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Keeping the A’s in Oakland: Franchise Relocation, *City of San Jose*, and the Broad Power of Baseball’s Antitrust Exemption

Ari Khuner Haber*

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INTRODUCTION

Since 1922, Major League Baseball (MLB) and its owners have enjoyed a privilege that no other American business can claim: a judicially-granted exemption from the laws of antitrust.¹ What began as a simple proposition—that the competition-enhancing regulations should not apply to professional baseball because its exhibitions do not amount to interstate commerce²—has since been both reaffirmed and reshaped at every level of the federal courts. While the reasoning behind the exemption has shifted to a theory of congressional intent, the exemption’s effects remain the same. Ninety years, three Supreme Court opinions,³ and an assortment of lower court decisions later, the exemption continues to protect the “business of baseball” from antitrust review and affords MLB, as well as Minor League Baseball, an unparalleled level of control over its league structure and commercial activities. In turn, animosity toward the exemption from baseball historians, legal scholars, and fans alike has persisted unremittingly.

Perhaps more than any other area of baseball, MLB’s restrictions on the free movement of its teams have led to numerous antitrust challenges over the past four decades. The MLB Constitution delineates territorial boundaries for each of the thirty Major League clubs, and requires a three-quarter-majority vote of the owners for any territorial rule to be changed or for any franchise relocation to be approved.⁴ Though the use of similar rules by other sports leagues has been subjected to, and often invalidated under, antitrust law,⁵ MLB’s restrictions remain virtually untouchable absent a Supreme Court decision or congressional act to revoke baseball’s unique status. Where antitrust regulation might otherwise intervene to promote fair competition among businesses, MLB club owners wishing to change cities can look only to their counterparts for the necessary approval to do so.

Oakland Athletics (A’s) owner Lew Wolff has left no doubt in recent years of his desire to relocate his franchise to nearby San Jose, preferring the corporate- and

¹ See *Fed. Baseball Club of Baltimore v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200 (1922). Though the organization known today as Major League Baseball was not officially formed until 2001, when the American and National Leagues were merged into a single business entity, this Comment will use the terms baseball, MLB, and Major Leagues interchangeably.

² *Id.* at 209.

³ See also *Toolson v. N.Y. Yankees*, 346 U.S. 356, 357 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972).

⁴ Major League Constitution, at Art. VIII, § 8, available at <http://www.bizofbaseball.com/docs/ML-ConstitutionJune2005Update.pdf> [hereinafter MLB CONST.].

⁵ See, e.g., *Los Angeles Mem’l Coliseum v. Nat’l Football League*, 726 F.2d 1381, 1398 (9th Cir. 1984) (upholding as reasonable a jury finding that the NFL’s use of a similarly restrictive relocation system was an unreasonable restraint of trade and thus in violation of antitrust law). Not all such cases have resulted in losses for the leagues, however, as courts have resisted the notion that restraints on franchise relocation are per se illegal and allowed such restraints to stand under certain facts. See, e.g., *Nat’l Basketball Ass’n v. SDC Basketball Club*, 815 F.2d 562, 568 (9th Cir. 1987) (rejecting the argument that franchise movement restrictions are invalid as a matter of law); *San Francisco Seals, Ltd. v. Nat’l Hockey League*, 379 F. Supp. 966 (C.D. Cal. 1974) (allowing the NHL to block relocation into a market where no team was currently operating, since such a move would not actually enhance competition). See also *infra* note 149.

sponsor-rich Silicon Valley to the team's current stadium quagmire in the East Bay.⁶ Wolff's efforts to relocate have been welcomed by San Jose and the companies that call the Valley home,⁷ but one overwhelming obstacle remains: the territorial rights to San Jose and greater Santa Clara County belong to the San Francisco Giants, the A's cross-Bay rival.⁸ The Giants, understanding the value accrued by keeping Silicon Valley their own, have vehemently opposed ceding the territory, even though an A's move to San Jose would actually place a greater physical distance between the two clubs.⁹

The City of San Jose, however, has been unwilling to accept the status quo. On June 18, 2013, it filed suit in federal court against MLB, alleging violations of both federal and state antitrust regulations, as well as of several state interference and unfair competition laws.¹⁰ In October 2013, Judge Ronald M. Whyte of the Northern District of California granted MLB's motion to dismiss the City's antitrust claims, relying on Supreme Court precedent to conclude that the business of baseball is broadly immune from antitrust review, without any true limitations on the exemption.¹¹ In doing so, Judge Whyte explicitly rejected a narrower interpretation adopted by other courts that the baseball exemption applies only to MLB's use of the reserve clause,¹² and refused to endorse another often-followed framework, the "integral test," which allows the exemption to cover only that which is integral to the business of baseball.¹³ The A's efforts to move to San Jose will therefore fail unless MLB's owners

⁶ See Ken Belson, *In Tug of War over San Jose, A's and the Giants Remain at a Standoff*, N.Y. TIMES (Apr. 2, 2012), <http://www.nytimes.com/2012/04/02/sports/baseball/as-and-giants-in-tug-of-war-over-rights-to-san-jose.html>.

⁷ To this effect, seventy-five Silicon Valley CEOs were signatories of a 2010 letter to MLB Commissioner Bud Selig voicing support for an A's move to San Jose. See Complaint at Exh. 2, City of San Jose v. Office of the Comm'r of Baseball, No. C-13-02787 (N.D. Cal. Oct. 11, 2013) [hereinafter San Jose Complaint].

⁸ See MLB CONST., *supra* note 4. For an explanation of how this territorial delineation came to be, see *infra* Part III.B.

⁹ The A's Oakland Coliseum and the Giants' AT&T Park are only seventeen miles apart, making them two of the two closest stadiums in MLB. See *Athletics Owner Waits for Selig's Decision on Whether He Can Move Team*, USA TODAY (Mar. 7, 2011, 5:51 PM), http://usatoday30.usatoday.com/sports/baseball/al/athletics/2011-03-07-owner-san-jose_N.htm. Downtown San Jose, where Wolff would like to eventually build the A's new home, is approximately 48 miles south of AT&T Park. *Id.*

¹⁰ San Jose Complaint, *supra* note 7, at 40-42. San Jose sought primarily to enjoin MLB from enforcing its relocation restrictions, as well as monetary damages. *Id.* at 42-43.

¹¹ City of San Jose v. Office of the Comm'r of Baseball, No. C-13-02787, 2013 WL 5609346, at *16 (N.D. Cal. Oct. 11, 2013). Two of San Jose's state law interference claims were dismissed without prejudice by Judge Whyte in December 2013, though a refiling in state court is unlikely since recovery under those claims would be limited to monetary damages and would not help effect a relocation. See *Judge Dismisses San Jose's Remaining Claims vs. MLB*, CSNBAYAREA.COM (Jan. 3, 2014, 8:45 PM), <http://www.csnbayarea.com/athletics/judge-dismisses-san-joses-remaining-claims-vs-mlb>. MLB has since appealed the dismissal of its antitrust claims to the Ninth Circuit, where oral arguments were held in August 2014. No decision had been issued as of the publication of this Comment. For a detailed explanation of the Ninth Circuit appeal, see *infra* note 178.

¹² See, e.g., *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993).

¹³ *City of San Jose*, 2013 WL 5609346 at *10-*11.

approve the relocation or Congress or the Supreme Court revokes the exemption, all highly unlikely outcomes.

This Comment argues that future courts should follow Judge Whyte in abandoning the narrower views of the exemption that have emerged over the last four decades. Rather, the exemption should be applied as it was originally granted: as a broad immunity from antitrust law for the business of providing baseball games to the public for profit. The two limiting interpretations of the exemption that have been adopted by certain courts—that the exemption is limited to the reserve clause, and that the exemption covers only those aspects of baseball that are “integral” to its business—are flawed and ultimately meritless. The focus instead should be on the key issue of determining the scope of the business of baseball, a difficult task given how prior exemption cases have ignored the issue, and on the importance of applying the exemption broadly, even where the results may be inequitable. By looking inductively to the facts of these prior cases and examining MLB’s enterprise in its modern form, judges in future cases can fill in the gaps left by their predecessors to uphold the broad and protective nature of the exemption as it was first handed down.

Part I of this Comment traces the history of the antitrust exemption from 1922 through 1972, discussing the Supreme Court cases that established and affirmed the exemption, the Court’s fundamental shift in reasoning behind the exemption, and the simultaneous changes to baseball that brought the sport into its modern era. Part II examines the subsequent lower court cases that have debated the exemption’s scope, including the opinions that have sought to broadly exempt the entire business of baseball, those that have narrowly construed the exemption, and the cases that have attempted to broker some middle ground. Part III discusses MLB’s rules on franchise relocation, provides a brief history of the league’s territorial divisions in the Bay Area, and assesses the results of the *City of San Jose* case. Finally, Part IV analyzes the future implications of *City of San Jose* on the scope of the exemption, concluding that the exemption should be applied broadly, even despite its controversial nature.

I. THE EXEMPTION ESTABLISHED: THE SUPREME COURT TRILOGY

A. *The Divergent Beginnings of Baseball and Antitrust Law*

It is no coincidence that baseball and antitrust law share a long history, given that the earliest forms of professional baseball were intentionally designed to be commercially anti-competitive. Not long after founding the league in 1876, club owners in the National League of Professional Baseball Clubs (the National League) became alarmed at the rising costs of player contracts and the prevalent use of bidding wars to secure them.¹⁴ To rein in salaries and eliminate the risk of losing star players to richer teams, the owners implemented what became known as the reserve system,

¹⁴ David L. Snyder, *Anatomy of an Aberration: An Examination of the Attempts to Apply Antitrust Law to Major League Baseball Through Flood v. Kuhn (1972)*, 4 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 177, 178 (2008).

which allowed clubs to “reserve” the exclusive rights to as many as five players per season and carry them over from year to year.¹⁵ Ballplayers, viewing their careers more as hobbies than as true vocation, generally accepted the system despite the total bar it placed on the ability to realize their true economic potential.¹⁶ Able to keep its profits high and player movement low, the National League staved off a host of competitors to become the most prominent league in America’s most popular sport.¹⁷

While the cartel of professional baseball was becoming as deliberately non-competitive as possible, sentiment in America against big business and concentrated wealth accumulation was growing.¹⁸ Using its power to regulate interstate commerce, Congress responded by passing the Sherman Antitrust Act (the Sherman Act)¹⁹ in 1890, a decidedly vague piece of legislation aimed at promoting free market competition and protecting consumers.²⁰ Section 1 of the Act states that “[e]very contract . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.”²¹ Judicial interpretation followed, with the Supreme Court ruling that potential antitrust violations must be judged by a “rule of reason” test,²² a fact-intensive inquiry that requires a determination of whether the challenged restraint “merely regulates and perhaps thereby promotes competition,” or whether it “suppress[es] or even destroy[s] competition” in an unreasonable way.²³ Where there

¹⁵ By 1890, this power was expanded to allow owners to reserve their entire roster and was formalized in the uniform player’s contract as the reserve clause, giving owners unilateral power to extend contracts on identical terms at the end of each season. JEROLD J. DUQUETTE, *REGULATING THE NATIONAL PASTIME: BASEBALL AND ANTITRUST* 3 (1999); Snyder, *supra* note 14, at 178.

¹⁶ PAUL D. STAUDOHR, *PLAYING FOR DOLLARS: LABOR RELATIONS AND THE SPORTS BUSINESS* 3-4 (1996) (writing that in the era of the reserve system, “professional athletes were treated like privileged peons”).

¹⁷ The National League went on to merge with its most powerful rival, the American League, in 1903, forming the structure of what today is MLB. See Snyder, *supra* note 14, at 179. The merger agreement between the leagues mandated that all clubs abide by the reserve system. *Id.* It also contained a provision requiring the approval of a majority of the clubs before any team could change cities, an early form of the modern, more restrictive relocation rules. STUART BANNER, *THE BASEBALL TRUST: A HISTORY OF BASEBALL’S ANTITRUST EXEMPTION* 36 (2013).

¹⁸ See Jeffrey Gordon, Note, *Baseball’s Antitrust Exemption and Franchise Relocation: Can a Team Move?*, 26 *FORDHAM URB. L.J.* 1201, 1203 (1999).

¹⁹ 15 U.S.C. § 1 *et seq.*

²⁰ See *id.*; 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*, 34 *J. SUP. CT. HIST.* 183, 184 (2009).

²¹ 15 U.S.C. § 1. The Sherman Act was supplemented by the Clayton Act of 1914, which made illegal certain types of anticompetitive conduct such as price discrimination, as well as mergers and acquisitions that substantially lessen competition, and allowed for treble damages in antitrust suits. *Id.* at §§ 12-27.

²² *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 66 (1911). *Standard Oil*, however, left open the possibility that some antitrust violations could still be judged to be per se unlawful where the act in question would undoubtedly fail to pass the rule of reason test. *Id.* at 64-65.

²³ *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918). The Ninth Circuit, home to much of the sports-focused antitrust litigation over the last thirty years, has enumerated three elements that must be established before the rule of reason test is used: “(1) An agreement among two or more persons or distinct business entities; (2) Which is intended to harm or unreasonably restrain competition; (3) And which actually causes injury to competition.” *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 290 (9th Cir. 1979).

are no “offsetting procompetitive justifications” and the parties have enough market power to make an economic impact, antitrust violations are likely to be found.²⁴

B. Federal Baseball *and the Creation of the Exemption*

Given the unique business structure of professional sports leagues and the overtly noncompetitive nature of the reserve system, legal challenges to National League-American League merger were inevitable.²⁵ In 1913, a group of wealthy Midwestern businessmen founded the Federal League and adopted the goal of competing with the American and National Leagues (collectively, the Major Leagues).²⁶ Undaunted by the Major Leagues’ size and market dominance, the Federal League began moving its teams eastward and attempting to poach Major League talent by offering salaries far exceeding those available under the reserve system.²⁷ This strategy, however, failed decisively, as Federal League teams were only able to attract players in the twilight of their careers by exorbitantly overpaying them.²⁸ Coupled with over-aggressive capital expenditures, these salaries soon put the Federal League out of business and several of its clubs were bought out by the Major Leagues in settlement of a lawsuit brought by the Federal League that it was no longer able to fund.²⁹

After the Federal League disbanded in 1916, its Baltimore club, the Terrapins,³⁰ filed suit the following year against the Major Leagues, its sixteen teams, and league

²⁴ See *Cal. Dental Ass’n v. FTC*, 526 U.S. 756 (1999).

²⁵ The first fully litigated lawsuit to feature such a challenge was a state court claim filed against Hal Chase, a ballplayer who attempted to “jump leagues” by terminating his contract with the American League’s Chicago White Sox and signing with the Buffalo club of the newly-formed Federal League. See Snyder, *supra* note 14, at 180-81. Characterizing the merger as subjecting players to “a species of quasi peonage unlawfully controlling and interfering with [their] freedom” to contract and seek labor, the court found that “‘organized baseball’ is now as complete a monopoly of the baseball business for profit as can be made.” *Am. League Baseball Club of Chicago v. Chase*, 86 Misc. 441, 461 (N.Y. Sup. Ct. 1914). The court nonetheless held that baseball was not subject to federal antitrust law and rejected the argument that “the business of baseball for profit is interstate trade or commerce”; rather, it characterized baseball as “an amusement, a sport, a game that . . . is not a commodity or an article of merchandise subject to the regulation of Congress.” *Id.* at 459-60.

²⁶ Alito, *supra* note 20, at 186.

²⁷ *Id.* at 186-87. The Federal League enticed Major League players by offering annual five-percent salary increases and free agency eligibility after ten years of professional service. ALBERT THEODORE POWERS, *THE BUSINESS OF BASEBALL* 37 (2003). Major League clubs fought back by also increasing salaries but blacklisting any player who jumped leagues. *Id.*

²⁸ Alito, *supra* note 20, at 188.

²⁹ *Id.* at 188-90. The Federal League first sued the Major Leagues in 1915, seeking the dissolution of all Major League contracts and a declaration that the American and National League owners had formed an illegal monopoly. BANNER, *supra* note 17, at 53. The case was heard in Chicago by District Judge Kenesaw Mountain Landis, who took so long to decide the case that the bankrupt Federal League was forced to settle with the Major Leagues and disband. *Id.* at 60. Judge Landis, who later admitted that he had delayed the case so that he would not have to rule against the Major Leagues and thereby dismantle the game he loved, became the first Commissioner of Baseball in 1920. *Id.* at 61.

³⁰ The Terrapins were the lone Federal League club to decline joining in the settlement with the Major Leagues, as its local shareholders preferred the possibility of keeping a team in the city to a monetary inducement to fold the club. *Id.* at 60.

officials, alleging that the defendants had conspired to monopolize baseball and prevent Federal League teams from competing.³¹ The district judge instructed the jury that the Major Leagues did in fact engage in interstate commerce and had created a monopoly, leading the jury to find in favor of Baltimore and award over \$240,000 in trebled damages.³² The D.C. Circuit Court reversed on appeal, adopting a narrower view of interstate commerce consistent with other cases at the time and thus failing to reach the substantive antitrust violations alleged in the suit.³³

The Terrapins' claim ascended to the Supreme Court in 1922, where a unanimous decision in favor of the Major Leagues was reached.³⁴ Building on *Chase* and upholding the Circuit Court's opinion, the Supreme Court too avoided any substantive antitrust analysis and addressed only the threshold question of whether baseball constituted interstate commerce. In holding that it did not, Justice Oliver Wendell Holmes wrote that "the business is giving exhibitions of base ball [sic], which are purely state affairs," and, though the exhibitions require the interstate travel of ball-players, "the transport is mere incident, not the essential thing."³⁵ Justice Holmes wrote further that, despite their profitability, baseball games could hardly be considered commerce, since "personal effort, not related to production, is not a subject of commerce" and "[t]hat which in its consummation is not commerce does not become commerce among the States because the transportation . . . takes place."³⁶ Without qualifying as interstate in nature or as commerce, professional baseball could thus not be bound by federal antitrust law, and the baseball exemption was born.³⁷

C. *Fundamental Changes, Same Result: Toolson and the Non-Baseball Cases*

The reasoning behind *Federal Baseball* was not anomalous for its time, as the Supreme Court in the beginning of the twentieth century adopted a narrow interpretation of interstate commerce.³⁸ What is aberrational about the case, rather, is that the

³¹ See *Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Baltimore*, 269 F. 681 (D.C. Cir. 1920). See also Alito, *supra* note 20, at 190; Gordon, *supra* note 18, at 1207.

