WITH *SAN JOSÉ* AT BAT, *FEDERAL BASEBALL* IS IN THE BOTTOM OF THE NINTH

Colleen Ganin*

Baseball and antitrust are influential cultural and economic American traditions. They famously intersected in a series of cases whereby the Supreme Court created and reinforced a peculiar exemption for baseball from federal antitrust law. Since its creation in 1922, baseball's exemption has been widely criticized as both misguided and unwarranted. The rationale behind baseball's exemption is, in essence, that baseball is somehow on a higher moral ground, impervious to the law. As such, the exemption is used as an example for the Supreme Court's conscious willingness to serve interest groups.

The Court will soon have the opportunity to reconsider baseball's exemption. In 2013, the City of San José, California filed a complaint against MLB and some of its subsidiaries in the District Court of the Northern District of California. In its complaint, San José alleges, among other things, that MLB has violated federal and state antitrust laws by not allowing the Oakland A's major league baseball club to move to San José. City of San José v. Office of the Commissioner of Baseball *is likely to reach the Supreme Court.* San José *will be a test on the Court—the world will be watching as the Court is given the opportunity to correct almost a century of error and finally level the playing field between baseball and all other professional sports. This is an opportunity the Court must seize.*

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INTRODUCTION

"How can you not be romantic about baseball?"[1]

Baseball has been the national pastime for over 100 years, thus occupying a unique position in the fabric of American life and society.[2] Professional baseball undoubtedly holds a special place in the hearts of Americans but, in particular, it has captured the heart of the American judiciary as well. Major League Baseball ("MLB") has been set apart from every other professional sport,[3] and virtually every other business, through its exemption from federal antitrust law—a luxury that it has enjoyed for almost a century.

Through a series of cases that have come to be known as the "Baseball Trilogy,"[4] the U.S. Supreme Court forged and then reinforced baseball's antitrust exemption. The exemption originated in the 1922 Supreme Court case *Federal*

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1. MONEYBALL (Columbia Pictures 2011).
2. Flood v. Kuhn, 309 F. Supp. 793, 797 (S.D.N.Y. 1970).
3. *But see infra* Part V.
4. The "Baseball Trilogy" is comprised of three Supreme Court decisions that effectively constructed MLB's antitrust exemption: Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922); Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953); and Flood v. Kuhn, 407 U.S. 258 (1972).

Baseball Club of Baltimore v. National League,[5] where the Court determined that baseball could not be subject to the federal antitrust laws because it was a game, not a business, and because baseball was not a form of interstate commerce.[6] The Supreme Court revisited the issue in 1953[7] and again in 1972[8] where, on both occasions, it refused to overturn *Federal Baseball*. However, despite almost a century of deference to *Federal Baseball* by the Court, the decision "has not withstood the test of time"[9]—judges and commentators alike have widely condemned *Federal Baseball*,[10] labeling it "not one of Holmes' happiest days,"[11] and an "'aberration' that makes little sense given the heavily interstate nature of the 'business of baseball' today."[12] As one commentator points out, surely Holmes "got lucky on some First Amendment cases, and was dead solid perfect on *Lochner*, but this antitrust stuff was too much for him."[13] Further, as Justice Douglas properly

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5. 259 U.S. at 208–09.

6. *Id.* at 208.

7. *Toolson*, 346 U.S. at 357.

8. *Flood*, 407 U.S. at 258. In fact, the *Flood* Court went a step further, and determined that baseball was exempt from state antitrust laws as well. *See id.* at 284–85.

9. Opening Brief at 2, City of San José v. Office of the Comm'r of Baseball, No. C-14-15139 (9th Cir. Mar. 5, 2014) (emphasis added), *available at* http://cdn.ca9.uscourts.gov/datastore/general/2014/03/06/14-15139_opening_brief.pdf.

10. *See, e.g.*, STUART BANNER, THE BASEBALL TRUST: A HISTORY OF BASEBALL'S ANTITRUST EXEMPTION xi (2013) ("Scarcely anyone believes that baseball's exemption makes any sense."); G. EDWARD WHITE, CREATING THE NATIONAL PASTIME 70 (1996) (discussing *Federal Baseball* as "remarkably myopic, almost willfully ignorant of the nature of the enterprise"); Connie Mack & Richard M. Blau, *The Need for Fair Play: Repealing the Federal Baseball Antitrust Exemption*, 45 FLA. L. REV. 201 (1993); Samuel G. Mann, *In Name Only: How Major League Baseball's Antitrust Exemption Is Hurting the Game*, 54 WM. & MARY L. REV. 587 (2012); Kevin McDonald, *Antitrust and Baseball: Stealing Holmes*, 23 J. OF SUP. CT. HIST. 89, 90 (1998) ("The reaction of others ranged from thumping denouncement . . . to gentle embarrassment on Holmes' behalf . . . ."); Morgan A. Sullivan, *A Derelict in the Stream of Law: Overruling Baseball's Antitrust Exemption*, 48 DUKE L.J. 1265 (1999); Martin M. Tomlinson, *The Commissioner's New Clothes: The Myth of Major League Baseball's Antitrust Exemption*, 20 ST. THOMAS L. REV. 255 (2008); Andrew Zimbalist, *Baseball Economics and Antitrust Immunity*, 4 SETON HALL J. SPORTS L. 287 (1994).

11. Salerno v. Am. League of Prof'l Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970) (Friendly, J.) ("We freely acknowledge our belief that *Federal Baseball* was not one of Justice Holmes' happiest days [and] that the rationale in *Toolson* is extremely dubious . . . .").

12. City of San Jose v. Office of the Comm'r of Baseball, 2013 WL 5609346, No. C-13-02787 RMW, at *10 (N.D. Cal. Oct. 11, 2013) (citing *Flood*, 407 U.S. at 282). The court also indicated that it agreed "with the other jurists that have found baseball's antitrust exemption to be 'unrealistic, inconsistent, or illogical.'" *Id.* (citing Radovich v. Nat'l Football League, 352 U.S. 445, 452 (1957)).

13. McDonald, *supra* note 10, at 92. Interestingly, McDonald points out that, while antitrust may have been outside of Holmes's pay-grade, *Federal Baseball* was a unanimous decision supported by all of the 1922 justices, including antitrust darling Chief Justice Taft:

noted, *Federal Baseball* hinged on a "narrow parochial view of commerce" that will not survive the Court's "modern decisions."[14]

Indeed, the Court's antitrust decisions frequently run counter to widely accepted antitrust principles.[15] *Federal Baseball*, "[p]roduct of a bygone era, . . . is the *most widely criticized* of the Supreme Court's antitrust decisions."[16] Indeed, there is no legal justification as to *why* baseball has been (and should be) allowed to enjoy this unfettered freedom while other professional sports leagues are subjected to federal antitrust scrutiny.[17] All MLB teams compete with one another for players, coaches, and fans. From this perspective, an MLB team is no different than any other firm engaged in a market. MLB teams, as well as all other professional sports teams, compete to offer the best products at the lowest prices, a benefit which is conveyed to consumers—the fans.[18]

Professional sports organizations collaborate with their competitors in order to facilitate competition.[19] These types of collaborations among competitors are necessary in order to produce the product itself. In most markets, agreements among competitors would not have such characteristics and, instead, would have largely anticompetitive effects. For example, if direct competitors Pepsi and Coca-Cola agreed to market their products together, they would no longer compete in several important dimensions. However, in professional sports markets, the competition—the league—is built on arrangements among competitors. These contractual arrangements, therefore, are critical to healthy competition.[20] To be sure, this rationale does not mean that *all* contractual arrangements among professional sports organizations promote competition.[21] For example, licensing agreements with third parties may not promote competition and may even suppress competition.[22]

> Poor dumb Holmes. And poor dumb Brandeis, too. The *Federal Baseball* decision was unanimous, after all. You are not as much to blame if you did not write the opinion, but it can't be one of your 'happiest days' either. . . . Poor dumb Chief Justice Taft, as well. Taft is revered by most antitrust historians, including Judge Bork, for his opinion while still a Circuit Judge in the *Addyston Pipe* case . . . . Such a prescient thinker must certainly have looked back with shame on his vote in *Federal Baseball* if it is as bad as the conventional wisdom holds.

Id.

14. 407 U.S. at 286; *see also* McDonald, *supra* note 10, at 90.

15. *See, e.g.*, Appalachian Coals v. United States, 288 U.S. 344 (1933); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Am. Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304 (2013).

16. Opening Brief at 2, City of San José v. Office of the Comm'r of Baseball, No. C-14-15139 (9th Cir. Mar. 5, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/general/2014/03/06/14-15139_opening_brief.pdf.

17. BANNER, *supra* note 10, at xi.

18. *Id.*

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

20. *Id.*

21. *Id.*

22. *Id.*; Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010).

This general framework holds true for *all* professional sports, not just professional baseball. Accordingly, if all other professional sports are to be subject to antitrust laws,[23] the special constraints associated with professional sports leagues offer no justification for exempting baseball alone—there is virtually no disagreement on this point.[24]

So what has allowed this peculiar exemption to remain unscathed by the Court or Congress for almost 100 years? The most common explanation—albeit one without much legal substance—points to baseball's truly unique place in American culture.[25] Indeed, baseball is believed to have a position of moral superiority, setting it apart from other professional sports in the eyes and hearts of American fans—including judges and legislators.[26] For example, Justice Blackmun's opinion in *Flood v. Kuhn* is, for all intents and purposes, a baseball fan's stroll down memory lane—Justice Blackmun, appearing baffled by the question presented, began the infamous opinion with a list of 88 MLB players and business figures.[27] It is clear that, though Justice Blackmun "took the time to regale the eternal verities of the national game, he could not have considered how the reserve system, which the Court's opinion upheld, affected the lives of the men he memorialized."[28]

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23. *See infra* Part IV.

24. BANNER, *supra* note 10, at xiii. Banner cites one law professor's summary of this consensus: "[B]aseball's unique status . . . has been a favorite whipping boy for scholars and journalists alike . . . . [I]t has enjoyed almost no support except from the baseball hierarchy itself." *Id.* (citing Gary R. Roberts, *The Case for Baseball's Special Antitrust Immunity*, 4 J. OF SPORTS. ECO. 302, 307 (2003)).

25. *Id.* Banner cites one study on the history of federal regulation of professional sports, which observed that in 1951, baseball already "maintained an image in the hearts and minds of Americans as the pastoral, innocent, and noble national pastime," to which, he notes, is very much unlike the popular image of all other professional sports. *Id.* at xiv; *see also* Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption:* Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 24 J. SUP. CT. HIST. 183, 185 (2009); McDonald, *supra* note 10; *see generally* Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. OF ABNORMAL & SOC. PSYCH. 129 (1954).

26. BANNER, *supra* note 10, at xiv ("One can find starry-eyed judges professing their love for baseball as far back as 1915, when baseball confronted its first antitrust crisis . . . . It is not difficult to collect examples of judges and politicians making sentimental statements about baseball."); *see, e.g.*, Flood v. Kuhn, 407 U.S. 258, 266 (1972). In *Flood*, Justice Blackmun went as far as to emphasize the lower court's sentiment that "baseball's status in the life of the nation is so pervasive that . . . the Court can take judicial notice that baseball is everybody's business." *Id.* (quoting Flood v. Kuhn, 309 F. Supp. 793, 797 (S.D.N.Y. 1970)). Blackmun went on to state that "[t]he game is on a higher ground; it behooves every one to keep it there." *Id.* at 267 (quoting *Flood*, 309 F. Supp. at 797).

27. *Flood*, 407 U.S. at 260–64. Some of Blackmun's colleagues were appalled with Part I of the opinion (entitled "The Game"); Justice White "offered what he called a 'gentle suggestion that you omit Part I.' Blackmun declined." BANNER, *supra* note 10, at 209–10. Accordingly, Justice White and Justice Burger concurred in all parts of the opinion except for Part I. *Id.* at 210; *see* Michael J. Mozes & Ben Glicksman, *Adjusting the Stream? Analyzing Major League Baseball's Antitrust Exemption After* American Needle, 2 HARV. J. SPORTS & ENT. L. 265, 269 n.18 (2011).

28. Roger I. Abrams, *Blackmun's List*, 6 VA. SPORTS & ENT. L. J. 181, 188 (2007).

So the question remains—regardless of baseball's beloved place in American society, should baseball be held accountable under federal antitrust law, like nearly every other industry in this country? The answer is undoubtedly yes. MLB operates in open violation of federal antitrust laws on the basis of outdated authority that "is both unsupported by contemporary jurisprudence and the object of widespread criticism."[29] Further, because of the adverse effects that have arisen from the obscurities of the exemption,[30] the Court would be wise to correct its own mistake and overturn *Federal Baseball*—"a decision that was dubious in 1922 and indefensible in 2014"[31]—once and for all.

Through judicial misguidance and cultural transformation, MLB's antitrust exemption has been reduced to a true "derelict in the stream of the law."[32] No legally significant reasoning has emerged to support the notion that baseball should be the *only* major league sport that is exempt from federal antitrust laws.[33] Additionally, because the Supreme Court never gave a definitive scope to the exemption, lower courts have struggled with interpreting and applying the exemption. This uncertainty has been counterproductive, and has negatively impacted the business of baseball.[34]

The Court will soon get its chance to rectify this so-called illogical[35] anomaly.[36] In 2013, the City of San José, California filed a complaint against MLB in the District Court for the Northern District of California. In its complaint, San José alleged, among other things, that MLB had violated federal and state antitrust laws by not allowing the Oakland A's ("the A's") major league baseball club to

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29. Opening Brief at 4, City of San José v. Office of the Comm'r of Baseball, No. C-14-15139 (9th Cir. Mar. 5, 2014) (emphasis added), *available at* http://cdn.ca9.uscourts.gov/datastore/general/2014/03/06/14-15139_opening_brief.pdf.

