
Defining the “Business of Baseball”: A Proposed Framework for Determining the Scope of Professional Baseball’s Antitrust Exemption

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This Article proposes a new analytical framework for determining the proper scope of the judicially created exemption shielding the activities of professional baseball from antitrust law. Specifically, the Article finds that lower courts have applied the exemption in widely divergent ways, due to a misunderstanding, and in some cases a misinterpretation, of the underlying focus of the United States Supreme Court’s opinions creating and affirming the exemption. The Article argues that future courts should reject the existing lower court precedent and instead, consistent with the often overlooked focus of the Supreme Court’s decisions, hold that the baseball exemption protects only those activities directly related to the business of providing baseball entertainment to the public.

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INTRODUCTION

For nearly ninety years, professional baseball has had the unique distinction of being the only professional sport to enjoy a judicially created exemption from federal antitrust law. Under the exemption, the activities of both Major League Baseball (“MLB”) — professional baseball’s highest level of competition — and the lower ranked, so-called “minor leagues” are generally shielded from antitrust law. Originating from the United States Supreme Court’s 1922 opinion in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,¹ the Court has affirmed baseball’s antitrust exemption on two subsequent occasions: first in the 1953 case of *Toolson v. New York Yankees*,² and later in the 1972 case of *Flood v. Kuhn*.³ In those opinions, the Supreme Court affirmed baseball’s exemption on the basis of both stare decisis concerns and congressional inaction,⁴ despite acknowledging that the exemption is an “aberration” and an “anomaly.”⁵

Due to the peculiarity of the exemption, as well as baseball’s standing as the “national pastime,”⁶ baseball’s antitrust exemption has generated substantial consideration over the years from both courts⁷

¹ *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200 (1922).

² *Toolson v. N.Y. Yankees*, 346 U.S. 356 (1953).

³ *Flood v. Kuhn*, 407 U.S. 258 (1972).

⁴ *See id.* at 283; *Toolson*, 346 U.S. at 357.

⁵ *Flood*, 407 U.S. at 282.

⁶ *See id.* at 264; 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, 186 (2009).

⁷ *See, e.g.,* *Major League Baseball v. Crist*, 331 F.3d 1177 (11th Cir. 2003) (considering baseball’s antitrust exemption); *Prof’l Baseball Sch. & Clubs, Inc. v. Kuhn*, 693 F.2d 1085 (11th Cir. 1982) (same); *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978) (same); *Salerno v. Am. League of Prof’l Baseball Clubs*, 429 F.2d 1003 (2d Cir. 1970) (same); *Portland Baseball Club, Inc. v. Balt. Baseball Club, Inc.*, 282 F.2d 680 (9th Cir. 1960) (same); *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949) (same); *Major League Baseball v. Butterworth*, 181 F. Supp. 2d 1316 (N.D. Fla. 2001) (same); *McCoy v. Major League Baseball*, 911 F. Supp. 454 (W.D. Wash. 1995) (same); *New Orleans Pelicans Baseball, Inc. v. Nat’l Ass’n of Prof’l Baseball Leagues*, No. 93-253, 1994 WL 631144 (E.D. La. Mar. 1, 1994) (same); *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993) (same); *Postema v. Nat’l League of Prof’l Baseball Clubs*, 799 F. Supp. 1475 (S.D.N.Y. 1992) (same); *Henderson Broad. Corp. v. Hous. Sports Ass’n*, 541 F. Supp. 263 (S.D. Tex. 1982) (same); *Portland Baseball Club v. Kuhn*, 368 F. Supp. 1004 (D. Or. 1971) (same); *Butterworth v. Nat’l League of Prof’l Baseball Clubs*, 644 So. 2d 1021 (Fla. 1994) (same); *Morsani v. Major League Baseball*, 663 So. 2d 653 (Fla. Dist. Ct. App. 1995) (same); *Minn.*

and commentators.⁸ Despite this voluminous analysis, surprisingly little attention has been devoted to determining the extent to which

Twins P'ship v. State, 592 N.W.2d 847 (Minn. 1999) (same); Wisconsin v. Milwaukee Braves, Inc., 144 N.W.2d 1 (Wis. 1966) (same).