³² Alito, *supra* note 20, at 190.

³³ Snyder, *supra* note 14, at 184.

³⁴ *Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).

³⁵ *Id.* at 208-09.

³⁶ *Id.* at 209.

³⁷ This conclusion is not explicitly asserted in the opinion, which ends only by stating that the antitrust violations alleged by the Terrapins did not amount to "an interference with commerce among the States." *Id.* However, since qualification as interstate commerce is a necessary threshold for reaching antitrust analysis, no other conclusion regarding antitrust can follow. Holmes' opinion also does not explicitly create an exemption for baseball, as the words "exempt" and "exemption" are not found within the text. The characterization of *Federal Baseball* as creating an exemption does not appear in judicial opinions until *Flood*, discussed *infra* in Part I.D.

³⁸ Indeed, the only case cited by Holmes as precedent in *Federal Baseball* was *Hooper v. California*, in which the Court held that the interstate sale of insurance policies did not constitute interstate commerce because "the making of [an insurance contract] is a mere incident of commercial intercourse." *Hooper v. California*, 155 U.S. 648, 655 (1895). The logic of *Federal Baseball* "was consistent with Progressive Era jurisprudence regarding the treatment of 'incidental' interstate transportation," as commerce then was

Court has twice upheld the opinion despite perpetual criticism³⁹ and the fundamental shift it has made away from the era-specific precedent on which Holmes' opinion was based.

The years immediately following *Federal Baseball* saw pronounced changes in the national and commercial nature of baseball, highlighted most strongly by the advent of radio. Professional teams began employing the new technology in 1921, and all Major League clubs were broadcasting games via radio by 1939.⁴⁰ For many teams, these broadcasts stretched across state lines, linking local markets to consumers across the country and introducing a heavy stream of revenue in the process.⁴¹ This broadcast revolution, and the profits it generated, would only grow with the introduction of television soon after. The World Series was televised for the first time in 1947, and the country would see its first coast-to-coast broadcast of a Major League game four years later.⁴² As the game's national reach continued to grow, denial of baseball as interstate commerce was becoming an increasingly untenable position.

The Court's own definition of interstate commerce would change drastically as well. What had been a three-Justice minority favoring broader commerce power suddenly became a five-four majority in the aftermath of President Roosevelt's threats of court-packing.⁴³ In the landmark case *Wickard v. Filburn*, the Court held that business activities that were local in nature but contributed to the national economy could be federally regulated as interstate commerce.⁴⁴ *Hooper*, the only case directly cited as precedent in *Federal Baseball*, was overturned by the Court in 1944, further shaking the credibility of Justice Holmes' decision.⁴⁵

These two shifts formed the basis of the next significant lawsuit to challenge the Sherman Act's applicability to baseball. Danny Gardella, the first of about two-dozen ballplayers to leave the Major Leagues to play for higher salaries in the newly

predominantly associated with the transportation of goods, not with their production or with the goods themselves. DUQUETTE, *supra* note 15, at 18.

³⁹ A sampling of the criticism levied at *Federal Baseball* manifests a common theme: that Holmes and the Court were out of touch with the realities of baseball as a business and blinded by a sentimental relationship with the game. See, e.g., *Salerno v. Amer. League of Prof'l Baseball Clubs*, 429 F.2d 1003, 1005 (2d. Cir. 1970) ("We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days . . . and that . . . the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent,' and 'illogical.'"); Paul Finkelman, *Baseball and the Rule of Law Revisited*, 25 T. JEFFERSON L. REV. 17, 30-31 (2002) (writing that Holmes' opinion "seems to have been based on either a curious and narrow misunderstanding of the antitrust laws and/or his utter misunderstanding of the nature of the business of baseball").

⁴⁰ Snyder, *supra* note 14, at 186.

⁴¹ See *id.* at 187; Martin M. Tomlinson, *The Commissioner's New Clothes: The Myth of Major League Baseball's Antitrust Exemption*, 20 ST. THOMAS L. REV. 255, 262 (2008).

⁴² POWERS, *supra* note 27, at 264.

⁴³ Tomlinson, *supra* note 41, at 262-63.

⁴⁴ *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

⁴⁵ See *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 553 (1944) (holding that, contrary to the ruling in *Hooper*, the sale of insurance policies in more than one jurisdiction *did* constitute interstate commerce).

established Mexican League,⁴⁶ was blacklisted by MLB Commissioner Happy Chandler when the Mexican League failed after its second season.⁴⁷ Unable to rejoin his former club, Gardella sued MLB in District Court, where his suit was dismissed on its pleadings pursuant to *Federal Baseball*.⁴⁸ The Second Circuit then reversed with a pair of majority holdings written by Learned Hand and Jerome Frank, both of whom found that baseball *was* interstate commerce.⁴⁹ Learned Hand likened the use of radio and TV for broadcasting baseball to playing games in a ballpark “where a state line ran between the diamond and the grandstand.”⁵⁰ Echoing the same notion, Judge Frank wrote that “the [baseball] games themselves, because of the radio and television are . . . played interstate as well as intra-state.”⁵¹ Despite the majority’s findings, the case would never reach the question of whether any antitrust violation had occurred. On remand, MLB elected to settle with Gardella and reinstate the players, rather than risk an adverse judicial decision.⁵²

As Congress began to consider the issue on its own,⁵³ antitrust suits against the Major Leagues continued to mount. Eight new cases were pending in the courts within a year of *Gardella*, and the split in authority manifested by the Second Circuit’s decision prompted the Supreme Court to consider the issue once again.⁵⁴ The Court granted certiorari to a consolidation of three suits all alleging that the reserve clause was an illegal restraint on trade, and that Major League owners had conspired to monopolize the professional baseball industry.⁵⁵ The plaintiff in the named case, George Toolson, was a Minor Leaguer for the Yankees whom the club had blacklisted in retaliation for his refusal to report to his new assignment with the Class-A team.⁵⁶ The

⁴⁶ See BANNER, *supra* note 17, at 96-97; Snyder, *supra* note 14, at 187.

⁴⁷ POWERS, *supra* note 27, at 121.

⁴⁸ *Gardella v. Chandler*, 79 F. Supp. 260 (S.D.N.Y. 1948).

⁴⁹ *Gardella v. Chandler*, 172 F.2d 402 (2d. Cir. 1949).

⁵⁰ *Id.* at 407. Judge Learned Hand stopped short of finding that cross-state broadcasting necessarily rendered baseball to be interstate commerce, holding instead that the case should be remanded for a trial court determination of whether the interstate nature of baseball “form[ed] a large enough . . . part of the business to impress upon it an interstate character.” *Id.* at 408.

⁵¹ *Id.* at 411. Judge Frank concluded by writing that “the public’s pleasure does not authorize the courts to condone illegality, and that no court should strive ingeniously to legalize a private (even if benevolent) dictatorship.” *Id.* at 415.

⁵² Snyder, *supra* note 14, at 190.

⁵³ After *Gardella*, the House Judiciary Committee’s Subcommittee on Study of Monopoly Power began to examine baseball’s antitrust trust but, wary of drafting new legislation that would damage their beloved game, members of the subcommittee opted to leave the issue to the courts. BANNER, *supra* note 17, at 110-11. In a lengthy report, the subcommittee conceded that organized baseball was both a monopoly and an interstate entity, but stressed that it was a unique industry in which clubs had no choice but to “act as partners as well as competitors.” *Id.*

⁵⁴ *Id.* at 112; Kevin McDonald, *Antitrust and Baseball: Stealing Holmes*, 2 J. SUP. CT. HIST. 89, 100 (1998).

⁵⁵ See 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, 569 (2010) [hereinafter Grow, *Defining the “Business of Baseball”*].

⁵⁶ *Id.* (writing that it was Toolson’s frustration with the Minor League system and the barriers it placed on his chance at the playing in the Major Leagues that caused him to bring suit).

district court dismissed Toolson's complaint and the court of appeals affirmed, both following *Federal Baseball*.⁵⁷

Despite the undeniable changes to both professional baseball and its own Commerce Clause doctrine, the Supreme Court too affirmed, holding 7-2 that the authority of *Federal Baseball* still controlled.⁵⁸ In its one-paragraph, per curiam decision, however, the majority moved away from Justice Holmes' reasoning and looked instead to Congress' inaction and baseball's reliance on *Federal Baseball* over the previous three decades as reason for maintaining the status quo.⁵⁹ The justices were also wary of imposing retroactive liability on professional baseball, considering the costly wave of antitrust suits that would follow from a change in Court precedent.⁶⁰ Rather, they were content to allow Congress to structure new law prospectively, in a way that could avoid such a precarious scenario for the sport.⁶¹

The Court's adoption of a new rationale was highlighted most strongly in the opinion's final sentence, in which the Court wrote that "the judgments below are affirmed on the authority of [*Federal Baseball*], so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."⁶² With this statement, the Court effectively abandoned the earlier interstate commerce justification for the exemption and shifted its basis instead to one of congressional intent. It was Congress' choice not to apply antitrust law to baseball, rather than its inability to do so, that gave baseball its exemption.⁶³

Though the Supreme Court's desire in *Toolson* to place the burden of change firmly on Congress could not have been more apparent, no congressional action would follow. Questions over the baseball exemption before the Court, however, continued to linger, as other sports and similar industries fought for their own antitrust exemptions.⁶⁴ Two years after *Toolson*, the Court ruled simultaneously that both

⁵⁷ BANNER, *supra* note 17, at 112-13.

⁵⁸ *Toolson v. N.Y. Yankees*, 346 U.S. 356, 357 (1953) (characterizing the holding in *Federal Baseball* as "the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws").

⁵⁹ *Id.* ("Congress has had [*Federal Baseball*] under consideration but has not seen fit to bring such business under these laws by legislation The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation.")

⁶⁰ BANNER, *supra* note 17, at 121-22.

⁶¹ *Id.*

⁶² *Toolson*, 346 U.S. at 357.

⁶³ See BANNER, *supra* note 17, at 120 (characterizing the shift from a question of whether Congress could bring baseball under antitrust law to a question of whether it should); Grow, *Defining the "Business of Baseball"*, *supra* note 55, at 570 ("[T]he *Toolson* Court . . . reinterpreted *Federal Baseball* to stand for the proposition that Congress had never intended for baseball to fall within the purview of the Sherman Act in the first place."). Like *Federal Baseball*, the *Toolson* opinion, too, has since been widely disparaged. See, e.g., ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* 59 (1998) (attacking the notion that the origin of the exemption could be found in Congress' intent, since "[t]here is no evidence that any member of Congress even thought about the baseball enterprise" when the Sherman Act was passed); McDonald, *supra* note 54, at 100 (calling the *Toolson* Court's reinterpretation of *Federal Baseball* "the greatest bait-and-switch scheme in the history of the Supreme Court").

⁶⁴ The other major professional sports leagues—the National Football League (NFL), National

traveling theater⁶⁵ and boxing⁶⁶ were subject to the Sherman Act, declining to extend the baseball cases beyond the sport itself. Rather than differentiate between baseball and boxing, the Court simply characterized *Federal Baseball* as “dealing with the business of baseball and nothing else,” and *Toolson* merely as “a narrow application of stare decisis.”⁶⁷

When the case of professional football player Bill Radovich⁶⁸ came before the Supreme Court in 1957, the justices again held that *Federal Baseball* and *Toolson* pertained only to baseball.⁶⁹ Though the majority admitted that, “were we considering the question of baseball for the first time upon a clean slate, we would have no doubts” that antitrust law would apply, it concluded that the only “orderly way” to correct its error and the resulting inequity was “by legislation, and not by court decision.”⁷⁰ *Radovich* thus provided some needed clarity: all sports leagues and their use of the reserve system were subject to antitrust law by default.⁷¹ Baseball—specifically, the business of baseball—was to have the only exemption.⁷²

D. Flood and the End of the Reserve Clause Era

The final Supreme Court ratification of baseball’s unique status would come in 1972. Curt Flood, an outstanding and well-respected centerfielder⁷³ for the St.

Basketball Association (NBA), and National Hockey League (NHL)—all began by modeling themselves after MLB, including the adoption of the reserve clause and baseball’s strict rules on franchise movement. See BANNER, *supra* note 17, at 123-24.

⁶⁵ United States v. Shubert, 348 U.S. 222 (1955).

⁶⁶ United States v. Int’l Boxing Club of N.Y., 348 U.S. 236 (1955).

⁶⁷ *Shubert*, 348 U.S. at 228-30.

⁶⁸ Similar to Danny Gardella, Radovich had been blacklisted by his former team, the Detroit Lions, after his trade request was denied and he began playing for a rival league in Los Angeles to be closer to his ailing father. BANNER, *supra* note 17, at 134. He sued after his offer to join another team, the Pacific Coast League’s San Francisco Clippers, was withdrawn per league rules barring the hiring of players blacklisted by the NFL. *Id.*

⁶⁹ *Radovich v. Nat’l Football League*, 352 U.S. 445, 451 (1957) (“[W]e now specifically limit the rule there established [in *Federal Baseball* and *Toolson*] to the facts there involved, *i.e.*, the business of organized professional baseball.”).

⁷⁰ *Id.* at 452 (adding that baseball’s distinct status may be “unrealistic, inconsistent, or illogical” but is nonetheless an established part of the law).

⁷¹ Professional basketball was formally subjected to the Sherman Act in 1971, in a case challenging the NBA’s rule that players must wait four years after their high school graduation before being drafted by a professional club. See *Haywood v. Nat’l Basketball Ass’n*, 401 U.S. 1204, 1205 (1971) (stating that the NBA “does not enjoy exemption from the antitrust laws”).

⁷² The cementing of baseball’s special treatment set off a flurry of bill drafting in Congress aimed at rectifying the perceived inequity, with seven bills submitted for consideration in the first four months after *Radovich*. BANNER, *supra* note 17, at 145. Fifteen days of hearings were held but no congressional action followed, a process (and result) that would become recurrent: each of the next four years in Congress saw the introduction of multiple sports antitrust bills, and each time no action was taken. *Id.* at 145-46 (counting at least 61 such bills introduced by 1965).

⁷³ Unlike Gardella and Toolson, two lesser-known players whose legal notoriety far outweighed their on-field accomplishments, Flood’s prominence was established: he was a two-time World Series champion, a three-time All Star, and had won seven consecutive Gold Glove awards when his fight against MLB

Louis Cardinals, was abruptly traded to the Philadelphia Phillies following the 1969 season, a move he refused to accept.⁷⁴ As an African-American ballplayer, Flood found inspiration in the civil rights movement, seeing a natural connection between the struggle for equal rights and the ballplayers' fight to end the reserve system.⁷⁵ He was also encouraged by another recent change for Major Leaguers: the development of an effective players' union under the leadership of new MLB Players Association (MLBPA) executive director Marvin Miller.⁷⁶ Despite his prescient knowledge that a loss in the courts would result in his being blacklisted from baseball, Flood secured the financial support of the MLBPA and sued the Major Leagues for violating the Sherman Act's ban on illegal restraints on trade.⁷⁷

The Supreme Court ultimately granted certiorari to Flood's case and voted 5-3⁷⁸ to adhere to its own precedent.⁷⁹ After opening with a sentimental ode to the history of baseball, Justice Blackmun began his analysis by declaring unambiguously that "[p]rofessional baseball is a business . . . engaged in interstate commerce" and that it enjoyed an "exemption from the federal antitrust laws" that was both "an exception and an anomaly."⁸⁰ Citing the Court's five precedent cases on the matter,⁸¹ Blackmun then stated firmly that the exception was "fully entitled to the benefit of stare decisis," and based on "a recognition and an acceptance of baseball's unique characteristics and needs."⁸² Blackmun concluded by returning to the issue of legislative inaction, writing that Congress' refusal to modify the status quo "has clearly evinced

began. Tomlinson, *supra* note 41, at 266.

⁷⁴ Aside from his desire to remain in St. Louis with a quality Cardinals club, Flood's apprehension about playing in Philadelphia was amplified by the Phillies' fans, known notoriously as the most racist in baseball. *Id.* at 267.

⁷⁵ See KATHRYN JAY, MORE THAN JUST A GAME: SPORTS IN AMERICAN LIFE SINCE 1945 at 153-54 (2004) (positing that "the civil rights movement had helped Flood see the link between racial oppression and labor injustice" and, by 1969, he believed that "he had a moral responsibility to challenge the system"). In a letter to Commissioner Bowie Kuhn, Flood likened his treatment under the reserve clause to slavery, writing, "[a]fter 12 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." ABRAMS, *supra* note 63, at 311.

⁷⁶ Miller's role in transforming sports labor relations and toppling the reserve system cannot be overstated. An economist for the United Steelworkers before taking over the defunct MLBPA, Miller transformed the way ballplayers viewed unionization and their own economic value. Galvanizing the players into a cohesive unit and pushing them to take league owners head on, Miller was able to secure the first collective bargaining agreement (CBA) in sports in 1968 and free agency for his players by 1975. For more on Miller's revolutionary contributions to sports labor and the entire industry, see CHARLES P. KORR, THE END OF BASEBALL AS WE KNEW IT: THE PLAYERS UNION, 1960-1981 (2002); MARVIN MILLER, A WHOLE DIFFERENT BALL GAME: THE SPORT AND BUSINESS OF BASEBALL (1991).

⁷⁷ See BANNER, *supra* note 17, at 191-92.

⁷⁸ Justice Powell recused himself from the case because he was a shareholder of Anheuser-Busch, which owned the Cardinals. Snyder, *supra* note 14, at 197.

⁷⁹ Flood v. Kuhn, 407 U.S. 258 (1972).

⁸⁰ *Id.* at 282.

⁸¹ Namely, *Federal Baseball*, *Toolson*, *Shubert*, *International Boxing Club*, and *Radovich*. The latter three are herein referred to as the "non-baseball cases."

