *See* Grow, *supra* note 43.

47. *See* Michael A. McCann, Feature, American Needle v. NFL*: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 735 (2010) ("[Federal antitrust law was] born during the Industrial Revolution as a means to curb anticompetitive combinations of powerful competitors and primarily designed to maximize total societal wealth, efficiency, and consumer welfare."); *see also* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 702 (describing the social, economic, and distributive goals of antitrust law).

48. 15 U.S.C. § 1.

49. McCann, *supra* note 47, at 735.

50. *Id.* at 735–36.

1. The Rule of Reason and the Per Se Rule

While a literal interpretation of section 1 would seem to outlaw any agreement that limits trade, courts have interpreted the provision as forbidding only "unreasonable" restraints of trade whose anticompetitive effects outweigh their procompetitive benefits.[51] This "rule of reason" test was adopted by the U.S. Supreme Court in *Addyston Pipe & Steel Co. v. United States*.[52] In *Standard Oil Co. of New Jersey v. United States*, the Court attempted to reconcile the rule of reason with section 1's seemingly categorical prohibition on restraints of trade by declaring that some restraints are inherently unreasonable.[53] Thus, considerable experience with certain business arrangements enables courts to classify such arrangements as "per se" violations of the Sherman Act.[54] This per se analysis constitutes a "streamlined approach" for situations where the court believes that a restraint is anticompetitive on its face.[55] Examples of such restraints include price-fixing and territorial allocation agreements.[56]

When a court determines that a particular restraint is *not* unreasonable per se, it applies the rule of reason test.[57] Under the rule of reason, the court examines "the facts peculiar to the business, the history of the restraint, and the reasons why it was

51. *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

52. *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 245 (1899) ("All the facts and circumstances are, however, to be considered in order to determine the fundamental question—whether the necessary effect of the combination is to restrain interstate commerce.").

53. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 64–65 (1911).

54. United States v. Topco Assocs., Inc., 405 U.S. 596, 607–08 (1972).

55. McCann, *supra* note 47, at 736.

56. *See id.* at 736 n.53 ("Price-fixing agreements, for instance, are normally considered per se illegal." (citing *In re* Baby Food Antitrust Litig., 166 F.3d 112, 118 (3d Cir. 1999))); *see also* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107–08 (1984) ("Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.").

57. The rule of reason test is a burden-shifting analysis. To state a claim under section 1, the plaintiff must establish three elements: "(1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or [unreasonably restrain competition; and] (3) which actually injures competition." Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir. 2012) (quoting Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)). If the plaintiff establishes those three elements, the burden of proof then shifts to the defendant to provide a procompetitive justification for the restraint. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. at 113.

imposed" to determine the effect on competition in the relevant product market.[58] Ultimately, the rule of reason requires a fact-intensive inquiry whereby the court will deem an agreement unlawful "only if it causes an anticompetitive injury that outweighs procompetitive effects."[59] This balancing of anticompetitive and procompetitive effects typically requires courts to consider the restraint's rationale, history, and impact on the relevant market.[60]

The Supreme Court applied the rule of reason test in *Radovich v. National Football League*, where it held for the first time that the federal antitrust laws apply to professional football.[61] In *Radovich*, a former Detroit Lions player sued the NFL and its member teams under sections 1 and 2 of the Sherman Act, alleging that the defendants had entered into a conspiracy to blacklist him and prevent an affiliated league from hiring him as a player-coach.[62] Justice Clark's opinion for the majority found that the former player had adequately alleged the existence of a conspiracy as well as a resultant injury that entitled him to an opportunity to prove his charges.[63] The player ultimately settled with the league for $42,500.[64]

2. The Ancillary Restraints Doctrine

A less common feature of contemporary antitrust analysis is the ancillary restraints doctrine.[65] This common-law doctrine first entered Sherman Act jurisprudence with Judge Taft's 1898 opinion for the Sixth Circuit in *United States v. Addyston Pipe & Steel Co.*, where the government sued six manufacturers of

58. Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978).

59. McCann, *supra* note 47, at 737.

60. *Id.*

61. Radovich v. Nat'l Football League, 352 U.S. 445, 448 (1957) (holding that the antitrust laws apply to professional football).

62. *Id.*

63. *Id.* at 454.

64. William C. Rhoden, *N.F.L.'s Labor Pioneer Remains Unknown*, N.Y. TIMES (Oct. 2, 1994), https://www.nytimes.com/1994/10/02/sports/sports-of-the-times-nfl-s-labor-pioneer-remains-unknown.html [https://perma.cc/34YX 2WCE] ("Radovich's attorney, Maxwell Keith, urged him to drop the suit. Radovich said that he wanted to go to trial and that after three days of arguing with Keith, agreed to a $42,500 out-of-court settlement with the league.").

65. *See* L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1395 (9th Cir. 1984) (describing the ancillary restraints doctrine as a "little used area of antitrust law").

cast-iron pipe that had agreed to fix prices and divide territories.[66] In deciding for the government, Judge Taft formulated a rule of per se illegality for "naked" price-fixing and market agreements—i.e., "agreements between competitors who cooperated in no other integrated economic activity."[67] But Judge Taft also explained that the per se rule would have no bearing where "fusions" or "integrations" of economic activity had occurred and that agreements eliminating rivalry within such an enterprise constituted means of enhancing the firm's efficiency.[68] Under those circumstances, the restraint at issue would be "merely ancillary to the main purpose of a lawful contract, and [therefore] necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party."[69] The result is an expedited rule of reason analysis whereby courts may presume that certain agreements are reasonably necessary to the existence of a joint venture and therefore permissible under section 1.[70]

As a scholar and a jurist, Judge Robert Bork made numerous attempts to highlight and extend the ancillary restraints doctrine, noting that *Addyston Pipe* provided the Sherman Act with "a workable formula" for evaluating restraints but had remained almost entirely unexploited by judges for more than seventy years.[71] He argued that the ancillary restraints doctrine offers the Sherman Act "not content but form" and that "the sole function of the concept of ancillarity under the Sherman Act should be to point out instances when *per se* illegality should not attach and to confine the exceptions thus made to their proper scope."[72]

One of Judge Bork's clearest statements on the topic appeared in his opinion for the D.C. Circuit in *Rothery Storage &*

66. United States v. Addyston Pipe & Steel Co., 85 F. 271, 272 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

67. Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 224 (D.C. Cir. 1986) (citing *Addyston Pipe & Steel Co.*, 85 F. at 280–83).

68. *Id.*

69. *Addyston Pipe & Steel Co.*, 85 F. at 282.

70. *See, e.g.*, *L.A. Mem'l Coliseum Comm'n*, 726 F.2d at 1396 (noting that "[j]oint marketing decisions" by NFL teams would probably be found reasonable and therefore legitimate because of the importance of television to the league).

71. ROBERT H. BORK, THE ANTITRUST PARADOX 26 (1978).

72. Robert H. Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. SEC. ANTITRUST L. 211, 216, 227 (1959).

Van Co. v. Atlas Van Lines, Inc., where he explained that to be ancillary and thus exempt from the per se rule, an agreement eliminating competition must be "subordinate and collateral to a separate, legitimate transaction."[73] In other words, the restraint "serves to make the main transaction more effective in accomplishing its purpose."[74] On at least one occasion, Judge Bork suggested that the ancillary restraints doctrine may be especially relevant within the unique context of sports-league jurisprudence.[75]

B. ANTITRUST LAW AND PROFESSIONAL SPORTS LEAGUES

Courts have frequently examined the activities of professional sports leagues under section 1 of the Sherman Act.[76] But as jurists and scholars have noted, section 1 provides an awkward fit for entities whose member teams are not completely independent economic actors and whose very existence depends on concerted action.[77] Judge Bork famously described league sports as "perhaps the leading example" of an activity that can only be carried out jointly,[78] and suggested on at least one occasion the ancillary restraints doctrine may hold particular relevance in this context.[79] Unlike other industries where the goal of driving

73. Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 224 (D.C. Cir. 1986).

74. *Id.*

75. *See* BORK, *supra* note 71, at 278–79 (noting the applicability of the ancillary restraints doctrine in the context of professional sports leagues).

76. *See* Grow, *supra* note 43, at 580 ("[T]he NFL, NBA, and NHL have each been subject to the [Sherman Act] for the better part of sixty years.").

77. *See, e.g.*, Brown v. Pro Football, Inc., 518 U.S. 231, 248 (1996) ("[T]he clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival."); Am. Needle Inc. v. Nat'l Football League, 538 F.3d 736, 743 (7th Cir. 2008) ("Certainly the NFL teams can function only as one source of economic power when collectively producing NFL football. Asserting that a single football team could produce a football game is less of a legal argument than it is a Zen riddle: Who wins when a football team plays itself?").

78. BORK, *supra* note 71, at 278–79 ("When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams. In this case the league is best viewed as being the firm, and horizontal merger limitations are inappropriate. Such limitations may become appropriate, of course, when leagues seek to merge.").

79. Bork, *supra* note 72, at 231 ("The doctrine of ancillary restraints may be of assistance in the difficult area of the application of the antitrust laws to professional league sports such as football and baseball. There has been a good

a rival out of business makes intuitive sense, competitive athletic contests depend on the interaction and cooperation of separate, independently operated clubs.[80] To create a marketable product, these teams must cooperate not only physically on the playing field but they also must establish certain agreements related to scheduling and the rules that govern their interactions.[81]

Given the unique features of professional sports leagues, courts have struggled to apply section 1's anti-collusion restrictions in this context.[82] For its part, the NFL has contended on multiple occasions that it should be treated as a "single entity" for purposes of antitrust law and is therefore precluded from section 1 scrutiny.[83] This single-entity defense draws principally from the Supreme Court's 1984 decision in *Copperweld Corp. v. Independence Tube Corp.*, where the Court decided that a parent company and its wholly owned subsidiary constituted a single entity for purposes of antitrust analysis.[84] According to the Court, the parent company and its wholly owned subsidiary acted with a "complete unity of interest" and were "not unlike a multiple team of horses drawing a vehicle under the control of a single driver."[85]

But the *Copperweld* Court explicitly limited its holding to situations involving a corporate parent and its wholly owned

deal of confusion in the attempt to apply the Sherman Act to these businesses and the problem appears to pose a severe test for the rule of reason.").

80. *See* Grow, *supra* note 43, at 586–87 ("Unlike any other industry, competitive athletic contests depend on the interaction of two different, independently operated teams to create a marketable product. A game staged by a single team acting alone—such as an intra-squad scrimmage—would lack the competitive intensity that consumers have come to expect and demand. Meanwhile, an entire league of teams is necessary to provide a complete season of competition culminating in the crowning of an overall league champion." (internal quotations omitted)).

81. *See id.* ("To create these products, the teams in a league must not only physically interact on the playing field but also agree to a playing schedule and a common set of rules governing their interaction.").

82. *See id.* at 589.

83. *See, e.g.*, L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1387 (9th Cir. 1984) ("[T]he NFL contends that it is a single entity incapable of conspiring to restrain trade under section 1.").

84. *See* McCann, *supra* note 47, at 743 (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984)).

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

subsidiary.[86] Consequently, judges have rejected the single-entity defense in the context of section 1 claims against the NFL, recognizing that while the league's member teams must cooperate in producing a "product"—i.e., the annual NFL season culminating in a playoff race and the Super Bowl—the clubs are in other respects separate business entities whose other products have independent value.[87]

In *American Needle*, the Court held that the NFL had violated section 1 by pooling individual teams' intellectual property rights in logos and merchandise.[88] The plaintiff, American Needle, Inc., was a clothing manufacturer that made apparel featuring team logos under a nonexclusive license from National Football League Properties (NFLP), a joint venture that had managed NFL intellectual properties since 1963.[89] After NFLP changed its licensing policy and issued an exclusive license to Reebok International Ltd., American Needle sued the NFL, its teams, NFLP, and Reebok, claiming among other things that the league had violated section 1 by pooling individual teams' intellectual property rights.[90] The Court concluded that the NFL's licensing activities in intellectual property and merchandise constituted concerted action that is not categorically beyond the scope of section 1.[91] In reaching that conclusion, the Court reasoned that, for purposes of licensing intellectual property, the teams remain "separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being."[92]

86. *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.").

87. *See, e.g.*, Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 196 (2010) ("Each of the teams is a substantial, independently owned, and independently managed business. Their general corporate actions are guided or determined by separate corporate consciousnesses, and their objectives are not common." (internal quotations omitted)). The *American Needle* Court reversed the Seventh Circuit and remanded the case. *Id.* at 204.