⁸ See, e.g., ROGER I. ABRAMS, LEGAL BASES: BASEBALL AND THE LAW 43-69 (1998) [hereinafter LEGAL BASES] (discussing baseball's antitrust exemption); JEROLD J. DUQUETTE, REGULATING THE NATIONAL PASTIME: BASEBALL AND ANTITRUST (1999) (same); Robert G. Berger, *After the Strikes: A Reexamination of Professional Baseball's Exemption from the Antitrust Laws*, 45 U. PITT. L. REV. 209 (1983) (same); Andrew E. Bortek, *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 (2004) (same); Charles Matthew Burns, *The Scope of Major League Baseball's Antitrust Exemption*, 24 STETSON L. REV. 495 (1995) (same); Walter T. Champion, Jr., *The Baseball Antitrust Exemption Revisited: 21 Years After Flood v. Kuhn*, 19 T. MARSHALL L. REV. 573 (1994) (same); H. Ward Classen, *Three Strikes and You're Out: An Investigation of Professional Baseball's Antitrust Exemption*, 21 AKRON L. REV. 369 (1988) (same); Edmund P. Edmonds, *Over Forty Years in the On-Deck Circle: Congress and the Baseball Antitrust Exemption*, 19 T. MARSHALL L. REV. 627 (1994) (same); John W. Guarisco, "Buy Me Some Peanuts and Cracker Jack," but You Can't Buy the Team: *The Scope and Future of Baseball's Antitrust Exemption*, 1994 U. ILL. L. REV. 651 (1994) (same); Joseph A. Kohm, Jr., *Baseball's Antitrust Exemption: It's Going, Going . . . Gone!*, 20 NOVA L. REV. 1231 (1996) (same); Latour Rey Lafferty, *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 (1994) (same); Connie Mack & Richard M. Blau, *The Need for Fair Play: Repealing the Federal Baseball Antitrust Exemption*, 45 FLA. L. REV. 201 (1993) (same); Stephen J. Matzura, *Will Maple Bats Splinter Baseball's Antitrust Exemptions?: The Rule of Reason Steps to the Plate*, 18 WIDENER L.J. 975 (2009) (same); Kevin McDonald, *Antitrust and Baseball: Stealing Holmes*, 1998 J. SUP. CT. HIST. 89 (1998) (same); Joseph J. McMahon, Jr. & John P. Rossi, *A History and Analysis of Baseball's Three Antitrust Exemptions*, 2 VILL. SPORTS & ENT. L.J. 213 (1995) (same); Mitchell Nathanson, *The Irrelevance of Baseball's Antitrust Exemption: A Historical Review*, 58 RUTGERS L. REV. 1 (2005) (same); Thomas J. Ostertag, *Baseball's Antitrust Exemption: Its History and Continuing Importance*, 4 VA. SPORTS & ENT. L.J. 54 (2004) (same); Thomas C. Picher, *Baseball's Antitrust Exemption Repealed: An Analysis of the Effect on Salary Cap and Salary Taxation Provisions*, 7 SETON HALL J. SPORT L. 5 (1997) (same); Gary R. Roberts, *The Case for Baseball's Special Antitrust Immunity*, 4 J. SPORTS ECON. 302 (2003) (same); Stephen F. Ross, *Reconsidering Flood v. Kuhn*, 12 U. MIAMI ENT. & SPORTS L. REV. 169 (1994) (same); Eric C. Scheible, *No Runs. No Hits. One Error: Eliminating Major League Baseball's Antitrust Exemption Will Not Save the Game*, 73 U. DET. MERCY L. REV. 73 (1995) (same); Frank P. Scibilia, *Baseball Franchise Stability and Consumer Welfare: An Argument for Reaffirming Baseball's Antitrust Exemption with Regard to Its Franchise Relocation Rules*, 6 SETON HALL J. SPORT L. 409 (1996) (same); Anthony Sica, *Baseball's Antitrust Exemption: Out of the Pennant Race Since 1972*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 295 (1996) (same); David L. Snyder, *Anatomy of an Aberration: An Examination of the Attempts to Apply Antitrust Law to Major League Baseball Through Flood v. Kuhn*, 4 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 177 (2008) (same); Morgen A. Sullivan, "A Derelict in the Stream of the Law": *Overruling Baseball's Antitrust Exemption*, 48 DUKE L.J. 1265 (1999) (same); Martin M. Tomlinson, *The Commissioner's New Clothes: The Myth of Major League Baseball's Antitrust Exemption*,

baseball's operations are properly protected under the antitrust exemption.⁹ The Supreme Court itself has never specifically addressed the scope of the baseball exemption,¹⁰ but instead has only generally held that the "business of baseball" is exempt from antitrust law.¹¹ Based on this language, some lower courts have broadly interpreted the Supreme Court's precedent as providing an exemption for the entire business of baseball.¹² Other courts have concluded that the exemption is more limited, with some finding that it protects only the "unique characteristics and needs" of professional baseball.¹³ Meanwhile, still others have held that the exemption is restricted solely to the facts of the Supreme Court's most recent affirmance in *Flood v. Kuhn*.¹⁴ In *Flood*, the Court reconsidered baseball's antitrust exemption in the specific context of the so-called "reserve clause," a provision included at the time in all baseball player contracts that precluded players from negotiating future contracts with anyone but their current employer.¹⁵ Because MLB players subsequently rid

20 ST. THOMAS L. REV. 255 (2008) (same); Kathleen L. Turland, *Major League Baseball and Antitrust: Bottom of the Ninth, Bases Loaded, Two Outs, Full Count and Congress Takes a Swing*, 45 SYRACUSE L. REV. 1329 (1995) (same); James D. Weinberger, *Baseball Trademark Licensing and the Antitrust Exemption: An Analysis of New York Yankees Partnership v. Major League Baseball Enterprises, Inc.*, 23 COLUM.-VLA J.L. & ARTS 75 (1999) (same); Andrew Zimbalist, *Baseball's Antitrust Exemption: Why It Still Matters*, 13 NINE 1 (2004) (same).

⁹ See Guarisco, *supra* note 8, at 652 (noting that "courts and commentators have . . . devoted relatively little effort to delineating the limits, if any, of the exemption").

¹⁰ Nathanson, *supra* note 8, at 5 (noting that "[n]owhere in [the Court's] three decisions is there a discussion of the scope of the exemption"); see also *Minn. Twins P'ship*, 592 N.W.2d at 854 (noting that "the *Flood* opinion is not clear about the extent of the conduct that is exempt from antitrust laws"); McMahon & Rossi, *supra* note 8, at 243 (noting that "*Federal Baseball*, *Toolson* and *Flood* do not provide any helpful guidance as to the bounds of the exemption").

¹¹ See generally *infra* Parts I.A-E (reviewing prior Supreme Court holdings).

¹² See *Crist*, 331 F.3d at 1183-84; *Profl Baseball Sch. & Clubs*, 693 F.2d at 1085-86; *Charles O. Finley & Co.*, 569 F.2d at 541; *Butterworth*, 181 F. Supp. 2d at 1322; *McCoy*, 911 F. Supp. at 456-57; *New Orleans Pelicans Baseball*, 1994 WL 631144 at *9; *Minn. Twins P'ship*, 592 N.W.2d at 856.

¹³ See *Postema v. Nat'l League of Profl Baseball Clubs*, 799 F. Supp. 1475, 1488-89 (S.D.N.Y. 1992); *Henderson Broad. Corp. v. Hous. Sports Ass'n*, 541 F. Supp. 263, 268-69 (S.D. Tex. 1982).

¹⁴ See *Piazza v. Major League Baseball*, 831 F. Supp. 420, 435-38 (E.D. Pa. 1993); *Butterworth v. Nat'l League of Profl Baseball Clubs*, 644 So. 2d 1021, 1025 (Fla. 1994); *Morsani v. Major League Baseball*, 663 So. 2d 653, 657 (Fla. Dist. Ct. App. 1995).