30. *See infra* Part III.

31. Opening Brief at 5, *San José*, No. C-14-15139 (emphasis added).

32. *Flood*, 407 U.S. at 286–88 (Douglas, J., dissenting).

33. *See id.* at 291 (Marshall, J., dissenting). Justice Marshall explains the lack of legal basis as follows:

> Since baseball is interstate commerce, if we re-examine baseball's antitrust exemption, the Court's decision[s] in *United States v. Shubert*, *United States v. International Boxing Club*, and *Radovich v. National Football League*, require that we bring baseball within the coverage of the antitrust laws.

Id. (internal citations omitted) (internal formatting omitted).

34. *See infra* Part V.

35. Radovich v. Nat'l Football League, 352 U.S. 445, 452 (1957) ("If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the [Sherman] Act. No other business claiming the coverage of those cases has such an adjudication."); *see also* Avraham J. Sommer, *The National Pastime of the American Judiciary: Reexamining the Strength of Major League Baseball's Antitrust Exemption Following the Passage of the Curt Flood Act and the Supreme Court's Ruling in* American Needle, Inc. v. NFL, 19 SPORTS LAW. J. 325, 331–32 (2012).

36. *See Flood*, 407 U.S. at 286–88.

move to San José.[37] The lower court granted MLB's motion to dismiss in part, and as of November 2014, the case was before the Ninth Circuit.[38]

City of San José v. Office of Commissioner of Baseball will be a test on the Court—the world will be watching as the Court is given the opportunity to correct almost a century of error and finally level the playing field between baseball and all other professional sports. This is an opportunity that the Court must seize.

Part I of this Note summarizes the history and development of baseball's antitrust exemption, largely by looking at the Supreme Court's "Baseball Trilogy." Part II addresses The Curt Flood Act of 1998 and its insignificant effect on limiting the scope and impact of the exemption. Part III examines the inconsistent interpretations and applications of the exemption by the lower courts. Part IV summarizes the game-changing case, *American Needle, Inc. v. National Football League*,[39] and the impact that it will certainly have on future baseball antitrust litigation. Part V discusses *San José* and how that case should be decided based on the conclusions articulated in the prior Parts of this Note. Part VI forecasts what the future is likely to hold for MLB in the event that *Federal Baseball* is overturned.

I. HISTORICAL BACKGROUND: "THE BASEBALL TRILOGY" AND DEFINING THE "BUSINESS OF BASEBALL"

According to baseball legend, the first baseball game was played in Cooperstown, New York in 1839.[40] In truth, versions of baseball date back much earlier, but organized baseball did not emerge until the mid-nineteenth century.[41] The first organized game was played in Hoboken, New Jersey in 1845.[42] Fourteen years later, the first college game took place in Pittsfield, Massachusetts between Amherst College and Williams College. The first professional baseball team, the Cincinnati Red Stockings, was established in 1869, and in 1876, the National League of Professional Baseball Clubs (the "National League")—the predecessor to the modern-day National Baseball League—was established as the first professional baseball league.[43] In constructing the National League, the creators sought to "bring respectability and Victorian sensibility to the game," and aimed to market to a higher-end clientele by placing a ban on Sunday games and "ungentlemanly

37. Complaint at 2, City of San José v. Comm'r of Baseball, No. C-13-02787 (RMW), 2013 WL 5609346 (N.D. Cal. Oct. 11, 2013) (No. 13-02787), *appeal docketed*, No. 14-15139 (9th Cir. Jan. 27, 2014).

38. The case is being presided over by a panel led by Chief Judge Alex Kozinski. *See* Beth Winegarner, *MLB Antitrust Suit Not Barred By Exemption, 9th Cir. Told*, LAW360 (Aug. 12, 2014, 7:16 PM), http://www.law360.com/articles/566663/mlb-antitrust-suit-not-barred-by-exemption-9th-circ-told.

39. 560 U.S. 183 (2010).

40. GEOFFRY C. WARD & KEVIN BURNS, BASEBALL: AN ILLUSTRATED HISTORY 3 (2007).

41. *Id.* at 3–4.

42. Alito, *supra* note 25, at 185.

43. *Flood*, 407 U.S. at 261.

behavior" such as gambling and drinking, as well as by charging $.50 per ticket to "ensure a more upscale crowd."[44]

A. The Reserve Clause

Baseball's exemption from antitrust law is rooted in its historical position as the national pastime,[45] and the "reserve clause" system is central to understanding that history. The reserve clause was a contractual stipulation implemented by the National League, whereby each club had the right to renew a player's contract following each season—effectively rendering the player's contract property of the team that first acquired him for the remainder of the player's career.[46]

While the reserve clause was a standard provision in MLB players' contracts for nearly a century, it did not start that way.[47] Prior to the reserve clause, many National League baseball clubs were unable to turn a profit due to the competitive nature of player salaries. In the early days of professional baseball, long before radio and television broadcasting, revenue came almost entirely from ticket sales.[48] So naturally bigger-city clubs enjoyed a large monetary advantage.[49] The oligarchic big-city clubs were able to buy better talent, thus putting the smaller, poorer teams at a huge competitive disadvantage.[50] However, even the large-city clubs felt the pressure of high-priced player contracts. Inflated player salaries meant that, in a given season, most clubs' costs greatly exceeded revenue in a given season.[51] In order to maintain the sanctity of the game, and to mitigate the crushing financial pressure of unconstrained salaries, something had to change. The reserve clause was the answer.

In an effort to mitigate crushing costs, in 1879 the National League clubs agreed to not compete with each other in hiring the best players. Accordingly, each club was allowed to "reserve" five players who were not allowed to sign with any other club without permission from their "reserve" club.[52] The reserve clause was placed in contracts to prevent "the wrecking of leagues . . . whereby the richest clubs could always win."[53] The preliminary reserve clause of 1879 proved to be so

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44. JEROLD J. DUQUETTE, REGULATING THE NATIONAL PASTIME: BASEBALL AND ANTITRUST 4 (1999).

45. *But see infra* Part IV (suggesting baseball's reign as the "National Pastime" has been supplanted by football).

46. *Baseball's Labor History*, SPORTS MOGUL, http://www.sportsmogul.com /content/labor_history.html (last visited Apr. 13, 2014).

47. BANNER, *supra* note 10, at 4.

48. *Id.* at 9.

49. *Id.* The National League played in cities that varied greatly in size, ranging from New York (with a population of 1.2 million, according to the 1880 census) to Hartford (with a population of 42,000, according to the 1880 census). *Id.*

50. *See id.* at 9.

51. *Id.*

52. *Id.*

53. *Id.* at 9 (quoting sportswriter Hugh Fullerton).

successful in growing team profits that, by 1887, the reserve clause was an explicit term in every player's contract.[54]

While several unsuccessful rival leagues emerged in the early days of professional baseball, the American League, established in 1901, was the most formidable competition for the National League.[55] The American League effectively poached fans by selling alcohol at games, playing on Sundays, and only charging $.25 for admission.[56] Additionally, the American League did not limit player salaries. Thus, the American League's free contracting[57] won over many talented players from the National League, and in 1901 alone the American League had stolen more than 100 players from the National League.[58]

In 1903, in order to mitigate fierce interleague competition, the American and National Leagues came to a truce known as the "National Agreement." Under the Agreement, the Leagues formed the Major League Baseball ("MLB") organization, and established the anticompetitive framework that laid the foundation for the economic structure of modern-day professional baseball.[59] The terms of the Agreement provided that each League would use the reserve clause system and would respect the other League's player contracts.[60] This meant that if American League players violated their contracts, they were subject to the disciplinary actions associated with the reserve clause—including sanctions, injunctions to prevent "contract jumping," and blacklisting by all other professional baseball clubs.[61]

The National Agreement resulted in a very unusual system whereby a baseball player was essentially bound for life to the team that first signed him;[62] a player's "reserve" team could sell, trade, or release the player without his consent at any time.[63] While baseball clubs enjoyed the profits associated with the reserve clause, the inequities associated with its restrictive operation gradually prompted a huge backlash from the media, players, and labor leaders, all of whom felt that the

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54. *Id.* at 5.

55. Alito, *supra* note 25, at 185–86.

56. DUQUETTE, *supra* note 44, at 6. Duquette goes on to note that "[t]hese measures were intended to attract those fans who had been abandoned by the National League's campaign to instill Victorian values and standards." *Id.* (citing HAROLD SEYMOUR, BASEBALL: THE GOLDEN AGE 343 (1971)).

57. "Free contracting" means that players were given the freedom to contract with the highest-bidding team. This was unlike the National League's reserve clause, which kept player salaries at a minimum in order to increase profitability for the National League teams. *See id.* at 4–5.

58. *See id.* at 7 (citing ROBERT GREGORY, DIZ: THE STORY OF DIZZY DEAN AND BASEBALL DURING THE GREAT DEPRESSION 95 (1992)); *see also* BANNER, *supra* note 10, at 36.

59. DUQUETTE, *supra* note 44, at 7–8.

60. Alito, *supra* note 25, at 186.

61. WARREN FREEDMAN, PROFESSIONAL SPORTS AND ANTITRUST 33 (1987) (citing Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949)).

62. BANNER, *supra* note 10, at 6.

63. *Id.*

reserve clause exemplified that "it is possible practically to condemn a man to perpetual slavery."[64]

B. Enter the Federal League

After the National Agreement, baseball became big business—it is not a stretch to say that the National Agreement allowed professional baseball to develop into the national pastime we know today.[65] Yet, despite the Agreement's success, the Federal League of Baseball Clubs (the "Federal League") soon emerged as a potential threat to MLB's stronghold on the professional baseball market.[66]

Founded in 1913, the Federal League was established as an independent minor league of six teams representing major cities in the Midwest.[67] The Federal League initially did not intend to compete with MLB, and even took steps to ensure that it did not step on MLB's toes. For example, the Federal League's schedule was strategically planned to avoid competition with MLB games, and the clubs were careful not to recruit players that were under contract with MLB.[68] Despite its initial submissive approach, in 1914 the Federal League declared itself a major league and went into open competition with MLB for fans and talent.[69]

The Federal League offered huge paydays to players willing to leave MLB, but because of MLB's reserve clause and players' subsequent fears of being blacklisted, the Federal League only attracted aging talent with little to lose.[70] Despite MLB's stronghold on valuable talent, the threat of the Federal League, however small, caused MLB player salaries to balloon. As a result, the Federal League was forced to pay older players even larger salaries to stay afloat, which placed a financial strain on the League that was ultimately too great to bear.[71]

C. The Baseball Trilogy

1. The Creation of the Exemption

By 1916, the Federal League could no longer withstand the economic pressures of MLB's reserve clause, and most Federal League club owners either accepted a buy-out from MLB, or accepted an offer to buy a franchise within MLB in exchange for abandoning their Federal League club.[72] After the disintegration of the Federal League, the Baltimore club, one of two publicly owned Federal League

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64. *Id.* (quoting labor leader Charles Lichtman).
65. Alito, *supra* note 25, at 186.
66. *See id.* at 187.
67. *See* BANNER, *supra* note 10, at 45. The teams included: the Baltimore Terrapins; the Brooklyn Tip-Tops; the Buffalo Blues; the Chicago Whales; the Indianapolis Hoosiers (which became the Newark Peppers in 1915); the Kansas City Packers; the Pittsburgh Rebels; and the St. Louis Terriers. Alito, *supra* note 25, at 186.
68. Alito, *supra* note 25, at 186.
69. *Id.* at 187; *see also* BANNER, *supra* note 10, at 48.
70. Alito, *supra* note 25, at 188.
71. *Id.* at 187–89.
72. *Id.* at 189.

clubs, filed suit against MLB in the Supreme Court of the District of Columbia.[73] The Baltimore Club argued that, by stomping out the Federal Baseball League, MLB had violated §§ 1 & 2 of the Sherman Act,[74] as well as § 4 of the Clayton Act.[75] Additionally, the Baltimore Club accused MLB of "conspiring to destroy its franchise by monopolizing the baseball business and restraining trade therein."[76] The D.C. Supreme Court held for the Baltimore Club, but the D.C. Circuit reversed on appeal,[77] reasoning that the business of baseball did not constitute interstate commerce.[78]

The Federal Baseball League appealed to the U.S. Supreme Court and, in a decision authored by noted laissez-faire capitalist Justice Holmes, the Court unanimously upheld the D.C. Circuit Court's decision on the basis that professional baseball did not constitute interstate commerce.[79] Justice Holmes reasoned that, although "in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so," that fact was "not enough to change the character of the business."[80] The substantive question of whether MLB had violated federal antitrust laws was not addressed in the decision because, under the Court's rationale, the federal antitrust laws were inapplicable to professional baseball.[81] Therefore, the only real question addressed by the Court was whether the business of baseball constituted "trade or commerce" within the meaning of the Sherman Act.[82]

The essence of *Federal Baseball* was that the Sherman Act's jurisdictional reach could only extend as far as Congress's jurisdictional reach.[83] Thus, the Sherman Act could only be constitutionally interpreted to apply to interstate commerce.[84] The Court did not explicitly say that Congress intended to exempt baseball from antitrust laws;[85] rather, it held that because the business of baseball was beyond the purview of the antitrust laws, Congress *could not* apply them.[86] Keeping in mind that *Federal Baseball* was decided under a narrow interpretation of "commerce," Justice Holmes's decision is somewhat less reprehensible; baseball involves "exhibitions"—a "purely state" affair—versus a flow of goods and services

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73. *See* Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Balt., Inc., 269 F. 681, 682 (D.C. Cir. 1920), *aff'd*, 259 U.S. 200 (1922), *reh'g granted*, 42 S.Ct. 587 (1922).

74. 15 U.S.C. §§ 1–2 (1890); *Nat'l League of Prof'l Baseball Clubs*, 269 F. at 684.