88. *Id.* at 197 ("Decisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that deprive the marketplace of independent centers of decisionmaking." (internal quotations omitted)).

89. *Id.* at 187.

90. *Id.*

91. *Id.* at 201.

92. *Id.*

But the Court's analysis in *American Needle* also suggested that some concerted activities by the teams could receive preferential treatment under the rule of reason test.[93] Justice Stevens's opinion for the Court specifically acknowledged the Court's longstanding recognition that "'the interest in maintaining a competitive balance' among 'athletic teams is legitimate and important'"[94] and that such an interest "may well justify a variety of collective decisions by the teams."[95]

Although Justice Stevens's opinion was enigmatic as to the types of collective decisions that would survive a rule of reason analysis, one scholar has interpreted *American Needle* as setting forth an adaptable two-part test for analyzing the activities of professional sports leagues more generally.[96] Assuming the plaintiff has plausibly alleged the existence of concerted action, the first part of the test asks whether the challenged activity constitutes a "core" or "central" feature of the joint venture.[97] The second part of the test is essentially a rule of reason analysis.[98] If the restraint is found not to be core or central to the joint venture under the first part of the test, then the court should apply traditional rule of reason standards.[99] But if the restraint is found to be core or central to the joint venture, then the court should treat the restraint as almost per se reasonable.[100]

The implications of this test for the NFL and its current media deals are significant. Given the outsized importance of

93. *See id.* at 202–03 ("Football teams that need to cooperate are not trapped by antitrust law. The special characteristics of this industry may provide a justification for many kinds of agreements. The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions . . . . When restraints on competition are essential if the product is to be available at all, *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason." (internal quotations omitted) (citations omitted)).

94. *Id.* at 204 (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 117 (1984)).

95. *Id.*

96. *See* Babette Boliek, *Antitrust, Regulation, and the "New" Rules of Sports Telecasts*, 65 HASTINGS L.J. 501, 521 (2014) (interpreting *American Needle* as setting forth a two-part test).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

telecasting revenues,[101] it would be relatively easy for the league to assert that its practice of pooling member teams' telecasting rights for purposes of streaming agreements is ancillary to the exhibition of competitive football games, which is core or central to the joint venture of the league.

C. ANTITRUST CHALLENGES TO THE NFL'S TELECASTING AGREEMENTS

The NFL is, far and away, the most lucrative sports league in the United States, and its games are some of the most valuable entertainment properties in the world.[102] In 2024, the average NFL team was worth $6.5 billion, with owners' returns on their initial investments dwarfing the gains of traditional stocks over the same period.[103] The growth in team valuations is largely the result of massively lucrative media deals under which teams share revenues equally.[104] The NFL's current telecasting agreements, which were signed in 2021 and extend through the 2033 season, are collectively worth about $110

101. *See infra* Part I.C.

102. *See, e.g.*, Michael Johnson, *As NFL Revenue Rises, Current Media Rights Deals Ensure Future Success*, S&P GLOBAL (Dec. 2, 2024), https://www.spglobal.com/market-intelligence/en/news-insights/research/as-nfl-revenue-rises-current-media-rights-deals-ensure-future-success [https://perma.cc/6P6Z-ZJ4Q] (describing the NFL as "the most lucrative sports league in the U.S."); Jake Kobrick, *NFL Television Broadcasting and the Federal Courts*, FED. JUD. CTR., https://www.fjc.gov/history/spotlight-judicial-history/nfl-television-broadcasting [https://perma.cc/3528-8EEM] ("In the mid to late twentieth century, the NFL grew to become the most popular and profitable professional sports league in the United States, and its presence on television was the single most important factor in its rise. Today, NFL games are among the most valuable entertainment properties in the world, as evidenced by the league's most recent set of broadcasting contracts, worth more than $100 billion over eleven years."); *The NFL: The Complete History & Strategy of the NFL*, ACQUIRED (Jan. 25, 2023), https://www.acquired.fm/episodes/the-nfl [https://perma.cc/GqqY-VTTY] (describing the NFL as "the most valuable media property in America").

103. Michael Ozanian, *Rising NFL Valuations Mean Massive Returns for Owners. Here's How Good the Investment Is*, CNBC SPORT (last updated Sept. 5, 2024), https://www.cnbc.com/2024/09/05/rising-nfl-valuations-massive-returns-for-owners.html [https://perma.cc/Q7RS-6LSL] ("Back in 1999, the last time the NFL expanded, the late Robert McNair agreed to buy the rights to the [Houston Texans] at a purchase price of $600 million, which takes into account payment structure and the value of a deal over time. The Texans are now worth $6.35 billion, more than 10 times McNair's fee and three times more than the gains of the S&P 500 since that year.").

104. *Id.* ("The escalation in football team values is largely the result of the league's massive and growing media deals.").

billion.[105] The importance of these agreements to television broadcasters cannot be overstated.[106] In 2023, NFL games accounted for ninety-three of the 100 most watched telecasts in the United States, with seventeen games surpassing twenty-five million viewers.[107]

Such dizzying figures would have been unfathomable in 1920 when the league was founded in the showroom of a car dealership in Canton, Ohio and included franchises like the Dayton Triangles and Muncie Flyers.[108] As late as 1952, NFL franchises routinely encountered bankruptcy, with former league Commissioner Pete Rozelle once testifying that forty-one franchises had failed within the league's first forty-one years of existence.[109] Rozelle became commissioner of the NFL in 1960, and many historians have emphasized his foresight in recognizing the critical role that telecasting agreements would play in ensuring the league's long-term stability and growth.[110] But since the 1950s,

105. Ken Belson & Kevin Draper, *NFL Signs Media Deals Worth Over $100 Billion*, N.Y. TIMES (Mar. 19, 2021), https://www.nytimes.com/2021/03/18/sports/football/nfl-tv-contracts.html [https://perma.cc/54AXZ3CE]. It should be noted, however, that the NFL has an out clause after the 2029 season with all of its partners except Disney. This means that, after the 2029–30 Super Bowl, the NFL could effectively reengineer the entire media landscape. *See* Alex Sherman, *Why Television Executives are Freaking Out over 2029*, CNBC SPORT (Sept. 26, 2024), https://www.cnbc.com/2024/09/26/cnbc-sport-television-executives-freak-out-over-2029.html [https://perma.cc/6B6N-8XF2] (discussing the NFL's current media rights deals and their ability to change the landscape in the future).

106. *See The NFL: The Complete History & Strategy of the NFL*, *supra* note 102 ("It is the NFL's world, and Americans are just living in it, especially the TV networks, which have been reduced from pillars of our nation in their heyday to largely distribution channels for the NFL today.").

107. Brad Adgate, *NFL Games Made Up 93% of the Most Watched TV Programs in 2023*, FORBES (last updated Jan. 5, 2024), https://www.forbes.com/sites/bradadgate/2024/01/05/nfl-games-made-up-93-of-the-most-watched-tv-programs-in-2023 [https://perma.cc/9HQR-VV8W].

108. *See* U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1343 (2d Cir. 1988); *see also* MICHAEL ORIARD, BRAND NFL 1 (2007) ("The professional version [of football] developed haphazardly in midwestern mill towns for two decades before it was organized in 1920 into what became the National Football League, with franchises in places like Akron and Dayton, Ohio; Hammond, Indiana; and Rock Island, Illinois, as well as Chicago and later New York City.").

109. *U.S. Football League*, 842 F.2d at 1343.

110. *See, e.g.*, STEPHEN R. LOWE, THE KID ON THE SANDLOT 92–94 (1995) (noting Rozelle's role in lobbying for the SBA and that the Act "was probably the most important facilitator in the rise of professional football in the late 1960s and early 1970s"); Michael Oriard, *American Football*, BRITTANICA:

these agreements have faced repeated challenges under the Sherman Act.[111]

The first such challenge was in *United States v. National Football League* (1953). In this case, the U.S. Justice Department sued the NFL to enjoin enforcement of certain provisions in the league's bylaws that restrained the ability of member teams to telecast their games into the home territories of other member teams.[112] These provisions prohibited teams from telecasting their games within seventy-five miles of the city of another team on the day the other team was playing either at home or away.[113] The Eastern District of Pennsylvania held that the

SPORTS & RECREATION (Aug. 21, 2025), https://www.britannica.com/sports/American-football/The-era-of-television [https://perma.cc/WH83E436] ("To an even greater degree than for college football, television became the professional sport's lifeblood, with increasingly lucrative television contracts guaranteeing large profits for every club no matter how well it fared on the field . . . . Rozelle negotiated a series of contracts with the TV networks that grew from $4.65 million for the 1962 season to nearly $500 million per year when he retired in 1989, guaranteeing more than $17 million per club before a single fan bought a ticket."); MICHAEL MACCAMBRIDGE, AMERICA'S GAME 174 (2004) ("That the entire enterprise [of professional football] came to dominate America's living rooms on fall weekends, changing the rhythm, tone, and nature of Sunday afternoons across the country, was still a work in progress. It would be years before professional football could plausibly boast of eclipsing Major League Baseball in overall popularity. But with the historic television deal, the last of the necessary elements was in place for the coming gridiron coup, as well as the continued survival of the Packers and other small-market teams."); *see also* DAVID A. KLATELL & NORMAN MARCUS, SPORTS FOR SALE 135 (1988) ("It is widely believed that 1958 marked a turning point for the fortunes of the league. The dramatic, sudden-death championship between the [Baltimore] Colts and the [New York] Giants was a television triumph; some 30 million viewers saw Alan 'The Horse' Ameche's winning plunge. More importantly, the game went a long way towards convincing the skeptical New York advertising community that the league should be taken seriously as a business venture.").

111. *See, e.g.*, United States v. Nat'l Football League, 116 F. Supp. 319, 327 (E.D. Pa. 1953) (holding that the NFL's restrictions on telecasting outside games in home markets when home teams were playing away games and telecasting those games into their home markets were illegal under the Sherman Act); United States v. Nat'l Football League, 196 F. Supp. 445, 447 (E.D. Pa. 1961) (holding that a contract pooling the broadcasting rights of NFL teams and granting CBS exclusive rights to televise all league games was illegal under section 1 of the Sherman Act).

112. United States v. Nat'l Football League, 116 F. Supp. at 321. This was the first and only antitrust suit by the Justice Department against a professional sports league. PAUL C. WEILER ET AL., SPORTS AND THE LAW 469–70 (6th ed. 2019).

113. United States v. Nat'l Football League, 116 F. Supp. at 321. For example, if the New York Giants were playing the Philadelphia Eagles at Yankee Stadium in the Bronx, and the Pittsburgh Steelers were playing the Baltimore

league's restriction on telecasting outside games into the home territories of other teams when the other teams were playing at home did not violate section 1 of the Sherman Act.[114] Although the restriction clearly constituted a contract in restraint of trade, the court acknowledged that the unique features of a professional sports league could necessitate the use of such restrictions to ensure the economic viability of the league as a whole.[115] Because the greatest part of the member teams' income was then derived from the sale of tickets to the games (i.e., gate receipts), the court reasoned, the "[r]easonable protection of home game attendance [was] essential to the very existence of the individual clubs."[116]

But the court also held that the restriction on telecasting outside games into the home territories of other teams when the other teams were playing away from home *did* qualify as an illegal restraint of trade under section 1.[117] The telecasting of these games into the home territories of other teams that were playing away did not have a significant adverse effect on gate receipts.[118] In fact, "the evidence indicate[d] that broadcasts of outside games when there is no home game [had] a stimulating effect on attendance at home games because of the interest thereby created in professional football generally."[119] Consequently, the

Colts at Pitt Stadium in Pittsburgh, the Steelers would not have been permitted to broadcast their game in either New York City or Philadelphia.

114. *Id.* at 330.

115. *Id.* at 323 ("Professional teams in a league, however, must not compete too well with each other in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably.").

116. *Id.* at 325.

117. *Id.* at 330; *see also* MACCAMBRIDGE, *supra* note 110, at xvi ("In 1961, the National Football League's owners voted to sign a national television contract with CBS, and share the revenues from that deal equally among all of its teams, regardless of market size or national appeal. This was important at the time, when the individual team television revenues were wildly disparate and made up a sizable portion of a team's income. It would become crucial in the decades ahead, when television exploded into the largest source of revenue in professional football.").