¹⁵ See Ryan T. Dryer, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL. 267, 268; Joshua P. Jones, *A Congressional Swing and Miss: The Curt Flood Act, Player Control, and the National Pastime*, 33 GA. L. REV. 639, 642 (1999); Kohm, *supra* note 8,

themselves of the constraints of the reserve clause through arbitration,¹⁶ the implication of this final subset of decisions is that baseball's antitrust exemption is now largely a nullity.

Meanwhile, the few existing scholarly works devoting any significant analysis to the scope of the baseball exemption are equally conflicted. The majority of commentators to consider the issue support the subset of judicial decisions limiting the exemption to the facts of *Flood*.¹⁷ However, one leading scholar has argued in favor of the standard adopted by other courts, finding that *Flood* maintains an exemption protecting only baseball's "unique characteristics and needs."¹⁸ Finally, another top commentator has concluded that the exemption generally extends to the "structuring of professional baseball and [the production of] baseball entertainment," but not contracts between professional baseball entities and third parties.¹⁹

at 1234-35.

¹⁶ In 1975, at the guidance of the recently founded Major League Baseball Players Association, pitchers Andy Messersmith and Dave McNally elected not to sign contracts that included the reserve clause and instead played out the season without a contract. ABRAMS, LEGAL BASES, *supra* note 8, at 117-33; CHARLES C. ALEXANDER, OUR GAME: AN AMERICAN BASEBALL HISTORY 296 (1991). At season's end, Messersmith and McNally declared themselves to be "free agents" eligible to negotiate with any MLB team, arguing that the reserve clause only allowed their contracts to be renewed for a single season and, thus, since the two pitchers were not under contract for the 1975 season, the reserve clause no longer applied. Jennifer Dyer, *The Curt Flood Act of 1998: After 76 Years, Congress Lifts Baseball's Antitrust Exemption on Labor Relations but Leaves Franchise Relocation Up to the Courts*, 3 T.M. COOLEY J. PRAC. & CLINICAL L. 247, 259 (2000). Not surprisingly, the owners disagreed. *Id.* The dispute between the owners and two pitchers was ultimately heard by a panel of arbitrators — a right the players had earned as part of the 1970 collective bargaining agreement. Jones, *supra* note 15, at 659-60. The arbitration panel sided with Messersmith and McNally, finding that the reserve clause in a particular contract lapsed after one season. *Id.* at 660. Following the arbitration decision, the owners and the MLB players' union eventually negotiated a new collective bargaining agreement in 1976, granting players with six years of service the right to negotiate with all MLB teams, thus beginning baseball's free agency era. ALEXANDER, *supra*, at 297.

¹⁷ See Burns, *supra* note 8, at 532-34; Lafferty, *supra* note 8, at 1288-90; Mack & Blau, *supra* note 8, at 212; Nathanson, *supra* note 8, at 5-6; Tomlinson, *supra* note 8, at 309.

¹⁸ Ross, *supra* note 8, at 205 (finding that *Flood* held that "baseball's 'unique characteristics and needs' are exempt from the antitrust laws").

¹⁹ Gary Roberts, *On the Scope and Effect of Baseball's Antitrust Exclusion*, 4 SETON HALL J. SPORT L. 321, 325 (1994) [hereinafter *Scope and Effect*]; see also Weinberger, *supra* note 8, at 96 (arguing that *Flood* does not support extending exemption to agreements with member of "an industry outside of baseball"); Richard Sandomir, *Kerry Joins Fans Upset by the Plan for Extra Innings*, N.Y. TIMES, Feb. 9, 2007, at D4 (quoting Professor Gabriel Feldman, Director of Tulane University's Sports Law Program, as stating that "[a] few courts have said the exemption does not apply when baseball makes agreements with third parties").

In view of these conflicting opinions among both courts and scholars, some commentators have gone so far as to conclude that “the scope of baseball’s antitrust exemption has become whatever the reviewing court says it is.”²⁰ This lack of consensus regarding the scope of the exemption is particularly problematic because MLB regularly finds itself embroiled in antitrust disputes. For example, in August 2009, trading card manufacturer Upper Deck threatened to file an antitrust suit against MLB following MLB’s decision to grant rival card manufacturer Topps an exclusive trademark license.²¹ Similarly, in 2007, Pennsylvania Senator Arlen Specter alleged that a proposed deal between MLB and DirecTV, under which the satellite television company would have received the exclusive rights to air MLB’s “Extra Innings” broadcasting package, violated antitrust law.²² Meanwhile, MLB’s restrictive territory allocation policies — a regular source of antitrust complaints against the league²³ — were again at issue in December 2009 when the city attorney for San Francisco threatened to sue MLB after the league considered permitting the Oakland Athletics franchise to relocate to San Jose, territory assigned to the San Francisco Giants organization.²⁴ Had any of these disputes resulted in litigation, the applicability of the baseball antitrust exemption would

²⁰ McMahon & Rossi, *supra* note 8, at 243; *see also* Mack & Blau, *supra* note 8, at 212 (“Even today, courts differ over the scope and application of the *Federal Baseball* exemption.”).

²¹ *See* Richard Sandomir, *Topps Gets Exclusive Deal with Baseball, Landing a Blow to Upper Deck*, N.Y. TIMES, Aug. 6, 2009, at B16; *see also* Luke Winn, *The Last Iconic Baseball Card*, SPORTS ILLUSTRATED, Aug. 24, 2009, at 50, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1159241/index.htm> (noting that Upper Deck considered filing lawsuit challenging Topps’s exclusive license).

MLB eventually sued Upper Deck in February 2010 for alleged trademark infringement. *Major League Baseball Props., Inc. v. Upper Deck Co.*, No. 2010-CV-00732 (S.D.N.Y. filed Feb. 1, 2010). The parties settled out of court soon thereafter. *See* Mike Freeman, *Upper Deck Settles MLB Trademark Suit*, S.D. UNION-TRIB., Mar. 4, 2010, at C-1 (reporting same).

²² Sandomir, *supra* note 19, at D4. MLB ultimately elected not to grant DirecTV exclusive rights to the Extra Innings package. *See MLB Strikes Deal to Keep Games on Cable*, WASH. POST, Apr. 5, 2007, at E06. For more on the “Extra Innings” package, *see infra* note 346 and accompanying text.