⁸² *Flood v. Kuhn*, 407 U.S. at 282.

a desire not to disapprove” of the Court’s decisions through legislation.⁸³ Once again, the Court’s preference for deferring to Congress had allowed baseball’s exemption to stand.⁸⁴

Justice Blackmun’s peculiar introduction left his opinion open to a barrage of criticism, mostly accusing him of letting his romanticism for baseball cloud his legal judgment.⁸⁵ As a practical matter, Blackmun’s opinion would also generate a new uncertainty: whether the exemption applied to the entire “business of baseball,” or solely to baseball’s use of the reserve system. The Court’s prior decisions asserted the former, as *Federal Baseball*, *Toolson*, and the non-baseball cases made sweeping reference to baseball’s business, without a single mention of the reserve clause in their majority opinions. Blackmun’s approach now appeared to support the latter, as portions of his opinion suggested a narrower exemption that only applied to baseball’s use of the reserve system.⁸⁶ At the same time, his stated intention to adhere to the Court’s precedent still left room for broader interpretation.⁸⁷ As Major League owners were soon forced to largely abandon the reserve system and adopt modern free agency,⁸⁸ the struggle to resolve this uncertainty would define the next wave of litigation challenging the exemption.

⁸³ *Id.* at 282-83 (“Congress as yet has had no intention to subject baseball’s reserve system to the reach of the antitrust statutes. This, obviously, has been deemed to be something other than mere congressional silence and passivity.”). Similarly to the Court in *Toolson*, Justice Blackmun also expressed concerns over subjecting the Major Leagues to retroactive liability. *Id.* at 284. In a brief conclusion, Blackmun affirmed the lower courts’ holding that, with a federal exemption in place, baseball could not be governed by state antitrust regulations either because of the need for national uniformity of the law. *Id.*

⁸⁴ The dissenting justices would not let the exemption off so easily. According to Justice Douglas, the Court’s original decision in *Federal Baseball* was a “derelict in the stream of the law” that the Court, as its creator, “should remove.” *Id.* at 286 (Douglas, J., dissenting). Justice Marshall dismissed the majority’s repeated concerns over retroactivity, stating that it was possible for the Court to remove the exemption in a purely prospective manner. *Id.* at 293 (Marshall, J., dissenting). Even in his concurring opinion, Chief Justice Burger seemed to hardly agree with the majority, writing that he had “grave reservations” and that leaving the matter to Congress was merely “the least undesirable course.” *Id.* at 286 (Burger, C.J., concurring).

⁸⁵ See, e.g., ABRAMS, *supra* note 63, at 67 (“Blackmun’s majority opinion may have confused the business of baseball with the glorious game of baseball, the national pastime wrapped up in legend and myth”); BANNER, *supra* note 17, at 215 (“Baseball’s exemption now seemed to rest on the nostalgia of elderly men for the glory days of the national pastime rather than on any defensible legal basis.”); PAUL WEILER, LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS 170 (2000) (“[W]hatever the legal reasons for the Supreme Court’s decision to preserve baseball’s unique exemption . . . a crucial motivating factor was the special place that baseball has long occupied in American life.”).

⁸⁶ Indeed, Blackmun opened his analysis by writing that “[w]ith its reserve system enjoying exemption from the federal antitrust law, baseball is, in a very distinct sense, an exception and an anomaly.” *Flood*, 407 U.S. at 282.

⁸⁷ See Grow, *Defining the “Business of Baseball”*, *supra* note 55, at 578 (arguing that the opinion’s “emphasis on stare decisis reveals that the Court did not intend to alter the underlying focus of the exemption created in *Federal Baseball* and *Toolson*”).

⁸⁸ Despite his loss at the Supreme Court, Flood’s fight against the reserve clause was a key catalyst in swaying public opinion towards the side of the players. See MILLER, *supra* note 76, at 195-96 (writing that Flood’s biggest accomplishment was “raising the consciousness of everyone involved with baseball: the writers, the fans, the players—and perhaps even some of the owners”). Free agency would arrive in

II. THE EXEMPTION IN QUESTION: THE LOWER COURT SPLIT IN AUTHORITY

For over fifty years, the antitrust exemption served as baseball's first line of defense for the reserve system and the unchecked control it gave owners over player movement. With the reserve clause no longer standard in player contracts after 1975, however, MLB began relying on the exemption to protect the other areas of its business in which the owners were able to exercise unparalleled control, such as franchise relocation, contraction, and labor relations with non-players. Though the baseball exemption has not reached the Supreme Court since *Flood*, it is in these areas where questions over the scope of the exemption—specifically, whether it covers the broad “business of baseball,” applies narrowly to the reserve system, or falls somewhere in between—have persisted in both federal and state courts.

A. *The Broad View: An Exemption for the Entire Business of Baseball*

The first post-*Flood* suit to attack baseball on antitrust grounds was brought in 1976 by Oakland A's owner Charlie Finley, who sought to capitalize on Justice Blackmun's ambiguous shift in scope. Finley's sale of the contracts of three star players to other clubs had been blocked by Commissioner Kuhn under his power to veto player transactions “not in the best interests of baseball.”⁸⁹ In an attempt to avoid having his antitrust claims dismissed under the exemption, Finley argued that Blackmun's opinion limited the scope of the exemption to cover only baseball's recently dismantled reserve system.⁹⁰ The Seventh Circuit disagreed, holding that the trilogy of baseball opinions, along with the non-baseball cases, manifested the Supreme Court's intent to exempt the *entire* “business of baseball,” and “not any particular facet of that business.”⁹¹

Under a similarly broad reading of the exemption, the Eastern District of Louisiana dismissed the claims of a plaintiff whose plan to purchase and relocate the

the Major Leagues three years later, when an arbitrator ruled that the reserve clause did not allow MLB owners to unilaterally renew player contracts indefinitely. *Id.* at 244. Liberated from the archaic reserve system, Major Leaguers were soon able to realize their true economic potential, and salaries (as well as league revenues) soon skyrocketed. *Id.* at 284-86. The arbitrator, Peter Seitz, would later refer to MLBPA chief Miller as “the Moses who had led Baseball's Children of Israel out of the land of bondage.” *Id.* at 331.

⁸⁹ Like most MLB rules that would potentially run afoul of antitrust regulations, the Commissioner's veto power is established by the Major League Constitution, the modern form of the Major League Agreement adopted in 1921. *See* MLB CONST., *supra* note 4, at Art. II, § 2(a). In this case, Kuhn claimed that his veto was justified because sale of the contracts would debilitate the A's and damage the league's competitive balance by allowing the “buying of success by more affluent clubs.” *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 531 (7th Cir. 1978).

⁹⁰ *Id.* at 540.

⁹¹ *Id.* at 541. The Seventh Circuit did recognize that the exemption “does not apply wholesale to all cases which may have some attenuated relation to the business of baseball,” citing to a case in which the A's accused a concessions company of antitrust violations. *Id.* at 541 n.51 (citing *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 365 F. Supp. 235 (N.D. Cal. 1972), *rev'd on other grounds*, 512 F.2d 1264 (9th Cir. 1975)). What constitutes an “attenuated relation,” however, has not been further judicially explored.

Class-AA Charlotte Knights was quashed by the governing body of Minor League Baseball.⁹² Without citing any limits, the court found that the Supreme Court had simply exempted the “business of baseball.”⁹³ In the wake of the 1994 players’ strike, a class-action antitrust suit filed by fans, as well as owners of businesses near MLB stadiums, was likewise dismissed, with the court finding that “the great weight of authority recognizes that the scope of the antitrust exemption covers the business of baseball.”⁹⁴

More recently, MLB’s proposed plans to contract the league by eliminating two clubs led the Florida Attorney General to bring an antitrust investigation in federal court, where the Eleventh Circuit ultimately found that contraction was covered by an expansive interpretation of the exemption.⁹⁵ The court did note that, even when read broadly, the exemption was still not unlimited, as it did not “immunize the dealings between professional baseball clubs and third parties.”⁹⁶

These four cases, from *Finley* to *Crist*, evidence a broad interpretation of the exemption created by the Supreme Court in *Federal Baseball* and *Toolson*. Taken together, they propose that antitrust law does not apply to professional baseball for any area subsumed within the “business of baseball,” regardless of whether labor relations are involved. What is encompassed within the business of baseball, however, has been left largely undefined. The only boundary contemplated by these cases is the relationship between the league and third parties, such as vendors, independent business owners, and fans, whose relationship with baseball is more incidental than direct. Where there is some tangible association between baseball’s business practices and its on-field product, however, these cases have allowed MLB, as well as the Minor Leagues, to be broadly exempted from antitrust law.

B. *The Middle View: An Exemption for the Integral Aspects of the Business of Baseball*

Several courts have attempted to find a middle ground between the broad and narrow readings of the exemption, imposing limits on the exemption while still finding it to cover a wide swath of baseball’s business activities. The first such case came in 1982, when a local radio station sued the Houston Astros for allegedly conspiring

⁹² *New Orleans Pelican Baseball, Inc. v. Nat’l Ass’n of Prof’l Baseball Leagues*, No. 93-253, 1994 WL 631144 at *8 (E.D. La. Mar. 1, 1994).

⁹³ *Id.* at *8-*9.

⁹⁴ *McCoy v. Major League Baseball*, 911 F. Supp. 454, 457 (W.D. Wash. 1994). In addition to rejecting the plaintiffs’ request for a narrow reading of the exemption, the court also found that neither the fans nor the business owners had standing in such a suit, as the antitrust laws were not intended to apply to “ripple effect” injuries sustained by third parties. *Id.* at 458.

⁹⁵ *Major League Baseball v. Crist*, 331 F.3d 1177, 1179, 1183 (11th Cir. 2003) (holding that “the number of clubs, and their organization into leagues for the purpose of playing scheduled games, are basic elements of the production of major league baseball games” and are therefore within the “business of baseball”).

⁹⁶ *Id.* at 1183.

with a competing station and violating the Sherman Act in the process.⁹⁷ Noting that there is a presumption for the broad application of antitrust law, the Southern District of Texas found that the Supreme Court trilogy had “impl[ie]d that the exemption covers only those aspects of baseball, such as leagues, clubs and players[,] which are integral to the sport and not related activities which merely enhance its commercial success.”⁹⁸ Adopting Blackmun’s language in *Flood*, the court thus found that the exemption did not apply because “[t]he reserve clause and other ‘unique characteristics and needs’ of the game have no bearing” on radio broadcast agreements.⁹⁹ A similar result followed later that year in *Professional Baseball Schools*, when the Eleventh Circuit determined in a brief per curiam opinion that those “matters that are an integral part of the business of baseball” are fully exempt from antitrust regulation.¹⁰⁰

The Southern District of New York arrived at an analogous conclusion in 1992, after female umpire Pamela Postema sued MLB and Minor League Baseball for allegedly conspiring to prevent her from being promoted to the Major Leagues.¹⁰¹ The court determined that while the exemption “does immunize baseball from antitrust challenges to its league structure and its reserve system,” it “does not provide baseball with blanket immunity for anti-competitive behavior in every context in which it operates.”¹⁰² Accordingly, limits should be imposed on the exemption’s application to baseball’s relations with non-players, which “are not a unique characteristic or need of the game” and “in no way enhance[] its vitality or viability.”¹⁰³ Postema could thus proceed with her antitrust claims, and the parties ultimately settled out of court.¹⁰⁴ The Minnesota Supreme Court employed a similar framework after the Minnesota Attorney General claimed antitrust violations stemming from the proposed purchase and relocation to North Carolina of the Twins.¹⁰⁵ Admitting that *Flood* was

⁹⁷ *Henderson Broad. Corp. v. Houston Sports Ass’n*, 541 F. Supp. 263, 264 (S.D. Tex. 1982).

⁹⁸ *Id.* at 265. The court framed the issue as being whether broadcasting is “central enough to baseball to be encompassed in the baseball exemption.” *Id.* This Comment refers to this framework as the “integral test,” which allows the exemption to apply only to those areas that are integral, central, or essential to the business of baseball. *See infra* Part III.D.

⁹⁹ *Id.* at 271. In *Flood*, Justice Blackmun concluded a paragraph regarding the anomalous nature of the exemption by stating that it “rests on a recognition and an acceptance of baseball’s unique characteristics and needs.” *Flood v. Kuhn*, 407 U.S. 258, 282 (1972). As sports law professor Nathaniel Grow argues, the Court meant this passage as a justification for the exemption, rather than as a new limitation to be placed upon it, and its use as a test for coverage under the exemption is therefore dubious. *See* Grow, *Defining the “Business of Baseball”*, *supra* note 55, at 601 (noting that the Court did not use a “unique characteristics and needs” analysis in any of its preceding exemption cases or in *Flood* itself).

¹⁰⁰ *Prof’l Baseball Schools & Clubs, Inc. v. Kuhn*, 693 F.2d 1085, 1086 (11th Cir. 1982) (dismissing the claims of a Minor League franchise owner who alleged antitrust and monopoly violations stemming from the league’s restrictions on Minor League player assignment, franchise location, and interleague exhibitions).

¹⁰¹ *Postema v. Nat’l League of Prof’l Baseball Clubs*, 799 F. Supp. 1475, 1478-80 (S.D.N.Y. 1982).

¹⁰² *Id.* at 1489.

¹⁰³ *Id.* (adding that “[a]nti-competitive conduct toward umpires is not an essential part of baseball and in no way enhances its vitality or viability”).

¹⁰⁴ *See* BANNER, *supra* note 17, at 243.

¹⁰⁵ *Minn. Twins P’ship v. State*, 592 N.W.2d 847, 851 (Minn. 1999) (determining that Minnesota

“not clear about the extent of the conduct that is exempt from antitrust laws,”¹⁰⁶ the court nonetheless determined that the sale and relocation of a franchise is “an integral part of the business of professional baseball” and thus exempt all the same.¹⁰⁷

C. *The Narrow View: An Exemption Only for the Reserve System*

Fifteen years after failing in the Seventh Circuit, Charlie Finley’s argument for narrowing the exemption to cover solely the reserve clause finally found acceptance in federal court. An investment group led by Vincent Piazza, the father of then-MLB catcher Mike Piazza, had entered into an agreement to purchase the San Francisco Giants for \$115 million and move the club to Tampa Bay when the National League owners abruptly rejected the sale.¹⁰⁸ When another ownership group’s offer to buy the Giants for only \$100 million and keep the club in San Francisco was accepted instead, Piazza and another investor sued MLB for violations of Sections One and Two of the Sherman Act, among other claims.¹⁰⁹ Arguing primarily that its antitrust exemption applied to the whole of its business, MLB moved to dismiss the suit.¹¹⁰

Characterizing *Federal Baseball*, *Toolson*, and *Flood* as all involving antitrust allegations that stemmed directly from use of the reserve clause, the Eastern District of Pennsylvania denied MLB’s motion.¹¹¹ The court held that the scope of the exemption extended no further than the facts of the cases that created it, meaning that the exemption should only protect baseball’s use of the reserve clause.¹¹² The court also found that the analytic underpinnings of *Federal Baseball* and *Toolson*—the notion that baseball was exempt from antitrust law because it did not qualify as interstate commerce—had been squarely rejected in *Flood*.¹¹³ *Flood* had allowed the exemption to stand not because its original rationale was justified but because of stare decisis, congressional inaction, and the fact that baseball had been allowed to develop with the understanding that it was not subject to antitrust regulation.¹¹⁴ According to

antitrust law is to be applied consistently with federal antitrust law).

¹⁰⁶ *Id.* at 854.

¹⁰⁷ *Id.* at 856.

¹⁰⁸ *Piazza v. Major League Baseball*, 831 F. Supp. 420, 423 (E.D. Pa. 1993). In defending its blocking of the sale, MLB cited “serious questions” surrounding the primary investors that had arisen after a background check uncovered possible Mafia ties, which Piazza denied fully. *Id.* at 422-23.

¹⁰⁹ *Id.* at 423-24. The plaintiffs alleged specifically that MLB had monopolized the market for professional baseball and had “placed direct and indirect restraints on the purchase, sale, transfer, relocation of, and competition” of its teams, constituting an unlawful restraint of the plaintiffs’ business opportunities. *Id.* at 424.

¹¹⁰ *Id.* at 429.

¹¹¹ *Id.* at 438.

¹¹² *Id.* (“I conclude that the antitrust exemption created by *Federal Baseball* is limited to baseball’s reserve system, and because the parties agree that the reserve system is not at issue in this case, I reject Baseball’s argument that it is exempt from antitrust liability”). The district court’s decision would never be reviewed by a higher court, as the case was settled shortly thereafter. See Thomas J. Ostertag, *Baseball’s Antitrust Exemption: Its History and Continuing Importance*, 4 VA. SPORTS & ENT. L.J. 54, 63 (2004).

¹¹³ *Piazza*, 831 F. Supp. at 436.

¹¹⁴ *Id.* *Piazza* also cited the several explicit references in *Flood* to the reserve system as supporting its

the court, therefore, *Flood* was devoid of any precedential value “beyond the particular facts there involved, *i.e.* the reserve clause” and did not apply to *Piazza*, which involved only the issues of franchise acquisition and relocation.¹¹⁵

Two state courts would soon agree with *Piazza*'s novel restrictions on the exemption's scope. The Florida Supreme Court, in a state antitrust investigation also regarding the rejected Giants sale, agreed that *Flood* supported such an interpretation and elected to follow *Piazza*'s narrowing of the exemption.¹¹⁶ Though it acknowledged that *Piazza* went against “the great weight of federal cases” that read the exemption broadly, the court felt it was also the only case to have analyzed *Flood* and its implications so comprehensively.¹¹⁷ Accordingly, because *Flood* had invalidated the original justification for the exemption, the court agreed that “baseball's antitrust exemption extends only to the reserve system.”¹¹⁸ A year later, the plaintiffs in *Morsani*¹¹⁹ alleged that MLB had committed federal and state antitrust violations by preventing their proposed purchase and relocation to Tampa of two different franchises, as well as by ending their efforts to bring an expansion team to the area.¹²⁰ Offering no substantive analysis of the Supreme Court trilogy or subsequent cases, the court simply deferred to the binding authority of *Butterworth* and agreed that the exemption was confined only to use of the reserve clause.¹²¹

These three cases offer a more satisfying interpretation to those seeking fully delineated boundaries for the exemption by asserting that, because the Supreme Court only considered baseball's labor relations in its trilogy of exemption cases, the exemption was only intended to apply to the reserve system no longer in use. However, much of the analysis in *Piazza* and its progeny depends on a misguided understanding of *Flood* and lacks the precedential value of a higher court opinion. As recent cases have found, and as this Comment argues, *Piazza* should be read as an unsupported break from precedent rather than as the start of a legitimate trend.

narrow reading of *Flood*'s precedential value. *Id.*

¹¹⁵ *Id.* In rejecting the Seventh Circuit's contrary holding in *Finley*, the court cited a preference for rule-based, rather than result-based, *stare decisis*, which emphasizes that precedent comes not only from adherence to the results of prior cases but from the reasoning of those cases as well. *Id.* at 437-38 (citing *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682 (3d Cir.1991), *aff'd in part and rev'd in part on other grounds*, 505 U.S. 833 (1992)). The *Piazza* court faulted *Flood* for following the results of *Federal Baseball* and *Toolson* rather than taking the opportunity to fundamentally change the defective reasoning on which they were based. *Id.* at 438. The court went on to dichotomize the market for baseball games, which had been exempted explicitly in *Federal Baseball*, and the market for baseball *teams*, which was at issue in the case presented. *Id.* at 440.