118. United States v. Nat'l Football League, 116 F. Supp. at 327.

119. *Id.*

court concluded that this restraint was unreasonable and therefore impermissible.[120]

As the NFL's member clubs contemplated the growing threat of a rival in the newly established American Football League (AFL), the clubs voted in 1961 to sell their telecasting rights as a single package to CBS and to share the profits evenly.[121] The NFL then brought this package agreement before the Eastern District of Pennsylvania for a determination as to whether it conflicted with the court's 1953 judgment.[122] Finding the NFL's member clubs had eliminated competition among themselves in the sale of television rights, the court held that the NFL's contract with CBS violated the 1953 judgment and enjoined the league from entering into the agreement.[123] Specifically, the court noted that by pooling their telecasting rights under the CBS agreement, the league's member teams had "eliminated competition among themselves in the sale of television rights to their games."[124]

Instead of filing an appeal, the NFL pushed for congressional relief through a vigorous lobbying campaign that extended all the way up to President Kennedy.[125] The fact that the AFL had been operating under a similar agreement unchallenged may have bolstered the NFL's case before lawmakers.[126] In any event, Congress responded quickly,[127] enacting the SBA

120. *See id.* ("There is no factual justification for Article X's territorial restrictions on the sale of radio broadcasting rights. Therefore, they are illegal under the Sherman Act.").

121. U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1346 (2d Cir. 1988).

122. United States v. Nat'l Football League, 196 F. Supp. 445, 446 (E.D. Pa. 1961).

123. *Id.* at 447.

124. *Id.*

125. *See* MACCAMBRIDGE, *supra* note 110, at 173 ("The deal was aided by [Baltimore Colts owner] Carroll Rosenbloom's close relationship with the Kennedy family, as well as Rozelle's friendship with Kennedy press secretary and fellow University of San Francisco alum Pierre Salinger.").

126. *See* KLATELL & MARCUS, *supra* note 110, at 139 ("The AFL seemed to enjoy the court's sympathy, perhaps because of its underdog status, or because its success would reduce the NFL's hegemony over pro football, and thus was a mixed blessing, in anti-trust terms.").

127. *See* MACCAMBRIDGE, *supra* note 110, at 173 ("After a round of intense politicking—and a promise not to play or televise games on Saturday during the college football season to placate the NCAA—the league successfully pushed through a congressional action that provided an antitrust exemption for joint TV deals.").

with the express purpose of superseding the Eastern District of Pennsylvania's order.[128] Specifically, the Act created an exemption from the antitrust laws that allows the member teams of professional sports leagues to pool their rights for purposes of "sponsored telecasting."[129] The Act did not define this term—an omission that has become increasingly conspicuous with the proliferation of newer technologies like cable, satellite, and streaming.

* * *

Section 1 of the Sherman Act outlaws contracts, combinations, or conspiracies in restraint of trade and has long been one of the primary tools with which courts have regulated the activities of professional sports leagues. Since the 1950s, the NFL's telecasting agreements have faced numerous challenges under section 1, beginning with a lawsuit brought by the U.S. Justice Department. These early challenges prompted Congress to enact the SBA. Although the Act created an explicit antitrust exemption for pooled-rights agreements in the "sponsored telecasting" of professional sports, the scope of this exemption remains unsettled.

II. ANTITRUST CHALLENGES TO THE NFL'S SUNDAY TICKET PACKAGE

The failure of the SBA's drafters to define the term "sponsored telecasting" has left the statute open to competing interpretations, with some courts finding that its antitrust exemption applies only to free, over-the-air television.[130] This Part analyzes two challenges to the NFL Sunday Ticket, a subscription-based

128. U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1347 (2d Cir. 1988).

129. 15 U.S.C. § 1291 ("The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged or conducted by such clubs.").

130. *See, e.g.*, Shaw v. Dall. Cowboys Football Club, Ltd., 172 F.3d 299, 303 (3d Cir. 1999) ("[W]e find that the subscription satellite broadcast of NFL games is not a part of the NFL's rights to the sponsored telecasting of those games . . . .").

package that gives fans access to live out-of-market games that are not available on their local network affiliates.

In *Shaw v. Dallas Cowboys Football Club, Ltd.* and *In re NFL's Sunday Ticket Antitrust Litigation* (*Sunday Ticket*), DirecTV subscribers alleged that the Sunday Ticket agreement between the NFL and the satellite provider did not fall within the SBA's antitrust exemption and therefore violated section 1 of the Sherman Act.[131] In *Shaw*, the Third Circuit affirmed the district court's holding that the phrase "sponsored telecasting" exempts only over-the-air broadcasts.[132] In *Sunday Ticket*, the Ninth Circuit held that the plaintiffs had adequately alleged a claim under the Sherman Act that survived a motion to dismiss.[133] Although no court has ruled on the legality of the league's exclusive streaming agreements, some commentators have used these cases to conclude that the NFL's exclusive agreements with digital platforms like Peacock and Prime Video would run afoul of the antitrust laws.[134] Section A of this Part discusses *Shaw*, while Section B discusses *Sunday Ticket*.

A. *SHAW V. DALLAS COWBOYS FOOTBALL CLUB, LTD.*

In *Shaw*, a putative class of Sunday Ticket subscribers sued the NFL, alleging that an agreement among the league's member teams to sell broadcast rights jointly to satellite distributor

131. *Id.* at 300 ("Shaw filed this class action suit, alleging that the NFL's joint agreement with [DIRECTV] violates section 1 of the Sherman Act."); *In re* National Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1143–44 ("The plaintiff's, a putative class of [DirecTV] Sunday Ticket subscribers, claim that this arrangement harms NFL fans because it eliminates competition in the market for live telecasts of NFL games.").

132. *Shaw*, 172 F.3d at 303.

133. *In re* National Football League's Sunday Ticket Antitrust Litig., 933 F.3d at 1159.

134. *See, e.g.*, Drew Nathanson, *The NFL-Amazon Agreement vs. Antitrust Legislation: The Future of the National Football League in OTT Services*, 39 ENT. & SPORTS L. 80 (2023) (arguing that the NFL's Thursday Night Football agreement with Prime Video is not exempt from antitrust scrutiny under the SBA); Scott M. Finney, *Too Many, Too Late: The NFL's Inverse Accessibility Issue and the New RPO*, 25 N.C. J.L. & TECH. 161, 183 (2023) (interpreting the SBA to mean that the NFL cannot pool and sell the collective rights of its teams for distribution on any platform other than free, over-the-air television). *But cf.* Stephen James, Note, *The NFL's Anti-Trust Problem in the Streaming Era*, 46 J. CORP. L. 813, 822, 825 (noting that "sponsored telecasting" as interpreted by courts likely applies only to over-the-air antennae and not cable and satellite packages but that an expanded view of "sponsored telecasting" may be "practical" in light of technological changes).

DirecTV violated section 1 of the Sherman Act.[135] Specifically, the subscribers contended that the pooled-rights agreement restricted the options available to fans and resulted in "artificially high and noncompetitive prices."[136] The NFL filed a motion to dismiss, arguing that the pooled sale to a satellite distributor was exempted from antitrust law under the SBA.[137] The district court denied the NFL's motion and certified to the Third Circuit the question of whether the NFL's agreement was exempt from antitrust scrutiny under the SBA.[138] After examining the legislative history of the SBA, the Third Circuit held that the agreement did not involve the sale of "sponsored telecasting" and affirmed the district court's holding that the phrase "sponsored telecasting" exempts only a commercially sponsored free broadcast.[139]

In reaching that conclusion, the Third Circuit adopted the district court's interpretation of the SBA, finding that the phrase "sponsored telecasting" refers to broadcasts that are "financed by business enterprises . . . in return for advertising time and are therefore provided free to the general public."[140] While the NFL conceded that a package of satellite broadcasts sold to individual subscribers did not constitute a "sponsored telecasting" within the meaning of the Act, it asserted that its pooled sale to DirecTV fell within the Act's exemption nonetheless because the sale in this instance constituted a "sale of residual or retained rights in the sponsored telecasts" already being broadcast by free, over-the-air television networks.[141] The court rejected this argument, explaining in a footnote that the use of the same signal for telecasting over two separate media (i.e., the over-the-air network and the satellite distributor) did not render the rights in one telecast derivative of the rights in the other.[142] Further, the court reasoned that the purpose of the SBA was to "preserve

135. *Shaw*, 172 F.3d at 300.

136. *Id.*

137. *Id.* at 300–01.

138. *Id.* at 301.

139. *Id.* at 302 ("Our review of the Act's legislative history also leads us to conclude that it clearly reflects *Congress's* intent . . . that the Act address only the sale of games to a sponsored television network.").

140. *Id.* at 301 (citing Shaw v. Dall. Cowboys Football Club, Ltd., No. CIV.A 97-5184, 1998 WL 419765, at *3 (E.D. Pa. June 23, 1998)).

141. *Shaw*, 172 F.3d at 301.

142. *Id.* at 301 n.9.

the availability of NFL games on free broadcast television," and that the exemption "expressly did *not* apply to subscription television."[143] After the Third Circuit remanded the case, the NFL settled with the plaintiffs[144] and spared Sunday Ticket from the consequences of an adverse ruling.

B. *IN RE NATIONAL FOOTBALL LEAGUE'S SUNDAY TICKET LITIGATION*

The NFL-DirecTV agreement at issue in *Shaw* reentered the spotlight twenty years later with *Sunday Ticket*.[145] In that case, a putative class of Sunday Ticket subscribers sued both the league and the satellite provider, alleging among other things that interlocking agreements between the NFL, its member clubs, and DirecTV harmed NFL fans by eliminating competition in the market for live telecasts of NFL games and therefore violated section 1 of the Sherman Act.[146] Without these interlocking agreements, the plaintiffs argued, individual teams would create multiple telecasts for every game and compete against each another by distributing these telecasts through various cable, satellite, and streaming channels.[147] The district court dismissed the plaintiffs' complaint for failure to state a claim under section 1.[148] But the Ninth Circuit reversed, holding that the plaintiffs had adequately alleged antitrust violations.[149]

Notably, the Ninth Circuit did not decide whether the SBA applies to satellite broadcasting because the NFL did not raise the argument on appeal.[150] Instead, the court chose to base its

143. *Id.* at 301–02.

144. Schwartz v. Dall. Cowboys Football Club, Ltd., No. CIV.A. 97-5184, 2001 WL 1689714, at *1 (E.D. Pa. Nov. 21, 2001) (approving a revised settlement agreement between the NFL and DirecTV subscribers).

145. *In re* National Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1143–44 (9th Cir. 2019).

146. *Id.* at 1143.

147. *Id.* at 1143–44.

148. *Id.* at 1149.

149. *Id.* at 1159 ("The complaint adequately alleges that the interlocking NFL-Team and NFL-DirecTV agreements were designed to maintain market power, which is sufficient to allege defendants' specific intent. Accordingly, we conclude that the complaint adequately alleges a [s]ection 2 violation.").

150. *Id.* at 1149 ("It is significant here that the defendants do not argue on appeal that the SBA applies to the Teams-NFL or NFL-DirecTV Agreements . . . . Because the defendants do not argue that the SBA applies to satellite broadcasting, we assume (without deciding) that it is not applicable to the Teams-NFL or NFL-DirecTV Agreements."). Note, however, that the court cited

analysis on the Supreme Court's 1984 decision in *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma* (*Board of Regents*).[151] In *Board of Regents*, the University of Oklahoma and the University of Georgia sued the National Collegiate Athletic Association (NCAA), alleging that an agreement between the NCAA and its member institutions had unreasonably restrained trade in the telecasting of college football games by restricting the telecasting rights of member institutions.[152] Ruling for the plaintiffs, the Court held that the NCAA agreement violated section 1 of the Sherman Act because it eliminated competition in the market for college football telecasts.[153]

In *Sunday Ticket*, the Ninth Circuit highlighted four aspects of the NCAA agreement from *Board of Regents*.[154] First, the NCAA agreement "limit[ed] the total amount of televised intercollegiate football and the number of games that any one team [could] televise."[155] Second, the agreement provided that "[n]o member [college was] permitted to make any sale of television rights except in accordance with the basic plan."[156] Third, the agreement "was a horizontal agreement among competitors because 'the policies of the NCAA with respect to television rights are ultimately controlled by the vote of member institutions.'"[157] Finally, the agreement constituted a naked restriction on output, which the Court defined as "the total amount of televised intercollegiate football."[158]

Shaw for the proposition that "the SBA does not exempt league contracts with cable or satellite television services, for which subscribers are charged a fee, from antitrust liability." *Id.* at 1147 (citing Shaw v. Dall. Cowboys Football Club, Ltd., 172 F.3d 299, 303 (3d Cir. 1999)).

151. *In re* National Football League's Sunday Ticket Antitrust Litig., 933 F.3d at 1146 (describing *Board of Regents* as the Court's "authoritative opinion on the antitrust law of league sports").

152. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 88 (1984).

153. *Id.* at 120. Because the SBA applies only to professional sports leagues, it does not apply to NCAA college football, whose "sponsored telecasts" continue to be subject to the Sherman Act. *See* 15 U.S.C. § 1291.

154. *In re* National Football League's Sunday Ticket Antitrust Litig., 933 F.3d at 1151–52 (discussing how the NFL's interlocking agreements impose similar restrictions to those in the NCAA case).

155. *Id.* at 1151 (quoting *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 94).

156. *Id.* (quoting *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 94).

157. *Id.* (quoting *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 99).

158. *Id.* at 1152 (quoting *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 94).

Taking each of these in turn, the Ninth Circuit found that the interlocking agreements between the NFL, its member teams, and DirecTV involved "the same sort of restrictions that *Board of Regents* concluded constituted an injury to competition."[159] First, the court found the *Sunday Ticket* plaintiffs plausibly asserted that the interlocking agreements limited the amount of televised professional football that one team may televise because they restricted the number of telecasts to a single telecast for each game.[160] Second, the court found that the interlocking agreements prohibited NFL teams from selling their telecasting rights independently.[161] Third, the court found that the complaint adequately alleged that the agreement between the NFL and its member teams was a horizontal restraint that placed an artificial limit on the quantity of televised football games available.[162] Finally, the court found the complaint plausibly alleged that the interlocking agreements restrained the production and sale of telecasts in a manner that constituted a "naked restriction" on the number of telecasts available.[163] In

159. *Id.*

160. *See id.* at 1151 ("The complaint here alleges that the interlocking agreements in this case impose analogous limitations: plaintiffs assert that the Teams-NFL and NFL-DirecTV Agreements limit the 'amount of televised [professional] football' that one team may televise because they restrict the number of telecasts made to a single telecast for each game." (alteration in original)).

161. *See id.* ("In our case, plaintiffs allege that the NFL teams are similarly restricted. Under the terms of the Teams-NFL and NFL-DirecTV Agreements, no individual NFL team is permitted to sell its telecasting rights independently. Independent telecasts are forbidden under the terms of the Agreements because they would cause the teams to compete with each other and with DirecTV. Just as the University of Oklahoma was forbidden from increasing the number of telecasts made of its games, so too are the Seattle Seahawks forbidden from selling their telecast rights independently from the NFL.").

162. *See id.* at 1151–52 ("The same type of agreement is alleged here. According to the complaint, the NFL members vote to approve the contract between DirecTV and the NFL. Therefore, the complaint adequately alleges that the Teams-NFL Agreement is a 'horizontal restraint—an agreement among competitors' that 'places an artificial limit on the quantity of televised football that is available for sale to broadcasters and consumers.'" (quoting *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 99)).

163. *See id.* at 1152 ("In our case, the complaint likewise alleges that the interlocking agreements restrain the production and sale of telecasts in a manner that constitutes 'a naked restriction' on the number of telecasts available for broadcasters and consumers.").

light of these findings, the court held that the plaintiffs had plausibly alleged an injury to competition under section 1.[164]

Following the Ninth Circuit's decision against the NFL, the Supreme Court denied the league's petition for certiorari, with Justice Kavanaugh explaining that the Court would not review the case because it was at the motion-to-dismiss stage.[165] But Justice Kavanaugh wrote separately to explain that the Court's denial should not necessarily be viewed as agreement with the Ninth Circuit's legal analysis.[166] In fact, he suggested that the subscribers' contention that each team must negotiate its own cable, satellite, and streaming contracts "appears to be in substantial tension with antitrust principles and precedents."[167]

How the rest of the Court would decide the *Sunday Ticket* issue remains unclear. After the Ninth Circuit remanded the case to the district court, a jury found that the defendants' conduct violated sections 1 and 2 of the Sherman Act and awarded the plaintiffs over $4.6 billion in damages.[168] But the district court overturned the verdict, explaining that the testimony of two expert witnesses relied on flawed methodologies and should have been excluded.[169] In the absence of expert testimony based

164. *Id.* ("Because the complaint alleges that the interlocking agreements in this case involve the same sorts of restrictions that [the *Board of Regents* Court] concluded constituted an injury to competition, we likewise conclude that the complaint plausibly alleges an injury to competition.").

165. Nat'l Football League v. Ninth Inning, Inc., 141 S. Ct. 56, 56–57 (2020) ("Ordinarily, a decision of such legal and economic significance might warrant this Court's review. But the case comes to us at the motion-to-dismiss stage, and the interlocutory posture is a factor counseling against this Court's review at this time.").

166. *Id.* at 57.

167. *Id.* ("The NFL and its member teams operate as a joint venture. And antitrust law likely does not require that the NFL and its member teams compete against each other with respect to television rights." (first citing Smith v. Pro Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978); then citing Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 202 (2010))).

168. *In re* NFL "Sunday Ticket" Antitrust Litig., No. ML 15-02668 PSG, 2024 WL 3628118, at *1 (C.D. Cal. Aug. 1, 2024).

169. *See id.* at *11 ("[W]ithout the testimonies of Dr. Rascher and Dr. Zona, no reasonable jury could have found class-wide injury or damages."). Dr. Rascher testified that in the absence of the competitive restrictions at issue, NFL teams would sell their out-of-market games independently. *Id.* at *3. But the court found that this "but-for" world was "the product of sound economic reasoning." *Id.* at *4. Meanwhile, Dr. Zona's testimony raised the possibility of an alternative direct-to-consumer distributor of Sunday Ticket that would not require an underlying subscription and would have been able to sell Sunday Ticket as a standalone service. *Id.* at *7. Here, the court found that Dr. Zona

on a sound methodology, the plaintiffs had "failed to provide evidence from which a reasonable jury could make a finding of injury and an award of actual damages that would not be erroneous as a matter of law, be totally unfounded and/or be purely speculative."[170] The NFL released a statement shortly after the decision, noting that it was "grateful" for the court's ruling and reiterated its claim that the league's media distribution model "provides our fans with an array of options to follow the game they love, including local broadcasts of every single game on free over-the-air television."[171]

* * *

In *Shaw* and *Sunday Ticket*, DirecTV subscribers alleged that a telecasting agreement between the NFL and the satellite provider violated section 1 of the Sherman Act.[172]

In *Shaw*, the Third Circuit held that the agreement did not involve the sale of "sponsored telecasting" under the SBA and affirmed the district court's finding that the SBA applies only to free, over-the-air television.[173] Although the Ninth Circuit in *Sunday Ticket* did not decide whether the SBA applied to satellite television, the court still found that the plaintiffs had adequately alleged antitrust violations under section 1.[174]

Although the NFL's Sunday Ticket package survives, observers have used the *Shaw* and *Sunday Ticket* holdings to argue that the NFL's exclusive streaming agreements run afoul of federal antitrust laws.[175] Still, others have posited that a narrow

"provided no evidence that any distributor other than DirecTV was working to provide live streaming of sports during the entire class period." *Id.* According to the court, the plaintiffs "needed to offer evidence that *another* distributor—outside DirecTV—existed that could have provided live streaming of Sunday Ticket since 2011 for Dr. Zona's models to be feasible." *Id.*

170. *Id.* at *8.

171. *Federal Judge Overturns $4.7B Verdict in 'Sunday Ticket' Lawsuit, Rules for NFL*, NAT'L FOOTBALL LEAGUE (Aug. 1, 2024), https://www.nfl.com/news/federal-judge-overturns-4-7b-verdict-in-sunday-ticket-lawsuit-rules-for-nfl [https://perma.cc/Y685-PQ2K].

172. Shaw v. Dall. Cowboys Football Club, Ltd., 172 F.3d 299 (3d Cir. 1999); *In re* National Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136 (9th Cir. 2019).

173. *Shaw*, 172 F.3d at 303.

174. *In re* National Football League's Sunday Ticket Antitrust Litig., 933 F.3d at 1159.

175. *See, e.g.*, Nathanson, *supra* note 134, at 84–85 (arguing that the NFL's Thursday Night Football agreement with Prime Video is not exempt from antitrust scrutiny under the SBA); Finney, *supra* note 134 (interpreting the SBA to

interpretation of the SBA restricting "sponsored telecasting" to free, over-the-air broadcasts is problematic in light of technological developments like cable, satellite, and streaming.[176] One scholar goes a step further by arguing that "much might be gained by abolishing [the SBA] in its entirety."[177]

This Note contends that the proper framework for analyzing the NFL's streaming agreements is neither *Shaw* nor *Sunday Ticket* but rather the Supreme Court's 2010 decision in *American Needle*.[178] Further, this Note argues that Congress should amend the SBA instead of abolishing it.[179]

III. ANALYZING THE NFL'S EXCLUSIVE STREAMING AGREEMENTS UNDER FEDERAL ANTITRUST LAW

This Part argues that the *Shaw* and *Sunday Ticket* holdings do not provide an adequate framework for thinking through the legality of the NFL's exclusive agreements with streaming services like Peacock and Prime Video. Even if the NFL's exclusive streaming agreements are not protected by the SBA, the appropriate framework for analyzing these agreements is the Court's 2010 decision in *American Needle*, which set out an adaptable framework for analyzing the activities of professional sports leagues under section 1 of the Sherman Act.[180] Under this framework, the league's exclusive streaming agreements would likely survive a challenge under section 1.

Section A of this Part argues that the SBA's antitrust exemption for "sponsored telecasting" encompasses newer

mean that the NFL cannot pool and sell the collective rights of its teams for distribution on any platform other than free, over-the-air television).

176. *See* Lacie L. Kasier, Note, *Revisiting the Sports Broadcasting Act of 1961: A Call for Equitable Antitrust Immunity from Section One of the Sherman Act for All Professional Sports Leagues*, 54 DEPAUL L. REV. 1237, 1254 (2005) ("A professional sport league should have the right to horizontally pool its individual teams' rights into a television broadcasting package. Furthermore, the SBA should be expanded to cover all forms of television broadcasting mediums.").

177. *See* Boliek, *supra* note 96, at 508.

178. *See infra* Part III.

179. *See infra* Part IV.

180. *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 189–202 (2010) (analyzing whether the NFL is capable of engaging in a "contract, combination . . . , or conspiracy" under the Sherman Act); *see also* Boliek, *supra* note 96, at 521 (describing *American Needle*'s two-part test).

technologies like cable, satellite, and streaming.[181] Section B contends that the appropriate framework for analyzing the NFL's exclusive streaming agreements is the Court's opinion in *American Needle*. Finally, Section C suggests the *American Needle* Court's notion of an expedited rule of reason analysis recalls the ancillary restraint doctrine, a common-law tool that validates certain restraints in the context of a joint venture and provides an independent basis for upholding those agreements. In sum, the NFL's exclusive streaming deals would likely survive a challenge under section 1.

A. INTERPRETING "SPONSORED TELECASTING"

Notwithstanding judicial interpretations limiting the SBA's antitrust exemption to free, over-the-air television,[182] the ordinary meaning of "sponsored telecasting" encompasses the NFL's exclusive telecasting agreements with streaming services like Peacock and Prime Video. The Supreme Court has long held that statutory construction must begin with the language used by Congress and the assumption that the ordinary meaning of this language at the time of enactment accurately expresses the legislative purpose animating the statute.[183] Put differently,

181. This Note adopts a textualist approach to statutory interpretation, which has become the dominant approach on the Court. *See, e.g.*, Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:29 (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg ("We're all textualists now.").

182. *See, e.g.*, Shaw v. Dall. Cowboys Football Club, Ltd., 172 F.3d 299, 302 (3d Cir. 1999) ("[T]he NFL obtained in [the SBA] an expressly limited exception to 'the normal prohibition on monopolistic behavior'; one which permitted it to sell pooled rights to sponsored telecasters and which expressly did *not* apply to subscription television."); Chi. Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 808 F. Supp. 646, 650 (N.D. Ill. 1992) ("[P]rior and subsequent legislative history demonstrates that 'sponsored telecasting' as used in the SBA is limited to free commercial television as opposed to cable.").

183. *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020) ("After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives."); Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."); Perrin v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their

"words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations."[184] Thus, a statute referring to an "aircraft," if still in effect one hundred years later, would embrace whatever inventions that "aircraft" fairly embraces.[185]

This approach to statutory interpretation insists on four basic limitations:

> First, the purpose must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter's desires.
>
> Second, the purpose must be defined precisely, and not in a fashion that smuggles in the answer to the question before the decision-maker. . . .
>
> Third, the purpose is to be described as concretely as possible, not abstractly. . . .
>
> Fourth, except in the rare case of an obvious scrivener's error, purpose . . . cannot be used to contradict the text or supplement it.[186]

Of these limitations, the first holds particular relevance to debates about the scope of the SBA's antitrust exemption.