²³ *See, e.g.,* *New Orleans Pelicans Baseball, Inc. v. Nat’l Ass’n of Prof’l Baseball Leagues*, No. 93-253, 1994 WL 631144 (E.D. La. Mar. 1, 1994) (applying antitrust exemption in suit involving proposed relocation of minor league franchise to New Orleans, Louisiana); *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993) (considering MLB’s rejection of proposed relocation of San Francisco Giants to Tampa Bay, Florida).

²⁴ John Cote, *S.F. Threatens Suit if A’s Move to San Jose*, S.F. CHRON., Dec. 18, 2009, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/12/18/BA521B5T0T.DTL>.

have been unclear under both the existing judicial precedent and scholarly analysis.

This uncertainty is undesirable and runs contrary to the public interest.²⁵ The inability to reliably gauge the antitrust risks for various baseball-related business arrangements harms not only MLB owners and their would-be business partners, but also potential litigants hoping to contest a particular practice or agreement. The conflicting judicial precedents also create undesirable opportunities for forum shopping, allowing enterprising plaintiffs to file antitrust suits in the jurisdiction most likely to rule that baseball's exemption does not apply to the particular claim at issue.²⁶ Accordingly, a consistent standard defining the scope of baseball's antitrust protection is sorely needed.

This Article rejects the existing precedent and scholarly analyses, and instead asserts that future courts considering the scope of the baseball exemption should hold that only those activities directly related to the business of providing baseball entertainment to the public are exempt from antitrust law. This standard draws upon the largely overlooked focus of the Supreme Court's opinions in *Federal Baseball* and *Toolson*, which both explicitly exempted the business of supplying baseball exhibitions (i.e., games) to the public.²⁷ Under the proposed standard, exempt activities directly related to the provision of baseball entertainment would include the formulation of baseball's official rules, decisions regarding the league structure (at both the major and minor league levels), broadcasting agreements, and certain labor disputes.²⁸ Meanwhile, commercial activities not directly related to supplying baseball entertainment, such as merchandise licensing, concessions, and sponsorship agreements, would not be exempt.²⁹

Admittedly, this proposed standard is unlikely to satisfy those who advocate the severe restriction or outright revocation of the baseball exemption on policy grounds.³⁰ However, while these commentators'

²⁵ Roberts, *Scope and Effect*, *supra* note 19, at 331; see also ANDREW ZIMBALIST, MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND PUBLIC POLICY 138 (2003) (noting that this uncertainty prevents baseball owners from fully and confidently investing in their teams).

²⁶ See Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 777 (2010) (noting that circuit splits in antitrust cases against sports leagues "may spawn undesirable incentives for forum shopping").

²⁷ See generally *infra* Part I.F (discussing focus of Supreme Court's baseball antitrust opinions).

²⁸ See *infra* Parts IV.A-D.

²⁹ See *infra* Part IV.E.

³⁰ See Joshua Hamilton, *Congress in Relief: The Economic Importance of Revoking*

policy arguments may ultimately convince the Supreme Court or Congress to restrict or revoke baseball's antitrust immunity, in the meantime a uniform standard for the baseball exemption is necessary. Therefore, this Article sets aside the general policy concerns advanced by both the opponents and proponents of baseball's antitrust exemption, and instead attempts to provide a much needed, workable standard consistent with the Supreme Court's existing precedent for courts applying the exemption in the future.

This Article thus argues that future courts considering baseball's antitrust exemption should hold that only those league functions directly related to delivering baseball entertainment to the public are exempt from antitrust law. Specifically, Part I reviews the relevant Supreme Court precedent, as well as Congress's single, limited attempt to constrain the baseball exemption (namely, the Curt Flood Act of 1998), and asserts that courts should construe baseball's antitrust exemption to protect the business of providing baseball entertainment to the public.³¹ Part II reviews the subsequent conflicting lower court opinions considering the scope of baseball's exemption.³² Part III argues that these courts have provided flawed or unworkable standards.³³ Finally, Part IV applies the proposed standard to a variety of different aspects of the baseball business and delineates between properly exempt and non-exempt activities.³⁴

I. THE ESTABLISHMENT OF THE BASEBALL ANTITRUST EXEMPTION

Any attempt to ascertain the proper scope of baseball's antitrust exemption must begin with an examination of the Supreme Court's decisions establishing and affirming the exemption. Upon thorough review, these precedents reveal that the Supreme Court generally exempted the "business of baseball" from antitrust law, rather than any single facet of professional baseball, such as the reserve clause.³⁵ More specifically, however, the Court has focused its decisions on the business of providing baseball entertainment to the public, thereby providing an effective, albeit overlooked, standard for lower courts to apply when considering the scope of the baseball exemption.

Baseball's Antitrust Exemption, 38 SANTA CLARA L. REV. 1223, 1224 (1998); Mack & Blau, *supra* note 8, at 206; Ross, *supra* note 8, at 169-70; Sullivan, *supra* note 8, at 1267; Tomlinson, *supra* note 8, at 259; Zimbalist, *supra* note 8, at 1-6.

³¹ See *infra* Part I.

³² See *infra* Part II.

³³ See *infra* Part III.

³⁴ See *infra* Part IV.

³⁵ See *supra* notes 15-16 and accompanying text (explaining reserve clause).

A. Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs

The United States Supreme Court first considered baseball's status under federal antitrust law in the 1922 case of *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.³⁶ *Federal Baseball* arose out of the Federal League's ill-fated attempt to challenge the American League ("AL") and National League's ("NL") position as the predominant leagues in professional baseball during the 1910s.³⁷ After the AL and NL rejected the Federal League's merger inquiries,³⁸ the Federal League owners filed an antitrust suit against the two established leagues alleging violations of both Sections One and Two of the Sherman Act.³⁹ Recognizing that the Federal League's suit threatened their supremacy, and having grown weary of the costs of competing with their would-be rival, the AL and NL eventually bought out the owners of seven of the Federal League's eight teams.⁴⁰ The owner of the Federal League's Baltimore Terrapins franchise refused to accept the buyout offer, however, and instead filed a new suit against both the AL and NL, again alleging that the predominant leagues had conspired to monopolize the business of baseball in violation of the Sherman Act.⁴¹

³⁶ *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).