75. 15 U.S.C. § 15 (1914); Alito, *supra* note 25, at 190.

76. Alito, *supra* note 25, at 190.

77. *Nat'l League of Prof'l Baseball Clubs*, 269 F. at 681.

78. *Id.* at 684.

79. Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208 (1922).

80. *Id.* at 208–09.

81. *See id.* at 209.

82. *See id.*

83. *See id.* at 208.

84. BANNER, *supra* note 10, at 91.

85. *Contra* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953).

86. BANNER, *supra* note 10, at 91.

across state lines.[87] On that basis, *Federal Baseball* did not address whether MLB had violated federal antitrust laws.[88] Though, it goes without saying that, if the Court had found that the business of baseball was subject to antitrust scrutiny, the National Agreement would have been deemed a plain violation of antitrust laws.

The view of interstate commerce relied upon in *Federal Baseball* began to collapse shortly thereafter,[89] and the irrelevance of *Federal Baseball*'s reasoning became apparent just one year later with the Court's unanimous decision in *Hart v. B.F. Keith Vaudeville Exchange*, an antitrust case brought against a group of vaudeville theaters.[90] The theaters relied on *Federal Baseball* in arguing that vaudeville—just like baseball—consisted of performances in a single location, and that the traveling aspect of the performances—just like baseball—was merely incidental.[91] However, in another opinion authored by Justice Holmes, the Court held that interstate travel was essential to the enterprise, thus making vaudeville a form of interstate commerce.[92] Despite the glaring inconsistency with *Federal Baseball*, Justice Holmes offered no basis for his conclusion that moving a vaudeville show's apparatus across state lines constituted interstate commerce, while moving a baseball club's team and equipment did not.[93] With little substantive reasoning to rely on, lower courts began to distinguish *Federal Baseball* from other cases involving exhibitions and entertainment that crossed state lines merely because they were not in the "business of baseball."[94]

Following *Federal Baseball*, MLB was virtually absent from judicial dockets for almost a quarter of a century.[95] This inactivity ended with the emergence of another rival baseball league—in 1946, the long-established Mexican Baseball

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87. *Fed. Baseball*, 259 U.S. at 208.

88. *Id.*

89. For example, in the late 1930s and early 1940s, the Supreme Court radically expanded the definition of interstate commerce in a series of cases involving New Deal legislation. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941). In *Darby*, the Court determined that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce . . . ." *Id.* at 118; *see also* Wickard v. Filburn, 317 U.S. 111 (1942) (holding that a farmer growing his own wheat affected interstate commerce because the farmer, in turn, was not purchasing another's wheat).

90. 262 U.S. 271, 272 (1923).

91. BANNER, *supra* note 10, at 92.

92. *Compare Hart*, 262 U.S. at 273, *with Fed. Baseball*, 259 U.S. at 208 (defining the business of baseball as "giving *exhibitions* of [baseball]") (emphasis added).

93. BANNER, *supra* note 10, at 92.

94. Jacqueline Lamer, *Baseball's Antitrust Exemption Part I: Then vs. Now*, OFFICIAL REVIEW (Apr. 25, 2013), http://www.theofficialreview.com/baseballs-antitrust-exemption-part-i-then-vs-now/.

95. *But cf.* Milwaukee Am. Ass'n v. Landis, 49 F.2d 298 (N.D. Ill. 1931); Spencer v. Milton, 287 N.Y.S. 944 (N.Y. Sup. Ct. 1936). For more explanation on the "interim" period between *Federal Baseball* and the post-WWII MLB litigation, see Dr. Richard L. Irwin, *A Historical Review of Litigation in Baseball*, 1 MARQ. SPORTS. L.J. 283, 292–93 (1991).

League surfaced as a competitor to MLB, and "[a]ll hell broke loose."[96] Prior to 1946, the Mexican Baseball League's salaries and quality of play were inferior to those in the United States.[97] Aiming to turn its standing around, the Mexican Baseball League took a lesson out of the old Federal League playbook and began offering salaries to MLB players of up to ten times what they were earning in the United States.[98] Many players took the bait and began violating their contracts with MLB to play in Mexico.[99] In response, MLB's then-Commissioner Happy Chandler banned those players from returning to MLB for a five-year period.[100]

Despite some initial success, the economic pressures of MLB and the reserve clause were too strong and, like the Federal Baseball League, the Mexican League quickly fell on hard times.[101] Accordingly, many players who left to play in Mexico returned after just one season, only to find themselves jobless because of MLB's five-year ban.[102] In 1948, New York Giants' outfielder Danny Gardella was the first player to challenge the ban.[103] Gardella brought suit against Chandler, MLB, and others, arguing that blacklisting players was a restraint of trade in violation of §§ 1, 2, and 3 of the Sherman Act, and §§ 2 and 3 of the Clayton Act.[104] Among other things, Gardella alleged that the defendants entered into a conspiracy that illegally restrained trade, and that the reserve clause was used as a means to foster and maintain MLB's monopoly.[105]

The District Court for the Southern District of New York dismissed the suit for failure to state a cause of action.[106] The Second Circuit reversed in a plurality opinion, reasoning that, because of the widespread broadcasting of MLB games, the business of baseball *was* effectively engaged in interstate commerce.[107] Writing for the court, Judge Learned Hand explained that, because the broadcasting of professional baseball games was an integral part of the business of baseball itself, professional baseball was a business that engaged in interstate commerce.[108] Judge Frank's concurring opinion described the reserve system as "shockingly repugnant

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96. BANNER, *supra* note 10, at 95–96 (quoting Happy Chandler's memoirs, which described the *Gardella* era as such).

97. *Id.* at 96.

98. *Id.* ("Johnny Pesky, the shortstop for the Red Sox, earned $4,000 in Boston; he was offered $45,000 to play in Mexico. [Yankee] Phil Rizzuto . . . [was offered] $100,000 for [a] three-year-contract.").

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *See* Gardella v. Chandler, 79 F. Supp. 260 (S.D.N.Y. 1948), *rev'd*, 172 F.2d 402 (2d Cir. 1949).

104. Gardella v. Chandler, 172 F.2d 402, 403 (2d Cir. 1949). The court in *Gardella* went on to explain that "[a]pparently [Gardella] relies upon Sec. 4 of the Clayton Act" as the basis for his damages claim. *Id.*

105. *Gardella*, 79 F. Supp. at 261–62.

106. *Id.* at 261.

107. *Gardella*, 172 F.2d at 402.

108. *Id.* at 407–08.

to moral principles," and equated it to "involuntary servitude."[109] Judge Frank also construed *Federal Baseball* narrowly, determining that only the traveling aspect of the game did not constitute interstate commerce.[110] Despite the majority and concurring opinions' differing analyses of the reserve system, they agreed in their conclusion that *Federal Baseball*'s approach—which was grounded on an outdated notion that baseball did not constitute interstate commerce—was no longer authoritative.[111]

Following the Second Circuit's determination that Gardella did have a cause of action, he settled out of court with MLB instead of moving forward with the litigation.[112] But, for the first time since 1922, a court had pierced the armor that protected baseball from antitrust scrutiny. The *Gardella* decision "struck terror in the hearts of club owners," who now worried that the reserve clause might not stand up against subsequent antitrust attacks.[113]

2. Reliance on "Congressional Inaction"

Following *Gardella*, more and more players came out of the woodwork with antitrust claims against MLB. George Toolson, a pitcher for Yankees's AAA minor-league affiliate team,[114] the Newark Bears, filed suit in spring of 1951 after being sent down to the Binghamton Triplets, a class A team.[115] At the time, the Yankees were riding high after winning five consecutive World Series, leaving Toolson with little chance of ever playing in the majors so long as he remained a Yankees affiliate.[116] As a result of the reserve clause system, the Yankees owned Toolson's contract and could keep him in the minor leagues indefinitely; whereas, if Toolson was affiliated with a less-winning team, he may have been given the opportunity to see playing time in the majors.

In his complaint, Toolson alleged that, by preventing free agency, MLB's reserve clause system was an illegal restraint on trade in violation of the Sherman

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109. *Id.* at 409.

110. *Id.* at 411. Judge Frank relied on the following statement by the Court: "The business of giving exhibitions of [baseball are] purely state affairs . . . [and] the fact that in order to give exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business." *Id.* He went on to conclude that "we will not trespass on the Supreme Court's domain if we hold that the rationale of the Federal Baseball case is now confined to the insufficiency of traveling, when employed as a means of accomplishing local activities, to establish the existence of interstate commerce." *Id.* at 412; *see* Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208–09 (1922).

111. *Gardella*, 172 F.2d at 412.

112. Irwin, *supra* note 95, at 294.

113. BANNER, *supra* note 10, at 101.

114. For a more thorough discussion of the minor-league structure, see *infra* Part VII.

115. BANNER, *supra* note 10, at 112.

116. *Id.*

Act.[117] Additionally, Toolson alleged that MLB conspired to monopolize the professional sports industry.[118] In *Toolson v. New York Yankees, Inc.*, the District Court for the Southern District of California dismissed Toolson's complaint on the basis of *Federal Baseball*, and reasoned that, if the Supreme Court erred, or if changed conditions warranted a different approach, the Supreme Court should be the one to correct the error.[119] On appeal, the Ninth Circuit affirmed.[120] Around the same time that *Toolson* was being adjudicated, two other antitrust cases were filed against MLB: *Kowalski v. Chandler*[121] and *Corbett v. Chandler*[122]—both of which were dismissed on the basis of *Federal Baseball*.[123] All three cases were appealed to the Supreme Court and consolidated for hearing and decision.

Toolson gave the Supreme Court an opportunity to revisit its highly-criticized opinion in *Federal Baseball*, and while many believed that it would bring an end to *Federal Baseball*,[124] the Court affirmed.[125] The Court reasoned that Congress's silence on *Federal Baseball* indicated Congressional acquiescence and approval of the exemption.[126] Under *Federal Baseball*, baseball's antitrust immunity existed based on the notion that the "business of baseball" did not constitute interstate commerce, and thus could not be regulated by Congress.[127] Oddly, despite the fact that this rationale had long been rejected, the Court affirmed *Federal Baseball* but reinterpreted it to state that Congress *could* regulate baseball, but it had simply chosen not to do so.[128] Inexplicably, the issue of whether baseball was engaged in interstate commerce was not addressed in the *Toolson* Court's opinion. Additionally, rather than obfuscating the issue as it did in *Federal Baseball*, the *Toolson* Court explicitly stated that MLB was exempted from antitrust regulation.[129]

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117. Toolson v. N.Y. Yankees, 101 F. Supp. 93, 94–95 (S.D. Cal. 1951), *aff'd*, 200 F.2d 198 (9th Cir. 1952), *aff'd*, 346 U.S. 356 (1953), *reh'g denied*, 346 U.S. 917 (1953).

118. *Id.* at 93.

119. *Id.* at 94–95.

120. Toolson v. N.Y. Yankees, Inc. 200 F.2d 198 (9th Cir. 1952), *aff'd*, 346 U.S. 356 (1953), *reh'g denied*, 346 U.S. 917 (1953).

121. 202 F.2d 413 (6th Cir. 1953).

122. 202 F.2d 428 (6th Cir. 1953).

123. The U.S. District Court for the Southern District of Ohio dismissed both Kowalski and Corbett's complaints in unreported opinions. Both plaintiffs appealed, and the Sixth Circuit affirmed. *See Kowalski*, 202 F.2d at 413; *Corbett*, 202 F.2d at 428.

124. *See* BANNER, *supra* note 10, at 114.

125. Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953) (per curiam).

126. *Id.* at 357 (affirming on the authority of *Federal Baseball*, which determined that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws").

127. *See* Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922).

128. BANNER, *supra* note 10, at 120–21. ("Before *Toolson*, it was uncertain whether the antitrust exemption was still in effect, and it was almost uncertain whether Congress had the power to modify it. *Toolson* removed these uncertainties by answering both of these questions affirmatively.").

129. *Id.* at 120.

While the Court's affirmation of *Federal Baseball* was not terribly surprising, the Court's reasoning in *Toolson* was questionable; specifically, *Toolson*'s reliance on Congressional inaction has gone on to perplex lower courts and legal commentators alike.[130] By interpreting *Federal Baseball* to say that Congress never intended for baseball to be subject to the Sherman Act, *Toolson* altered the exemption's underlying rationale.[131] *Toolson*'s interpretation of *Federal Baseball* is alarmingly misguided because there is no evidence that Congress was contemplating professional baseball at all when it enacted the Sherman Act—the Sherman Act was enacted in 1890, 13 years prior to the National Agreement. Furthermore, in light of *Federal Baseball*'s proclamation that Congress was unable to regulate baseball, the "congressional inaction" justification employed by the *Toolson* Court is dubious at best—some have gone as far as to dub *Toolson*'s reinterpretation of *Federal Baseball* as "the biggest bait-and-switch scheme in the history of the Supreme Court."[132] Though, while the *Toolson* rationale is unsettling, the decision's import lies in its transformation of *Federal Baseball* into a "permanent exemption grounded in Congress's purported original intent when passing the Sherman Act."[133]

Following *Toolson*, the Court refused to extend *Federal Baseball* to any other professional sport,[134] and many lower courts "grew increasingly restive" with the exemption "that Judge Jerome Frank dubbed an 'impotent zombie' in 1949 and that Judge Henry Friendly in 1970 found 'extremely dubious.'"[135]

3. Upholding the "Illogical" Exemption

Flood v. Kuhn,[136] the last—and most unusual—installment of the Trilogy stood out amongst the two preceding Trilogy cases. This, in part, is because of the importance of the plaintiff—at the time of filing, Curt Flood was a seven-time Gold Glove winner, and was in the prime of his career.[137] Additionally, during the 1960s and 1970s, the Major League Baseball Players Association ("MLBPA") was established, providing players with a medium to "claim full citizenship in

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130. *See* McCoy v. Major League Baseball, 911 F. Supp. 454, 457 (W.D. Wash. 1995). In *McCoy*, the court noted that Congressional silence is not typically read to mean Congressional acquiescence as it was in *Toolson*. *Id.*

131. Nathaniel Grow, *Defining the "Business of Baseball": A Proposed Framework for Determining the Scope of Professional Baseball's Antitrust Exemption*, 44 U.C. DAVIS L. REV. 557, 570 (2010).