When Congress enacted the SBA, for a radio or television program to be "sponsored" meant that the program was supported by "a business firm or a person who pay[ed] a broadcaster for [the] program . . . with the understanding that a limited portion of the time allotted [was] devoted to advertising a commercial product."[187] "Telecasting," meanwhile, referred to "a

ordinary, common sense meaning." (citing Burns v. Alcala, 420 U.S. 575, 580–581 (1975))).

184. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012). It is worth noting that when the SBA was enacted, independent cable stations were very much "the second class citizens" of the television industry. *See* GARY R. EDGERTON, THE COLUMBIA HISTORY OF AMERICAN TELEVISION 302 (2007). In other words, cable TV was far from ordinary. Before the 1962 All-Channel Receiver Act, most TVs even lacked the ability to access the UAF broadband, which is where the vast majority of the country's independent stations resided at the time. *Id.* To suggest that Congress intended the SBA to apply only to free, over-the-air television in perpetuity ignores this background and fails to consider the possibility of technological advancements and changing viewing habits.

185. SCALIA & GARNER, *supra* note 184, at 16.

186. *Id.* at 56–57.

187. *See Sponsor*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1961).

broadcasting or a program broadcast by television."[188] Thus, a sponsored telecast was an advertiser-supported television broadcast. This definition plainly encompasses the NFL's exclusive streaming agreements. Unlike the Sunday Ticket package on DirecTV, the telecasting of NFL games on Peacock or Prime Video is supported by sponsored advertising.[189] Furthermore, the general term "telecast" embraces the transmission of NFL games on newer platforms like cable, satellite, and streaming, each which would have been recognizable to the ordinary football fan as television.[190] Thus, the NFL's streaming deals fall squarely within the exemption's ordinary, common-sense meaning.

The *Shaw* court's finding that the SBA's antitrust exemption did not extend to satellite telecasts is inapposite for at least two reasons. First, the Third Circuit inserted the word "free" into its interpretation of "sponsored telecasting" without explaining

188. *See Telecast*, WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1961).

189. *See* Parker Herren, *Amazon's 'Thursday Night Football' Adds More Than 50 New Advertisers for 2024 Season*, AD AGE (Sept. 11, 2024), https://adage.com/article/media/thursday-night-football-adds-more-50-advertisers-2024-season/2579806 [https://perma.cc/PV6C-3JJR] (noting that Amazon averaged $440,523 in unit prices for ad inventory during Prime Video's Thursday Night Football telecasts in 2023). In 2024, Prime Video's Thursday Night Football took the advertising in "sponsored telecasting" to another level of ubiquity and intrusiveness: The pregame was sponsored by Verizon; the "pre-kick" was sponsored by Subway; the halftime show was presented by State Farm; the postgame was presented by JC Penney; and the "nightcap" was presented by Allstate. Saleah Blancaflor, *Amazon Kicks Off Thursday Night Football with Expanded Shoppable Ad Reach*, ADWEEK (Sept. 11, 2024), https://www.adweek.com/convergent-tv/amazon-thursday-night-football-shoppable [https://perma.cc/5ERG-5VVN]. In addition, Prime Video expanded its use of interactive advertisements that allow viewers to add products to their Amazon shopping carts and receive brand information via text or email. *Id.*

190. *See Television*, WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1961) (defining "television" as "the transmission and reproduction of transient images of fixed or moving objects"). Some viewers have complained that the experience of watching NFL games on Prime Video is *too* similar to watching the games on traditional, over-the-air television. *See, e.g.*, Rodger Sherman, *The Amazon Experience Comes to the NFL*, RINGER (Sept. 16, 2022), https://www.theringer.com/2022/09/16/nfl/amazon-nfl-broadcast-kansas-city-chiefs-los-angeles-chargers [https://perma.cc/39GEQ6Z7] ("To be honest, I was surprised there were commercials at all. Most streaming services—including TV shows on Prime Video—don't have commercials . . . . I thought maybe they'd fill the blank spaces built into football games with something unique, something only Amazon could afford to provide, something to convince us that for $9 per month, we can get the premier football-watching experience.").

why sponsorship would necessarily entail that the telecast is provided at no cost to the viewer.[191] The Third Circuit adopted the interpretation of the district court, which noted that "[o]nly telecasting which is performed with [an advertising] sponsor can meet the meaning of the phrase 'rights . . . in the sponsored telecasting.'"[192] True enough. But while this appears to be a straightforward interpretation of the statutory language—and could exclude a service like DirecTV whose NFL telecasts depend entirely on subscriber fees—it does not follow that "sponsored telecasting" excludes streaming telecasts that are financed in part by subscriber fees and advertising revenues. The streaming telecasts of NFL games generate significant ad sales that bring them within the ordinary, common-sense meaning of the exemption.[193] For whatever reason, the *Shaw* court seems not to have allowed for the possibility that "telecasting" could embrace technological innovations and changing viewing habits, even as the court was confronted with the reality of a satellite provider airing live football games.

The NFL's exclusive streaming agreements would also survive under a purposivist reading of the SBA's antitrust exemption.[194] The House committee report that accompanied the legislation stated in no uncertain terms that the purpose of the SBA was to enable the member clubs of professional sports leagues "to pool their separate rights in the sponsored telecasting of their games and to permit the league to sell the resulting package of pooled rights to a purchaser, such as a television network,

191. Shaw v. Dall. Cowboys Football Club, Ltd., 172 F.3d 299, 301 (3d Cir. 1999) ("'[S]ponsored telecasting' refers to broadcasts which are financed by business enterprises . . . in return for advertising time and are therefore provided free to the general public." (citing Shaw v. Dall. Cowboys Football Club, Ltd., No. CIV. A. 97-5184, 1998 WL 419765, at *3 (E.D. Pa. June 23, 1998))).

192. Shaw v. Dall. Cowboys Football Club, Ltd., No. CIV. A. 97-5184, 1998 WL 419765, at *3 (E.D. Pa. June 23, 1998).

193. *See* Alex Weprin, *How Profitable is ESPN? Disney Breaks Out Figures for First Time*, HOLLYWOOD REP. (Oct. 18, 2023), https://www.hollywoodreporter.com/business/business-news/espn-revenue-profits-revealed-first-time-1235622182 [https://perma.cc/LNP6-RCT7] (noting that ESPN generated $4.4 billion in advertising revenue in fiscal year 2022); *see also* Herren, *supra* note 189 (noting that Amazon averaged $440,523 in unit prices for ad inventory during Prime Video's Thursday Night Football telecasts in 2023).

194. Under a purposivist approach to statutory interpretation, "purpose is taken to mean the purpose of the author"—either the legislature or private drafter. SCALIA & GARNER, *supra* note 184, at 18.

without violating the antitrust laws."[195] Specifically, the report noted that the SBA was needed to "overrule the effect of [the Eastern District of Pennsylvania's 1961] decision" and to remedy the "apparent inequity" of that decision in light of the fact that the member clubs of the AFL and other professional sports leagues were freely operating under package television contracts of their own.[196]

The SBA's proponents argued that "a league needs the power to make 'package' sales of the television rights of its member clubs to assure the weaker clubs of the league continuing television income and television coverage on the basis of substantial equality with the stronger clubs."[197] As the committee report shows, lawmakers responded favorably to this argument, finding that "should these weaker clubs be allowed to founder, there is danger that the structure of the league would become impaired and its continued operation imperiled."[198] Furthermore, the report noted that "the public interest in viewing professional league sports warrants some accommodation of antitrust principles in order to avoid these consequences."[199]

The Third Circuit's opinion in *Shaw* made selective use of this legislative history and failed to account for the context and purpose of the statute. In particular, the court's analysis placed undue emphasis on two comparatively minor features of the congressional record: language in the committee report stating that "[t]he bill does not apply to closed circuit or subscription television"[200] and a stray remark from Commissioner Pete Rozelle that the Act "[a]bsolutely" does not cover subscription-based television.[201] It marks an odd approach to statutory interpretation to infer congressional purpose from a statement made by somebody who was not the drafter, let alone a lawmaker.[202] But even if the statutory language of the SBA were vague enough to

195. H.R. REP. NO. 87-1178, at 2 (1961).

196. *Id.*

197. *Id.* at 2–3.

198. *Id.* at 3.

199. *Id.*

200. *Id.* at 5.

201. *See Telecasting of Professional Sports Contests: Hearing Before the Antitrust Subcomm. of the Comm. on the Judiciary on H.R. 8757*, 87th Cong. 36 (1961) (statement of Pete Rozelle, Comm'r, National Football League).

202. *See* SCALIA & GARNER, *supra* note 184, at 18 (noting that the purposivist school of statutory interpretation generally takes "purpose" to mean the purpose of the author, either the legislature or a private drafter).

necessitate recourse to the legislative history, that history speaks to congressional intent in a way that differs markedly from what the Third Circuit purported to uncover in *Shaw*. The express purpose of the Act was to enable the member clubs of professional sports leagues "to pool their separate rights in the sponsored telecasting of their games and to permit the league to sell the resulting package of pooled rights to a purchaser, such as a television network, without violating the antitrust laws."[203]

In sum, the plain meaning and purpose of the SBA make clear that the act's "sponsored telecasting" exemption encompasses the NFL's exclusive media deals with streaming services like Peacock and Prime Video.

B. *BOARD OF REGENTS*, *AMERICAN NEEDLE*, AND THE RULE OF REASON

Even without the explicit protection of the SBA, the NFL's streaming agreements would likely survive an expedited rule of reason analysis. The Court set forth the appropriate framework for analyzing such agreements in *American Needle*, where it noted in dicta that football teams are not "trapped" by antitrust law and that "'[t]he special characteristics of this industry may provide a justification' for many kinds of agreements."[204] It is somewhat perplexing, then, that the *Sunday Ticket* court relied so heavily on *Board of Regents*, a case that preceded *American Needle* by twenty-six years and failed to mention a single professional sports league by name.[205] Contrary to what the Ninth Circuit suggested in *Sunday Ticket*, *Board of Regents* offers comparatively limited utility for analyzing the activities of a professional sports league like the NFL.[206]

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203. S. REP. NO. 87-1087, at 1 (1961).

204. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 202 (2010) (quoting Brown v. Pro Football, Inc., 518 U.S. 231, 252 (1996) (Stevens, J., dissenting)).

205. *See In re* Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1146 (9th Cir. 2019) (describing *Board of Regents* as "the Supreme Court's authoritative opinion on the antitrust law of league sports"). The *Sunday Ticket* court gave *American Needle* a surprisingly cursory treatment, citing this case only for the proposition that the NFL is an association of "separately owned [and managed] professional football teams." *Id.* at 1144, 1148.

206. *See* McCann, *supra* note 47, at 745 ("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

In *Board of Regents*, the NCAA used the Supreme Court's decision in *Broadcast Music, Inc. v. CBS, Inc.*[207] to argue that its telecasting plan constituted a cooperative "joint venture" that assisted teams in the marketing of their telecasting rights and thus achieved procompetitive efficiencies.[208] But the district court found that the NCAA's telecasting plan did not produce any procompetitive efficiencies and that NCAA football could be marketed just as effectively without the plan.[209] In light of these findings, the Court concluded that the NCAA's efficiency argument was not supported by the record.[210] Notably, the Court also rejected the NCAA's argument that the plan promoted competitive balance among the teams, reasoning that although the plan was nationwide in scope, no league or tournament existed in which all college football teams competed with each other.[211] Thus, the NCAA's purported interest in maintaining a competitive balance "[was] not related to any neutral standard or to any readily identifiable group of competitors" and could not stand as a legitimate justification for the NCAA to regulate the telecasting of all intercollegiate football.[212]

In contrast to the NCAA, the NFL has long sought to establish competitive balance among its teams to create a marketable product.[213] In 1952, then-NFL Commissioner Bert Bell famously

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.").

207. *See* Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 23 (1979) ("Not all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints . . . . Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.").

208. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 113 (1984).

209. *Id.* at 114.

210. *Id.* at 115.

211. *Id.* at 117–18. The Court explicitly noted that while the NCAA sponsored and conducted national tournaments in some sports like baseball and basketball, it had not done so in football. *See id.* at 88. Further, the NCAA's 850 voting members were "classified into separate divisions to reflect differences in the size and scope of their athletic programs." *Id.* at 89. These facts suggest that the functions and interests of the NCAA were distinct from those of a professional sports league such as the NFL.