³⁷ See Jesse Gary, *The Demise of Sport? The Effect of Judicially Mandated Free Agency on European Football and American Baseball*, 38 CORNELL INT'L L.J. 293, 308 (2005) (noting that Federal League was "the last significant challenger to the Major Leagues' (i.e., the National and American Leagues) control of professional baseball"). See generally Alito, *supra* note 6 (discussing history of Federal League and resulting litigation).

³⁸ Snyder, *supra* note 8, at 183.

³⁹ Alito, *supra* note 6, at 190; McMahon & Rossi, *supra* note 8, at 235.

⁴⁰ *Fed. Baseball*, 259 U.S. at 207; see also Alito, *supra* note 6, at 189. For more on the history of the Federal League, see generally MARC OKKONEN, *THE FEDERAL LEAGUE OF 1914-1915: BASEBALL'S THIRD MAJOR LEAGUE* (1989) (discussing history), and ROBERT PEYTON WIGGINS, *THE FEDERAL LEAGUE OF BASE BALL CLUBS: THE HISTORY OF AN OUTLAW MAJOR LEAGUE, 1914-1915* (2009) (same).

⁴¹ Roger I. Abrams, *Before the Flood: The History of Baseball's Antitrust Exemption*, 9 MARQ. SPORTS L.J. 307, 308 (1999) [hereinafter *Before the Flood*]. Baltimore's owner rejected the settlement offer because it did not provide the city with another major league team. See BRAD SNYDER, *A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS* 20 (2006) (noting that Terrapins "demanded a major league team in Baltimore"); Mack & Blau, *supra* note 8, at 210 n.76 ("The Baltimore owners were so intent on keeping professional baseball, however, that they rejected the settlement and proceeded to court by initiating their own litigation.").

The Baltimore franchise prevailed at trial, but lost on appeal,⁴² before the Supreme Court finally rejected the Terrapins’ antitrust claims. Justice Oliver Wendell Holmes wrote for a unanimous court, holding that professional baseball was not within the scope of federal antitrust law, which governs only interstate commerce.⁴³ Justice Holmes offered a two-part analysis.

First, the Court concluded that the business of professional baseball was not interstate in nature.⁴⁴ Specifically, Justice Holmes focused on the precise business activity at issue in the case as “giving exhibitions of base ball,” events that he concluded were “purely state affairs.”⁴⁵ In other words, Justice Holmes focused precisely on the manner in which baseball teams generated revenue at the time of *Federal Baseball*, namely the sale of tickets to baseball games held in a single state.⁴⁶ Justice Holmes acknowledged that the popularity of these exhibitions was attributable to competition between teams from different cities and states,⁴⁷ but found that the requirement that teams cross state lines was “not enough to change the character of the business,” which was wholly intrastate, rather than interstate in nature.⁴⁸

From there, Justice Holmes quickly transitioned to a second basis supporting his decision. Specifically, the Court held that baseball did not constitute “trade or commerce” under the common legal understanding of those terms at the time,⁴⁹ stating in particular that “personal effort, not related to production, is not a subject of commerce.”⁵⁰

Although critics have since widely disparaged Justice Holmes’s opinion in *Federal Baseball*,⁵¹ when viewed in light of the business of

⁴² Nat’l League of Prof’l Baseball Clubs v. Fed. Baseball Club of Balt., Inc., 269 F. 681, 688 (D.C. Cir. 1920); see also Alito, *supra* note 6, at 190-91.

⁴³ *Fed. Baseball*, 259 U.S. at 207-09.

⁴⁴ *Id.* at 208.

⁴⁵ *Id.* See generally McDonald, *supra* note 8, at 95-96 (analyzing Justice Holmes’s opinion).

⁴⁶ McDonald, *supra* note 8, at 95-96.

⁴⁷ *Fed. Baseball*, 259 U.S. at 208.

⁴⁸ *Id.*

⁴⁹ *Id.* at 209.

⁵⁰ *Id.*

⁵¹ See, e.g., Salerno v. Am. League of Prof’l Baseball, 429 F.2d 1003, 1005 (2d Cir. 1970) (stating that “[w]e freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes’s happiest days”); ABRAMS, LEGAL BASES, *supra* note 8, at 58 (finding that “[the *Federal Baseball*] opinion has since been criticized as ludicrous”); Classen, *supra* note 8, at 376 (reporting that *Federal Baseball* has been “widely criticized”); Robert M. Jarvis & Phyllis Coleman, *Early Baseball History*, 45 AM. J. LEGAL HIST. 117, 117 n.2 (2001) (finding that *Federal Baseball* opinion has been

professional baseball at the time the Supreme Court decided the case, and considering the Court's then-existing interstate commerce jurisprudence, the opinion becomes more reasonable. Today, professional baseball is unquestionably engaged in interstate commerce,⁵² with its extensive revenues from selling broadcast rights (local and national; television, radio, and Internet) and its licensing of intellectual property rights for merchandise.⁵³ At the time *Federal Baseball* was decided, however, such revenue streams did not exist, with ticket sales constituting the overwhelming source of revenue for MLB teams.⁵⁴ Indeed, radio broadcasts of MLB games were only in the experimental stage in 1922 and would not become popular or profitable for a number of years.⁵⁵ Meanwhile, although the play-by-play results of baseball games were transmitted throughout the nation via telegraph at the time the Court decided *Federal Baseball*, these transmissions did not generate any profits for MLB.⁵⁶ Therefore, while baseball fans certainly followed the results of out-of-state contests closely, baseball's revenue was overwhelmingly generated through ticket sales to those actually attending games at the stadium, an inherently local activity.⁵⁷

Thus, the central focus of Justice Holmes's opinion in *Federal Baseball* was the business of providing baseball exhibitions to the public. When so viewed, and in light of the realities of the professional baseball business in 1922, Justice Holmes's conclusion that these

"much-criticized").

⁵² See *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) ("Professional baseball is a business, and it is engaged in interstate commerce.").