¹¹⁶ *Butterworth v. Nat'l League of Prof'l Baseball Clubs*, 644 So. 2d 1021, 1022, 1024 (Fla. 1994).

¹¹⁷ *Id.* at 1025.

¹¹⁸ *Id.* The court emphasized, however, that it was not ruling on the merits of an antitrust suit against the National League; rather, it was merely certifying Attorney General Butterworth's demands for investigation. *Id.* at 1025 n.8.

¹¹⁹ *Morsani v. Major League Baseball*, 663 So. 2d 653 (Fla. Dist. Ct. App. 1995).

¹²⁰ *Id.* at 655-56. The plaintiffs had previously tried to purchase and relocate the Minnesota Twins in 1984 and the Texas Rangers in 1988. *Id.*

¹²¹ *Id.* at 657.

D. *The Curt Flood Act: Congress' Ineffective Intervention*

Despite the demise of the reserve system and the advent of free agency, MLB was unable to shake its penchant for labor strife in the 1990s. League revenues and player salaries reached unprecedented highs—the average player salary first topped \$1 million in 1992¹²²—yet neither owners nor players were satisfied. Owners wanted a salary cap as insurance against the possibility of a downturn in revenues, a position the players staunchly refused.¹²³ The disagreement culminated when the players elected to go on strike in August 1994, leading to the cancellation of the season's remaining games and, for the first time, the World Series.¹²⁴ Though the owners and players reached a new, post-strike collective bargaining agreement (CBA) in December 1996, both groups yearned for more clarity and stability regarding baseball's antitrust status. To this end, the parties included a provision in the CBA requiring the cooperation of both sides in lobbying Congress to enact legislation that would clarify that MLB players *were* protected by antitrust law in the same manner as athletes in other sports.¹²⁵

¹²² STAUDOHAR, *supra* note 16, at 32.

¹²³ Murray Chass, *No Runs, No Hits, No Errors: Baseball Goes on Strike*, N.Y. TIMES (Aug. 12, 1994), <http://www.nytimes.com/1994/08/12/us/baseball-no-runs-no-hits-no-errors-baseball-goes-on-strike.html>.

¹²⁴ *Id.* The strike finally ended on March 31, 1995, when future Supreme Court Justice Sonia Sotomayor, then a district judge, blocked the owners from unilaterally abolishing salary arbitration and altering the free agency system. See *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 261 (S.D.N.Y. 1995), *aff'd*, 67 F.3d 1054 (2d Cir. 1995); *Sotomayor Helped in '95 Baseball Strike*, ESPN.COM (May 26, 2009), <http://espn.go.com/espn/print?id=4206638>. The owners, fearful of potential unfair labor practice liability, ended their threat of locking the players out and allowed them to return under the terms of the CBA that had expired in 1993. See Gary R. Roberts, *A Brief Appraisal of Curt Flood Act of 1998 from the Minor League Perspective*, 9 MARQ. SPORTS L. REV. 413, 415 (1999). The next two seasons were played under those same terms before a new CBA was implemented. Steven A. Fehr, *The Curt Flood Act and Its Effect on the Future of the Baseball Antitrust Exemption*, 14 ANTITRUST 25, 27 (2000).

¹²⁵ BANNER, *supra* note 17, at 246. The players sought such a provision because they feared that their free agency would be at risk whenever a CBA expired and that they would be unable to protect themselves through antitrust litigation as other athletes could. *Id.* The owners' willingness to partially relinquish their exemption was bolstered by a recent Supreme Court case holding that the nonstatutory labor exemption barred unionized NFL players from suing the league for antitrust violations based on noncompetitive practices to which the two sides had already agreed. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996) ("[T]o give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions."). Accordingly, so long as the owners and players maintained a bargaining relationship, requiring both that they maintained an interest in bargaining and that the players did not decertify their union, provisions of the CBA that the players had collectively agreed to could not be challenged in court. *Id.* at 250 (holding further that restraints *unilaterally* imposed after expiration of a CBA and an impasse in good faith bargaining were also exempt under the nonstatutory labor exemption, even if those restraints were rejected by the union). See also *Brady v. Nat'l Football League*, 640 F.3d 785 (8th Cir. 2011) (concerning the 2011 NFL lockout and the effect of the players' having decertified their union).

By extension, the owners could safely assume that any labor issues that had been bargained for collectively, such as the amateur draft or the three-year window at the beginning of a player's career in which his rights are unconditionally owned by his team, could not form the basis of an antitrust lawsuit against them, regardless of a congressional act that partially removed the exemption. See Nathaniel Grow, *Reevaluating*

The result of the parties' joint effort was the Curt Flood Act (the CFA, or the Act),¹²⁶ passed in 1998 as a supplement to the Clayton Act and named for the man who sacrificed his career to catalyze the players' fight for free agency. The first section of the CFA states conclusively that the league's and owners' "conduct, acts, practices, or agreements" that directly relate to Major League players' employment are subject to antitrust law to the same extent that they are for other professional athletes.¹²⁷ While this unambiguously removed the exemption from the issue of MLB player labor relations, the subsequent provisions of the Act lack such clear resolve. Section (b) adds that "[n]o court shall rely on [the CFA] for changing the application of the antitrust laws" to any conduct or practices beyond Major League player employment, and then goes on to list the numerous areas of baseball in which its antitrust status remains unchanged.¹²⁸ These areas include, but are expressly *not* limited to: Minor League Baseball; the amateur player draft; franchise expansion, location and relocation; franchise ownership and transfer; league marketing, broadcasting, and intellectual property issues; umpire employment; and agreements with "persons not in the business of organized professional baseball."¹²⁹

The only unequivocal conclusion thus provided by the CFA is that there is no longer an antitrust exemption for MLB's labor relations with Major League players. For all other aspects of baseball, no further mandate on antitrust law was provided. Though some have argued that the CFA does in fact provide a broad exemption for the non-labor areas discussed in Section (b),¹³⁰ the Act's legislative history confirms that Congress intended to leave it to the courts to resolve the ambiguity in these areas. Senator Orrin Hatch, then-chairman of the Senate Judiciary Committee and co-sponsor of the CFA, declared in a floor debate that the Act was "absolutely neutral with respect to the state of the antitrust laws" outside the area of player employment and that "[w]hatever the law was the day before this bill passes . . . will continue to be after the bill passes."¹³¹ Referring to the divergence in authority effected by *Piazza*, Minnesota Senator Paul Wellstone stated that the CFA would "have no effect on the courts' ultimate resolution of the scope of the antitrust exemption on matters beyond those related to owner-player relations at the major league level."¹³² Though

the Curt Flood Act of 1998, 87 NEB. L. REV. 747, 749-750 (2008) [hereinafter Grow, *Reevaluating the CFA*]; Tomlinson, *supra* note 41, at 290-91. Acquiescence by the owners was also conditioned on the inclusion of clarification that any legislation sought by the two sides would "not change the application of the antitrust laws in any other context," in order to maintain the other protections the exemption afforded them. Fehr, *supra* note 124, at 28.

¹²⁶ 15 U.S.C. § 26b (2006) [hereinafter CURT FLOOD ACT].

¹²⁷ *Id.* at § 26b(a).

¹²⁸ *Id.* at § 26b(b).

¹²⁹ *Id.*

¹³⁰ *See, e.g.,* Roberts, *supra* note 124, at 437 ("the likely effect of the Act [is] actually to expand the scope and strength of the antitrust immunity in most respects Thus, legislation that started out to apply antitrust more broadly to baseball has probably caused exactly the opposite effect.").

¹³¹ Tomlinson, *supra* note 41, at 287 (citing 45 CONG. REC. S9496 (daily ed. July 30, 1998) (statement of Sen. Hatch)).

¹³² Fehr, *supra* note 124, at 28-29 (citing 144 CONG. REC. S9621-01 (daily ed. July 31, 1998) (statement

the Supreme Court had for years implored Congress to settle the issue of MLB's anti-trust status through legislation, Congress nonetheless opted to pass the responsibility right back to the judiciary. As such, commentators have widely labeled the CFA as "accomplish[ing] virtually nothing," considering the lack of a true reason for MLB players to sue the owners on labor grounds in the post-reserve system era.¹³³ Having left so many questions over antitrust law's applicability to baseball unanswered, the CFA was hardly the definitive congressional act that had been awaited for so long.¹³⁴

III. THE EXEMPTION REASSERTED: FRANCHISE RELOCATION AND CITY OF SAN JOSE V. OFFICE OF THE COMMISSIONER OF BASEBALL

A. *MLB's Rules on Franchise Relocation and Territorial Rights*

Baseball's strict rules on franchise location and movement are nearly as old as the sport itself. The first National League constitution, adopted in 1876, provided each club with an exclusive five-mile operating radius around its home city.¹³⁵ Even after the American-National League merger in 1903, and with it, the potential for territorial overlap between teams of opposite leagues, each league maintained rules requiring a three-quarter-majority approval of the owners on any proposed franchise relocation.¹³⁶ As a result, no clubs changed cities, and none were added, in the first half of the twentieth century, despite America's rapid population growth and shifts.¹³⁷

By the 1950s, the western half of the country's demand for baseball, and its increased accessibility via air travel, was too great to be ignored.¹³⁸ Six clubs relocated between 1953 and 1961, most notably the Brooklyn Dodgers and New York Giants,

of Sen. Wellstone)). Fehr, the brother of former MLBPA executive director Donald Fehr, stresses that "it seems overwhelmingly clear that Congress did not intend to address the question of to what extent baseball's antitrust exemption continues to exist. Indeed Congress went out of its way to make sure that it was *not* speaking to that issue." *Id.* at 29.

¹³³ Roberts, *supra* note 124, at 432; *see also* J. Gordon Hylton, *Why Baseball's Antitrust Exemption Still Survives*, 9 MARQ. SPORTS L. REV. 391, 391 (1999) (claiming that the CFA has had "no practical effect" and adding that "[t]he remarkable feature of the Flood Act is not what it did, but what it did not do"); Alfred Dennis Mathewson, *Ali to Flood to Marshall: The Most Triumphant of Words*, 9 MARQ. SPORTS L. REV. 439, 439 (1999) (characterizing the Act as mostly just a "symbolic tribute" to Curt Flood); Grow, *Reevaluating the CFA*, *supra* note 125, at 749 (surveying the extensive criticism of the CFA).

¹³⁴ Professor Grow suggests, however, that the CFA has had a positive effect in ushering in a new era of relative labor peace, a welcome change after the turmoil that preceded it. *See* Grow, *Reevaluating the CFA*, *supra* note 125, at 754. According to Grow, though the players would still need to decertify the MLBPA in order to sue MLB if reason to do so arose, the mere threat of litigation allowed by the CFA, and with it, the possibility of treble damages, has softened the owners' position in recent CBA negotiations. *Id.* One need not look further than the recent lockouts in the three other major sports (the NFL and NBA in 2011 and the NHL in 2012) to understand why labor peace in baseball has been such an important accomplishment.

¹³⁵ Mark S. Nagel et al., *Major League Baseball Anti-Trust Immunity: Examining the Legal and Financial Implications of the Relocation Rules*, 4 ENT. & SPORTS L. J., no. 3, 2007, at *5.

¹³⁶ *Id.*

¹³⁷ BANNER, *supra* note 17, at 162.

¹³⁸ Nagel et al., *supra* note 135, at *5.

who moved to Los Angeles and San Francisco, respectively.¹³⁹ Though unpopular with fans and politicians of the cities that lost teams, these moves occurred free of any restriction by other owners, as clubs remaining on the East Coast had little reason to worry about economic competition with teams moving even farther away.

By 1961, MLB's territorial rules would change again. The National League expanded its teams' exclusive zones to ten miles beyond city limits, and the American League followed by expanding to one hundred miles.¹⁴⁰ Both leagues maintained their three-quarter-majority approval rule, but teams in one league would not have the ability to block the movement of a team in the other, regardless of regional intrusion.¹⁴¹ A period of expansion then followed,¹⁴² but relocation stemmed. Since the time of *Flood* in 1972, when the Washington Senators moved to Texas to become the Rangers, the Montreal Expos' 2005 relocation to Washington, D.C. (where they became the Nationals) has been the only movement among MLB franchises.¹⁴³

One key reason behind this freeze is a new element of MLB's rules on franchise relocation, added after the leagues officially merged in 2001: the delineation, by county, of exclusive "operating territories" for the thirty Major League clubs, "within which they have the right and obligation to play baseball games as the home Club."¹⁴⁴ A three-quarter majority of all thirty teams (twenty-three votes total) is needed to approve any change to these territorial delineations, as well as to authorize the relocation of any franchise in general.¹⁴⁵ The rules on the relocation of Minor League teams are similarly restrictive, mandating that a proposed move be approved by Minor League Baseball, the team's parent club, and the MLB Commissioner.¹⁴⁶

¹³⁹ Additionally, the Boston Braves left for Milwaukee in 1953, the St. Louis Browns moved to Baltimore in 1954 and became the Orioles, the Philadelphia A's moved to Kansas City in 1955, and the Washington Senators became the Minnesota Twins in 1961. BANNER, *supra* note 17, at 162. In the next decade, the Braves and A's moved to their current homes in Atlanta (in 1966) and Oakland (1968). *Id.*

¹⁴⁰ Nagel et al., *supra* note 135, at *5.

¹⁴¹ *Id.* It was this rule that made the A's 1968 relocation from Kansas City to Oakland possible, as the Giants in neighboring San Francisco were powerless to prevent it once the American League owners had given their approval. *Id.*

¹⁴² In 1961, the Los Angeles Angels and the Washington Senators, replacing the team that had just departed for Minnesota, joined the American League. Baseball Almanac, *Baseball Teams*, <http://www.baseball-almanac.com/teammenu.shtml>. The National League expanded in 1962 with the Houston Colt .45s (now in the American League as the Astros) and the New York Mets. *Id.* In 1969, the American League added the Kansas City Royals and Seattle Pilots (who soon after moved to Milwaukee to become the Brewers), while the National League added the Montreal Expos and San Diego Padres. Harold Friend, *A Brief Summary of MLB's Expansion Since 1961*, YAHOO! (Nov. 10, 2008), <https://web.archive.org/web/20131003105955/http://voices.yahoo.com/a-brief-summary-mlbs-expansion-since-1961-2141418.html?>

¹⁴³ While movement was stagnant, expansion continued: in 1977 the American League added the Seattle Pilots (now the Mariners) and the Toronto Blue Jays. *Id.* The National League expanded with the Colorado Rockies and the Florida (now Miami) Marlins in 1993. *Id.* The latest round of expansion was completed in 1998, when the Arizona Diamondbacks joined the National League and the Tampa Bay Devil Rays (now simply the Rays) joined the American League. *Id.*

¹⁴⁴ MLB CONST., *supra* note 4, at art. VIII, § 8.

¹⁴⁵ *Id.* at art. V, § 2(b)(3).

¹⁴⁶ See Gordon, *supra* note 18, at 1214.

The ability to restrain franchise movement is perhaps the most important privilege of MLB protected by the antitrust exemption and, as some have argued, it may be the only real power the baseball exemption still affords MLB in the post-reserve clause era.¹⁴⁷ Courts have consistently found that relocation restrictions are not per se illegal under the Sherman Act,¹⁴⁸ but such rules can still violate antitrust law under certain circumstances and require extensive factual review in cases that challenge them.¹⁴⁹ By many accounts, MLB's relocation rules without the benefit of the ex-

¹⁴⁷ See, e.g., Andrew E. Bortek, Note, *The Faux Fix: Why a Repeal of Major League Baseball's Antitrust Exemption Would Not Solve Its Severe Competitive Balance Problems*, 25 CARDOZO L. REV. 1069, 1072 (2004) (writing that the exemption's "practical, day-to-day effect on the game is significantly less than in years past" and that "restricting franchise relocation is the only thing that MLB owners are allowed to do under the protection of the antitrust exemption that team owners in leagues such as the NFL cannot do"). This argument, however, ignores the crucial role that the antitrust exemption plays in protecting baseball's Minor League system, which is unique among the major professional sports leagues both in structure and size. Minor League Baseball is composed of over 150 teams (not including Rookie or Mexican League clubs) and annually brings professional baseball to over 41 million fans in nearly every corner of the country. See *Teams by Name*, MINOR LEAGUE BASEBALL, <http://www.milb.com/milb/info/teams.jsp>; *MiLB Attendance Exceeds 41.2 Million*, MINOR LEAGUE BASEBALL (Sep. 17, 2013, 7:00 AM), http://www.milb.com/news/article.jsp?ymd=20130917&content_id=60843450&fext=.jsp&vkey=pr_milb&sid=milb.

The exemption, of course, covers all of *professional* baseball, not just MLB, and many of the cases that have helped define the exemption have involved Minor League players and teams. Still, Minor Leaguers have been shut out of the post-*Flood* victories enjoyed by their MLB counterparts. Free agency has hardly been extended to the lower tiers of baseball and the Curt Flood Act is expressly applicable only to Major League ballplayers. This has led to the persistence of a Minor League system fraught with potential antitrust issues that cannot be eliminated through litigation. These include the lack of true free agency (and resulting depression of Minor League salaries); strict rules restraining franchise relocation; and the control MLB clubs have over their affiliated Minor League teams, who must sacrifice much of their autonomy in order to realize the benefits of such affiliation. See Gary R. Roberts, *The Case for Baseball's Special Antitrust Immunity*, 4 J. SPORTS ECON. 302, 309-310 (2003). As Roberts argues, removing the antitrust exemption would force many Minor League clubs out of business, harming the communities they serve as well as MLB's ability to develop talent. *Id.* at 310-311.

¹⁴⁸ See, e.g., Nat'l Basketball Ass'n v. SDC Basketball Club, Inc., 815 F.2d 562, 568 (9th Cir. 1987) [hereinafter *Clippers*] ("It [is] clear that franchise movement restrictions are not invalid as a matter of law").