132. *Id.* at 570–71 (citing McDonald, *supra* note 10, at 100).

133. *Id.* at 571.

134. *See* William Eskridge, *Overuling Statutory Precedent*, 76 GEO. L. J. 1361, 1381 (1988). For a full discussion of the Court's refusal to exempt other professional sports from federal antitrust regulation, see *infra* Part V.

135. Eskridge, *supra* note 134, at 1381 (quoting Gardella v. Chandler, 172 F.2d 402, 409 (2d Cir. 1949) (Frank, J., concurring); Salerno v. Am. League of Prof'l Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970), *cert denied*, 400 U.S. 1001 (1971)).

136. 407 U.S. 258 (1972).

137. BANNER, *supra* note 10, at 187–88 (noting that, because the case was brought by seven-time Gold Glove winner Curt Flood, *Flood v. Kuhn* is the best known case out of the three trilogy cases).

baseball."[138] The MLBPA developed into a very powerful union, and due to its support of Flood in the litigation, the case garnered further attention.[139]

At the end of the 1969 season, 31-year-old Flood was traded to the Philadelphia Phillies after playing on the St. Louis Cardinals for 12 years.[140] Trades of this nature were commonplace because of the reserve clause, which allowed baseball clubs to control the course of their employees' careers indefinitely.[141] Oftentimes players were not even told that they had been traded by team management, but rather were forced to find out from newspapers or radio shows. Hank Greenberg, a two-time American League MVP, learned that he had been sold to the Pittsburgh Pirates after playing for the Detroit Tigers for 17 years: "I couldn't believe it . . . I was so shocked and hurt I quit baseball."[142]

Upon learning that he had been traded, Flood wrote then-Commissioner Bowie Kuhn, petitioning for free agency:[143]

> After twelve years in the Major Leagues, I do not feel that I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic rights as a citizen and is inconsistent with the laws of the United States . . . .[144]

Despite the heartfelt letter, Kuhn refused to aid Flood in his pursuit of free agency. Accordingly, in January 1970 Flood filed suit against MLB, challenging baseball's reserve clause.[145] The District Court for the Southern District of New York dismissed the complaint,[146] and the Second Circuit affirmed.[147] Flood then petitioned the Supreme Court, which granted review.

Subsequent to *Toolson*, the Court had decided several cases holding that other professional sports leagues were subject to antitrust scrutiny.[148] Because of this turn of events, *Flood* was thought to be the probable end to the exemption. Also,

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138. DUQUETTE, *supra* note 44, at 62–63.

139. *See id.* at 67. "MLBPA's executive director Marvin Miller orchestrated Flood's challenge of baseball's storied exemption. Miller convinced the association to finance Flood's lawsuit. Miller also personally recruited former Supreme Court Justice Arthur Goldberg to represent Flood." *Id.*

140. BANNER, *supra* note 10, at 188–89.

141. *Id.*

142. Abrams, *supra* note 28, at 203 (citing LAWRENCE S. RITTER, THE GLORY OF THEIR TIMES 324–25 (Macmillan & Co., Inc. 1984) (1966)).

143. *Id.* at 189.

144. *Id.*; *see also* Flood v. Kuhn, 407 U.S. 258, 288–89 (1972).

145. Flood v. Kuhn, 316 F. Supp. 271, 272 (N.Y.S.D. 1970).

146. *Id.* The district court held that, under *Federal Baseball*, "baseball remains exempt from [antitrust] laws, that baseball's federal [antitrust] exemption was within the area preempted from state regulation, and that [the] reserve system did not constitute involuntary servitude." *Id.*

147. Flood v. Kuhn, 443 F.2d 264 (2d Cir. 1971).

148. *See, e.g.*, Radovich v. Nat'l Football League, 352 U.S. 445 (1957) (holding that the NFL was not exempt from antitrust law); Int'l Boxing Club of N.Y. v. U.S., 358 U.S. 242 (1959) (holding that professional boxing was not exempt from antitrust law).

baseball had become increasingly involved in interstate commerce, which was believed to further undercut the stated rationale for the exemption.[149] Despite this opportunity to right the wrongs of *Federal Baseball*, the Supreme Court affirmed, citing stare decisis and congressional inaction as the basis for its reasoning.[150]

Many have criticized the *Flood* opinion as "stare decisis run amok."[151] Though, despite these criticisms, when later asked which of his authored opinions he found most significant, Justice Blackmun replied: "Part of my answer is that *Flood v. Kuhn* was the one I enjoyed the most."[152] The Court's majority opinion starts with a narrative that Blackmun dubbed as a "sentimental journey" through the history of baseball.[153] To begin his opinion in *Flood*, Blackmun regaled over 80 of baseball's most famous players, and celebrated baseball's position as the "national pastime," which was enjoyed by millions of fans.[154] Later in the opinion, he addressed the merits of the exemption, and made several observations. First, Justice Blackmun recognized that "baseball is a business and it is engaged in interstate commerce."[155] In fact, Blackmun even disclosed in his private notes that while he "basically agreed with Justice Holmes that baseball was 'a sport, not a business,'" he acknowledged that, "'today' that kind of outcome was less than 'realistic.'"[156] One might have anticipated that, once baseball was acknowledged as being a part of interstate commerce, the exemption would fail. Instead, the Court stood squarely behind the same confused concept of "congressional inaction" as *Toolson* had.[157] And, while Justice Blackmun conceded that *Federal Baseball* was "an exception and an anomaly," he immediately went on to justify that anomaly on the basis of "baseball's unique characteristics and needs"[158]—without identifying what exactly those unique characteristics and needs were. Furthermore, the opinion expressed a concern that reversing the Court's prior decisions would lead to huge retroactive costs.[159] In the end, the Court concluded that it was "loath . . . to overturn [MLB's

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149. Irwin, *supra* note 95, at 296 (citing JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS 486 (1979)).

150. Flood v. Kuhn, 407 U.S. 258, 285 (1972).

151. Abrams, *supra* note 28, at 182 (citing Eskridge, *supra* note 134, at 1381 ("Flood v. Kuhn is an almost comical adherence to the strict rule against overruling statutory precedents, particularly considering that the Sherman Act has developed essentially through a common law process.")).

152. *Id.* at 184, n.4. Abrams cites Justice Blackmun's papers (hereinafter "Blackmun Papers") as the source for this quoted material (available at the Library of Congress in Washington, D.C.) ("In correspondence included in those papers, Blackmun plainly states his fondness for baseball and his deep appreciation for the opportunity to write an opinion about the game he loved.").

153. *Id.* (citing Blackmun Papers).

154. Grow, *supra* note 131, at 574; *see also* Abrams, *supra* note 28, at 188.

155. *Flood*, 407 U.S. at 282.

156. Abrams, *supra* note 28, at 184 (quoting Blackmun Papers).

157. 346 U.S. 356, 357 (1953) (affirming on the authority of *Federal Baseball*, which determined that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws").

158. *Flood*, 407 U.S. at 282.

159. *Id.* at 283.

exemption] judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and . . . has clearly evinced a desire not to disapprove them legislatively."[160]

Flood has been chastised as "an almost comical adherence to the strict rule against overruling statutory precedents, particularly considering that the Sherman Act developed essentially through a common law process."[161] Though, notwithstanding the Court's refusal to overturn *Federal Baseball*, the Court narrowed the scope of exemption to the reserve clause, which deserves some recognition: "With its *reserve system* enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly."[162] Nevertheless, lower courts have largely overlooked this statement when applying *Flood*.[163] Furthermore, the Court hinted that the exemption should be removed, conceding that *Federal Baseball* and *Toolson* had become an "*aberration* confined to baseball,"[164] and that they were "unrealistic, inconsistent, [and] illogical."[165] Justice Douglas, in his dissent, described *Federal Baseball* as "a derelict in the stream of law that [the Supreme Court], its creator, should remove."[166] In *Radovich v. National Football League*, the Court had even acknowledged that, if they were "considering the question of baseball for the first time upon a clean slate, [they] would have no doubts" that the business of baseball was within the scope of the Sherman Act.[167] Still, amidst its recognition of the exemption's flaws, the Court has consistently refused to overturn it.

II. THE CURT FLOOD ACT OF 1998

Following *Flood*, although baseball continued to enjoy its antitrust exemption, the circumstances were precarious—the exemption was constantly at risk of being chipped away at courts, or being abolished entirely by Congress.[168] Additionally, the MLBPA continued to push for free agency through arbitration with MLB.[169] Consequently, the perpetual grasp of the reserve clause was loosened in 1975 when free agency was finally incorporated into MLB player contracts.[170] Following the introduction of free agency, the reserve clause only bound players to their clubs until their contracts expired, rather than for their entire careers.[171] However, negative implications of the exemption persisted and put players' free

160. *Id.* at 283–84.
161. Eskridge, *supra* note 134, at 1381.
162. *Id.* at 282 (emphasis added).
163. *See infra* Part III.B.
164. *Flood*, 407 U.S at 282.
165. *Id.* (emphasis added); Radovich v. Nat'l Football League, 352 U.S. 445, 452 (1957); *see also* Mozes & Glicksman, *supra* note 27, at 269.
166. *Flood*, 407 U.S. at 286–88 (Douglas, J., dissenting).
167. 352 U.S. at 452 (holding that the NFL was not exempt from antitrust law).
168. BANNER, *supra* note 10, at 241.
169. Abrams, *supra* note 28, at 188, n.31.
170. *See id.* at 233.
171. *Id.* at 219.

agency at risk every time a collective bargaining agreement expired.[172] This differed from other professional sports, where federal antitrust laws protected free agency.[173]

In both *Toolson* and *Flood*, the Supreme Court called upon Congress to pass legislation addressing baseball's status under the antitrust laws.[174] For quite some time, Congress did not heed the call. During the early 1990s, MLB was engaged in nearly continuous lobbying and litigation to preserve its freedom from antitrust laws.[175] However, as a result of the 1994–1995 MLB player strike, the politics of the exemption changed and there was a new urgency to remove the exemption.[176]

In 1998, Congress finally answered the Supreme Court's call with the Curt Flood Act ("The Flood Act").[177] The Flood Act amended the Clayton Act[178] to provide that practices "directly relating to or affecting major league baseball players"[179] are subject to the federal antitrust laws in the same manner as "if engaged in by persons in any other professional sports business affecting *interstate commerce*."[180]

While the Flood Act was important for players' rights under the reserve clause, ultimately its benefits were limited to that and no more.[181] For example, in § B, Congress explicitly carved out what is *not* regulated by the Act, including: minor league players,[182] umpires,[183] broadcasting,[184] and franchise relocation issues.[185] Although this language in the Flood Act excludes those areas from its coverage, it does not necessarily mean that antitrust laws do *not* apply to those areas or, for that matter, any other areas not covered by the statute.[186] In effect, the Flood Act only scratched the surface of the issues related to baseball's antitrust exemption, and therefore left many critical questions regarding the relationship between MLB and the antitrust laws unanswered—this, in turn, led to divergent interpretations of the exemption by the lower courts.

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172. *Id.* at 246.

173. *Id.*

174. *See* Toolson v. N.Y. Yankess, Inc., 346 U.S. 356, 357 (1953); Flood v. Kuhn, 407 U.S. 258, 283–84 (1972).

175. BANNER, *supra* note 10, at 241.

176. *See* DUQUETTE, *supra* note 44, at 114.

177. Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (1998).

178. 15 U.S.C. §§ 12–27 (1994); 29 U.S.C. § 52 (1994).

179. ALBERT THEODORE POWERS, THE BUSINESS OF BASEBALL 164 (2003).

180. 15 U.S.C. § 26b(a) (emphasis added).

181. BANNER, *supra* note 10, at 246.

182. 15 U.S.C. § 26b(b)(1)–(2).

183. *Id.* § 26b(b)(5).

184. *Id.* § 26b(b)(4). Broadcasting issues were already regulated by the Sports Broadcasting Act of 1961. *See* 15 U.S.C. § 1291 (1961). For more on the Sports Broadcasting Act as it relates to MLB, see Tomlinson, *supra* note 10, at 293–94.

185. 15 U.S.C. § 26b(b)(3).

186. *See id.* § 26b; Mozes & Glicksman, *supra* note 27, at 275.

III. JURISDICTIONAL SPLIT IN DEFINING THE "BUSINESS OF BASEBALL"

Despite having been in existence for almost a century, the outer limits of baseball's antitrust exemption have never been formally defined.[187] Nevertheless, while the outer limits are unclear, the conventional view has been that the exemption protects the "business of baseball"—a mucky, poorly defined phrase in and of itself.[188]

While there are some activities that clearly fall within the scope of the "business of baseball" definition, there are many other activities that leave room for debate. Baseball teams sell food and they purchase advertising. Both of these activities are ultimately for the purpose of putting on baseball games, but otherwise they have little to do with the sport itself. Are they exempt from antitrust scrutiny?[189]

As a result of the obscurities surrounding baseball's antitrust exemption, lower courts have interpreted and applied it with tremendous inconsistency. Courts generally seem to distinguish "between those things they believe are intimately a part of baseball, such as the reserve system and franchise relocation, and those that are not, such as concessions."[190]

Overall, because of the wavering definition of the "business of baseball," courts are split on its scope. Most courts have defined the "business of baseball" broadly, while a small minority has defined it very narrowly. The importance, however, does not lie in a determination of which of these competing perceptions is proper, but rather in that no consistent standard exists—a circumstance that has exposed MLB to increased judicial and legislative scrutiny.[191] This lack of a consistent standard makes it nearly impossible for MLB and its business partners to fully utilize the alleged benefits of the exemption—yet one more reason supporting the case for its demise.