212. *Id.* at 87.

213. Blowouts are a fixture of NCAA football, in some instances by design. *See, e.g.*, Keith Jenkins, *Biggest College Football Bowl Game Blowouts*, ESPN

observed that "[t]he teams are so closely matched . . . that on any given Sunday, any one team can beat any other team."[214] Rozelle's proposal to sell teams' telecasting as a single package breathed life into this expression.[215] The shared revenues from such pooled-rights media deals continue to be the "driving force" of the league's economics and are essential to promoting the competitive parity that makes the NFL an engaging product.[216] In

(Dec. 21, 2024), https://www.espn.com/college-football/story/_/id/43026277/biggest-college-football-bowl-game-blowouts [https://perma.cc/8M99-KMRP] (noting that college football's bowl season can "be a time for lopsided victories and embarrassing defeats"); Ned Dutton, *NCAA Football: Out of Conference Schedules, the Risk/Reward Game*, BLEACHER REP. (July 30, 2008), https://bleacherreport.com/articles/42493-ncaa-football-out-of-conference-schedules-the-riskreward-game [https://perma.cc/WA4N-LPL7] (noting that some of the more competitive college football teams schedule early-season games with weaker non-conference opponents in order to inflate their win totals and help guarantee an undefeated season).

214. *NFL Attendance Improved: Dallas Club 16,281 Up on 1951 Yankees*, TULSA WORLD, Nov. 13, 1952, at 52 ("Physically these clubs are even, so it depends on the mental outlook of squads to determine the winner. It's this factor that has made the game close and is bringing fans out to the ball parks.").

215. *See* Oriard, *supra* note 110 (noting that Rozelle's television contracts became the NFL's "lifeblood" and guaranteed large profits for every club no matter the size of its market or how well it fared on the field); *see also* ORIARD, *supra* note 108, at 12 ("Sharing television revenue meant rough parity and financial stability throughout the league. More important, [Rozelle] . . . understood that, because the NFL could never have franchises everywhere, viewers willing to turn on pro football every week in much of the country would have to be fans of the league, not just the New York Giants or Los Angeles Rams. More than any other single factor, the first national TV contract made the NFL what it has become.").

216. Kurt Badenhausen, *How NFL Teams and Owners Make Their Money*, SPORTICO (Aug. 29, 2024), https://www.sportico.com/leagues/football/2024/how-nfl-teams-owners-make-money-1234795113 [https://perma.cc/USF7-4HKE] ("NFL teams received $13 billion, or just over $400 million apiece, from league-wide media, sponsorship, licensing and merchandise deals [in 2023]. In addition, teams got $25 million each as part of the NFL's shared gate receipt system, which calls for 34% of each team's ticket revenue to go toward a general pool to be shared equally. The result: 67% of the $20.5 billion in 2023 NFL revenue was distributed in equal parcels to the 32 teams."); *see NFL: It's Unique Strategy and Dominating Valuation Proposition*, KROLL: VALUATION INSIGHTS (Nov. 25, 2024), https://www.kroll.com/en/insights/publications/valuation/valuation-insights-h2-2024/nfl-unique-strategy-dominating-valuation-proposition [https://perma.cc/HUT8-YMSF] ("Unlike other major U.S. sports leagues such as NBA, MLB, and NHL, the NFL's operating model relies heavily on national revenue. In this operating model, national revenues are shared equally among all teams in the league, while local revenues remain under individual team control. National revenues mainly consist of the sale of media rights that reach a national audience while local revenues include venue-related revenues

American Needle, the Court made clear that the NFL's interest in maintaining a competitive balance among its teams could justify an expedited rule of reason analysis that would have been inappropriate in the context of *Board of Regents*.[217]

The *American Needle* Court held that the NFL's licensing activities in intellectual property and merchandise constituted concerted activity that fell within the scope of section 1.[218] For such purposes, the Court reasoned, NFL teams remain "separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being."[219] But while some observers have inferred that *American Needle* signaled the death of the single entity defense for sports leagues,[220] this inference misinterprets the scope of the holding. In fact, the Court stressed the narrowness of its decision by noting that the member teams of the NFL "are not trapped by antitrust law."[221] According to Justice Stevens's opinion for the Court, "[t]he fact that NFL teams share an interest in making the entire league successful and profitable . . . provides a perfectly sensible justification for making a host of collective decisions."[222] The opinion went on to note that other features of the NFL, including "competitive balance," could justify a variety of collective decisions made by the teams.[223] In such cases, the rule of reason may not require a detailed analysis; it can sometimes be applied "in the twinkling of an eye."[224]

(ticketing, concessions, sponsorship, etc.), and local media rights sales, which include TV and radio broadcast rights available only within their local markets.").

217. *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 204 (2010) ("Other features of the NFL may also save agreements amongst the teams. We have recognized for example, 'that the interest in maintaining a competitive balance' among 'athletic teams is legitimate and important.'" (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984))).

218. *Id.* at 201.

219. *Id.*

220. *See, e.g.*, Meir Feder, *Is There Life After Death for Sports League Immunity?* American Needle *and Beyond*, 18 VILL. SPORTS & ENT. L.J. 407, 420 (2011) ("On its face, *American Needle* broadly ruled out 'single entity' status for sports leagues . . . .").

221. *Am. Needle, Inc.*, 560 U.S. at 202.

222. *Id.*

223. *Id.* at 204.

224. *Id.* at 203 (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 110 (1984)).

One scholar has interpreted the *American Needle* decision as setting forth an adaptable two-part test for courts analyzing the activities of professional sports leagues.[225] Assuming that the plaintiff has plausibly alleged the existence of an agreement in restraint of trade, the first part of this test asks whether the "challenged activity constitute[s] a core or central feature of the joint venture."[226] The second part of the test is essentially a rule of reason analysis, asking whether the restraint at issue is unreasonable and therefore illegal.[227] If the restraint is found not to be core or central to the joint venture under the first prong, then the court should apply a traditional, fact-intensive rule of reason analysis.[228] But if the restraint is found to be core or central to the joint venture, then the court should treat the restraint as almost per se reasonable and therefore valid.[229]

The *American Needle* Court did not present its analysis in this formulized manner.[230] But the two-part test appears to be consistent with Justice Stevens's opinion, which suggested that certain features of the NFL would provide a "sensible justification for a host of collective decisions" by its member teams.[231] Using this test, a court might permit the member clubs of a professional sports league to agree to "certain 'core' activities" but still find that the teams illegally cooperated in others (the licensing of branded merchandise, for example).[232]

Applying this test to the NFL's exclusive streaming deals shows that such agreements would likely survive an antitrust analysis under section 1. The first part of the test asks whether the sale of telecasting rights to streaming platforms is "core" or

225. *See* Boliek, *supra* note 96, at 521.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 202 (2010); *see* Boliek, *supra* note 96, at 521–33 ("The Court noted that '[a]lthough NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned.' In other words, using a quick rule of reason analysis the Court found this particular agreement was not core to the NFL's 'common interests.' Next, the Court noted that given that conclusion, the restraint examined under a rule of reason analysis was found unreasonable." (alteration in original)).

232. *See* Boliek, *supra* note 96, at 522.

"central" to the NFL's business. Given the outsize importance of media deals, the league could plausibly assert that pooled-rights telecasting agreements are in fact central to its business, which is the exhibition of competitive football games.[233] Furthermore, the increasing popularity of streaming services relative to traditional, over-the-air television suggests that digital platforms like Netflix and Prime Video now constitute a critical piece of a successful media distribution strategy for any professional sports league.[234]

The second part of the test asks whether the league's restrictions on the ability of its teams to enter into their own streaming agreements are reasonable to achieve the stated goal, the exhibition of competitive football games. This part of the test is "an almost rebuttable presumption that the restraint was reasonably ancillary to the 'core activity.'"[235] Here, the NFL would likely assert that the pooling of telecasting rights for the purpose of entering into exclusive streaming agreements is necessary to guarantee an even revenue split among the teams, which is critical to ensuring the economic viability of the league as a whole.

233. *See id.* ("The NFL produces games for exhibition; arguably in today's world 'exhibition' means video exhibition as much as tickets for in-person viewing. Indeed, given the overwhelming importance of broadcast revenue to the NFL, it is fairly easy to assert that the centralized sale of broadcast rights is central to the 'economic reality' of providing competitive football.").

234. *See* Lillian Rizzo, *Streaming Deals Are Key to Future of NFL Viewership, Fandom*, CNBC SPORT (Sept. 10, 2024), https://www.cnbc.com/2024/09/10/streaming-deals-are-key-to-future-of-nfl-viewership-fandom.html [https://perma.cc/VWR6-VHFP] (noting that while traditional, over-the-air television has maintained a majority of viewership, consumers continue to "flee the cable bundle for streaming services"). In November 2024, streaming accounted for 41.6% of TV usage in the United States, achieving its highest share ever recorded by Nielsen and surpassing broadcast and cable. *TV Viewing in November Interval Reaches Highest Level Since February, Streaming Nabs Largest Share of TV Ever in The Gauge*, NIELSEN (Dec. 10, 2024), https://www.nielsen.com/news-center/2024/tv-viewing-in-november-interval-reaches-highest-level-since-february-streaming-nabs-largest-share-of-tv-ever-in-the-gauge [https://perma.cc/JK9N-FVCM]; *see NFL: Its Unique Strategy and Dominating Valuation Proposition*, *supra* note 216 ("The proliferation of streaming technology not only transforms the landscape of sports broadcasting and viewership but also offers an opportunity to solidify the NFL's winning approach. This accelerating shift to streaming and its potential value creation emphasizes the urgency for other major U.S. sports leagues to reassess their strategies. Adopting a model akin to the NFL's, with a focus on national revenue models enhanced by streaming, could perhaps unlock new levels of success and fan engagement.").

235. Boliek, *supra* note 96, at 523.

The Court's opinion in *American Needle*, which explicitly mentioned competitive balance as a "legitimate" and "important" interest, suggests that this argument would be persuasive.[236] For some commentators, the notion that a sports league qualifies as a single entity for purposes of telecasting agreements is already a foregone conclusion: The league itself is the lowest indivisible economic unity capable of producing the entertainment product, which is a series of interrelated games that culminate in a postseason and championship.[237] This is especially true for the NFL, whose distinctive operating model depends heavily on its pooled-rights media deals.

In denying the league's petition for certiorari in *Sunday Ticket*, Justice Kavanaugh suggested that the Court would find this reasoning compelling.[238] Noting "substantial arguments on the law," he described the NFL and its member teams as a "joint venture"[239] and cited *American Needle* for the proposition that "antitrust law likely does not require that the NFL and its member teams compete against each other with respect to television rights."[240] But precedent was not the only authority that Justice

236. *See Am. Needle, Inc.*, 560 U.S. at 185, 204 ("The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate to produce games, provides a perfectly sensible justification for making a host of collective decisions . . . . We have recognized, for example, 'that the interest in maintaining a competitive balance' among 'athletic teams is legitimate and important.'" (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984))).

237. *See, e.g.*, 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, 228 (1984) ("Each team [in a league] has a potential [economic] utility, but before it can be realized the two teams must agree as to the time and place of the game, the rules under which the game will be played, the prices that will be charged for admission and broadcast rights, and how the costs and revenues will be divided between them. Because both teams must cooperate completely if the game is to be played at all, there must be total integration—either express or tacit agreement on every aspect of the game's production and marketing . . . . Without these agreements, this type of entertainment product could not exist.").

238. *See* Nat'l Football League v. Ninth Inning, Inc., 141 S. Ct. 56, 57 (2020) ("In sum, the defendants—the NFL, its teams, and DirecTV—have substantial arguments on the law. If the defendants do not prevail at summary judgment or at trial, they may raise those legal arguments again in a new petition for certiorari, as appropriate.").

239. *Id.* (citing Smith v. Pro Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978)).

240. *Id.* at 57 ("NFL teams . . . must cooperate in the production and scheduling of games[.]" (citing *Am. Needle, Inc.*, 560 U.S. at 202)).

Kavanaugh used to support this claim. In addition to *American Needle*, he cited to a discussion of the ancillary restraints doctrine from Judge Bork.[241] In placing these authorities next to each other, Justice Kavanaugh's opinion implied that *American Needle* had signaled a reemergence of the ancillary restraints doctrine, a little used feature of antitrust law that "increases the probability that [a] restraint will be found reasonable."[242] Although the *American Needle* Court did not refer to the ancillary restraints doctrine explicitly, its test for analyzing the activities of professional sports leagues resembles the doctrine in purpose and effect. The NFL's exclusive streaming agreements would likely survive an antitrust analysis under either framework.