⁵³ See Michael J. Hauptert, *The Economic History of Major League Baseball*, EH.NET ENCYCLOPEDIA OF ECONOMIC AND BUSINESS HISTORY, <http://eh.net/encyclopedia/article/hauptert.mlb/> (last visited June 12, 2010) ("By 2002, media revenue exceeded gate revenue for the average MLB team."). See generally *infra* Parts IV.C, IV.E (discussing baseball's broadcasting and licensing activities).

⁵⁴ See *Toolson v. N.Y. Yankees*, 346 U.S. 356, 359 n.3 (1953) (Burton, J., dissenting) (citing revenue data for 1929).

⁵⁵ While baseball's first experimental radio broadcasts occurred in August 1921, broadcasting games in earnest did not gain popularity until the 1930s and 1940s. See McDonald, *supra* note 8, at 113 (noting date of first experimental broadcasts); McMahon & Rossi, *supra* note 8, at 237 ("Radio coverage of professional baseball became popular following World War II."); Tomlinson, *supra* note 8, at 262 (noting that radio broadcasts became popular after *Federal Baseball*).

⁵⁶ *Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Balt., Inc.*, 269 F. 681, 683 (D.C. Cir. 1920) (stating that "each league had a contract with a telegraph company for service, and had an income sufficient only to meet necessary expenses").

⁵⁷ McDonald, *supra* note 8, at 114.

games were “purely state affairs” under the Court’s then-limited conceptions of interstate commerce becomes easier to understand.⁵⁸

B. Toolson v. New York Yankees

The Supreme Court did not revisit its *Federal Baseball* decision for thirty-one years, until the 1953 case of *Toolson v. New York Yankees*.⁵⁹ *Toolson* was one of three companion cases simultaneously considered by the Court, all of which alleged antitrust violations by professional baseball.⁶⁰ In *Toolson*, a minor league player from the New York Yankees’ farm system filed suit after he was blacklisted in 1950 for failing to report to the Yankees’ minor league affiliate in Binghamton as he had been assigned.⁶¹ Toolson refused to accept his assignment, having grown frustrated at toiling in the minor leagues under the Yankees’ control for a number of years without receiving a chance to play at the Major League level.⁶² All three consolidated suits alleged that the reserve clause constituted an illegal restraint of trade in violation of the Sherman Act,⁶³ meanwhile, both *Toolson* and the *Corbett v. Chandler* companion case also alleged that MLB had conspired to monopolize the professional baseball industry.⁶⁴

By the time *Toolson* reached the Court, the baseball business had changed significantly since the days of *Federal Baseball*. Most notably, the broadcasting of baseball games across state lines via both radio and television was well established by the 1950s.⁶⁵ Moreover, the Supreme Court had also significantly expanded its interstate commerce jurisprudence.⁶⁶ Despite these changes, the *Toolson* Court nevertheless affirmed the earlier baseball opinion by a 7–2 vote in a one paragraph, per curium decision.⁶⁷ The *Toolson* majority began by summarizing

⁵⁸ See *id.* at 95; see also Alito, *supra* note 6, at 191 (noting same).

⁵⁹ *Toolson*, 346 U.S. at 356.

⁶⁰ In addition to *Toolson*, the Court also decided *Kowalski v. Chandler* and *Corbett v. Chandler* in the same opinion. See *Toolson*, 346 U.S. at 356 (parties named in case heading).

⁶¹ Gordon Hylton, *Why Baseball’s Antitrust Exemption Still Survives*, 9 MARQ. SPORTS L.J. 391, 395-96 (1999).

⁶² *Id.* at 396.

⁶³ *Toolson*, 346 U.S. at 362 (Burton, J., dissenting); see also ABRAMS, LEGAL BASES, *supra* note 8, at 60.

⁶⁴ *Toolson*, 346 U.S. at 364 & n.10 (Burton, J., dissenting).

⁶⁵ See McDonald, *supra* note 8, at 112-13.

⁶⁶ See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (expanding limits of interstate commerce to encompass wheat grown solely for personal consumption in single state).

⁶⁷ *Toolson*, 346 U.S. at 357.

Federal Baseball as holding that “the business of providing public baseball games for profit . . . was not within the scope of the federal antitrust laws.”⁶⁸ The Court then went on to note that Congress had allowed more than thirty years to elapse since *Federal Baseball* without enacting legislation bringing MLB within the purview of federal antitrust law.⁶⁹ The Court thus asserted that the duty to revoke baseball’s exemption belonged to Congress and not the Court.⁷⁰ Otherwise, baseball potentially would face retroactive liability resulting from its reliance on *Federal Baseball*.⁷¹ The *Toolson* majority opinion then closed by affirming the lower court opinions 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.”⁷²

This closing statement by the *Toolson* Court is particularly noteworthy because it effectively changes the rationale underlying baseball’s antitrust exemption.⁷³ Rather than affirming *Federal Baseball* on the basis of Justice Holmes’s explicit reasoning — that exhibitions of baseball were neither interstate in nature, nor commerce and, thus, were not within the scope of federal antitrust law⁷⁴ — the *Toolson* Court instead 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.

One commentator has gone so far as to call the *Toolson* Court’s reformulation of *Federal Baseball* “the greatest bait-and-switch scheme

⁶⁸ *Id.*

⁶⁹ The historical record somewhat undermines the *Toolson* Court’s reliance on the apparent Congressional silence following *Federal Baseball*. In fact, a House subcommittee considering MLB’s antitrust exemption deferred its consideration of the exemption at the urging of MLB’s legal counsel, who had assured the subcommittee that the Supreme Court would decide the issue in *Toolson* the following term. ABRAMS, *Before the Flood*, *supra* note 41, at 310. Appearing before the Supreme Court in *Toolson*, however, MLB argued that the Court should affirm *Federal Baseball* specifically because Congress had elected not to disturb the precedent during its 1952 investigation. *Id.*

⁷⁰ *Toolson*, 346 U.S. at 357.

⁷¹ See Lafferty, *supra* note 8, at 1277 (concluding that *Toolson* opinion was based upon “two concerns: first, Congress’s refusal to act, and second, the retroactive effect of its decision”).

⁷² *Toolson*, 346 U.S. at 357.

⁷³ See Hylton, *supra* note 61, at 397.