A. The Narrow View

Following *Flood*, a small cluster of lower court cases emerged in the 1980s and 1990s that narrowly defined baseball's antitrust exemption. These cases, though few, were seen by some to signify the beginning of the end for MLB's exemption.[192]

The District Court for the Southern District of Texas was the first lower court to construe baseball's antitrust exemption in this fashion, ruling that the

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187. BANNER, *supra* note 10, at 242.

188. *Id.*; *see also* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953) (holding that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws").

189. BANNER, *supra* note 10, at 242.

190. Mozes & Glicksman, *supra* note 27, at 274; *see, e.g.*, Portland Baseball Club v. Kuhn, 491 F.2d 1101 (9th Cir. 1974) (applying the antitrust exemption to the minor league system); Twin City Sportservice Inc. v. Charles O. Finley & Co., 365 F. Supp. 235 (N.D. Cal 1972).

191. Mann, *supra* note 10, 602.

192. BANNER, *supra* note 10, at 244.

exemption did not apply to radio contracts for broadcasting baseball games.[193] In *Henderson Broadcasting Corp. v. Houston Sports Ass'n*, a Houston radio station sued the Houston Astros, alleging that the club's ownership violated antitrust laws by colluding with a competing radio station.[194] The court determined that the Baseball Trilogy cases "imply that the exemption covers only those aspects of baseball, such as leagues, clubs, and players, which are integral to the sport and not related to activities that merely enhance its commercial success."[195] The court went on to hold that the baseball antitrust exemption did not apply to the agreement in question because "[t]he reserve clause and other 'unique characteristics and needs' of the game have no bearing" on a radio broadcasting contract.[196]

In *Piazza v. Major League Baseball*, the District Court for the Eastern District of Pennsylvania relied on a particularly eccentric interpretation of the exemption. In 1992, a group of investors planned to purchase the San Francisco Giants and move the club to Tampa Bay, Florida, but were denied permission by MLB.[197] The investors subsequently sued MLB, alleging that MLB violated §§ 1 & 2 of the Sherman Act.[198] Relying on *Flood*, the court held that the baseball antitrust exemption applied only to the reserve clause, and that federal antitrust laws regulated all other aspects of the business of baseball—including franchise relocation.[199] The *Piazza* court noted that, unlike *Toolson*, *Flood* did not repeat the broad language of *Federal Baseball*.[200] On that basis, *Piazza* interpreted *Flood* to effectively narrow *Federal Baseball* to the reserve clause.[201] This interpretation of *Flood* could have been a huge blow to the exemption, but ultimately the parties settled before the suit reached its conclusion on appeal.[202]

The year after *Piazza,* Florida Attorney General Robert Butterworth filed a lawsuit against MLB for seeking to prevent the Giants' move to Tampa. In *Butterworth v. National League of Professional Baseball Clubs* (*Butterworth I*), the Florida Supreme Court sided with *Piazza* and the Florida attorney general, holding that baseball was in violation of antitrust laws.[203] The court stated that "even though the *Piazza* court is the only federal court to have interpreted baseball's antitrust exemption so narrowly, the language of the *Flood* opinion supports such

193. *See* Henderson Broad. Corp. v. Hous. Sports Ass'n, 541 F. Supp. 263, 264 (S.D. Tex. 1982).

194. *Id.* (alleging violations of the Sherman Act, §§ 1 and 2, and Texas antitrust laws).

195. *Id.* at 265.

196. *Id.* at 271.

197. Piazza v. Major League Baseball, 831 F. Supp. 420, 421 (E.D. Pa. 1993). Interestingly, the named plaintiff, Vince Piazza, was the father of former MLB catcher and 12-time All-Star Mike Piazza.

198. *Id.* at 423–24.

199. *Id.* at 438; *see* BANNER, *supra* note 10, at 243.

200. *See* Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922).

201. *Piazza*, 831 F. Supp. at 438; *see also* BANNER, *supra* note 10, at 243.

202. BANNER, *supra* note 10, at 243.

203. Butterworth v. Nat'l League of Prof'l Baseball Clubs (*Butterworth I*), 644 So. 2d 1021, 1025 (Fla. 1994).

interpretation."[204] The court went on to determine that the U.S. Supreme Court, by acknowledging that professional baseball is engaged in interstate commerce, "seriously undercuts the precedential value of both *Federal Baseball* and *Toolson*."[205]

In the meantime, the Giants filed suit in federal court and, despite the Florida Supreme Court's progressive interpretation of the exemption in *Butterworth I*, the district court rejected its approach, holding that the antitrust laws were inapplicable to MLB contracts (*Butterworth II*).[206] The Eleventh Circuit affirmed, reasoning that the business of baseball is exempt from antitrust regulation, and that the federal exemption preempts state antitrust laws.[207]

B. The Broad View

In the end, the courts that construed baseball's antitrust exemption narrowly were but a small minority. The vast majority of lower courts have taken an expansive view that the exemption covers the entire business of baseball, not just the reserve system—despite the inference to the contrary in *Flood*.

Prior to the Flood Act legislation, several courts applied a broad interpretation of baseball's antitrust exemption. In 1976, Oakland A's owner Charlie Finley sued MLB Commissioner Bowie Kuhn, alleging that Kuhn violated federal antitrust laws. Finley attempted to sell three A's players' contracts to other teams and, as allowed by MLB's rules, Kuhn disallowed the player transactions because he felt that they were "not in the best interest[] of baseball."[208]

The Seventh Circuit disagreed with Finley's argument that baseball's antitrust exemption only applied to the reserve clause system.[209] Taking the Baseball Trilogy (as well as *Radovich v. National Football League*) into account, the court held that, "[d]espite the two references in the [*Flood*] case to the reserve system, . . . the Supreme Court intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws."[210]

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204. *Id.* at 1024.

205. *Id.* at 1025.

206. Major League Baseball v. Butterworth (*Butterworth II*), 181 F. Supp. 2d 1316, 1326–31 (N.D. Fla. 2001).

207. Major League Baseball v. Crist, 331 F.3d 1177, 1179 (11th Cir. 2003). This is particularly interesting because, in *Federal Baseball*, the exemption was forged through an understanding that baseball was a purely state affair, lacking the elements to be construed as "interstate commerce"—how then can an exemption, which is wholly state-connected, be out of reach from state law as well? The conundrum of how baseball has dodged these blaring inconsistencies on the basis of stare decisis has left many scholars—and Supreme Court Justices—scratching their heads in confusion. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258, 292 (1972) (Marshall, J., dissenting) ("Has Congress acquiesced in our decisions in Federal Baseball Club and Toolson? I think not . . . . It is this Court that has made [professional baseball players] impotent, and this Court should correct its error.").

208. Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 530 (7th Cir. 1978).

209. *Id.* at 541.

210. *Id.* at 541.

Also prior to the Flood Act, Professional Baseball Schools & Clubs brought an antitrust case against MLB in 1982 for a dispute over a minor-league organization in the Carolina League.[211] The Eleventh Circuit held that each of the activities at issue in the case [212] plainly concerned matters that were "an integral part of the business of baseball," and thus were exempt from antitrust scrutiny.[213] Similarly, two federal district courts applied the exemption broadly without appeal. First, in *New Orleans Pelicans Baseball, Inc. v. National Association of Professional Baseball Leagues, Inc.*,[214] the owners of the New Orleans Pelicans AA minor league team brought suit against MLB for rejecting the owner's plans to move another AA team, the Charlotte Knights, to New Orleans.[215] The plaintiffs sought specific performance and a declaration by the court that they were entitled to the territory for the purposes of operating a minor league baseball club.[216] However, the District Court for the Eastern District of Louisiana granted MLB's motion for summary judgment, rejecting the *Piazza* court's "cramped view" of *Flood*.[217] The court reasoned that *Piazza* was not binding on the court, and while "the [c]ourt does find its reasoning impressive, it does not feel that *Piazza* warrants ignoring the strong precedent to the contrary."[218]

Second, in *McCoy v. Major League Baseball*,[219] a group of business owners and fans brought an antitrust action against owners of professional baseball teams, alleging unfair labor practice during the 1994–1995 player strike. The District Court for the Western District of Washington construed *Flood* broadly as well, and granted MLB's motion to dismiss. The court explicitly refused to follow the recent *Piazza* and *Butterworth I* decisions, reasoning that they were erroneous interpretations of the Supreme Court's opinion in *Flood*.[220] The court observed that both *Butterworth I* and *Piazza* failed to refer to *Flood*'s concluding paragraph which gave a broad statement of its holding—that "the remedy, if any is indicated, is for congressional, and not judicial, action."[221]

Following the Flood Act, the Minnesota Supreme Court also adopted a broad view of the exemption in applying Minnesota state law, holding that the sale and relocation of a baseball franchise, like the reserve clause discussed in *Flood*, is an "integral part of the business of professional baseball and falls within the

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211. *See* Prof'l Baseball Schools & Clubs, Inc. v. Kuhn, 693 F.2d 1085, 1085 (11th Cir. 1982).

212. Activities alleged included: (1) the player assignment system and franchise location system; (2) monopolization of the business of baseball; and (3) the Carolina League's rule only allowing member teams to play with other teams that belong to the National Association. *Id.*

213. *Id.* at 1086.

214. Civ. A No. 93-253, 1994 WL 631144 (E.D. La. Mar. 1, 1994).

215. *Id.* at *1.

216. *Id.* at *2.

217. *Id.* at *9.

218. *Id.*

219. 911 F. Supp. 454 (W.D. Wash. 1995).

220. *Id.* at 455; *see also* BANNER, *supra* note 10, at 244.

221. *McCoy*, 911 F. Supp. at 457 (citing Flood v. Kuhn, 407 U.S. 258, 285 (1972)).

exemption."[222] The court in *Minnesota Twins Partnership v. State ex rel. Hatch* essentially read baseball's antitrust exemption to protect every aspect of the baseball business, including business decisions that had no tangible connection to the on-field game.[223]

Butterworth II,[224] discussed earlier, probably represents the most pervasive interpretation of MLB's antitrust exemption by lower courts. In contrast to the Florida Supreme Court's decision in *Butterworth I*,[225] *Butterworth II* held that contracting was included under the "business of baseball" umbrella and accordingly was exempt from federal antitrust law.[226] The court justified its holding with the notion that "[b]aseball is an American game that has occupied a unique position in American society."[227] This commentary seems to drive home Justice Douglas's point that only "a romantic view of a rather dismal business account over the last 50 years would keep that derelict in midstream."[228]

On appeal, the Eleventh Circuit affirmed the district court's interpretation of the "business of baseball" exemption in *Butterworth II*.[229] The court determined that the decision to contract is a part of the "business of baseball," rendering it insusceptible to federal antitrust scrutiny.[230] However, to the court's credit, it implied that the exemption has outer bounds by stating that the exemption had not been "held to immunize the dealings between professional baseball clubs and third parties."[231]

As illustrated above, there is no consistent standard for implementing MLB's exemption. The erratic application of the exemption by the lower courts has put a strain on MLB's business dealings, which in turn has hurt MLB's bottom line and, ultimately, the consumer.[232] This strain occurs because it is unclear to what extent the exemption will apply in a given business transaction involving MLB—

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222. Minn. Twins P'ship v. State *ex rel.* Hatch, 592 N.W.2d 847, 856 (Minn. 1999).

223. *Id.*; BANNER, *supra* note 10, at 244.

224. *Butterworth II*, 181 F. Supp. 2d 1316; *see* BANNER, *supra* note 10, at 244.

225. *Butterworth I*, 644 So. 2d at 1024 (construing baseball's antitrust exemption narrowly). For a more thorough discussion of *Butterworth I*, see *supra* Part III.A.

226. *Butterworth II*, 181 F. Supp. at 1334.

227. *Id.* at 1318.

228. Flood v. Kuhn, 407 U.S. 258, 286 (1972) (Douglas, J., dissenting). Justice Douglas, of course, did not need to say whom he was accusing of holding a "romantic view" of the game—it was very clearly a dig at his colleague Justice Blackmun. *See* BANNER, *supra* note 10, at 210.

229. Major League Baseball v. Crist, 331 F.3d 1177, 1189 (11th Cir. 2003). The party-name change was due to the plaintiff, former Attorney General of Florida, Robert Butterworth, leaving office. Charlie Crist was his predecessor. *See* Terri Somers, *Crist as Attorney General Rounds Out Gop Cabinet*, SUN SENTINEL (Nov. 6, 2002), http://articles.sun-sentinel.com/2002-11-06/news/0211060337_1_crist-education-commissioner-democrat-buddy-dyer.

230. *Crist*, 331 F.3d at 1184.

231. *Id.* at 1183.

232. Mann, *supra* note 10, at 602; *see also* Tomlinson, *supra* note 10, at 307–08.

MLB's proposed deal with DirecTV in 2007 exemplifies this uncertainty.[233] MLB's "Extra Innings Package" is a service that MLB offers through certain cable and satellite providers whereby a customer pays an annual fee and in exchange can view out-of-market games to which they ordinarily would not have access.[234] Beginning in 2001, "Extra Innings" was offered through both DirecTV and local cable providers, but in January 2007, MLB entered into a $700 million, seven-year agreement with DirecTV, granting DirecTV an exclusive license to "Extra Innings."[235] This situation could have led to a lawsuit by fans with cable and Dish Network subscriptions, alleging the deal between MLB and DirecTV constituted an antitrust violation.[236] However, the exclusive deal with DirecTV created a substantial backlash from MLB fans and legislators—particularly then-Senator John Kerry, who called on the Federal Communications Commission to investigate the matter.[237] MLB—presumably fearful of how Congress would respond—folded under the weighty public criticism and entered into a nonexclusive contract with DirecTV, whereby MLB received substantially less money.[238] This action exemplifies MLB's fear that, because of the precarious standing of its exemption, Congress could statutorily remove the exemption, or strip MLB of the protection afforded by the Sports Broadcasting Act.[239]

Effectually, the lower courts' inconsistent application of the exemption has placed MLB on shaky ground, which will clearly continue until the Supreme Court takes a stance and resolves the problem.