C. APPLYING THE ANCILLARY RESTRAINTS DOCTRINE

The *American Needle* Court's notion of an expedited rule of reason analysis resembles the common-law ancillary restraints doctrine, which provides an independent basis for upholding the NFL's streaming agreements. Most often discussed in the context of covenants not to compete, the ancillary restraints doctrine holds that some agreements that "restrain competition may be valid if they are 'subordinate . . . to another legitimate transaction and necessary to make that transaction effective.'"[243]

"Generally, the effect of a finding of ancillarity is to 'remove the *per se* label from restraints otherwise [prohibited by section 1 of the Sherman Act.]'"[244] The restraint must then be evaluated under the rule of reason, with the finding of ancillarity increasing the probability that the restraint will be found reasonable.[245]

241. *Id.*; *see* BORK, *supra* note 71, at 278–79 ("[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams. In this case, the league is best viewed as being the firm, and horizontal merger limitations are inappropriate . . . . The upshot is that when the integration is essential if the activity is to be carried on at all, the integration and restraints that make it efficient should be completely lawful.").

242. *See* Aydin Corp. v. Loral Corp., 718 F.2d 897, 901 (9th Cir. 1983).

243. L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1395 (9th Cir. 1984) (quoting Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 797–98 (1965)).

244. *Id.* (quoting Bork, *supra* note 72, at 212).

245. *Id.* (first citing Bork, *supra* note 72, at 212; and then quoting Aydin Corp. v. Loral Corp., 718 F.2d at 901).

In other words, the ancillary restraints doctrine entails an expedited rule of reason analysis whereby courts may presume that certain agreements are reasonably necessary to the existence of a joint venture and therefore permissible under section 1.

The Ninth Circuit quoted Judge Bork's comments on the ancillary restraints doctrine in *Los Angeles Memorial Coliseum Commission v. National Football League*,[246] where it held that an NFL bylaw requiring a three-fourths vote among team owners for the relocation of any team violated section 1.[247] Although the court found that this bylaw was "not reasonably necessary to the production and sale of the NFL product,"[248] it observed that "[j]oint marketing decisions are surely legitimate because of the importance of television."[249] This suggests that pooled-rights telecasting agreements themselves are likely ancillary and therefore permissible under the antitrust laws.

On at least one occasion, Judge Bork explicitly suggested that the ancillary restraints doctrine may hold particular relevance in the context of professional sports.[250] When applying section 1 to a sports league, Judge Bork explained, a court faces three options: First, the court may note that each restraint imposed by the league is an agreement not to compete and illegal per se; second, the court may decide that league sports are joint ventures and that the agreements not to compete in certain areas should be treated as restraints ancillary to the joint venture; or third, the court may examine the effects of each restraint and

246. *Id.* ("Most often discussed in the area of covenants not to compete, the [ancillary restraints] doctrine teaches that some agreements which restrain competition may be valid if they are 'subordinate and collateral to another legitimate transaction and necessary to make that transaction effective.'" (quoting Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 797–98 (1965)).

247. *Id.* at 1401 (affirming the judgment enjoining the NFL from preventing the Raiders from relocating).

248. *Id.* at 1398.

249. *Id.* at 1396 ("[The SBA] grants the NFL an exemption from antitrust liability, *if any*, that might arise out of its collective negotiation of television rights with the networks." (emphasis added)).

250. Bork, *supra* note 72, at 231 ("The doctrine of ancillary restraints may be of assistance in the difficult area of the application of the antitrust laws to professional league sports such as football and baseball. There has been a good deal of confusion in the attempt to apply the Sherman Act to these businesses and the problem appears to pose a severe test for the rule of reason.").

attempt to judge it by whether the court regards that effect as proper.[251]

Judges are likely to reject the first option as untenable in the context of a professional sports league, where "some degree of lessening of competition is inherent in [the enterprise]."[252] The third option is essentially the path elected in the *Board of Regents* and *Sunday Ticket* opinions.[253] But as Judge Bork argued, conceptual difficulties arise when a judge attempts to go through an industry deciding how much competition is desirable and how much should be eliminated.[254] In the context of league sports, where the member teams have no alternative way of doing business except in the form of a joint enterprise, the second option likely is the simplest and most desirable course of action.[255]

The Supreme Court has touched on the ancillary restraints doctrine from time to time, although not always explicitly.[256]

251. *See id.* at 232.

252. *See id.* at 233.

253. *See supra* Part II.B.

254. *See* Bork, *supra* note 72, at 232 ("The law has been loathe [sic] to permit a judge to go through an industry deciding how much competition is good and how much may be properly eliminated."). This is the problem that Judge Taft referred to in *Addyston Pipe* when he described courts that "set sail on a sea of doubt" and "assume[] the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not." *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 284 (6th Cir. 1898).

255. *See* Bork, *supra* note 72, at 233 ("Perhaps a realistic approach to the problem is to recognize that the fact of league organization sets certain professional sports apart from other industries. The members of a league cannot compete in the way that members of other industries can. It is neither in the interests of the members of the league nor of the public generally that the more efficient teams should drive out the less efficient. If one team goes out of business, all are endangered. This suggests that the concept of business competition may be irrelevant as applied to the relationships between members of a league. Functionally the league appears to be a joint enterprise for the production of amusement spectacles. Unlike members of other industries, the members of a league have no alternative way of doing business except in the joint enterprise form. Viewing the league as a joint venture results in making lawful as reasonably ancillary to the joint venture all agreements between the members which do no more than eliminate business competition among themselves.").

256. In *Major League Baseball Properties, Inc. v. Salvino, Inc.*, then-Judge Sotomayor employed the ancillary restraints doctrine in a concurrence affirming the district court's dismissal of the defendant's section 1 claim against the exclusive licensing agent for Major League Baseball (MLB). *See* 542 F.3d 290, 334–41 (2d Cir. 2008) (Sotomayor, J., concurring). Judge Sotomayor agreed

Justice Stevens's opinion for the majority in *National Society of Professional Engineers v. United States* cited Judge Taft's opinion in *Addyston Pipe* for the proposition that the rule of reason is the "standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction."[257] More recently, Justice Thomas's opinion for the majority in *Texaco Inc. v. Dagher* explained that the ancillary restraints doctrine "governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities."[258] According to Justice Thomas, the doctrine requires courts to "determine whether the nonventure restriction is a naked restraint on trade, and thus invalid," or whether the restraint "is ancillary to the legitimate and competitive purposes of the business association, and thus valid."[259]

Justice Thomas's description of restraints that are "ancillary to the legitimate and competitive purposes of the business association" is remarkably consonant with the first prong of the two-part test, which asks whether the challenged activity constitutes a "core" or "central" feature of the joint venture.[260] That scheduling and rulemaking would qualify as core or central features of professional sports leagues seems relatively uncontroversial.[261] Whether the pooling of member teams' media rights would also qualify as a core or central feature is perhaps less obvious, but the history and operating model of the NFL indicate

with the majority that the MLB's centralization of licensing in Major League Baseball Properties, Inc. (MLBP) was not illegal per se, finding MLBP offered significant procompetitive benefits that individual clubs could not offer on their own, including decreased transaction costs on the sale of licenses, lower enforcement and monitoring costs, and the ability to "one-stop shop." *Id.* at 337. "Under such circumstances," she explained, "the challenged restraints must be viewed as ancillary to the joint venture and reviewed under the rule of reason in the context of the joint venture as a whole." *Id.* at 340.

257. Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 689 (1978) (citing *Addyston Pipe & Steel Co.*, 85 F. at 282–83).

258. Texaco Inc. v. Dagher, 547 U.S. 1, 7 (2006).

259. *Id.*

260. *See* Boliek, *supra* note 96, at 521.

261. *See* Grow, *supra* note 43, at 586–87 ("[P]rofessional sports teams produce a product—competitive sporting events—that inherently and uniquely cannot be produced by a single firm acting alone . . . . To create these products, the teams in a league must not only physically interact on the playing field but also agree to a playing schedule and a common set of rules governing their interaction.").

that a court should answer this question in the affirmative.[262] The legislative history of the SBA and the concerns about stability and competitive balance that motivated its passage support the conclusion that pooled-rights agreements are reasonably necessary to ensure the viability of clubs in comparatively small markets like Buffalo and Green Bay and ultimately the league as a whole.[263] The equal sharing of pooled-rights telecasting revenues remains foundational to the NFL's success.[264]

As the Court explained in *American Needle*, the nature of the rule of reason analysis may change depending on the concerted activity in question, with some activities justifying a less rigorous approach than others.[265] This is especially true in the context of professional sports, where certain restraints may be necessary to the survival of the league itself. Justice Stevens's opinion for the Court explicitly remarked upon the legitimacy of the NFL's interest in maintaining competitive balance and suggested that this interest "may well justify a variety of collective decisions made by the teams."[266] Given that NFL's pooled-rights

262. *See supra* Part I.B; *see also* Grow, *supra* note 43, at 587 ("Whereas in most industries competing firms usually would be eager to drive their rivals out of business to seize a larger share of the market for themselves, franchises in a professional sports league depend on the continued economic viability of their competitors for their own survival.").

263. *See supra* Part III.A; *see also* Clay Moorhead, Note, *Revenue Sharing and the Salary Cap in the NFL: Perfecting the Balance Between NFL Socialism and Unrestrained Free-Trade*, 8 VAND. J. ENT. & TECH. L. 641, 642 (2006) ("Since its inception in 1961, the revenue sharing system utilized by [the NFL] has been instrumental in propelling the League to the forefront of professional sports in America.").

264. *See* Moorhead, *supra* note 263, at 642 ("From 1961 onward, the League's continued commitment to the equal sharing of television revenues has remained the foundation of the NFL's revenue sharing system. Furthermore, the financial parity that resulted from this collective philosophy enhanced the competitiveness of the League as a whole, thereby fostering the massive popularity still enjoyed by the League today." (footnote omitted)).

265. *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010) ("When 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason . . . . In such instances, the agreement is likely to survive the Rule of Reason . . . . And depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye.'" (first quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984); then citing Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 23 (1979); and then quoting *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 110)).

266. *Id.* at 204.

media deals play a central role in guaranteeing stability and competitive balance, the league's exclusive streaming agreements would probably survive a rule of reason analysis under section 1.

* * *

The *American Needle* Court's notion of an expedited rule of reason analysis for core or central features of a professional sports league recalls certain aspects of the common-law ancillary restraints doctrine, which provides an independent basis for upholding the NFL's exclusive streaming agreements. The result under both tests is that the NFL's exclusive streaming agreements would likely survive an antitrust analysis. Given this probability, Congress should amend the SBA to provide fans with continued access to games on free, over-the-air television.

IV. A SIMPLE STATUTORY SOLUTION TO THE MIGRATION OF NFL PROGRAMMING AWAY FROM FREE BROADCAST TELEVISION

The continuing migration of NFL programming away from over-the-air television to subscription-based streaming services raises significant concerns that warrant legislative action. For football fans, recent changes to the NFL's media distribution strategy mean paying for games that had previously been available for free.[267] But the consequences of these changes are not limited to "subscription fatigue"[268] and rising credit card statements. It is difficult to exaggerate the extent to which television networks depend on the advertising dollars from NFL games to support essential public interest programming such as local news and weather updates.[269]

267. *See* Haggin, *supra* note 6; *see also* Cassillo, *supra* note 9.

268. *See* Jay Fitzgerald, *With Subscription Fatigue Setting in, Companies Need to Think Hard About Fees*, HARV. BUS. SCH.: WORKING KNOWLEDGE (Oct. 17, 2023), https://www.library.hbs.edu/working-knowledge/with-subscription-fatigue-setting-in-companies-need-to-think-hard-about-fees [https://perma.cc/6U4U-FQTA] (noting subscriptions have become so widespread that some consumers are starting to feel overwhelmed by "subscriptionitis").