¹⁴⁹ Perhaps the most notorious invalidation of a league's relocation restrictions came in the 1980s, after a three-quarter-majority vote of the NFL owners blocked the Oakland Raiders' proposed move to Los Angeles, where the Rams were already playing. See *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1385 (9th Cir. 1984) [hereinafter *Raiders I*]. With the Raiders attached as a cross-plaintiff, the LA Coliseum, then the home stadium of the Rams and the potential new home of the Raiders, sued the NFL and its club owners for antitrust violations, seeking to enjoin the league from blocking the move. *Id.* at 1385-86. In the liability portion of the lawsuit, the jury found that the NFL's rules on franchise relocation were an unreasonable restraint on trade under the rule of reason test, and thus unlawful under Section 1 of the Sherman Act. *Id.* at 1386-87. Upholding the verdict on appeal, the Ninth Circuit found that the NFL's rules satisfied the three elements given in *Kaplan*, see *supra* note 23, as the rules harmfully prevented free competition both among NFL franchises and the stadiums that could host them. *Id.* at 1395. In the damages portion of the suit, the Ninth Circuit upheld the trebled damages awarded to both the Coliseum and the Raiders. See *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356 (9th Cir. 1986) [hereinafter *Raiders II*].

However, as both *Raiders* cases and subsequent opinions such as *Clippers* have made clear, this was a fact-specific outcome not to be followed for its rule alone. Other cases have demonstrated that the presence of other factors, especially the lack of another team in the market into which a potential relocation

emption would be on precarious legal ground,¹⁵⁰ though the exact outcome of a fully litigated case would depend on the specific facts presented.

Meanwhile, baseball's unique status has created a huge discrepancy in franchise movement across the American major sports leagues over the past half century. While only four MLB franchises have moved since the league modified its relocation rules in 1961 (and only one since 1972),¹⁵¹ fifteen NBA franchises, nine NFL franchises, and nine NHL franchises have changed cities during that same period.¹⁵² These moves have been motivated by a wide variety of reasons—the search for a more profitable hometown, the desire not to share a market with another team, and even the sheer necessity of franchise survival—but one constant is present in each relocation: the hardship afflicted on the departing team's abandoned fans and hometown. Numerous commentators have suggested that, despite the exemption's illogical and anomalous place in antitrust law, MLB's ability to restrict relocation benefits baseball's cities and fans in a way that no other professional sports league can claim.¹⁵³

would occur, can result in a finding of no antitrust violation under the same rule of reason test. *See, e.g.,* Mid-South Grizzlies v. Nat'l Football League, 720 F.2d 772, 786 (3d Cir. 1983) (finding the denial by the NFL of league membership to a team in Memphis to actually be *pro*-competitive, because it left the city open to more teams from rival leagues that could compete with the plaintiff franchise); San Francisco Seals, Ltd. v. Nat'l Hockey League, 379 F. Supp. 966, 969-70 (C.D. Cal. 1974) (allowing the NHL to prevent the relocation of a team into a region where no other club was operating, since such a move would not create a shared market and thus not actually foster free competition).

¹⁵⁰ Many critics claim that MLB's rules absent the baseball exemption would be found to constitute an unreasonable restraint on trade, mainly because less restrictive alternatives exist and the league uses no objective criteria in evaluating potential relocations, two factors deemed crucial by *Raiders I*. *See, e.g.,* Gordon, *supra* note 18, at 1231-1243; *see also* Bortek, *supra* note 147, at 1082 (writing that "MLB essentially operates under a system of judicially sanctioned horizontal market allocation," a practice that is "per se illegal under Section 1 of the Sherman Act"). Along the lines of *Seals* and *Grizzlies*, however, such a straightforward outcome would be mere speculation in cases, like *City of San Jose*, where the potential relocation would be into a market where another team was not already located.

¹⁵¹ *See supra* notes 139 & 142 and accompanying text.

¹⁵² For a full list, *see* Daniel Rascher, *Franchise Relocations, Expansions, and Mergers in Professional Sports Leagues*, BUS. OF SPORTS, 2008, at 19-24, available at <http://mpr.a.ub.uni-muenchen.de/25809>; *NHL Expansion/Relocation Timeline*, DETROITHOCKEY.NET, <http://www.detroithockey.net/nhl/timeline.php>.

¹⁵³ The detrimental effects of "franchise free agency" on cities that lose teams go beyond lost revenues and economic activity. Among the intangible costs for the cities and fans of departed franchises are the loss of certain social benefits from having a local team, such as a sense of civic pride, the outreach work done by teams for their local communities, and the unique entertainment provided by live sporting events. *See* Gordon, *supra* note 18, at 1253, 1255 (writing that sports franchises "invigorate the interest of a community's citizens, including the city's youth in the participation in a sport" and that owners who relocate ignore the "needs of the cities that have supported their teams over the years"); Nathaniel Grow, *In Defense of Baseball's Antitrust Exemption*, 49 AM. BUS. L.J. 211, 237 (2012) (asserting that "the psychological effects of losing a franchise include diminished civic identity, community pride, [and] municipal self-esteem," and that "losing a team can . . . severely damage fan loyalty in the community" and "reduce the city's national visibility"); *cf.* Andrew Zimbalist, *The Practical Significance of Baseball's Presumed Antitrust Exemption*, 22 ENT. & SPORTS L. 1, 25 (2005) (arguing instead that MLB's restrictions on relocation "create artificial franchise scarcity" which allows the league an unfair amount of leverage over cities that seek to host a relocated team, and which drives up costs for cities to retain the team they already have, often in the form of taxpayer-funded stadium subsidies).

B. *The Bay Area Divided*

The A's franchise is no stranger to relocation, having moved from its original home in Philadelphia to Kansas City in 1955, and then to Oakland in 1968.¹⁵⁴ With the Giants on the western shore of the San Francisco Bay and the A's to the east, the Bay Area became the fourth metropolitan area to house a club from each league, following Chicago, Los Angeles, and New York.¹⁵⁵ Both the Giants and the A's experienced the vicissitudes of baseball in the 1970s,¹⁵⁶ and changes of ownership in the 1980s after failed relocation attempts.¹⁵⁷ By the early 1990s, however, the franchises seemed to be heading in opposite directions. The A's had swept the Giants in the 1989 earthquake-interrupted World Series and, measuring by attendance, were clearly the Bay Area's more popular team.¹⁵⁸ Believing their ballpark to be the root of their problems, the Giants abandoned their attempts to secure a new stadium in San Francisco¹⁵⁹ and instead looked south to corporate-rich Silicon Valley. Though the Valley was not yet considered to belong to one particular team, Giants owner Bob Lurie sought permission from A's owner Walter Haas before

¹⁵⁴ See *supra* note 139.

¹⁵⁵ The Baltimore-Washington, D.C. region became the fifth such metro area in 2005, when the Orioles allowed the Montreal Expos to relocate to Washington to become the Nationals. See Nagel et al., *supra* note 135, at *1-*2. Unlike the other four sets of split-market teams, though, the A's and Giants do not share any overlapping territory.

¹⁵⁶ After the A's saw early success in Oakland, winning three straight World Series championships from 1972-1974, the team's on-field performance began to falter and attendance plummeted. See Oakland Athletics, *Franchise Timeline*, <http://oakland.athletics.mlb.com/oak/history/timeline.jsp>. In 1979, the A's achieved a dubious record, the lowest-ever attendance for a single game, when only 653 fans watched the team defeat the Mariners. *Id.*; *Territorial Rights - A (Not So) Brief History*, ATHLETICS NATION (Apr. 20, 2012, 9:52 AM), www.athleticsnation.com/2012/4/18/2958535/territorial-rights-a-not-so-brief-history. Across the Bay, the Giants' attendance woes were exacerbated by the miserable conditions at waterfront Candlestick Park, where the cold and wind made night games nearly unbearable. See *id.*

¹⁵⁷ A's owner Charlie Finley first attempted to sell off his best players (leading to *Finley v. Kuhn* in 1976) and then looked to Denver, New Orleans, and even Chicago for a possible relocation before Oakland blocked the potential move by refusing to let the team out of its lease at the municipally-owned Oakland Coliseum. See ATHLETICS NATION, *supra* note 156. Desperate for cash during a bitter divorce, Finley agreed to sell the club to local buyer Walter Haas, the former CEO of Levi Strauss. *Id.* As for the Giants, their potential move to Toronto (before the addition of the Blue Jays in 1977) was thwarted when San Francisco Mayor George Moscone brokered an eleventh-hour sale to Bob Lurie, who was purportedly committed to keeping the team by the Bay. *Id.*

¹⁵⁸ It was the A's, not the Giants, who first achieved the milestone of attracting over two million fans in a season (in 1988), and the A's outdrew the Giants by an average of over 9,700 fans per game from 1988-1992. See 1988 Major League Baseball Attendance & Miscellaneous, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/leagues/MLB/1988-misc.shtml> (as well as the similar pages for 1989-1992).

¹⁵⁹ Municipal votes on new stadium sites in San Francisco failed for the Giants in both 1987 and 1989. ATHLETICS NATION, *supra* note 156.

publicly unveiling plans for a move to Santa Clara.¹⁶⁰ Haas, without much thought against it, agreed.¹⁶¹

His generosity, however, soon backfired. The Giants finally found a new home in downtown San Francisco and opened Pac Bell (now AT&T) Park in 2000 on a site significantly closer to Oakland than the Giants' old home at Candlestick. The territorial rights Haas had gifted the Giants were codified in the MLB Constitution, making San Jose's Santa Clara County officially part of the Giants' exclusive operating zone.¹⁶² The A's, still playing in the outdated Coliseum, have since lost their attendance advantage and their position as the region's more popular team. Though similarly situated franchises in both leagues have opened new, profit-enhancing ballparks, the A's remain mired in stadium purgatory and ranked near the bottom of both MLB's annual revenue intake and attendance standings.¹⁶³

C. *The Fight to Move the A's*

Current A's owner Lew Wolff has made no secret of his desire to relocate the team to San Jose, a possibility he has been exploring since buying the team in 2005

¹⁶⁰ Brian Costa, *Baseball's Battle for Silicon Valley*, WALL ST. J., <http://online.wsj.com/article/SB10001424127887323873904578571490506017364.html> (June 28, 2013, 1:27 PM). The potential move to Santa Clara failed when voters rejected the city ballot measure. ATHLETICS NATION, *supra* note 156. The same result occurred in 1992 when San Jose voters rejected another stadium plan, marking the fourth time in six years that Lurie had failed to secure a new Bay Area home for the Giants. *Id.* His subsequent plan to sell the franchise to the Vincent Piazza-led investor group that wanted to move it to Tampa was rejected by the other National League owners by a 9-4 vote in November 1992. *Id.* After Lurie sold the club to a group of local investors led by Safeway CEO Peter Magowan for \$15 million less than Piazza had offered, *Piazza v. MLB* was born. *Id.*

¹⁶¹ Haas' decision to cede Silicon Valley is not well documented but can be explained. The A's at the time were thriving on and off the field, and consistently outdrawing the Giants in terms of attendance. *See* Costa, *supra* note 160 (quoting a former A's executive as saying, "[w]e didn't feel at the time that there was any significant downside to our business"). Haas likely felt he had little to worry about in letting the Giants move even farther away from the A's. Additionally, the Giants' relocation to Silicon Valley would allow the A's to court baseball fans in Northern Bay Area counties such as Marin, Napa, and Sonoma, a largely untapped market. *See* Nagel et al., *supra* note 135, at *6. According to Commissioner Selig, Haas also did not believe that his territorial concession would be permanent if the Giants failed to relocate to Silicon Valley. *See* ATHLETICS NATION, *supra* note 156 (quoting Selig as stating that the "wonderful" Haas "didn't feel it was permission in perpetuity. He gave [Lurie] permission to go down there. Unfortunately or fortunately, it never got changed.").

¹⁶² MLB CONST., *supra* note 4, at art. VIII, § 8(a). The territorial division in the Bay Area is considerably lopsided in favor of the Giants: San Francisco, San Mateo, Santa Cruz, Monterey, and Marin Counties also belong to the Giants, while the A's are guaranteed only Alameda and Contra Costa Counties. *Id.* Aside from a clear advantage in geographic area, the Giants' territory is home to 4.3 million people, compared to 2.6 million for the A's. *California Counties by Population*, CALIFORNIA DEMOGRAPHICS, http://www.california-demographics.com/counties_by_population.

¹⁶³ Forbes calculated the A's 2013 revenue to be \$187 million, which places the team at 28th out of MLB's 30 clubs. *The Business of Baseball: MLB Team Values*, FORBES (Mar. 26, 2014), <http://www.forbes.com/mlb-valuations/list>. Measuring by both average fans per game and total attendance for the season, the 2014 A's finished 24th among MLB franchises. *MLB Attendance Report - 2014*, ESPN.COM, http://espn.go.com/mlb/attendance/_/year/2014. The Miami Marlins having opened their own stadium in 2012, the A's are also now the only MLB club to share its stadium with an NFL team.

for \$180 million.¹⁶⁴ Wolff has already secured a naming rights deal with Cisco for his proposed 36,000-seat Downtown San Jose ballpark, further highlighting the degree to which the proposed move is motivated by the lure of corporate sponsors in Silicon Valley.¹⁶⁵ In turn, San Jose has made all the necessary preparations for the A's arrival, including giving the team a \$6.9 million option to purchase five acres of land on which to build Cisco Field.¹⁶⁶ MLB Commissioner Bud Selig, a college fraternity brother of Wolff's, has done his part as well, establishing a blue ribbon committee in 2009 to study the proposed move and publicly acknowledging the A's need for a new stadium.¹⁶⁷ Selig, however, is not empowered with the ability to effect the move on his own. Any relocation by the A's would require twenty-three of MLB's thirty owners not only to approve the move, but to amend the league constitution to alter the territorial division of the Bay Area as well. Unless and until that happens, Wolff and his dream deal will be left stranded in the on-deck circle.

While Wolff has adamantly rejected the use of judicial recourse to catalyze the move,¹⁶⁸ San Jose has refused to be so patient. On June 18, 2013, the City filed suit in the Northern District of California against the Office of the Commissioner and Commissioner Selig, alleging, among other claims, violations of Sections One and Two of the Sherman Act.¹⁶⁹ Specifically, San Jose claimed that the MLB Constitution unlawfully allows owners to “conspire[] with and through MLB to maintain a mo-

¹⁶⁴ See Belson, *supra* note 6. Wolff also explored the possibility of moving the A's to Fremont, a city slightly more than halfway from Oakland to San Jose, but the plan fell through in 2009. See *ATHLETICS NATION*, *supra* note 156.

¹⁶⁵ Costa, *supra* note 160. In 2010, seventy-five Silicon Valley CEOs—including those of Adobe, Cisco, eBay, and Yahoo!—cosigned a letter to Selig voicing their support for an A's move to San Jose. See San Jose Complaint, *supra* note 7, at Exhibit 2. The corporate- and technology-rich nature of Silicon Valley is precisely the reason the Giants want to keep it their own, as the team has spent years courting and partnering with the Valley's elite companies. Costa, *supra* note 160.

¹⁶⁶ Tracy Seipel, *San Jose City Council Endorses Option Deal for Land Sale to Oakland A's*, SAN JOSE MERCURY NEWS (Nov. 8, 2011, 5:57 PM), http://www.mercurynews.com/ci_19292595. A 2009 economic impact analysis study by San Jose estimated that a move by the A's to downtown San Jose would generate over \$130 million per year in new spending within the city. See John Woolfolk, *San Jose Businesses Talk Suit over Stalled A's Ballpark*, SAN JOSE MERCURY NEWS (Apr. 27, 2013, 3:33 PM), http://www.mercurynews.com/ci_23122975.

¹⁶⁷ *Id.*; Costa, *supra* note 160 (noting that the committee still has not released any findings, despite the fact that it was established more than four years ago).

¹⁶⁸ See Paul Hagen, *Seeking A's, San Jose Officials Sue MLB*, MLB.COM (June 18, 2013, 8:04 PM), http://mlb.mlb.com/news/article.jsp?ymd=20130618&content_id=51022626 (quoting Wolff as saying he is “not in favor of legal action or legal threats to solve business issues”). Though a judicial decision subjecting baseball to antitrust law would serve Wolff in his efforts to move the A's, his refusal to pursue legal action manifests the desirable and unique nature of the advantages the exemption provides. As strong as his desire is to relocate the A's, Wolff is certainly wary of attacking the exemption and thereby jeopardizing its benefits to him and the other owners.

¹⁶⁹ San Jose Complaint, *supra* note 7, at 40-42. The other four claims against MLB were for: (1) tortious interference with prospective economic advantage; (2) tortious interference with contractual advantage; (3) violation of California's unfair competition law; and (4) violation of the California Cartwright Act, the State's equivalent of the Sherman Act. *Id.* at 34-40. The first three of these non-federal claims were premised on MLB's alleged interference with San Jose's ability to benefit from its land option contract with the A's. *Id.* at 6.

nopoly power in their ‘operating territories’” and to “restrain[] trade and commerce in the distribution of” professional baseball games.¹⁷⁰ Such actions, according to San Jose, have “inhibit[ed] the development of competition” in the Bay Area, to the detriment of consumers and the City alike, causing the City antitrust injury in the form of lower tax revenue and lost revenue from exercise of its land option agreement with the A’s.¹⁷¹ San Jose sought economic damages from MLB, and that the league be declared an illegal monopoly and enjoined from enforcing the territorial and relocation restrictions in its constitution.¹⁷²

In its Motion to Dismiss, MLB asserted the protection of its antitrust exemption and scolded San Jose for “blithely ignoring that [the] exemption erects an absolute bar” to its claims.¹⁷³ MLB asserted that ninety years of Supreme Court precedent have granted it an unquestionable exemption, and that franchise relocation is an issue that falls “squarely within the core” of the exemption’s coverage.¹⁷⁴ Though Selig himself has remained quiet on the topic, MLB has attacked the lawsuit publicly, with league Executive Vice President (and new Commissioner-elect) Rob Manfred calling it “an unfounded attack on the fundamental structures of a professional sports league.”¹⁷⁵ Invoking the reasoning advanced in *Piazza*, San Jose argued in its Response that the exemption applies only to the reserve clause, and defended the City’s state law claims from MLB’s counterattack.¹⁷⁶

¹⁷⁰ *Id.* at 40-41.

¹⁷¹ *Id.* at 40, 42.

¹⁷² *Id.* at 42-43.