⁷⁴ *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200, 208-09 (1922).

in the history of the Supreme Court.”⁷⁵ Indeed, congressional intent was never so much as mentioned in the *Federal Baseball* opinion.⁷⁶

Intellectually honest or not, *Toolson* represented a significant shift in the Supreme Court’s baseball antitrust jurisprudence. Whereas *Federal Baseball* had concluded that baseball was not interstate commerce under the prevailing jurisprudence at the time — a rule subject to change pending future developments in the law or the business of baseball⁷⁷ — *Toolson* transformed this precedent into a permanent exemption grounded in Congress’s purported original intent when passing the Sherman Act.⁷⁸ Thus, although many commentators have overlooked the significance of the opinion’s closing sentence, *Toolson* was not simply a summary affirmation of *Federal Baseball*, but instead altered the fundamental basis for the baseball exemption.⁷⁹

C. Intervening Supreme Court Decisions

Although the Supreme Court would not specifically reconsider baseball’s antitrust status again until nearly two decades after *Toolson*, the Court did address its *Federal Baseball* and *Toolson* precedents in

⁷⁵ McDonald, *supra* note 8, at 100.

⁷⁶ See SNYDER, *supra* note 41, at 23; Hylton, *supra* note 61, at 397; *see also Fed. Baseball*, 259 U.S. at 207-09.

⁷⁷ McDonald, *supra* note 8, at 107 (noting that *Federal Baseball*’s “conclusion that the interstate aspects of the business were merely ‘incidental’ to the game . . . [was not] immutable; it can change when the facts do”).

⁷⁸ *Id.* at 119-20 (arguing that *Toolson* really first created baseball’s lasting antitrust exemption).

⁷⁹ These commentators instead generally attribute the *Toolson* decision to reliance on Congressional inaction and retroactivity concern. *See, e.g.,* McCoy v. Major League Baseball, 911 F. Supp. 454, 456 (W.D. Wash. 1995) (stating that “[n]oting thirty years of Congressional inaction . . . the Court in *Toolson* declined to overrule *Federal Baseball*”); Philip R. Bautista, *Congress Says, “Yooou’re Out!!!” to the Antitrust Exemption of Professional Baseball: A Discussion of the Current State of Player-Owner Collective Bargaining and the Impact of the Curt Flood Act of 1998*, 15 OHIO ST. J. ON DISP. RESOL. 445, 451 (2000) (focusing on Congressional inaction and retroactivity factors); Lafferty, *supra* note 8, at 1277 (“The Supreme Court’s reluctance to abrogate the exemption in *Toolson* appears to have been founded upon two concerns: first, Congress’s refusal to act, and second, the retroactive effect of its decision.”); Marianne McGettigan, *The Curt Flood Act of 1998: The Players’ Perspective*, 9 MARQ. SPORTS L.J. 379, 386 n.20 (1999) (“The [*Toolson*] Court relied entirely on the failure of Congress, in 30 years, to change the result in *Federal Baseball*.”); Gilbert Stein, 6-4-3 (*Double Play*)! *Two Teams Out: Contraction in Baseball*, 10 VILL. SPORTS & ENT. L.J. 1, 2 n.3 (2003) (describing *Toolson* as “explaining professional baseball leagues are still exempt from federal antitrust regulation because Congress has not changed legislation to place within the scope of antitrust laws after Supreme Court decision in *Federal Baseball Club of Baltimore*”).

several intervening decisions. Through these decisions, the Court limited the application of *Federal Baseball* and *Toolson* to only the business of baseball, refusing to extend the exemption to any other industries or sports. For instance, in the 1955 case of *United States v. Shubert*,⁸⁰ the Court discussed baseball's exemption in the context of an antitrust action brought against a theater company.⁸¹ In considering the baseball exemption, the *Shubert* Court stated that *Federal Baseball* dealt "with the business of baseball and nothing else."⁸² With respect to *Toolson*, the *Shubert* Court construed the opinion to be "a narrow application of the rule of stare decisis," insofar "as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."⁸³

Similarly, in *United States v. International Boxing Club*⁸⁴ — a companion case to *Shubert*⁸⁵ — the Supreme Court refused to extend the baseball exemption to professional boxing.⁸⁶ There, the Court noted that "*Toolson* neither overruled *Federal Baseball* nor necessarily reaffirmed all that was said in *Federal Baseball*,"⁸⁷ before holding that the baseball exemption was inapplicable to other types of local performance exhibitions.⁸⁸

The Court again refused to extend baseball's exemption two years later in *Radovich v. National Football League*.⁸⁹ *Radovich*, an antitrust action brought by a former professional football player against the National Football League ("NFL"), reached the Supreme Court following dismissals by the trial court and Ninth Circuit Court of Appeals on the basis of the *Federal Baseball* and *Toolson* precedents.⁹⁰ The Supreme Court reversed, extensively discussing *Federal Baseball* and *Toolson* in the process. In the course of this discussion, the Court repeatedly interpreted the two baseball decisions as exempting the

⁸⁰ *United States v. Shubert*, 348 U.S. 222 (1955).

⁸¹ *Id.* at 223.

⁸² *Id.* at 228.

⁸³ *Id.* at 230 (quoting *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953)). As discussed *infra*, *Shubert* thus considered *Toolson* to be an application of stare decisis only insofar as it reinterpreted *Federal Baseball* into a statement of congressional intent. See *infra* notes 268-70 and accompanying text.

⁸⁴ See generally *United States v. Int'l Boxing Club*, 348 U.S. 236 (1955) (deciding antitrust case arising from professional boxing).

⁸⁵ Tomlinson, *supra* note 8, at 266.

⁸⁶ *Int'l Boxing Club*, 348 U.S. at 242-43.

⁸⁷ *Id.* at 242.

⁸⁸ *Id.*

⁸⁹ *Radovich v. Nat'l Football League*, 352 U.S. 445, 451-52 (1957).

⁹⁰ *Id.* at 447.