269. *See Impact of Television: How Television Has Changed the Game*, NAT'L FOOTBALL LEAGUE: FOOTBALL OPERATIONS, https://operations.nfl.com/gameday/technology/impact-of-television [https://perma.cc/8SE3NK6J] ("Of course, NFL football has been very good for TV . . . . The games are ratings behemoths that provide networks with advertising dollars, along with

As early as the 1980s and '90s, observers began to worry that over-the-air sports programming was being "siphoned away by cable and pay-per-view television," with some calling for legislative or regulatory action that would mandate continued access to playoff and championship games.[270] The NFL didn't sign its first cable TV deal until 1987, when it became the last of the major American sports leagues to do so.[271] But even then, the league continued to allow local television networks to broadcast the primetime games that were being shown on cable.[272] By letting in-market fans tune in to those games for free, the NFL "cemented precedent into principle which still exists today."[273] That strategy has allowed the league to avoid antitrust scrutiny by courts that take a narrow view of the SBA's "sponsored telecasting" exemption.[274]

But the accelerating migration of live sports to subscription-based streaming has created a greater sense of urgency around the issue.[275] When the NFL announced that Prime Video would carry a playoff game for the 2024–25 season, the league's executive vice president of media distribution invoked the NFL's "long-standing" distribution strategy as a way to assure fans that not much had changed: After all, Prime Video's playoff game

viewership that benefits the networks' promotions and non-NFL programming.").

270. Phillip M. Cox II, Note, *Flag on the Play? The Siphoning Effect on Sports Television*, 47 FED. COMMC'NS L.J. 571, 572 (1995).

271. *See* Finney, *supra* note 134, at 172.

272. *Id.* at 173.

273. *Id.*

274. *Id.*

275. *See* Oliver Darcy, *Live Sports Is Migrating to Streaming, Taking with It a Superpower of the Cable TV Bundle*, CNN BUS. (Sept. 21, 2023), https://www.cnn.com/2023/09/21/media/live-sports-streaming-reliable-sources/index.html [https://perma.cc/84DK-LQQB] (describing the growing existential threat that streaming poses to linear television). The NFL's ability to opt out of some of its current media deals as early as 2030 means that it could "completely rejigger the media landscape, if it so chooses." Sherman, *supra* note 105. Recent comments by NFL Commissioner Roger Goodell suggest that the league will exercise those opt-out rights. *See* Ed Dixon, *Roger Goodell: NFL Media Rights "Undervalued", Contract Opt-Outs Give "Significant Opportunity"*, SPORTSPRO (Feb. 4, 2025), https://www.sportspro.com/broadcast-ott/media-rights/nfl-media-broadcast-rights-opt-out-roger-goodell-super-bowl-flag-football-february-2025 [https://perma.cc/84DK-LQQB] (reporting that Goodell believes the NFL's media rights deals are "undervalued" and that streaming services constitute "a very important advancement for us in the context of media strategy").

would also be available "for free, over-the-air broadcast television in the local markets of the competing teams."[276] But after the uproar over the Peacock game,[277] those comments sounded like damage control. They were also disingenuous. Until the Peacock game, football fans had enjoyed access to every game of the NFL postseason on free, over-the-air television, regardless of where they lived.[278] The decision to move these games to a subscription-based streaming service was not consistent with "longstanding" policy. If anything, it signified a break from it.

For football fans living outside the markets of the competing teams, the NFL's exclusive telecasting agreements with streaming platforms like Peacock and Prime Video mean paying more to watch some of the most important games of the year. But the consequences for conventional, over-the-air television networks and the public-interest programming they provide are even more serious. Virtually every community in the United States depends on free, over-the-air broadcast stations to deliver not only "must-see" events like professional sports but essential public-interest programming including local news, weather updates, and emergency alerts.[279] The devastating wildfires that swept across southern California in January 2025 highlighted the importance of such programming, as anchors and correspondents worked around the clock to provide viewers with lifesaving details about evacuations and damage, and even emotional support.[280]

276. *NFL Announces*, *supra* note 16.

277. *See supra* Introduction; *see also* Karl Rasmussen, *NBC Bragged About Streaming Numbers for Peacock-Only Playoff Game, and Fans Didn't Want to Hear It*, SPORTS ILLUSTRATED (Jan. 14, 2024), https://www.si.com/nfl/2024/01/15/nbc-bragged-streaming-numbers-peacock-only-playoff-game [https://perma.cc/83ZP-6AHY] (explaining that the NFL's decision to show the game exclusively on a streaming platform angered many fans).

278. *See* Cassillo, *supra* note 9 (noting that the NFL took "what used to be a free over-the-air playoff game every year to-date" and turned it into a "pay-per-view transaction").

279. *See* Barr, *supra* note 9 ("For decades, virtually every community in America has counted on free over-the-air broadcast stations to deliver local news and weather programming, popular network content and 'must-see' events like professional sports, especially the NFL. Even as the NFL moved some of its regular season games to cable, when it came to the playoffs, nearly every American household was assured access to every game through one of their local broadcast stations. Sadly, this is no longer true.").

280. Stephen Battaglio, *L.A. Wildfire Coverage Shows Why Local TV News Matters in a Crisis*, L.A. TIMES (Jan. 19, 2025), https://www.latimes.com/entertainment-arts/business/story/2025-01-19/los-angeles-turns-to-local-tv-

Even as news consumption habits change, most Americans continue to see the value of conventional outlets.[281] Local TV stations remain the most common source of community news other than friends, family, and neighbors.[282] And yet few Americans are aware of the important connection between high-profile sporting events like the NFL playoffs and the operation of their local newsrooms.[283] For conventional broadcasters, live sports are critical to building the audiences that can sustain business operations and enable the delivery of the critical news that keeps millions of Americans safe and informed.[284] As advertisers shift their budgets away from those broadcasters, local public-interest programming faces an existential crisis.[285] The loss of the NFL, broadcast television's "last surefire attraction," would deliver a crushing blow to conventional networks and local affiliates.[286]

At a January 2024 congressional hearing on the future of sports media, several lawmakers voiced deep misgivings about the migration of live sports programming away from free, over-

news-as-a-beacon-of-trust-during-palisades-wildfires [https://perma.cc/HGH4-A875].

281. *See* Elisa Shearer et al., *Americans' Changing Relationship with Local News*, PEW RSCH. CTR. 4 (2024), https://www.pewresearch.org/wp-content/uploads/sites/20/2024/04/PJ_2024.05.07_local-news-trends_report.pdf [https://perma.cc/S735-T9SH]; *see also* Joy Jenkins & Lucas Graves, *Digital News Report 2024: United States*, REUTERS INST. FOR THE STUDY OF JOURNALISM 115 (2024), https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2024-06/RISJ_DNR_2024_Digital_v10%20lr.pdf [https://perma.cc/2XDL-9LQJ] (showing that local television news was trusted by sixty-two percent of Americans surveyed, well ahead of any digital source).

282. *See* Shearer et al., *supra* note 281.

283. *See* Barr, *supra* note 9 ("Most Americans are unaware of the thread connecting high-profile sports and live events, like the NFL playoffs, and the operation of local newsrooms.").

284. *See id.* ("For local broadcasters, these events are a critical part of building an audience that can sustain the business and enable the delivery of the critical and life-saving news, weather updates and emergency alerts that millions of Americans across the nation rely on to keep them safe and informed.").

285. *See* Stephen Battaglio, *Broadcast Television is in Trouble. Stations are Asking Washington for Help*, L.A. TIMES (Apr. 8, 2025), https://www.latimes.com/entertainment-arts/business/story/2025-04-08/broadcast-tv-2030-can-it-survive [https://perma.cc/KQ3W-4N4L] ("Streaming video has siphoned away the traditional viewing audience. Advertisers have shifted their budgets to digital and away from broadcasters . . . . All of this raises the question for the broadcast TV business that has offered news, entertainment and sports to their communities for generations: What will the business look like five years from now, and what can be done to preserve it?").

286. *Id.*

the-air television.[287] As some representatives pointed out, such programming constitutes the "principal driver" of TV viewership[288] and remains a "boon" for the networks that provide news, weather, and emergency alerts.[289] Representative Frank Pallone of New Jersey urged Congress to "examine the implications of a significant revenue-generator like sports programming moving off the free airwaves and what this will mean for the future of local news."[290] Meanwhile, Scripps Sports President Brian Lawlor said that he and other network executives were "alarmed" by the Peacock game and what it portends for their stations' local news operations.[291] The hearing even involved a limited discussion of whether Congress should enact local access mandates for some sports programming.[292]

Given recent developments in the sports media landscape, such mandates have become an increasingly compelling option. This Note has argued that the NFL's exclusive streaming agreements would likely survive an antitrust challenge under section 1 of the Sherman Act. Consequently, Congress should amend the SBA to guarantee NFL fans continued access on over-the-air television to the regular-season games of their home market teams, as well as playoff games and the Super Bowl.

287. *See TV Timeout: Understanding Sports Media Rights: Hearing Before the Subcomm. on Commc'ns & Tech. of the H. Comm. on Energy & Com.*, 118th Cong. (2024), https://energycommerce.house.gov/events/communications-and-technology-subcommittee-hearing-tv-timeout-understanding-sports-media-rights [https://perma.cc/EG7T-XPUX].

288. *Id.* at 15:16 (statement of Rep. Doris O. Matsui).

289. *Id.* at 23:57 (statement of Rep. Frank Pallone).

290. *Id.* at 27:05.

291. *Id.* at 1:44:29 (statement of Scripps Sports President Brian Lawlor) ("Most local news operations are not profitable by themselves. We need sports and other assets to be able to generate the revenue that allows us to fund that. So we're definitely concerned about this being the beginning of a trend.").

292. *Id.* at 1:49:17 (statement of Rep. Darren Soto) (asking whether there should be "limited dual programming requirements" for sports programming that mandate free, over-the-air broadcasts for certain games). For some observers, this discussion provided "faint echoes of the debate over mandates to preserve AM radio in the car" and implicated similar concerns about the continuing viability of local, over-the-air broadcasting. David Oxenford, *Sports Rights, the Super Bowl, and the Perception of Local Over-the-Air TV*, BROAD. L. BLOG (Feb. 7, 2024), https://www.broadcastlawblog.com/2024/02/articles/sports-rights-the-super-bowl-and-the-perception-of-local-over-the-air-tv [https://perma.cc/ZWD237C4].

Lawmakers want to act on this issue. Fortunately, the solution is straightforward. Congress should modify the SBA by adding the following language to section 1291:

> The antitrust laws, as defined in section 1 of the Act of October 15, 1914, as amended (38 Stat. 730), or in the Federal Trade Commission Act, as amended (38 Stat. 717), shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs. In addition, such laws shall not apply to a joint agreement by which the member clubs of two or more professional football leagues, which are exempt from income tax under section 501(c)(6) of the Internal Revenue Code of 1986, combine their operations in expanded single league so exempt from income tax, if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto.
>
> *"Sponsored telecasting" refers to any telecast, whether by broadcast, cable, satellite, streaming, or other media, that is funded either in whole or in part by sponsored advertising.*
>
> *Notwithstanding anything to the contrary in this provision, a league of clubs participating in professional football, baseball, basketball, or hockey shall ensure a free, over-the-air broadcast of any playoff and championship game in which its member clubs compete. In addition, such a league shall ensure free, over-the-air broadcasts of all the regular-season games of its member clubs in the local television markets of the competing teams.*[293]

This simple statutory solution would serve the dual purpose of allowing the NFL to continue to adapt to a changing media landscape while guaranteeing that fans still have access to the games that matter most. Placing an affirmative duty on the NFL to ensure free, over-the-air broadcasts would also lend much-needed support for conventional networks that use advertising dollars from high-profile sporting events to supply critical news, weather, and emergency information. Without congressional action, viewers could soon face the prospect of the Super Bowl migrating behind a digital paywall. The consequences of that move would reach beyond the fans that have to sign up for another streaming service.

293. 15 U.S.C. § 1291. This Note's proposed amended language is italicized.

CONCLUSION

The NFL's decision to grant Peacock exclusive rights to the 2023–24 wild-card matchup between the Dolphins and the Chiefs signaled a major shift in the league's media distribution strategy. Football fans that had long depended on free, over-the-air broadcasts for the most important games of the year suddenly discovered that they would have to pay for a streaming service they otherwise didn't need or want. But the migration of sports programming away from traditional broadcast networks touches on much more than subscription fatigue. The advertising dollars generated by high-profile NFL games are critical to over-the-air broadcasters that provide essential public interest programming such as local news, weather updates, and emergency alerts.

This Note has argued that the NFL's exclusive streaming agreements would probably survive an antitrust challenge under section 1 of the Sherman Act. First, the SBA's antitrust exemption for "sponsored telecasting" encompasses streaming services. Second, the Supreme Court's decision in *American Needle* suggests that the NFL's streaming agreements would likely withstand a rule of reason analysis. Finally, the common-law ancillary restraints doctrine provides yet another basis for the courts to uphold these agreements. Given the likely success of those arguments, Congress should amend the SBA to mandate free, over-the-air access for the games that matter most to fans and broadcasters alike.