IV. DIFFERENTIATING THE "BUSINESS OF BASEBALL" FROM OTHER PROFESSIONAL SPORTS

"All animals are equal, but some animals are more equal than others."[240]

Baseball's antitrust exemption is said to rest on a "recognition and an acceptance of baseball's unique characteristics and needs."[241] And yet, similarly

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233. Mann, *supra* note 10, at 602.

234. *Id.*

235. *Id.* at 602–03; Tomlinson, *supra* note 10, at 307 (noting that, under the exclusive deal with MLB, MLB was to make "$30 million more annually than it would have made had it kept offering the package to services like cable and Dish Network as well as DirecTV").

236. Tomlinson, *supra* note 10, at 307. The NFL, which currently has an exclusive deal with DirecTV for its Sunday Ticket package (football's equivalent of Extra Innings), has faced the possibility of antitrust litigation over the exclusive license. *See* Associated Press, *Specter Wants to Revisit NFL's Antitrust Status*, WASH. POST, Dec. 8, 2006, at E05.

237. Mann, *supra* note 10, at 603.

238. *Id.*; Tomlinson, *supra* note 10, at 308 (stating that the DirecTV deal is evidence that baseball "realizes that its antitrust exemption does not offer strong protection").

239. Tomlinson, *supra* note 10, at 308; Mann, *supra* note 10, at 603 n.99 (observing that there "are significant questions as to whether the Sports Broadcasting Act, 15 U.S.C. § 26b (2012), would have applied, but any resulting lawsuit is likely to have hinged on the antitrust exemption either way").

240. GEORGE ORWELL, ANIMAL FARM 118 (1945).

241. Flood v. Kuhn, 407 U.S. 258, 282–83 (1972).

situated professional sports leagues—including football, boxing, basketball, and hockey—have not been treated so kindly by the Supreme Court and are fully exposed to antitrust scrutiny.[242] Even following the enactment of the Flood Act, baseball's antitrust exemption has continued to benefit MLB club owners, who need only to "glance over at the other professional sports to see the value of not being governed by the Sherman Act."[243] In the late twentieth and early twenty-first century, the National Football League ("NFL"), the National Basketball Association ("NBA"), and the National Hockey League ("NHL") were all parties to antitrust suits, and, more often than not, were on the losing side.[244] Thus, MLB club owners plainly "enjoy a legal status that their counterparts in other sports can only envy."[245]

The advantage of being an MLB club owner is most obvious with regard to franchise relocation. In 1980, when the NFL attempted to prevent the Oakland Raiders from moving to Los Angeles, the Raiders brought an antitrust suit against the league and, sure enough, they moved to Los Angeles in 1982.[246] Over the next 15 years, five more NFL teams followed the Raiders' lead and moved their franchises: the Colts from Baltimore to Indianapolis, the Cardinals from St. Louis to Phoenix, the Rams from Los Angeles to St. Louis, the Browns from Cleveland to Baltimore, and the Oilers from Houston to Nashville.[247] Likewise, the NBA and the NHL have been equally powerless in preventing franchise relocation.[248] The Kansas City Athletics moved to Oakland in 1967,[249] and since then, only one MLB team has successfully relocated.[250] On the other hand, the NFL, NBA, and NHL saw 22 moves collectively during that same time period.[251]

Additionally, MLB's antitrust exemption allows it to operate its elaborate five-tiered minor leagues with no interference by federal antitrust laws. MLB's minor league system currently has more than 200 teams, which are organized into 20 leagues at 5 levels.[252] Minor League players are paid low salaries and are not members of the MLBPA, or, for that matter, any labor union.[253]

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242. BANNER, *supra* note 17, at 237.

243. *Id.*

244. *Id.*

245. *Id.*

246. However, the Raiders moved back to Oakland in 1995. *See Timeline—Raiders Historical Highlights*, RAIDERS, http://www.raiders.com/history/timeline.html (last visited Jan. 14, 2014).

247. BANNER, *supra* note 10, at 239.

248. *Id.*

249. *See* Larry Granillo, *The Nomadic A's*, SB NATION (June 20, 2013, 10:11 AM), http://www.sbnation.com/2013/6/20/4447478/oakland-athletics-franchise-moves-philadelphia-kansas-city-san-José.

250. In 2005, the Montreal Expos moved to Washington D.C and became the Washington Nationals. *See* Lori Montgomery & Thomas Heath, *Baseball's Coming Back to Washington*, WASH. POST, Sept. 30, 2004, at A01.

251. BANNER, *supra* note 10, 240.

252. *Id.* at 241.

253. *Id.*

When juxtaposed against other professional sports leagues, advocating for baseball's exemption is a remarkably difficult task. Today, the business of baseball does not look any different from the business of football or the business of any other professional sport. In other words, there really is nothing unique about baseball that justifies an exemption that has been expressly denied to all other similarly situated professional sports leagues.

When the exemption was created, MLB was, in fact, a firm that stood alone. Professional baseball was the national pastime and a largely profitable organization long before the mass-media explosion, and long before the creation of professional basketball and football.[254] Yet, with the incorporation of television into the American lifestyle, baseball's popularity has diminished in favor of more TV-friendly, fast-paced sports such as basketball, football, and hockey.[255] There was, and still is, something unique about attending a live baseball game, but the television era took fans out of the ballpark, rendering baseball the same as other professional sports. Yet, all the while, MLB has still received special treatment—a fact that has perpetually fueled animosity toward the exemption.[256] Furthermore, the 1994–1995 players' strike arguably signaled the end of baseball's long reign as the national pastime.[257] As one commentator noted, today it would be just about impossible to make the case that baseball is the national pastime—in a country of 314 million people, the 2012 World Series drew, on average, a television audience of only 12.7 million viewers per game, while in that same year, football's Super Bowl attracted an audience of more than 111 million.[258] All in all, it is clear that baseball, while still largely profitable, has been surpassed in many respects by other professional sports. Overall, football and basketball have grown tremendously despite being subject to federal antitrust laws, particularly in relation to baseball.[259] There is no material difference between baseball and these other sports and thus no reason to believe that baseball would not be just as well off as other professional sports leagues if the exemption were repealed.

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254. DUQUETTE, *supra* note 44, at 74.

255. *Id.*

256. *Id.*

257. *Id.* at 136. "Numerous surveys illustrated Americans' disgust with the game as the cultural pedestal on which baseball had rested for a century toppled. The political and legal ground beneath baseball's anomaly was crumbling as well." *Id.*

258. Bob Greene, *What's the New National Pastime?*, CNN (Nov. 11, 2012, 10:24 AM), http://www.cnn.com/2012/11/11/opinion/greene-national-pastime/; *see also* Mike Ozanian, *The Most Valuable NFL Teams*, FORBES (Aug. 14, 2013, 9:36 AM), http://www.forbes.com/sites/mikeozanian/2013/08/14/the-most-valuable-nfl-teams/ (noting that MLB's 30 teams are worth, on average, $744 million, while the NFL's 32 teams are worth $1.17 billion on average).

259. *See* DUQUETTE, *supra* note 44, at 74.

V. *AMERICAN NEEDLE, INC. V. NATIONAL FOOTBALL LEAGUE*—SETTING THE STAGE FOR SWEEPING CHANGE

A. The Case

"A product of a bygone era, *Federal Baseball* is the most widely criticized of the Supreme Court's antitrust decisions."[260] Despite its refusal to overturn *Federal Baseball*, the Supreme Court has explicitly acknowledged the exemption's flaws on a number of occasions. "[T]o use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent,' and 'illogical;'"[261] nonetheless, the Court has repeatedly held that the "orderly way to eliminate error or discrimination . . . is by legislation and not by court decision."[262] Prior Courts' statements about the Baseball Trilogy, in conjunction with *American Needle v. National Football League*, makes clear that the Roberts Court is prepared to take on the exemption. In *American Needle*, the Court unanimously held that the NFL is not exempt from antitrust law, and that its behavior must be analyzed under the rule of reason. The Court's unanimous decision, among other things,[263] is reason to believe that, were the opportunity to present itself, the Court would be willing to remove MLB's exemption.[264]

Prior to 2000, NFL Properties, the NFL's licensing agent, had granted the right to use NFL trademarks to American Needle, Inc., a headwear manufacturer, for over 20 years.[265] Notwithstanding this longstanding relationship, NFL Properties granted Reebok a ten-year exclusive license to manufacture NFL uniforms, equipment, apparel, and headwear in December 2000.[266] This, in turn, prohibited American Needle from producing NFL headwear.[267] Subsequently, American Needle sued the NFL and its subsidiaries, alleging that it had violated § 1 of the Sherman Act when it granted an exclusive license to Reebok.[268] The NFL relied on the single-entity defense as articulated in *Copperweld Corp. v. Independence Tube*

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260. Opening Brief at 2, City of San José v. Office of the Comm'r of Baseball, No. C-14-15139 (9th Cir. Mar. 5, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/general/2014/03/06/14-15139_opening_brief.pdf.

261. City of San José v. Office of the Comm'r of Baseball, No. C-13-02787 (RMW), 2013 WL 5609346, at *1 (N.D. Cal. Oct. 11, 2013) (citing Salerno v. Am. League of Prof'l Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970)).

262. *Id.* (quoting Radovich v. Nat'l Football League, 352 U.S. 445, 452 (1957)).

263. *See supra* Part V.A.

264. *See* Mozes & Glicksman, *supra* note 27, at 283.

265. Am. Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941, 942 (N.D. Ill. 2007), *aff'd sub nom.* Am. Needle, Inc. v. Nat'l Football League, 583 F.3d 736 (7th Cir. 2008), *rev'd*, 560 U.S. 183 (2010).

266. *Id.*

267. *Id.*

268. *Id.*

Corp.:[269] "a corporation and its wholly-owned subsidiary are incapable of conspiring with each other for purposes of the Sherman Act."[270]

The District Court for the Northern District of Illinois held that the NFL and its 32 teams were acting as a single entity for antitrust purposes, and granted summary judgment for the NFL.[271] The court reasoned that, since the NFL and its teams had "so integrated their operations," they should be considered a single entity, rather than joint ventures working together for a common purpose.[272] On appeal, the Seventh Circuit affirmed, reasoning that the NFL teams collectively function as one source of economic power when working together to produce NFL football.[273]

On May 24, 2010, the Supreme Court reversed the lower courts, holding that the 32 NFL teams cannot be considered a "single entity" because they are "substantial, independently owned, independently managed business[es]," whose "'objectives are' not 'common,'" and are therefore not immune from antitrust scrutiny.[274] The Court emphasized that the NFL teams compete in the market for intellectual property, and that when a team licenses its intellectual property, it is not pursuing the "common interests of the whole league," but, instead, it is pursuing its own selfish interests.[275]

B. What American Needle *Means for MLB*

While *American Needle* has no direct effect on MLB, it is the first decision in some time that effectively broadens, rather than reduces, the scope of the Sherman Act.[276] Long gone are the days of Justice Holmes and the laissez-faire regulatory ideology of *Federal Baseball*; *American Needle* represents a Court that is not only willing to clearly articulate its opinion on the interplay between antitrust and professional sports—as evidenced by the Court's unanimous decision—but also represents a Court that may be prepared to face baseball's antitrust exemption head-on.[277]

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269. 467 U.S. 752, 769 (1984) (rejecting the concept of intra-enterprise conspiracy).

270. *Am. Needle, Inc.*, 496 F. Supp. 2d at 943 (citing *Copperweld Co.*, 467 U.S. at 769); *see also* Texaco, Inc. v. Dagher, 547 U.S. 1, 6 (2006); Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Assn., 95 F.3d 593, 600 (7th Cir. 1996)).

271. *Id.* at 944.

272. *Id.*

273. Am. Needle Inc. v. Nat'l Football League, 538 F.3d 736, 743 (7th Cir. 2008), *rev'd*, 560 U.S. 183 (2010).

274. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 196, 204 (2010) (citing *Copperweld Co.*, 467 U.S. 752, 771 (1984)).

275. *Id.* at 197 (citing *Copperweld Corp.*, 467 U.S. at 770) (internal quotation marks omitted).

276. Judd E. Stone & Joshua D. Wright, *Antitrust Formalism is Dead! Long Live Antitrust Formalism!: Some Implications of* American Needle v. NFL, *in* CATO SUPREME COURT REVIEW, 2009–2010, 369, 395 (Ilya Shapiro ed., 2010).

277. *See* Mozes & Glicksman, *supra* note 27, at 290 ("In the context of professional baseball, [*American Needle*] is probably most important as a signal of the Court's willingness

This notion is further supported by the fact that two current Supreme Court justices have explicitly questioned the validity of the exemption. Prior to serving on the Supreme Court, Justice Sotomayor criticized the exemption on several occasions: first while serving as a district court judge in *Silverman v. Major League Baseball Player Relations Committee, Inc.*, where she denounced MLB as a "monopoly industry;"[278] and next, as a circuit court judge in *Major League Baseball Properties v. Salvino, Inc.*, where she held in a concurring opinion that MLB-subsidiary Major League Baseball Properties ("MLBP") should be evaluated under the rule-of-reason analysis.[279] Justice Sotomayor went on to reason that "the exclusive agreement between the [MLB] clubs . . . and MLBP removes all price competition between the clubs on the licensing of intellectual property" in violation of § 1 of the Sherman Act.[280] Justice Samuel Alito has also analyzed the exemption in "*The Origins of the Baseball Antitrust Exemption: Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,"[281] where he concludes that *Federal Baseball* "no longer represent[s] appropriate Commerce Clause analysis, agreeing with the assessment that *Federal Baseball* was 'scorned principally for things that were not in the opinion, but later added by *Toolson* and *Flood*.'"[282]

As articulated by the district court in *City of San José v. Office of the Commissioner of Baseball*, archaic law may be overruled "[w]hen opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of doom."[283] It is conceivable that the current Court would—and undoubtedly should—reconsider the legitimacy of MLB's antitrust exemption if such a case were to present itself—*San José* is that case.