¹⁷³ Motion to Dismiss at 2, *City of San Jose v. Office of the Comm’r of Baseball*, No. 13-CV-02787-RMW (N.D. Cal. Aug. 7, 2013). Contrary to San Jose’s assertions, MLB insisted that the Giants do not have the unilateral power to block an A’s move and that the territorial divisions in its Constitution do not create “exclusive” operating zones, as evidenced by the sharing of territory in the other two-team markets. *Id.* at 3. Per MLB’s apparent interpretation of its rules, the fact that San Jose is outside the A’s territory simply means that relocation there would require a three-quarters majority vote of the owners, whereas a move by the A’s to within its own territory would not.

¹⁷⁴ *Id.* at 7-8. MLB further countered that San Jose and its city development agencies do not have standing to bring an antitrust suit, as municipal entities cannot bring private causes of action under the Clayton Act and San Jose is unable to establish requisite damage to its business or property. *Id.* at 17-18. According to MLB, the damages the City claims are too speculative and San Jose does not satisfy the requirement that an antitrust plaintiff be a consumer or competitor of the defendant it is suing. *Id.* at 20-21. MLB also contested San Jose’s state antitrust claims, declaring them to be invalid under the Supremacy Clause and *Flood*, in which the Supreme Court held that state antitrust claims too are barred by the exemption. As for San Jose’s California interference and unfair competition claims, MLB argued that they cannot stand absent the antitrust claims or a showing of fraud or illegality, and because interference claims require that the allegedly interfering party be a “stranger” to the transaction, which MLB is not. *Id.* at 12-14.

¹⁷⁵ Hagen, *supra* note 168.

¹⁷⁶ Memorandum in Opposition to Defendants’ Motion to Dismiss at 6-18, *City of San Jose v. Office of the Comm’r of Baseball*, No. 13-CV-02787-RMW (N.D. Cal. Sept. 6, 2013). San Jose also lengthily addressed the issue of standing, claiming a commercial interest in the city’s downtown redevelopment agency and that the damages it claims are both direct and certain, given especially its land option contract with the A’s. *Id.* at 19, 24.

D. Findings in City of San Jose

On October 11, 2013, just one week after hearing oral arguments, District Judge Ronald M. Whyte granted MLB's Motion to Dismiss with respect to San Jose's federal and state antitrust claims.¹⁷⁷ Whyte's opinion made two principal findings: (1) that the baseball exemption is *not* limited to the reserve clause, a firm rejection of *Piazza*; and (2) that the exemption covers the "business of baseball," a concept that is easily broad enough to encompass franchise relocation, yet still undefined in scope. These findings manifest a return to the exemption's conventional interpretation and prove once again that, although baseball's exemption may not be logical or even fair, it remains an unquestionable source of protection for MLB's unique business model. This section analyzes and expands upon each of these conclusions.¹⁷⁸

1. The Baseball Exemption Is Not Limited to the Reserve Clause

After tracing the exemption's ninety-year history and acknowledging its anomalous nature, Judge Whyte proceeded to properly reject *Piazza's* novel reasoning and narrow reading of *Flood*.¹⁷⁹ Whyte found that *Flood's* holding that the reserve system was exempt from antitrust regulation was based on the limited facts of the case, rath-

¹⁷⁷ *City of San Jose v. Office of the Comm'r of Baseball*, No. C-13-02787, 2013 WL 5609346, at *16 (N.D. Cal. Oct. 11, 2013). The City's claims for tortious interference with contract and economic advantage were later dismissed as well, though could still be brought in state court with the possibility of monetary damages. See *supra* note 11; see also Sunny Brenner, *The Way to San Jose: Not Through Federal Court*, 10 SPORTS LITIG. ALERT (Oct. 18, 2013) (suggesting that the threat of discovery in state court could cause MLB to expedite its decisionmaking process both in the current A's relocation case and future club disputes that carry a substantial risk of litigation). Judge Whyte also sidestepped the issue of standing, finding that the City's property interest in its land option agreement with the A's would be sufficient to provide standing for injunctive relief, but declining to explore whether MLB's conduct is "of the type that the antitrust laws were intended to prevent." *City of San Jose*, 2013 WL 5609346 at *11-*12 ("The court need not decide this issue, however, because the court dismisses the antitrust claims on the basis of the federal antitrust exemption for the business of baseball.").

¹⁷⁸ San Jose has since appealed the dismissal to the Ninth Circuit, again arguing that the exemption is limited to the reserve clause and that the City has standing to pursue its antitrust claims. See Plaintiffs' and Appellants' Opening Brief, *City of San Jose v. Office of the Comm'r of Baseball*, No. 14-15139 (9th Cir. argued Aug. 12, 2014), available at http://cdn.ca9.uscourts.gov/datastore/general/2014/03/06/14-15139_opening_brief.pdf.

Though no decision had been issued at time of publication of this Comment, the panel of judges that heard the appeal appeared to find both arguments rather unconvincing. See Howard Mintz, *San Jose v. MLB: City's Case Looks Bleak in Appeals Court*, SAN JOSE MERCURY NEWS (Aug. 12, 2014, 12:46 PM), http://www.mercurynews.com/crime-courts/ci_26323021 (writing that the judges "appeared unlikely to strip" MLB of the exemption, and "questioned whether San Jose can show any economic harm from the league's refusal to support an A's move"). A decision upholding Judge Whyte's opinion or dismissing San Jose's claims for lack of standing appears to be highly likely, especially with the A's having renewed their lease at the Coliseum for another ten years. See Nina Thorsen, *San Jose's Case Against Major League Baseball Gets Another Day in Court*, KQED NEWS (Aug. 12, 2014), <http://www2.kqed.org/news/2014/08/12/san-jose-major-league-baseball-oakland-athletics-lawsuit>. For future updates on the Ninth Circuit appeal, see http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000720.

¹⁷⁹ *City of San Jose*, 2013 WL 5609346 at *10 ("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.").

er than any intention of the Supreme Court to limit the exemption.¹⁸⁰ Further, Whyte reasoned that the *Flood* Court's rejection of the original *Federal Baseball* interstate commerce rationale is not reason enough to discount *Flood*'s advancement of congressional inaction as the primary reason for keeping the exemption broad.¹⁸¹ From these points, Whyte determined that the exemption is not limited solely to the reserve clause and is thus still very much applicable in this era of free agency.¹⁸²

Judge Whyte's brief treatment of *Piazza* is valid but misses several key points regarding the precedential value of *Federal Baseball* and *Toolson*.¹⁸³ The district court's holding in *Piazza* was premised on the assumption that the shift in *Flood* to focus on the exemption's applicability to the reserve clause was intended to indicate that the exemption should apply *only* to the reserve clause.¹⁸⁴ The *Piazza* court, however, erred in inferring that the references to the reserve clause in *Flood* signified a desire to limit the existing precedent, and oversimplified the Supreme Court trilogy by finding that all three cases concerned only the reserve clause. In reality, both *Federal Baseball* and *Toolson* involved issues beyond clubs' ability to control player movement, and neither case even mentioned the reserve clause by name.¹⁸⁵

That a narrower focus was used in *Flood* was the natural consequence of the narrower allegations presented to the Court, as Curt Flood's sole federal antitrust claim was that the reserve system was an unlawful restraint on trade.¹⁸⁶ The reserve clause was mentioned more in *Flood* than in its predecessors because it was the only allegedly unlawful practice at issue. Jumping from this point to a finding that *Flood* intentionally restricted the exemption to *only* the reserve clause is a rather unsubstantiated leap. The references in *Flood* to exemption cases dealing with issues beyond the reserve clause,¹⁸⁷ coupled with the omission by Blackmun of any explanation

¹⁸⁰ *Id.*

¹⁸¹ *Id.* (explaining that “[t]he Court’s recognition and holding in *Flood* that the business of baseball is now in interstate commerce cannot override the Court’s ultimate holding that Congressional inaction . . . shows Congress’s intent that the judicial exception for the ‘business of baseball’ remain unchanged”).

¹⁸² *Id.* at *11 (“The court concludes that the federal antitrust exemption for the ‘business of baseball’ remains unchanged, and is not limited to the reserve clause”).

¹⁸³ Because *Butterworth* and *Morsani* were decided under the same reasoning as *Piazza*, *see supra* notes 117-123 and accompanying text, this analysis of *Piazza* can be applied to all three cases.

¹⁸⁴ *See Piazza v. Major League Baseball*, 831 F. Supp. 420, 436 (E.D. Pa. 1993) (“Thus in 1972, the Supreme Court made clear that the *Federal Baseball* exemption is limited to the reserve clause.”).

¹⁸⁵ The allegations in *Federal Baseball* were that the American and National Leagues had conspired to unlawfully monopolize baseball by forcing out (and then buying out) the Federal League. *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200, 207 (1922). While *Toolson* was more concerned with the reserve system, George Toolson (as well as the plaintiff in one of the companion cases, *Corbett v. Chandler*) also alleged generally that MLB owners had monopolized professional baseball. *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 364 n.10 (1953) (Burton, J., dissenting); *see also* Grow, *Defining the “Business of Baseball”*, *supra* note 55, at 599-600.

¹⁸⁶ *Id.* at 593.

¹⁸⁷ *Flood* cites to two earlier antitrust cases, one from federal and one from state court, that were decided for MLB pursuant to the exemption, even though the reserve clause was not at issue in either: *Salerno v. Am. League of Prof’l Baseball Clubs*, 429 F.2d 1003 (2d Cir. 1970) (dismissing an antitrust suit brought by MLB umpires), and *State v. Milwaukee Braves, Inc.*, 144 N.W.2d 1 (Wis. 1966) (finding that the relocation

that he intended to narrow the precedent, evidence the Court's intention to maintain a broad reading of the exemption.¹⁸⁸ While *Piazza's* constricted reading of *Flood* was novel and imaginative, it nonetheless failed to persuasively reinterpret the Supreme Court trilogy.

Piazza is also problematic for its mistaken conclusion that *Toolson* lacks any precedential value when considered after *Flood*. *Piazza* correctly acknowledged that the reasoning underlying *Federal Baseball* was vitiated by the change in the Court's Commerce Clause doctrine and the increasingly interstate nature of baseball.¹⁸⁹ It then repeated the statement in *Flood* that *Toolson* was "a narrow application of the doctrine of stare decisis"¹⁹⁰ and engaged in a lengthy discussion of the difference between rule- and result-based stare decisis.¹⁹¹ Finding that *Flood* had followed only the result of *Federal Baseball* and *Toolson*, *Piazza* then characterized *Flood* as having abandoned the rules of the two precedent cases.¹⁹² Such a conclusion may easily be reached for *Federal Baseball*, whose interstate commerce analysis is clearly obsolete, but the reasoning in *Toolson* cannot be dispatched so easily. Though confined to one paragraph, the Court's opinion in *Toolson* marked a clear shift to a new interpretation of *Federal Baseball*, namely that Congress never intended to regulate baseball under antitrust law.¹⁹³ Contrary to *Piazza's* finding, Justice Blackmun in *Flood* explicitly affirmed this reasoning by quoting *Toolson* to end his opinion.¹⁹⁴ *Toolson* was not merely a "narrow application" of stare decisis; rather, it was a fresh interpretation of the exemption that reached the same result as *Federal Baseball* without employing the same analysis. *Piazza* ignored this in its determination that the reasoning in *Toolson* was no longer authoritative.¹⁹⁵ Because *Toolson* is still binding precedent,

of the Milwaukee Braves to Atlanta was protected by the exemption). See *Flood v. Kuhn*, 407 U.S. 258, 272 n.12-13 (1972).

¹⁸⁸ Thomas Ostertag, writing as MLB's General Counsel, attacks *Piazza* by pointing out that Justice Blackmun ended his *Flood* opinion by quoting *Toolson's* broad conclusion that "the (judgment) below (is) affirmed on the authority of [*Federal Baseball*], so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." See Ostertag, *supra* note 112, at 58, 62-63 (observing that "[o]ne does not frequently choose to quote a conclusion verbatim if one has decided to narrow that conclusion").

¹⁸⁹ *Piazza v. Major League Baseball*, 831 F. Supp. 420, 436 (E.D. Pa. 1993).

¹⁹⁰ *Id.*

¹⁹¹ See *supra* note 115. For a more detailed discussion of rule- and result-based theories of stare decisis, see Latour Rey Lafferty, Note, *The Tampa Bay Giants and the Continuing Vitality of Major League Baseball's Antitrust Exemption: A Review of Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993), 21 FLA. ST. U. L. REV. 1271, 1287-89 (1994).

¹⁹² *Piazza*, 831 F. Supp. at 438 ("In *Flood*, the Supreme Court exercised its discretion to invalidate the rule of *Federal Baseball* and *Toolson*. Thus no rule from those cases binds the lower courts as a matter of stare decisis.").

¹⁹³ See *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953) ("Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."). See also *Salerno v. Amer. League of Prof'l Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970) ("the ground upon which *Toolson* rested was that Congress had no intention to bring baseball within the antitrust laws, not that baseball's activities did not sufficiently affect interstate commerce").

¹⁹⁴ See *Flood v. Kuhn*, 407 U.S. 258, 285 (1972).

¹⁹⁵ See also Grow, *Defining the "Business of Baseball"*, *supra* note 55, at 597 ("[F]ar from overruling

however, its broad holding that the business of baseball is exempt from antitrust regulation is still valid.

The *Piazza* court was correct in finding that *Flood* exempted the reserve clause from antitrust law, but incorrect in its ultimate holding that *Flood* thus limited the exemption to cover *only* the reserve clause. *Piazza* cannot be considered a viable alternative to the long line of cases that have found baseball's exemption to be more broadly applicable. As Judge Whyte recognized, the exemption was created and perpetuated to protect a wide, though undefined, range of MLB's business activities. *City of San Jose* is thus yet another rejection of *Piazza* and represents a return to the roots of the Supreme Court trilogy. As no federal court has followed *Piazza* in the twenty years since it was handed down, its influence in the debate over the exemption appears to be waning, and has likely now been extinguished altogether.

2. Though Its Limits Remain Undefined, the Exemption Is Broad Enough to Protect MLB's Restrictions on Franchise Relocation

With the limited ruling in *Piazza* properly rejected, Judge Whyte addressed the more demanding issue presented by San Jose's claims: a determination of the proper application of the baseball exemption and the relative place of franchise relocation within the exemption's scope. Looking first to the line of Supreme Court precedent, he found that *Federal Baseball*, *Toolson*, *Shubert*, *International Boxing*, and *Radovich* all reached the same conclusion—that the exemption covers the business of baseball, and does so without any prescribed limits.¹⁹⁶ According to Whyte, while “the reasoning and results of those cases seem illogical today, they have survived,” and thus form “precedent that the court must follow.”¹⁹⁷ Whyte then examined *Finley*, the first post-*Flood* circuit court opinion to support an equivalently broad exemption,¹⁹⁸ as well as the Curt Flood Act's failure to clarify or limit the exemption's reach.¹⁹⁹ From this, Whyte concluded definitively that “the federal antitrust exemption for the

Toolson, or limiting the opinion to a narrow application of the *Federal Baseball* precedent, the *Flood* Court unambiguously endorsed *Toolson*'s reinterpretation of *Federal Baseball*. Accordingly, the *Piazza* court incorrectly concluded that *Flood* had vitiated the precedential effect of *Toolson*.”)

¹⁹⁶ *City of San Jose v. Office of the Comm'r of Baseball*, No. C-13-02787, 2013 WL 5609346, at *5-*6 (N.D. Cal. Oct. 11, 2013). Whyte further found that in the three non-baseball cases, “the Court cabined the antitrust exemption to the ‘business of baseball’” and that *Radovich* in particular “continued to characterize baseball's exemption as broadly applicable to the ‘business of organized professional baseball.’” *Id.* at *6. This demonstrates yet another flaw of the court in *Piazza*, which acknowledged the holdings of the non-baseball cases but failed to reconcile them with its own narrow reading of *Flood*.

¹⁹⁷ *Id.* at *5.

¹⁹⁸ *Id.* at *8. As quoted by Whyte, *Finley* held that the Supreme Court had “intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws.” *Id.* (quoting *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 541 (7th Cir. 1978)).

¹⁹⁹ *Id.* at *10 (characterizing the Act as having provided “further support for the Court's holding in *Flood* that Congress does not intend to change the longstanding antitrust exemption ‘for the business of baseball’ with respect to franchise relocation issues”).

‘business of baseball’ remains unchanged” and, accordingly, “MLB’s alleged interference with the A’s relocation to San Jose is exempt from antitrust regulation.”²⁰⁰

Whyte’s analysis on the actual issue of franchise relocation is bare, but his conclusion that it is protected from antitrust law as a part of the business of baseball is justified. Courts considering the exemption have consistently found that issues of league structure and the production of ballgames are included in the exemption’s scope. Justice Holmes, in establishing the exemption, characterized the business of the two Major Leagues as “giving exhibitions of base ball [*sic*],”²⁰¹ and the *Toolson* Court echoed this notion, writing that “the business of providing public baseball games for profit . . . was not within the scope of the federal antitrust laws.”²⁰² While *Flood* and the non-baseball cases simply maintained that the entire business of baseball had been exempted,²⁰³ the lower court cases that followed have clarified that league structure decisions are undoubtedly a part of this exempted business. The district court in *Postema* held that the exemption “immunize[s] baseball from antitrust challenges to its league structure.”²⁰⁴ Most recently, *Crist*, dealing with the issue of contraction, found that “the number of clubs, and their organization into leagues for the purpose of playing scheduled games, are basic elements of the production of major league baseball games.”²⁰⁵

This line of reasoning extends naturally to the league rules restraining the free movement of franchises. The location and relocation of teams directly relate to MLB’s (as well as Minor League Baseball’s) business as an organized professional sports league, which, at its core, is the production of baseball games for public consumption. Franchise placement is the first step in establishing a competitive league structure,²⁰⁶ presenting a desirable on-field product in key markets, and ensuring that

²⁰⁰ *Id.* at *11 (dismissing the City’s Sherman Act claims).

²⁰¹ *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200, 208 (1922).

²⁰² *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953).

²⁰³ *See, e.g., United States v. Shubert*, 348 U.S. 222, 228 (1955) (“In [*Federal Baseball*], the Court . . . was dealing with the business of baseball and nothing else.”); *Radovich v. Nat’l Football League*, 352 U.S. 445, 451 (1957) (limiting the exemption given in *Federal Baseball* and *Toolson* to “the business of organized professional baseball”). Both of these passages are quoted in *Flood*. *See Flood v. Kuhn*, 407 U.S. 258, 275, 279 (1972).