VI. *CITY OF SAN JOSÉ V. OFFICE OF THE COMMISSIONER OF BASEBALL*—A FORESEEABLE END TO THE EXEMPTION

It has been over 40 years since the Supreme Court had its last at-bat with baseball's antitrust exemption, but the Court may be on-deck for another go with *San José*—a case centering on the City of San José's claim that, by its refusing to allow the A's relocation from Oakland to San José, MLB has violated federal

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to address antitrust issues in professional sports, and to do so with a heavy handedness that has not been seen since *Federal Baseball*.").

278. 880 F. Supp. 246, 261 (S.D.N.Y. 1995).

279. *See* 542 F.3d 290, 341 (2d Cir. 2008) (Sotomayor, J., concurring).

280. *Id.*; *see also* Dana M. Muir et al., *Justice Sotomayor on the Supreme Court: A Boon for Business?*, 4 VA. L. & BUS. REV. 187, 207 (2009).

281. *See* Alito, *supra* note 25.

282. Opening Brief at 28, City of San José v. Office of the Comm'r of Baseball, No. C-14-15139 (9th Cir. Mar. 5, 2014) (quoting Alito, *supra* note 25, at 193), *available at* http://cdn.ca9.uscourts.gov/datastore/general/2014/03/06/14-15139_opening_brief.pdf.

283. *Id.* (citing District Court's Order on MLB's Motion to Dismiss; Salerno v. Am. Leage of Prof'l Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970)).

antitrust laws. Indeed, there is speculation that this litigation could easily become MLB's worst nightmare.[284]

Under MLB's Constitution, each baseball club enjoys a monopoly in its home market—that is, a team cannot relocate to another team's territory without a three-fourths vote of approval;[285] nonetheless, it is nearly impossible for an MLB club to relocate because, even if the relocation is approved by a three-fourths vote, a franchise can veto another team's entry into that franchise's home territory.[286] This behavior is plainly anticompetitive and harms consumer fans by stifling competition, and some potentially great rivalries, that would otherwise exist.[287] As articulated by Roger G. Noll, Professor Emeritus of Economics at Stanford University:

> [P]reventing the [A's] from moving to San José causes harm to competition because relocating to San José would substantially increase the potential fan base and attendance of the team. . . . Given that San José is substantially more economically attractive than Oakland as a home location . . . the only plausible reason for preventing relocation . . . is to protect the Giants from more intense competition from the Athletics.[288]

San José has attempted to work with MLB for the last four years to resolve the issue, but it has become abundantly clear that MLB prefers to use territorial restrictions as an "excuse to restrict commerce and prevent [the A's] from relocating."[289] The A's currently share the Oakland Coliseum, the fourth-oldest park for MLB teams, with the NFL's Oakland Raiders. It is no secret that the A's have been struggling and, faced with declining game attendance and revenue, the A's organization feels that it has effectively exhausted its options in Oakland.[290] In 2004, San José and the A's began discussing a potential relocation plan. Despite the ongoing dispute between MLB and the A's, San José entered into a two-year option agreement, giving the A's the option to purchase land to build a ballpark.[291] Yet, despite the willingness of the city to build a ballpark, the team's desire to move, and

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284. *See, e.g.*, Lester Munson, *San José Suit Appears to be Strong*, ESPN (June 19, 2013), http://espn.go.com/espn/print?id=9403225&type=story.

285. MAJOR LEAGUE CONST. art. I, art. II, § 1, art. IV, art. VIII, § 1, art. XI, § 3.

286. *Id.* at art. V, § 2(b)(3).

287. *MLB's Refusal to Allow Oakland A's Move is Antitrust Violation, Suit Says* City of San José v. Office of the Comm'r of Baseball, 21 No. 4 WESTLAW J. ANTITRUST 10, at *2 (July 11, 2013) [hereinafter *MLB's Refusal to Allow Oakland A's Move is Antitrust Violation*].

288. Opening Brief at 46 n.11, City of San José v. Office of the Comm'r of Baseball, No. C-14-15139 (9th Cir. Mar. 5, 2014), *available at* http://cdn.ca9.uscourts.gov/datastore/general/2014/03/06/14-15139_opening_brief.pdf.

289. *Id.* at 1.

290. *Id.*

291. City of San José v. Office of Comm'r of Baseball, C-13-02787 (RMW), 2013 WL 5609346, at *4 (N.D. Cal. Oct. 11, 2013). The A's initial investment for the two-year option was $75,000, which included an option to renew for a third year for an additional $25,000. *Id.*

substantial community support, MLB has made it clear that it will not allow the A's to move.[292] When the option agreement was negotiated, both parties were aware that MLB might not approve the A's relocation.[293] San José's mayor called for a public vote on whether the A's could purchase land and build a stadium in San José. At MLB's request, the mayor delayed the vote pending the MLB Relocation Committee's resolution of the territorial dispute between the A's and the San Francisco Giants.[294] The A's and San José waited on MLB's relocation decision, assuming that it would be handed down within the two-year term of the option agreement. However, the decision never came and the A's were forced to extend the option agreement, causing them to incur an unnecessary $25,000 expense.[295] At the same time, San José has been forced to sit on the piece of land that is reserved for the A's under the option agreement.[296]

San José filed suit against MLB in 2013, seeking a court order to allow the A's to move to San José. San José alleged that MLB violated §§ 1 and 2 of the Sherman Act, and California's Cartwright Act, [297] asserting that the antitrust exemption set forth in *Federal Baseball*, *Toolson*, and *Flood* applies only to baseball's reserve clause.[298] San José further alleged that MLB is "hostile" to club movement, which is evidenced by the fact that only one MLB club has been allowed to relocate in the past 40 years.[299] San José's complaint also alleges claims "under California's unfair competition laws and for tortious interference with San José's contractual relationship with the A's and its prospective economic advantage."[300] San José contends that MLB intentionally delayed approving the A's' relocation for over four years, which effectively prevented the A's from exercising its option contract, and caused harm to San José in the form of lost revenue.[301]

On October 11, 2013, the District Court for the Northern District of California granted in part and denied in part MLB's motion to dismiss. [302] Specifically, the court held that MLB's interference with the A's relocation to San José was exempt from antitrust regulation and dismissed San José's Sherman Act and Cartwright Act claims, but determined that San José's state-law tort claims were sufficiently pled to survive MLB's motion to dismiss.[303]

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292. *MLB's Refusal to Allow Oakland A's Move is Antitrust Violation*, *supra* note 287, at *1.

293. *San José*, 2013 WL 5609346, at *15.

294. *Id.*

295. *Id.*

296. *Id.*

297. CAL. BUS. & PROF. CODE § 16720 (West 2009).

298. *San José*, 2013 WL 5609346, at *5.

299. *Id.* at *3 (In 2005, the Montreal Expos relocated to Washington, D.C. and became the Washington Nationals).

300. *Id.* at *4.

301. *Id.*

302. *Id.* at *16.

303. *Id.* at *2.

On the issue of baseball's antitrust exemption, while the court acknowledged that "the reasoning and results" of the Trilogy cases seem "illogical today," it held as follows:

> This court agrees with the other jurists that have found baseball's antitrust exemption to be "unrealistic, inconsistent, or illogical." The exemption is an "aberration" that makes little sense given the heavily interstate nature of the "business of baseball" today. Despite this recognition, the court is still bound by the Supreme Court's holdings, and cannot conclude today that those holdings are limited to the reserve clause.[304]

The trial court's decision left San José with one remaining claim that might expose MLB to monetary damages, but does not allow for relief on the antitrust matters. On January 23, 2014, San José filed a notice of appeal with the Ninth Circuit, looking to overturn the lower court's dismissal,[305] and as of November 2014, the case was before the Ninth Circuit.[306]

As stated above, the inconsistent application of MLB's antitrust exemption has made the Court's intervention necessary. The Court has not addressed baseball's antitrust exemption in almost forty years, indicating that the time is right to revisit *Federal Baseball*. Moreover, *American Needle* is a good indication of how the Supreme Court will—and ought to—rule on baseball's "proverbial blank check."[307]

VII. THE FUTURE OF BASEBALL—PRACTICAL EFFECTS OF ELIMINATING THE EXEMPTION

In analyzing whether to remove the exemption, the Supreme Court decision should turn on whom antitrust laws are meant to protect—the baseball fans. "The laws are concerned with efficiency: whether the market activity enhances competition, which is ultimately good for the consumer, or hurts competition, which injures the consumer."[308] Thus, because baseball's exemption plainly harms the consumer, the Court overrule must take steps to mitigate this harm.

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304. *Id.* at *10 (citing Radovich v. Nat'l Football League 352 U.S. 445, 452 (1957); Flood v. Kuhn, 407 U.S. 258, 282 (1972)). On the issue of "tortious disruption of a contract," the court determined that MLB's actions indicated its intent to frustrate the option agreement between the A's and San José. The court reasoned that MLB knew about the option agreement between San José and the A's, and yet still delayed the vote to approve or deny relocation. *Id.* at *15.

305. Joe Stiglich, *San José Appeals Federal Court Decision, Refiles State Lawsuit*, NBC BAY AREA (Jan. 23, 2014 7:15 PM), http://nbcbayarea.csnbayarea.com/athletics/san-José-appeals-federal-court-decision-refiles-state-lawsuit.

306. Opening Brief at 28, City of San José v. Office of the Comm'r of Baseball, No. C-14-15139 (9th Cir. Mar. 5, 2014) (quoting Alito, *supra* note 25, at 193), *available at* http://cdn.ca9.uscourts.gov/datastore/general/2014/03/06/14-15139_opening_brief.pdf.

307. Sommer, *supra* note 35, at 343.

308. Mozes & Glicksman, *supra* note 27, at 291 (citing Gary Chester, Op-Ed, *Views of Sports; Questions in Antitrust Case: Was Public Interest Served?*, N.Y. TIMES, Aug. 3, 1986, at S2).

If the Court overturns MLB's antitrust exemption in *San José*, the largest impact would be felt in the current minor-league structure[309] and franchise relocation.[310] Nonetheless, in reality not much would immediately change for baseball if the exemption were overturned. This is because removal of the exemption would not guarantee a win for plaintiffs, like San José, because the plaintiff in any antitrust litigation against MLB would have to prove an anticompetitive effect under the "rule of reason" analysis,[311] as opposed to the impenetrable per se rule.[312]

A. The Rule of Reason

When reviewing an anticompetitive practice under § 1 of the Sherman Act, the Court will apply either the "per se illegality" test or the "rule of reason" test. The per se illegality test is "invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."[313] On the other hand, the rule of reason analysis is applicable when "restraints on competition are essential if the product is to be available at all."[314] In applying the rule of reason analysis, the Court balances the anticompetitive effects of a given practice with its "pro-competitive impact and business justifications."[315] In short, the validity of a given practice hinges on how it impacts competition.[316] The Supreme Court has recognized that, in cases involving industries "in which horizontal restraints on competition are essential if the product is to be available at all," the rule of reason analysis should apply.[317] In turn, it "is now well established through the myriad of case law that rules and regulations

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309. The current minor league structure is intrinsically reliant on the reserve-clause system. *See* BANNER, *supra* note 10, at 241.

310. Mozes & Glicksman, *supra* note 27, at 292.

311. The rule of reason allows defendants who engage in anticompetitive activity to justify their actions. If the defendant is able to show that the benefits of its anticompetitive behavior outweigh the harms, and that there is not a less restrictive means for it to achieve its goals, the behavior will be deemed legal. *See* Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 718 (6th Cir. 2003).

312. *See id.* (explaining that "the *per se* rule is appropriate when the challenged practice is 'entirely void of redeeming competitive rationales' . . . . If the court determines that a practice is illegal *per se*, no examination of the practice's impact on the market or the precompetitive justifications for the practice is necessary for finding violation of antitrust law.") (citing Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1016 (10th Cir. 1998)). "The Supreme Court has stated that the *per se* rule is a 'demanding' standard that should only apply to clear cut cases." Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 436, 49–50 (1977); *accord* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 178 (1965) (determining that "the areas of *per se* illegality is carefully limited.").

313. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 103–04 (1984).

314. *Id.* at 101.

315. Mann, *supra* note 10, at 608 (quoting Frank P. Scibilia, *Baseball Franchise Stability and Consumer Welfare: An Argument for Reaffirming Baseball's Antitrust Exemption With Regard to Its Franchise Relocation Rules*, 6 SETON HALL J. SPORTS L. 409, 434 (1996)).

316. *NCAA*, 468 U.S. at 104; *see* Mann, *supra* note 10, at 608.

317. *NCAA*, 468 U.S. at 100–01.

normally employed by professional sports leagues and other organizations are not subject to the *per se* rule, but rather will be analyzed under the rule of reason."[318]

Under the rule of reason, a plaintiff who brought suit against MLB would have the burden of proving significant anticompetitive effects within the professional baseball market.[319] If the plaintiff were to meet that burden, MLB would be required to rebut such evidence with evidence of pro-competitive effects of the restraint, justifying the anticompetitive injuries.[320] If MLB were to meet its burden on rebuttal, the burden would then shift back to the plaintiff to "show that any legitimate objectives [could] be achieved in a substantially less restrictive manner."[321] If the plaintiff were to prove that MLB could use a different method that would be less restrictive on competition in the market, the court would assume that the intent of the restraint is *not* pro-competitive, signaling an antitrust violation.[322] In the realm of professional sports, most anticompetitive agreements would survive rule-of-reason scrutiny because they are ultimately good for the consumer[323]—for example, without agreements on rules and schedules, the MLB's product, professional baseball, would not exist.

B. Applying the Rule of Reason

As mentioned above, if the Supreme Court overturned *Federal Baseball*, the two primary aspects of the business of baseball that would be vulnerable to attack are: the current minor league system and franchise relocation.

In examining the minor league system, it is unclear whether its current structure would survive without the exemption.[324] Presently, minor league contracts effectively restrain trade because players are subject to the reserve system for a number of years and are unable to market themselves to other organizations.[325] MLB's minor league system currently has more than 200 teams, which are organized into 20 leagues at 5 levels. Each professional club maintains a contractual relationship with five or six minor league teams. This relationship fosters what is known as the MLB franchise's "farm system," which is a collection of minor league baseball clubs structured so that a "major league baseball club exercises control by

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318. Mark C. Anderson, *Self-Regulation and League Rules Under the Sherman Act*, 30 CAP. U. L. REV. 125, 149 (2002); *see, e.g.*, *NCAA*, 468 U.S. at 100–01.

319. Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 718 (6th Cir. 2003).

320. *Id.* (quoting Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)).

321. *Id.*

322. Mozes & Glicksman, *supra* note 27, at 295; *see also* Gabriel Feldman, *The Puzzle Persistence of the Single-Entity Argument for Sports Leagues:* American Needle *and the Supreme Court's Opportunity to Reject a Flawed Defense*, 2009 WIS. L. REV. 835, 913–15.

323. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 202–03 (2010) ("Football teams that need to cooperate are not trapped by antitrust law. '[T]he special characteristics of this industry may provide a justification' for many kinds of agreements.").

324. Grow, *supra* note 131, at 610.

325. Tomlinson, *supra* note 10, at 296.

means of either stock ownership or contract[] over the activities of several minor league clubs."[326]

Almost every MLB player is sent to the minor leagues prior to entering the majors, which often entails going through every level of the minor league system.[327] Once a team drafts a player, that team has the exclusive right to sign that player and other teams are prohibited from tampering with that player during the negotiation process. On average, only 1 in 10 minor league players ever gets the chance to play in the majors, and only 1 in 50 stays in the majors more than 6 years.[328] However, regardless of whether the exemption is overturned, the system would likely stay as it is because minor league players, at the end of the day, are interested in integrating themselves with professional baseball.[329]

Furthermore, even if a case were to be brought, MLB's minor league scheme would most likely survive rule-of-reason analysis because, without the parent MLB teams, many minor league franchises would be unable to survive financially. This is a product of the current business model that relies on the parent team to pay the salaries of affiliated minor league teams' players, coaches, and trainers.[330] Without the substantial financial support that MLB parent clubs provide, prices for minor league franchises would increase tremendously, which would negatively affect the consumer.[331] The minor leagues provide cheaper baseball entertainment in hundreds of small markets that otherwise would not have exposure to professional sports.[332] Additionally, MLB has a strong case that allowing teams to draft and develop young talent in their minor league subsidiaries gives small- and mid-market MLB teams a better chance to compete with large-market teams; thus, providing a competitive balance that benefits both the market and the fans.[333] In the end, a thorough rule-of-reason analysis would be highly unlikely to determine that the minor league system is a restraint on trade in violation of § 1 of the Sherman Act because, without the restraint on trade, the minor league baseball product—and possibly even the modern-day MLB product—would not be available at all.[334]

Were the Supreme Court to overturn *Federal Baseball*, the impact would probably be most noticeable in franchise relocation.[335] Though MLB may very well

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326. Jesse Gary, *The Demise of Sport? The Effect of Judicially Mandated Free Agency on European Football and American Baseball*, 38 CORNELL INT'L L.J. 293, 296 n.25 (citing LIONEL S. SOBEL, PROFESSIONAL SPORTS & THE LAW 21 (1977)).

327. Tomlinson, *supra* note 10, at 280–81. This means entering rookie ball, then proceeding to climb the minor league food chain: Single-A, Double-A, and Triple-A (the closest to the majors). *Id.* at 281.

328. *Id.*

329. Mozes & Glicksman, *supra* note 27, at 292 (citing ANDREW ZIMBALIST, MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND PUBLIC POLICY 26 (2003)).

330. Mann, *supra* note 10, at 620.

331. *Id.*

332. *Id.*

333. Tomlinson, *supra* note 10, at 296–97.

334. Mann, *supra* note 10, at 620–21 (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984)).

335. Mozes & Glicksman, *supra* note 27, at 294.

come out victorious in franchise relocation cases under the rule-of-reason analysis as well. Without the exemption, of course, it would be far more difficult for MLB to prevent franchise movement, but in many cases MLB has a strong argument that restraining team movement is better for baseball. Specifically, MLB could point to the financial benefits associated with maintaining franchise stability; it benefits the league, the individual franchises, geographic diversity, traditional rivalries, and fan loyalty—each of which is paramount to the welfare of a sports league. [336] Additionally, franchise stability makes MLB more attractive to potential television partners and national advertisers, as they are less likely to commit billions of dollars if they are uncertain as to the geographical makeup of the league.[337] Furthermore, there are times when franchise relocation may have negligible effects on consumers' welfare—those whom the antitrust laws were intrinsically designed to protect. For example, an individual owner's interest in relocating a team could conflict with the league's interests, as well as public interests. [338] Franchise relocation could detrimentally affect traditional rivalries.[339] It could also help an inefficient owner dodge the natural consequences of inefficiency in a competitive market, where the best result would be to force a sale to a new management.[340] To the same point, a particular relocation could be "inconsistent with a clear, long-term strategy of building credible commitments with localities that encourage local investment in return for assurances that the club will not move absent extraordinary circumstances."[341] MLB could prove that competition within the league would be increased by preventing a particular team relocation, and that would likely be enough to prevent the move.

On the other hand, while some team relocations could negatively impact the market, others would be in the best interest of baseball. For example, a club might find itself in a nonviable situation that requires relocation[342]—like the A's—or, market efficiency could call for multiple teams in a large market.[343] The current system, however, reflects MLB's hostility to the movement of clubs.[344] Under the MLB Constitution, in order for a club to relocate, the relocation must be approved by a three-fourths vote of the MLB clubs.[345] This burdensome requirement allows owners to reject relocation arbitrarily without allowing for consideration of the

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336. Mann, *supra* note 10, at 616 (citing Scibilia, *supra* note 315, at 439).

337. *Id.* (citing Matthew J. Mitten & Bruce W. Burton, *Professional Sports Franchise Relocations from Private Law and Public Law Perspectives: Balancing Marketplace Competition, League Autonomy, and the Need for a Level Playing Field*, 56 MD. L. REV. 57, 60–63 (1997)).

338. Stephen F. Ross, *Antitrust, Professional Sports, and the Public Interest*, 4 J. SPORTS ECON. 318, 323 (2003).

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.* at 324.

344. Complaint at 15, City of San José v. Comm'r of Baseball, No. C-13-02787 (RMW), 2013 WL 5609346 (N.D. Cal. Oct. 11, 2013) (No. 13-02787), *appeal docketed*, No. 14-15139 (9th Cir. Jan. 27, 2014).

345. *Id.*

potential public benefits. Owners often have personal incentives to disapprove of welfare-enhancing relocations, and there is a huge risk that owners will act in ways contrary to public interest—for example, the A's are currently sharing a deteriorating stadium with the Oakland Raiders, but the Giants' owners have incentive to monopolize the San José area as a way to protect their franchise.[346] Under the rule-of-reason analysis, the current supermajority approval for franchise relocation would be done away with, and all parties in interest would benefit in the long run.[347]

Another possibility is that, with removal of the exemption, rival leagues would pop up in an attempt to draw players and fans from MLB.[348] With that being said, there are public benefits associated with encouraging new entrants into professional sports markets; entry promotes innovation and expansion in a competitive market.[349] For example, with the threat of entry by the American Basketball Association into the professional basketball market, the NBA drew the three-point line during the 1979–1980 season.[350]

Furthermore, all four major leagues significantly expanded from actual or threatened entry.[351] Rival leagues in the past have effectively filled in the gaps in professional sports markets.[352] For instance, the creation of the XFL[353] in 2000, and the United Football League ("UFL") in 2009, filled voids in the professional football

346. Ross, *supra* note 338, at 324.

347. *See id.*

348. Mozes & Glicksman, *supra* note 27, at 294.

349. Ross, *supra* note 338, at 322.

350. *Id.*; *see generally* Justin Kubatko, *Keeping Score: The Story Arc of the 3-Point Shot*, OFF THE DRIBBLE (Feb. 10, 2011, 6:00 PM), http://offthedribble.blogs.nytimes.com/2011/02/10/keeping-score-the-story-arc-of-the-3-point-shot/?_php=true&_type=blogs&_r=0 (explaining the story behind the introduction of the 3-point shot in the National Basketball Association).

351. Ross, *supra* note 338, at 322.

352. Mozes & Glicksman, *supra* note 27, at 294.

353. The XFL was rival football league that was jointly owned and operated by World Wrestling Federation Entertainment, Inc. and NBC. *Frequently Asked Questions*, XFL, http://www.all-xfl.com/xfl/faq/faq.shtml (last visited Apr. 14, 2014). The XFL claimed to connect with fans by "returning football to its roots, including fostering a wide-open style of play and faster-paced action while encouraging player individuality to emerge." *Id.*

league market, such as in Los Angeles,[354] Houston,[355] and Las Vegas.[356] Additionally, the UFL offered advantages with regard to on-field rules—for example, group celebrations were permitted, and replays were called for and decided by a referee in a booth, rather than by referees on the field.[357] In the end, both the XFL and UFL could not weather the market's economic pressures and were forced to close their offices—the XFL in 2001, and the UFL in 2013.[358] The rival football leagues are an example of the ideal, unfettered market process at work. The UFL was developed to fulfill the unmet needs of football fans in markets that were being underserved by the NFL, but they ignored markets that were truly football starved—which in the end caused the market process to weed out the inefficient UFL.[359] Disallowing such market efficiency is detrimental to the public interest, which favors a market filled with competition, efficiency, and innovation.

Overall, overturning the exemption would have a negligible impact on MLB—specifically because many of MLB's current anticompetitive practices would survive the rule-of-reason analysis. In fact, the professional baseball industry would likely benefit from antitrust applicability, because, as with other professional sports, antitrust would encourage innovation, which in the end would benefit fans and the game alike.

CONCLUSION

The Supreme Court's prior strategy of waiting for Congress to remove baseball's antitrust exemption has been negligible—the ambiguities associated with the exemption have resulted in divergent interpretations by lower courts and have inhibited predictability regarding what the exemption means, or how a particular

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354. The Rams, after 49 years in Los Angeles, moved to St. Louis in 1995. *See History*, ST. LOUIS RAMS, http://www.stlouisrams.com/team/history.html (last visited Jan. 24, 2014). The XFL took advantage of the large market in Los Angeles in creating the "Los Angeles Xtreme." *See Los Angeles Xtreme*, XFL, http://www.all-xfl.com/losangelesxtreme/ (last visited Apr. 14, 2014).

355. The Houston Oilers moved to Nashville in 1997 and became the Tennessee Titans. *See History: 1990s*, TENNESSEE TITANS, http://www.titansonline.com/team/history/history-1990s.html. However, the NFL announced that the Houston Texans would be its newest expansion team in 1999. *History*, HOUSTON TEXANS, http://www.houstontexans.com/team/history.html. Here, the UFL did not necessarily close a gap, but by placing another team into a large market like Houston, they provided more choices for fans that were struggling with the loss of the Oilers.

356. *See Las Vegas Outlaws*, XFL, http://www.all-xfl.com/lasvegasoutlaws/ (last visited Apr. 14, 2014).

357. Bruce Raffel, *UFL Draft Could Affect NFL Rosters*, BALTIMORE BEATDOWN (May 4, 2011, 2:00 PM), http://www.baltimorebeatdown.com/2011/5/4/2152391/ufl-draft-could-affect-nfl-rosters.

358. *See* John Letzing & Justin Scheck, *Storied Investor's Football League Fumbles*, WALL ST. J. (Mar. 28, 2013, 12:45 AM), http://online.wsj.com/news/articles/SB10001424127887324077704578358904110131698.

359. Ted Fleming, *The Demise of the United Football League Could be Seen from the 50-Yard Line*, EXAMINER.COM (Oct. 21, 2012), http://www.examiner.com/article/the-demise-of-the-united-football-league-could-be-seen-from-the-50-yard-line.

court will rule on its scope. Furthermore, due to misunderstanding and lack of clarity, the inconsistent application of baseball's antitrust exemption has rendered it virtually powerless. MLB is reluctant to use the exemption for fear of losing it and, because MLB itself is unsure of the exemption's scope, business interactions between professional baseball and third parties will likely be compromised in the future. The Court's deference to Congress on the matter is wholly inconsistent with the exemption's existence—the exemption originated with the Court, and it should be the Court that removes it. As with most markets, consumer welfare would be better served by free market competition, and thus, the Supreme Court would be wise to use *San José* as an opportunity to overturn this troublesome "derelict in the stream of law."[360] If the Court does not take this opportunity, it will be doing a disservice not only to the justice system, but also to "true fans of sport everywhere who believe contests should be settled through true competition on the field . . . , not in the courtroom."[361]

360. Flood v. Kuhn, 407 U.S. 258, 286–88 (1972) (Douglas, J., dissenting).
361. Mozes & Glicksman, *supra* note 27, at 296.