²⁰⁴ *Postema v. Nat’l League of Prof’l Baseball Clubs*, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992). *See also Prof’l Baseball Schools & Clubs, Inc. v. Kuhn*, 693 F.2d 1085, 1086 (11th Cir. 1982) (holding that the relocation restrictions in Minor League Baseball, among other rules, were “plainly” within the business of baseball).

²⁰⁵ *Major League Baseball v. Crist*, 331 F.3d 1177, 1183 (11th Cir. 2003) (adding that “[w]hen the applicability of baseball’s exemption is so apparent, no factual analysis is necessary,” advice that Judge Whyte apparently took quite literally). Even *Piazza* recognized that “the physical relocation of a team and Baseball’s decisions regarding such a relocation could implicate matters of league structure, and thus be covered by the exemption.” *Piazza v. Major League Baseball*, 831 F. Supp. 420, 441 (E.D. Pa. 1993).

²⁰⁶ The location of a team’s hometown and division influences its schedule, its rivals, and its competition for making the playoffs, thereby directly affecting MLB’s provision of on-field product in both the regular season and the postseason. *See Gordon, supra* note 18, at 1230 (concluding that “[i]n light of the fact that the business of baseball concerns league structure, baseball’s exemption extends to franchise relocation rules and decisions”).

such production is profitable and sustainable for the league's owners.²⁰⁷ MLB operates as a partnership of thirty separate entities and, although the owners' unity is essential to league operations, the owners do not always have the same economic incentives. Restricting team movement thus allows the owners to make location- and market-related decisions collectively, guaranteeing that one owner alone cannot undermine the best interests of the league as a whole.²⁰⁸ While these considerations may not be necessary for resolving *City of San Jose*, it is nonetheless clear from the case and its predecessors that restrictions on franchise relocation are protected by the exemption as a part of the business of baseball.

The most immediate effect of *City of San Jose* is that the A's will still not be moving to Silicon Valley at any point in the near future. Absent the unlikely ascension of San Jose's case to the Supreme Court or an impressive lobbying push by the City, the prospect of either a judicial or congressional revocation of the exemption remains improbable. While the Giants cling to the territorial rights they were gifted twenty years ago, the union sought between Lew Wolff and San Jose will stay on hold unless a three-quarter-majority of MLB's owners votes to approve the A's relocation. Businesses and fans in Silicon Valley may suffer, and San Jose may lose out on millions in land sales and tax revenues, but the City retains its position as the second-most populous city in the country without an MLB team.²⁰⁹ Though this waste of market potential makes little sense from an economic standpoint, the location of franchises should not be viewed simply as a financial concern. The City of Oakland stands to lose a great deal more than just dollars from the departure of its beloved baseball team.²¹⁰

²⁰⁷ Although no doubt biased, MLB General Counsel Thomas Ostertag writes that "the business of baseball must include matters collectively decided by the clubs or the Commissioner for the overall good of baseball, such as decisions regarding . . . the location of [the] franchises," or those decisions to "promote close competition or to improve the collective health of the sport and its business." Ostertag, *supra* note 112, at 66-67.

²⁰⁸ Similarly partial, Commissioner Selig himself has written that relocation restraints help MLB in its role to serve the public interest by removing the unilateral ability of an owner to abandon a loyal and established market in search of a potentially more profitable one. See Allan Selig, *Major League Baseball and Its Antitrust Exemption*, 4 Seton Hall J. Sport L. 277, 283 (1994) (writing in response to the backlash from the Giants' blocked relocation attempt that "[i]t would obviously not be in the public interest to render MLB impotent to stop" detrimental franchise free agency).

²⁰⁹ San Jose, with 998,000 residents, trails only San Antonio (1.41 million) in this category. See *State and County QuickFacts*, US CENSUS, <http://quickfacts.census.gov/qfd/states/48/4865000.html> (San Antonio); *State and County QuickFacts*, US CENSUS, <http://quickfacts.census.gov/qfd/states/06/0668000.html> (San Jose). Given its high growth rate, San Jose will likely capture the top spot quite soon.

²¹⁰ See also Tim Keown, *Death of a Sports Town: What Does a City Lose When Its Pro Teams Leave? Oakland Just Might Find Out*, ESPN THE MAG., Oct. 14, 2013, available at http://espn.go.com/espn/story/_/id/9748993 (describing the role that Oakland's sports teams, all three of which could leave in the next decade, play in filling the gap between the city's socioeconomic problems and its efforts to stay relevant, both regionally and nationally).

IV. THE EXEMPTION AHEAD: THE BUSINESS OF BASEBALL AFTER *CITY OF SAN JOSE*

Though the Ninth Circuit has since heard oral argument on *City of San Jose*, Whyte is now the latest judge to wrestle with how to properly apply the baseball exemption, and his opinion joins the long line of cases that courts must look to in future lawsuits attacking professional baseball on antitrust grounds. With its heavy emphasis on both the Supreme Court trilogy and the non-baseball cases, his opinion is a well-grounded return to the exemption's original purpose: a grant of immunity from antitrust law for the business of baseball. More impressively, Whyte resisted the urge to place new limitations on the exemption or to subscribe to the boundaries previous courts have adopted. His ability to avoid such impulses, though, was undoubtedly aided by the relatively uncontroversial nature of the claims presented; in contrast to other aspects of baseball, there is little debate that franchise relocation restrictions are a league structure issue that is plainly part of the business of baseball. Whyte's conclusion that the exemption applies broadly to this business is thus a workable standard in the case at hand, but may not provide the most satisfying framework for cases with more complicated exemption-related issues. After all, it is in the more complex exemption cases where judges have applied narrower tests rather than venture to define what the business of baseball is and exempt accordingly.²¹¹

Perhaps in recognition of this shortcoming, Judge Whyte engaged in a substantial discussion of the cases that have applied the exemption with restricted parameters. Particularly, he explored the opinions that have applied the exemption to shield only those aspects of baseball that are "integral" or "essential" to its business. Such cases include *Professional Baseball Schools*,²¹² *Henderson*, and *Postema*, as well as several others not cited by Whyte. He found these cases to stand for the proposition that "certain aspects of baseball, which are merely related to, but not *essential* to, the business of baseball . . . are not subject to the antitrust exemption."²¹³ Whyte also referenced the "unique characteristics and needs" language that the *Postema* court (and the *Henderson* court before it) questionably adopted from *Flood* in placing a new limitation on the exemption.²¹⁴ Before making his final determination on the Sherman Act claims, Whyte employed these cases to confirm that franchise relocation would still be covered by a limited exemption. Though he stressed that he was "not endorsing the more narrow tests from *Henderson* and *Postema*," Whyte determined

²¹¹ The exception to this is of course *Piazza*, which also dealt with MLB's rules on team movement but in which the court adopted a much narrower interpretation of the exemption (i.e. that it applies *only* to the reserve clause) than the tests discussed in this section. Even in doing so, the court admitted that the relocation rules could be considered a league structure issue, and thus covered under a broader exemption. See *supra* note 204.

²¹² Prof'l Baseball Schools & Clubs, Inc. v. Kuhn, 693 F.2d 1085, 1086 (11th Cir. 1982) (concluding that each of the issues presented "plainly concerns matters that are an integral part of the business of baseball," a passage twice cited in *City of San Jose*).

²¹³ *City of San Jose v. Office of the Comm'r of Baseball*, No. C-13-02787, 2013 WL 5609346, at *8 (N.D. Cal. Oct. 11, 2013) (emphasis in original).

²¹⁴ *Id.* at *9. See also *supra* note 99 (discussing the problematic disconnect between the use of this language in *Flood* and its reiteration in *Henderson* and *Postema*).

that “interference with a baseball club’s relocation efforts presents an issue of league structure that is ‘integral’ to the business of baseball, and thus falls squarely within the exemption.”²¹⁵

Whyte’s opinion dichotomizes the existing precedent into two lines of cases, each providing a different framework within which to understand the scope of the baseball exemption. The first line, from *Federal Baseball* to *Finley*, represents the original and broad interpretation that the exemption applies simply to the business of baseball. The second, from *Professional Baseball Schools* to *Crist*, introduces a notable restriction: only those aspects that are *integral* to the business of baseball are to be protected by the exemption.²¹⁶ This narrower framework is referred to here as the “integral test,” though courts have interchangeably used words such as “central,”²¹⁷ “essential,”²¹⁸ and “necessary”²¹⁹ to the same effect. These terms taken together, the

²¹⁵ *City of San Jose*, 2013 WL 5609346 at *11; see also *id.* at *9 (“Even under this more narrow view of the exemption, however, there can be no dispute that team relocation is a ‘league structure’ issue and an ‘essential part of baseball’ that would fall within the exemption post-*Flood*.”). Both passages are accompanied by a citation to the *Professional Baseball Schools* holding that the relocation restrictions at issue in that case were protected under the exemption by virtue of being “an integral part of the business of baseball.” *Id.* at *9, *11 (citing *Prof’l Baseball Schools*, 693 F.2d at 1085).

²¹⁶ Use of the word “integral” as part of a framework for applying antitrust law to baseball first occurred in a suit brought by the state of Wisconsin against the Milwaukee Braves for the team’s alleged participation in the MLB monopoly. See *State v. Milwaukee Braves*, 144 N.W.2d 1, 17 (Wis. 1966) (“It is plausibly argued that silence of Congress . . . demonstrates congressional recognition that league structure and the related agreements and rules are integral parts of professional baseball.”). This passage was quoted by the district court in *Flood*, though the court did not discuss its significance and the word *integral* was not used in the subsequent *Flood* opinions. See *Flood v. Kuhn*, 316 F. Supp. 271, 279 (S.D.N.Y. 1970). *Henderson* was the first federal case to consider integrality as an independent standard, and the word was used again soon after in *Professional Baseball Schools*. See *Henderson Broad. Corp. v. Houston Sports Ass’n*, 541 F. Supp. 263, 265 (S.D. Tex. 1982) (“the exemption covers only those aspects of baseball . . . which are integral to the sport and not related activities which merely enhance its commercial success”); *Prof’l Baseball Schools*, 693 F.2d at 1086.

The Eleventh Circuit in *Crist* also examined integrality when considering league contraction, stating that “[i]t is difficult to conceive of a decision more integral to the business of [MLB] than the number of clubs that will be allowed to compete.” *Major League Baseball v. Crist*, 331 F.3d 1177, 1183 (11th Cir. 2003) (citing *Major League Baseball v. Butterworth*, 181 F. Supp. 2d 1316, 1332 (N.D. Fla. 2001)). While Whyte did discuss *Crist* briefly, he did not cite to this portion of the case. At least one state court opinion has used this integral test as well. See *Minn. Twins P’ship v. State*, 592 N.W.2d 847, 854 (Minn. 1999) (finding that that the sale and relocation of a franchise is “an integral part of the business of professional baseball” and thus protected by the exemption).

²¹⁷ See, e.g., *Henderson*, 541 F. Supp. at 265 (“[B]roadcasting is not central enough to baseball to be encompassed in the baseball exemption”). This passage was also used to frame the issue before the court in *Postema*. See *Postema v. Nat’l League of Prof’l Baseball Clubs*, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992).

²¹⁸ See, e.g., *id.* (holding that, because “[a]nti-competitive conduct toward umpires is not an essential part of baseball and in no way enhances its vitality or viability,” the exemption did not apply).

²¹⁹ See, e.g., *Braves*, 144 N.W.2d at 15 (“We venture to guess that this exemption does not cover every type of business activity . . . but it does seem clear that the exemption at least covers the agreements and rules which provide for the structure of the organization and the decisions which are necessary steps in maintaining it.”).

integral test has become the most-followed alternative to broadly exempting the business of baseball without limitations.

The integral test's post-*Flood* popularity likely stems from the propensity that lower courts have long shown for trying to narrow the exemption, perhaps out of frustration with the bare amount of guidance given by the Supreme Court and the perceived inequity of granting professional baseball such a unique status. As compared to the more constricted alternative developed in *Piazza*, the integral test does not cut against Court precedent as much as it allows judges to place an additional filter on the exemption without fundamentally reinterpreting binding authority. Rather than remove the exemption from the broader business of baseball as the court in *Piazza* attempted, the integral test instead focuses the exemption on those areas that are most essential to MLB's trade and most directly advance its goal of providing baseball games to the public. On the surface, integrality is a simple and intuitive concept, and using it is a satisfying alternative for those who call for a narrower exemption or no exemption at all.

However, this does not mean that the integral test is the best alternative, or even a viable one, to the broadly applicable exemption established in *Toolson* and *Flood*. Judge Whyte's opinion makes it clear that the exemption still does protect the entire business of baseball, as it always has, and must be applied as such, even if the rule lacks any prescribed limits. Further analysis of the integral test demonstrates that its origin is questionable, its terms are undefined, and that it provides no better understanding for what the business of baseball actually encompasses than does *Flood* or any preceding Court case. Under the broad business of baseball rule established by the Supreme Court, judges should instead use inductive reasoning and fact-based analogies to previous cases in order to grant or deny protection under the exemption.

A. *The Flaws of the Integral Test*

The integral test's flaws begin with its dubious origin. *Henderson*, the first federal case to use the test, provides neither a justification for doing so nor an explanation of why it found the challenged rules to be an integral part of the business of baseball. There is no authority cited in the case, let alone any Supreme Court precedent, to show how such a test could be fashioned from *Flood* or any other exemption opinion.²²⁰ The courts that have since adopted the test have provided similarly unsubstantiated reasons for doing so. *Professional Baseball Schools*, a brief per curiam opinion, gives no explanation of why the issues presented are "plainly" integral to the business of baseball.²²¹ *Postema* concludes that anti-competitive league conduct towards umpires is "not an essential part of baseball," but fails to explain why it used

²²⁰ Rather, the opinion merely claims that the Supreme Court's "opinions 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 activities which merely enhance its commercial success." *Henderson*, 541 F. Supp. at 265.

²²¹ *Prof'l Baseball Schools*, 693 F.2d at 1086.

such a framework.²²² The cases do not even cite each other; rather, they perpetuate a manufactured test devoid of any origin in authoritative case language and neglect to justify their doing so.

Two substantial problems further plague the integral test and should discourage its use. The first is that the notion of integrality is not actually defined or even truly analyzed in the cases that use it, and the test is too vague on its own to present a functional standard. This is compounded by the fact that the courts that have applied the test have focused on determining what is integral to baseball as a business rather than addressing the more critical question of what the business of baseball actually is. Terms like “integral,” “central,” and “essential” are difficult to apply to MLB, whose business covers a diverse range of activities and is constantly expanding. Given the dual nature of baseball as both a sport and an enterprise, and the sentimental place it holds in American society, any attempt to determine whether something is integral to the business of baseball necessarily entails a great deal of subjectivity and bias. A personal view of which aspects one can imagine baseball with or without should not be enough to justify granting (or denying) the considerable benefit of immunity from antitrust law, as individual perceptions of essentiality vary greatly among those who hold them. MLB would likely consider any of its activities that generate revenue to be integral to its business, since earnings are necessary to maintain a sufficient production level of baseball seasons from year to year.²²³ On the other hand, critics of the exemption would construe integrality more narrowly, perhaps as solely including those activities that are absolutely necessary to the production of a single baseball game, without consideration of franchise or league sustainability.

Even judges, the only true arbiters for determining the exemption’s scope, have reached contradictory answers when applying the integral test to the same question. An example of this comes from MLB’s labor relations with its umpires, an issue that has been discussed three times in exemption cases. The district court in *Henderson*, applying both the integral and the “unique characteristics and needs” framework, opined that “[r]adio broadcasting is not a part of the sport in the way in which players, umpires, the league structure and the reserve system are.”²²⁴ Under this same standard, *Postema* found that “[a]nti-competitive conduct toward umpires is *not* an essential part of baseball and *in no way* enhances its vitality or viability.”²²⁵ While

²²² *Postema*, 799 F. Supp. at 1489.

²²³ Revenue, generally the most basic and objective way to evaluate the success of any business, fails to provide a clear approach for evaluating centrality to baseball. Indeed, league revenues are likely *decreased* by the restrictions MLB places on franchise relocation, which leave more lucrative markets untapped. MLB’s peripheral businesses, such as merchandising, licensing, and sponsorships, generate profits far beyond what is essential to sustain the production of games, but play an important role in promoting the sport and keeping fans engaged. *See also* Grow, *Defining the “Business of Baseball”*, *supra* note 55, at 622 (characterizing these aspects of the business of baseball as “tangential,” and claiming that “neither the existence nor quality of the actual on-field competition would necessarily change” should they cease to exist).

²²⁴ *Henderson*, 541 F. Supp. at 269.

²²⁵ *Postema*, 799 F. Supp. at 1489 (emphasis added). The third umpire case, *Salerno*, was decided *pre-Flood* without actually addressing the role umpires play in baseball. *See Salerno v. Amer. League of*

baseball games cannot be played without umpires, MLB's employment agreements with its umpires are not necessarily an integral part of its business. Professional umpires certainly do not have the unequaled skills of professional ballplayers, nor do their services create high demand among rival leagues.²²⁶ More generally, given the lack of guidance from past courts, judges attempting to use the integral test in future exemption cases would be forced to balance considerations such as these and make largely subjective determinations about the threshold at which point something becomes central to a business that is uniquely multifaceted.

Second, the integral test does not account for the foundational changes in the business of baseball that have occurred over time and necessitated new conceptions of what the business' essential aspects are. This problem becomes especially complex when trying to stay grounded in opinions from bygone eras that featured a league bearing little resemblance to MLB's modern enterprise. Though the rules of the game have remained the same, baseball as a business entity has swelled into a multibillion-dollar behemoth²²⁷ and the league has fundamentally transformed from the idyllic pastime poetically described by Justice Blackmun in *Flood*.

Nowhere are these changes more apparent than in the immense expansion of MLB's broadcasting venture.²²⁸ Radio had barely begun to impact baseball when *Federal Baseball* was decided in 1922, and garnered no mention in the opinion. By the time *Flood* was decided fifty years later, the use of both radio and TV had altered the consumption of baseball so profoundly that it became a key impetus for the Justices' abandonment of the interstate commerce-based reasoning for the exemption.²²⁹ A shift away from the use of radio and into the Internet age has occurred since *Flood*, fundamentally changing both the way MLB generates revenue and the way in which

Prof'l Baseball Clubs, 429 F.2d 1003, 1005 (2d. Cir. 1970) (affirming, per the exemption, the dismissal of an antitrust suit brought by two discharged MLB umpires and adding that "[w]hile we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled, we are not at all certain the Court is ready to give them a happy despatch").

²²⁶ Additionally, umpires are generally more fungible than Major Leaguers and labor strife with them does not carry the same risk to the production of games, especially given the huge number of them working in the Minors. *But see* Bill Barnwell, *The Straw That Broke the NFL's Back*, GRANTLAND (Sep. 25, 2012), <http://grantland.com/features/the-nfl-needs-end-referee-lockout-immediately> (criticizing the NFL's handling of its 2012 replacement referee fiasco, in which the league locked out its regular officials after failing to reach a new labor agreement and played the first three weeks of the season with infamously incompetent college referees).

²²⁷ MLB's 2012 revenues were a reported \$7.5 billion, representing a 500% increase since just 1995 (\$1.5 billion), *after* accounting for inflation. *See* Maury Brown, *MLB Revenues \$7.5B for 2012, Could Approach \$9B by 2014*, THE BIZ OF BASEBALL (Dec. 10, 2012, 12:00 AM), http://bizofbaseball.com/index.php?option=com_content&view=article&id=5769.

²²⁸ Total league broadcasting revenue for 2014 is projected to approach \$9 billion, a surge owing to the inception of new contracts with ESPN, Fox, and TBS worth a total of \$788 million per year and the Dodgers' record-breaking regional TV deal. *Id.*

²²⁹ *See Flood v. Kuhn*, 407 U.S. 258, 287 (1972) (Burger, C.J., concurring) ("An industry so dependent on radio and television as is baseball and gleaming vast interstate revenues . . . would be hard put today to say with the Court in the *Federal Baseball Club* case that baseball was only a local exhibition, not trade or commerce.").

games are consumed. While broadcasting clearly would not be considered integral to the business of baseball in 1922, it is debatable whether or not radio would have been considered integral to the business by the time of *Toolson* in 1953, and whether TV broadcasting had achieved the same status by 1972.²³⁰ It is even more difficult to determine whether radio broadcasting would still be considered integral today, or to what degree the integrality of TV has been diminished by the onset of online consumption.²³¹ As baseball continues to evolve, conceptions of importance to baseball necessarily shift, diminishing the utility of the integral test.

Another ongoing case highlights the difficulty of reaching an objective determination of what is integral to baseball's business without precedential guidance. MLB Advanced Media (MLBAM), a limited partnership of the thirty club owners that manages the league's online and interactive content,²³² is the subject of a class-action suit attacking the territorial divisions and blackout restrictions of the MLB Extra Innings cable package and the MLB.tv Internet package.²³³ The plaintiffs allege that the league's broadcasting policies violate the Sherman Act by granting exclusive territories to regional broadcasters that enable monopolistic control and pricing, and by allowing blackouts in local markets that diminish consumer choice.²³⁴ In *De-*

²³⁰ *Henderson*, though, held that a broadcasting agreement with a TV station, at least for an individual team, was *not* integral enough to be covered by the exemption. *See supra* notes 97-99 and accompanying text. Additionally, the Sports Broadcasting Act generally exempts the four major sports leagues from antitrust regulation in their selling or transferring of "sponsored telecasting" rights, allowing the leagues to negotiate and set uniform policies with media outlets without antitrust constraints. *See* 15 U.S.C. § 1291 (2006) (hereinafter SPORTS BROADCASTING ACT). Congress' passing of the SBA suggests that broadcasting may not be covered by the baseball exemption after all, a point made in *Henderson*. *See Henderson Broad. Corp. v. Houston Sports Ass'n*, 541 F. Supp. 263, 269-70 (S.D. Tex. 1982). Nonetheless, the SBA treats MLB, the NBA, NFL, and NHL equally in providing a separate antitrust exemption for their league-wide TV deals.

²³¹ Whether the broadcasting of games has *ever* been integral to the business of baseball is also subject to reasonable debate. While consumption alone is not a sufficient metric for determining integrality, the number of people listening to, watching, or following the average MLB game via radio, TV, or the Internet does typically exceed the number of fans in attendance. *See Grow, Defining the "Business of Baseball"*, *supra* note 55, at 612. On the other hand, consumption by fans that are not in attendance it is not necessarily essential to the actual production of physical games in stadiums, which MLB could still achieve, though to a less profitable and popular extent, without its vast broadcasting venture.

²³² MLBAM was created in 2000, when the owners agreed to consolidate their interactive media rights in order to create a shared and centrally controlled entity. *See Some Key Moments in the History of MLB Advanced Media*, SPORTS BUS. J. (Mar. 21, 2011), <http://www.sportsbusinessdaily.com/Journal/Issues/2011/03/21/Media/MLBAM-timeline.aspx>. Its smartphone- and tablet-compatible mobile app, *At Bat*, surpassed three million downloads in 2012 and delivers over 800,000 streaming audio and video broadcasts to users daily during the season. *See MLB.com At Bat Sustains Frenzied Pace*, MLB.COM (Apr. 12, 2012), http://mlb.mlb.com/news/article.jsp?ymd=20120412&content_id=28494812.

²³³ *See Laumann v. Nat'l Hockey League*, 907 F. Supp. 2d 465 (S.D.N.Y. 2012). *See also MLB Faces Antitrust Suit Regarding Its TV Blackout Policies*, SPORTS L. BLOG (May 12, 2012), <http://sports-law.blogspot.com/2012/05/done-mlb-faces-antitrust-suit-regarding.html>. Pursuant to the league's blackout policy, subscribers do not have the option of purchasing access to only their favorite team's games, and cannot stream such games if they are simultaneously being broadcast nationally or on the team's regional TV network. *Id.*

²³⁴ *Id.* The named defendants include some (but not all) of the thirty clubs, the Office of the

cember 2012, after combining the case with a similar class action against the NHL, the Southern District of New York dismissed three of the named plaintiffs for lack of standing but allowed most of the antitrust claims to proceed.²³⁵ In August 2014, Judge Shira Scheindlin denied summary judgment for the league and broadcasting entities, allowing the claims to proceed to trial and denying exemption coverage for baseball broadcasting.²³⁶ MLB immediately filed for interlocutory appeal, which Judge Scheindlin denied in September.²³⁷

MLBAM and the revenues generated by individual teams' regional TV deals represent an enormous portion of baseball's annual profit and give the sport an unprecedented level of ubiquity never before contemplated in the exemption cases. Still, it is unclear whether this would be enough to merit exemption coverage under the integral test. Though the test has been invoked repeatedly, what it means to be essential or integral to the business of baseball has not been sufficiently explored and is not self-evident enough to be useful in analyzing such a complex facet of MLB. Given the expansive scope of the baseball exemption as contemplated in the Supreme Court cases, the integral test adds a narrowing layer to the exemption that is both unwarranted and unnecessary. Attempts by lower courts to forge novel interpretations of the exemption have led to results that are unworkable and unsupported by precedent. The integral test, like the even narrower framework fabricated in *Piazza*, forces courts to be too selective in granting an exemption that was originally prescribed without any discernible limits. The time is ripe for its abandonment.

Commissioner, MLBAM, and several cable providers, both national and regional. *Id.* For an explanation of MLB's economic motivations for maintaining these policies and further analysis of *Laumann*, see Jeff Passan, *MLB's Blackout Problem Keeps Sport in Dark Ages*, YAHOO! (June 22, 2012), <http://sports.yahoo.com/news/mlb%E2%80%99s-blackout-problem-keeps-sport-in-dark-ages.html>.

²³⁵ *Laumann*, 907 F. Supp. 2d at 492.

²³⁶ *Laumann v. Nat'l Hockey League*, Nos. 12—CV—1817, 12—CV—3704, 2014 WL 3900566 (S.D.N.Y. Aug. 8, 2014). Key to Judge Scheindlin's opinion is her conclusion that the language and structure of the SBA implies that Congress understood "sports broadcasting agreements to fall outside the baseball exemption." *Id.* at *25 (writing that a grant of "limited immunity to a narrow category of broadcasting agreements would be meaningless if all baseball broadcasting agreements were already covered" under the exemption, and that "the SBA expressly excluded from its safe harbor most agreements involving geographic broadcasting territories, suggesting that Congress intended such agreements to be subject to the antitrust laws"). The opinion also cites *Henderson's* post-SBA holding that a team's radio broadcasts are not protected by the exemption. *Id.* at *27. Judge Scheindlin, however, neglected to distinguish between television and Internet broadcasting, an issue that MLB would be wise to raise at trial, given that the SBA only technically exempts agreements for "sponsored telecasting." See Tomlinson, *supra* note 41, at 305 (noting that if Internet broadcasting is *not* protected by the SBA, MLB would still be able to argue that its Internet platform has general antitrust immunity under the baseball exemption).

²³⁷ *Garber v. Office of the Comm'r of Baseball*, No. 12-CV-3704, 2014 WL 4716068 (S.D.N.Y. Sep. 22, 2014). In both rulings, Judge Scheindlin expresses contempt for the exemption and a desire to construe it narrowly, even noting the *Piazza* line of cases before appearing to use a variation of the integral test to deny exemption coverage. *Laumann*, 2014 WL 3900566 at *29 ("I therefore decline to apply the exemption to a subject that is not central to the business of baseball, and that Congress did not intend to exempt . . ."). Though trial will provide a better forum for examining the exemption's scope, Judge Scheindlin's initial analysis of the exemption is a disappointingly shallow effort.

B. *A Properly Broad Exemption for the Business of Providing Baseball to the Public*

As correctly decided by Judge Whyte, the exemption serves to be broadly applicable: the business of baseball is immune from antitrust regulation. This is the rule as it was first handed down, it remains the rule after a near-century of Supreme Court affirmations and lower court challenges, and it will continue to be the rule unless the Court or Congress decrees otherwise. Even in the face of persistent criticism, future courts must employ this broad reading of the exemption and should err on the side of antitrust immunity for MLB and Minor League Baseball when faced with close questions of fact.

The lingering difficulty with applying the exemption lies in determining what actually qualifies as a part of the business of baseball without the artificial limits previously imposed by lower courts. Judges in exemption cases since *Federal Baseball* have unfortunately neglected to explore this question in full, focusing instead on the perceived inequity of the exemption and attempting to sidestep its mandate. Still, the holdings of many of these cases are valid and their facts are relevant. An inductive approach based on factual analogies to these cases is a helpful first step for applying the exemption in future lawsuits.

Federal Baseball can be relied on for the notion that issues of league structure are covered under the exemption as part of the business of baseball. Justice Holmes was faced with league structure questions of how many teams will play, who will own them, and where they will be located when he first granted a broad exemption.²³⁸ Coverage for league structure issues was also recognized by *Crist*, in which the Eleventh Circuit, considering league contraction, found that the “the number of clubs, and their organization into leagues for the purpose of playing scheduled games” are “basic elements” of the business of baseball.²³⁹ *Pelican Baseball* confirmed that the issue of franchise relocation restrictions falls under the exemption,²⁴⁰ and *City of San Jose* further validated this holding.²⁴¹

According to *Finley*, the commissioner’s unilateral power to veto the owners in order to protect the best interests of the game should also be protected by the exemption,²⁴² though the court did note that more “attenuated” aspects of the business of baseball, such as concessions, might not be protected.²⁴³ In a similar vein, *McCoy* applied the exemption broadly in dismissing a lawsuit brought by disgruntled fans and business owners after the 1994 players strike.²⁴⁴

²³⁸ *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200 (1922).

²³⁹ *Major League Baseball v. Crist*, 331 F.3d 1177, 1183 (11th Cir. 2003).

²⁴⁰ *New Orleans Pelican Baseball, Inc. v. Nat’l Ass’n of Prof’l Baseball Leagues*, No. 93-253, 1994 WL 631144 at *8 (E.D. La. Mar. 1, 1994).

²⁴¹ *City of San Jose v. Office of the Comm’r of Baseball*, No. C-13-02787, 2013 WL 5609346 (N.D. Cal. Oct. 11, 2013).

²⁴² *Charles O. Finley & Co., Inc. v. Kuhn*, 569 F.2d 527, 541 (7th Cir. 1978).

²⁴³ *Id.* at 541 n.51 (citing *Twin City Sportservice, Inc. v. Charles O. Finely & Co., Inc.*, 365 F. Supp. 235 (N.D. Cal. 1972) *rev’d on other grounds*, 512 F.2d 1264 (9th Cir. 1975)).

²⁴⁴ *McCoy v. Major League Baseball*, 911 F. Supp. 454, 457 (W.D. Wash. 1994).

The cases that have used the integral test to *allow* coverage under the exemption are also instructive, though those that denied coverage under the test are not. After all, something must first be a part of the business of baseball in order to also be integral to the business, and a finding that something is *not* integral leaves open the question of whether it can still be considered a nonessential, and thus protected, part of the business.²⁴⁵ *Professional Baseball Schools* stands for the proposition that, in addition to franchise relocation restrictions, player assignment rules and even MLB's unique ability to monopolize the market are part of the business of baseball.²⁴⁶ Though the main *Henderson* holding on broadcasting is unhelpful, given its use of the integral test, the case does suggest in dicta that labor relations with players and umpires, as well as league structure issues generally, are all a part of the business of baseball.²⁴⁷

Still, significant gaps persist. The facts of prior exemption cases are too limited and their reasoning is too often misguided to be useful in judging the complex and extensive nature of the modern business of baseball. Along with the demand for a broad application of the exemption and the importance of inductive reasoning wherever possible, two further principles should be followed to rectify this problem. The first is that the business of baseball should be construed in its modern incarnation, viewed as an evolving enterprise rather than in its antiquated, largely unfamiliar form of 1922. This is the approach the Supreme Court holdings since *Federal Baseball* have taken, with the Justices considering the then-present state of baseball both in dismantling the Commerce Clause reasoning behind the exemption and in choosing to maintain the exemption despite the changes to baseball that had taken place. Judges could be led to rather illogical findings if they were required to determine whether an aspect of MLB today would fit into the league's business model from a century ago, further reducing the legitimacy of an exemption already considered illegitimate by many.

The second principle is that the business of baseball should be construed as it was in *Toolson* and *Flood*: as the business of providing baseball games to the public for profit.²⁴⁸ This, of course, remains an inexact concept, but it adds an important qualification to the exemption. MLB is protected broadly in its provision of baseball to the public and in the rules, decisions, and ventures that allow it to provide such exhibition. Put simply, any aspect of baseball that has a rational connection to the production and public dissemination of games should be afforded the benefits of the exemption. League structure, team placement, on-field procedures, and labor issues with non-players thus do not come under the purview of antitrust regulation. The

²⁴⁵ Under this logic, *Postema*'s holding on labor relations with umpires and *Henderson*'s holding on broadcasting are unavailing for the issues at hand.

²⁴⁶ *Prof'l Baseball Schools & Clubs, Inc. v. Kuhn*, 693 F.2d 1085, 1086 (11th Cir. 1982).

²⁴⁷ *Henderson Broad. Corp. v. Houston Sports Ass'n*, 541 F. Supp. 263, 265 (S.D. Tex. 1982). *See also id.* at 269 ("Radio broadcasting is not a part of the sport in the way in which players, umpires, the league structure and the reserve system are.").

²⁴⁸ *See Toolson v. N.Y. Yankees*, 346 U.S. 356, 357 (1953) ("In [*Federal Baseball*], this Court held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws."); *Flood v. Kuhn*, 407 U.S. 258 (1972) (affirming the same).

same should be true for the broadcast of games via radio, TV, and the Internet, a direct and widespread form of disseminating baseball to the public.²⁴⁹

Activities of MLB and its teams to profit outside the production of games, such as merchandising and sponsorships, present the trickiest question, even when examined under a broad reading of the exemption.²⁵⁰ These activities provide immense profit that is helpful, though not necessarily crucial, to sustaining MLB's ability to produce baseball entertainment, and further promote baseball production by increasing league popularity and visibility. These areas of MLB have never been explored in exemption cases²⁵¹ and a proper factual inquiry is needed into whether the business of providing baseball to the public includes the businesses that contribute to the production of games. Nonetheless, for the areas of baseball that have been challenged and are most likely to be challenged in the future, a properly broad exemption should continue to protect the sport from unwanted antitrust review.

CONCLUSION

One of the most anomalous features of the entire federal legal system, the baseball exemption will likely never escape the controversy and scorn that has followed it since it was established by *Federal Baseball* in 1922. With little justification or logic, the exemption places MLB and its owners in an enviably advantageous position, allowing for the use of practices that would be susceptible to antitrust regulation in any other context. Among these are MLB's restraints on franchise relocation, at issue in *City of San Jose*, which allow the league unparalleled control over its market reach and fan loyalty. Though surely not the last, San Jose and Oakland A's owner Lew Wolff have become the latest victims of the exemption's unique power. Despite the perpetual dissatisfaction with the exemption, it is nonetheless the duty of courts to apply it broadly and inclusively to shield the business of baseball from antitrust law until Congress or the Court instructs otherwise. This may seem unfair, and could allow for the perpetuation of some truly anticompetitive practices by MLB, but the exemption was never intended to be fair or to enhance competition. It was intended only to protect America's pastime, as it has successfully done for nearly a century.

²⁴⁹ The caveat to this is the unsettled extent to which the vague and outdated Sports Broadcasting Act removes broadcasting from the exemption's scope, though the recent *Laumann* decision implies that, at minimum, MLB's TV broadcasting is not exempt from antitrust regulation. See *supra* notes 229 and 235.

²⁵⁰ Professor Grow considers these aspects to fall outside the exemption because they are not *directly* related to the production of games. See Grow, "Defining the Business of Baseball," *supra* note 55, at 622. His requirement of a direct relationship, however, more closely resembles the integral test than it does a broad reading of the exemption.

²⁵¹ Merchandising and licensing, however, have been explored in cases that did *not* implicate the exemption, perhaps implying that even MLB does not believe these areas to be within the exemption's scope. See *id.* at 620-21; *Major League Baseball Props., Inc. v. Salvino*, 542 F.3d 290 (2d Cir. 2008) (granting summary judgment for MLB's licensing entity after it was sued for Sherman Act violations by a merchandise manufacturer, a case in which MLB did not even raise the exemption as a defense). See also Transcript of Oral Argument, *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010) (in discussion on the NFL's licensing program, the distinguishing by several justices between merchandising and other business activities more connected to the provision of football entertainment).