“business of baseball.”⁹¹ In the process, the *Radovich* Court acknowledged that *Federal Baseball* “was of dubious validity,”⁹² and admitted that it would decide the case differently if being raised “for the first time upon a clean slate.”⁹³ Nevertheless, the Court refused to limit its prior baseball precedent beyond “the facts there involved, i.e., the business of organized professional baseball.”⁹⁴ The Court similarly declined to extend baseball’s antitrust exemption to the National Basketball Association a few years later in *Haywood v. National Basketball Association*.⁹⁵

Therefore, the Supreme Court considered *Federal Baseball* and *Toolson* on four separate occasions between 1955 and 1971, each time concluding that its prior precedent exempted the business of baseball from antitrust law. At no point did the Court find that its prior decisions exempted only a single facet of the baseball business, such as the reserve clause.

D. Flood v. Kuhn

Having decisively contained the *Federal Baseball* and *Toolson* precedents to the business of baseball in *Shubert*, *International Boxing Club*, *Radovich*, and *Haywood*, the Supreme Court directly confronted baseball’s antitrust status for the third and, to date, final time in the 1972 case of *Flood v. Kuhn*.⁹⁶ The suit was brought by Curt Flood, a former star outfielder for the St. Louis Cardinals who was traded against his will to the Philadelphia Phillies in 1969.⁹⁷ Upset over the

⁹¹ See *id.* at 452 (“*Federal [Baseball]* held the business of baseball outside the scope of the [Sherman] Act.”); *id.* at 450 (“*Federal [Baseball]* and *Toolson* . . . both involving the business of professional baseball . . .”); *id.* (stating that “In *Toolson* we continued to hold the umbrella over baseball”); *id.* at 451 (stating that “[t]he Court was careful to restrict *Toolson*’s coverage to baseball”).

⁹² *Id.* at 450.

⁹³ *Id.* at 452.

⁹⁴ *Id.* at 451.

⁹⁵ *Haywood v. Nat’l Basketball Ass’n*, 401 U.S. 1204, 1205-06 (1971) (finding that suit implicated issue “similar to the one on baseball’s reserve clause which our decisions exempting baseball from the antitrust laws have foreclosed”). Lower courts have subsequently refused to extend baseball’s antitrust exemption to professional hockey, *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 466 n.3 (E.D. Pa. 1972); professional golf, *Blalock v. Ladies Prof’l Golf Ass’n*, 359 F. Supp. 1260, 1263 (N.D. Ga. 1973); and professional tennis, *Gunter Harz Sports, Inc. v. U.S. Tennis Ass’n*, 665 F.2d 222, 223 (8th Cir. 1981). See Picher, *supra* note 8, at 14 n.53 (identifying cases).

⁹⁶ See generally *Flood v. Kuhn*, 407 U.S. 258 (1972) (deciding most recent challenge to baseball’s antitrust exemption).

⁹⁷ *Id.* at 264-65.

trade, and citing his long-standing business interests in St. Louis, Flood refused to play for the Phillies, instead requesting that baseball's commissioner Bowie Kuhn declare him a free agent and allow him to sign with the team of his choice.⁹⁸ Kuhn declined, citing the reserve clause in Flood's contract.⁹⁹ Flood filed suit against Kuhn and MLB shortly thereafter, alleging violations of federal and state antitrust law, and of the Thirteenth Amendment's prohibition of slavery.¹⁰⁰ After a bench trial, the Southern District of New York entered a judgment for the defendants pursuant to *Federal Baseball* and *Toolson*,¹⁰¹ and the Second Circuit Court of Appeals affirmed.¹⁰²

The Supreme Court affirmed as well, maintaining baseball's exemption by a 5–3 vote.¹⁰³ Justice Blackmun wrote the Court's majority opinion, beginning with what he would later describe as a "sentimental journey" through baseball history,¹⁰⁴ in which he named over eighty former baseball players while praising baseball's place as the "national pastime" enjoyed by millions of fans.¹⁰⁵ Justice Blackmun then provided a thorough review of the Court's prior precedent considering baseball's antitrust status, before turning to the merits of the case.¹⁰⁶

In considering the merits, Justice Blackmun made several observations regarding the baseball exemption. First, Justice Blackmun acknowledged that "baseball is a business and it is engaged in interstate commerce,"¹⁰⁷ thus repudiating the primary holding in *Federal Baseball*. Second, Justice Blackmun admitted that the baseball exemption was "an exception and an anomaly,"¹⁰⁸ but stressed that it

⁹⁸ *Id.* at 265.

⁹⁹ SNYDER, *supra* note 41, at 101-02.

¹⁰⁰ *Flood*, 407 U.S. at 265-66.

¹⁰¹ *See Flood v. Kuhn*, 316 F. Supp. 271, 285 (S.D.N.Y. 1970).

¹⁰² *See Flood v. Kuhn*, 443 F.2d 264, 268 (2d Cir. 1971). For a more complete history of the *Flood* litigation, *see generally* ALEX BELTH, *STEPPING UP: THE STORY OF ALL-STAR CURT FLOOD AND HIS FIGHT FOR BASEBALL PLAYERS' RIGHTS* (2006) (discussing history of case); ROBERT M. GOLDMAN, *ONE MAN OUT: CURT FLOOD VERSUS BASEBALL* (2008) (same); SNYDER, *supra* note 41 (same), and STUART L. WEISS, *THE CURT FLOOD STORY: THE MAN BEHIND THE MYTH* (2007) (same).

¹⁰³ *Flood*, 407 U.S. at 285.

¹⁰⁴ Roger I. Abrams, *Blackmun's List*, 6 VA. SPORTS & ENT. L.J. 181, 182 (2007) (discussing both source and inspiration for Justice Blackmun's list of players).

¹⁰⁵ *Flood*, 407 U.S. at 262-64. The players identified in Justice Blackmun's list ranged from luminaries such as Ty Cobb and Babe Ruth to the largely forgotten Germany Schaefer and Bobby Veach. *Id.* at 262-63.

¹⁰⁶ *Id.* at 269-81.

¹⁰⁷ *Id.* at 282.

¹⁰⁸ *Id.*

was an established aberration that the Court had recognized on five separate occasions over the course of more than a half a century, and one which rested “on a recognition and acceptance of baseball’s unique characteristics and needs.”¹⁰⁹ The opinion went on to emphasize that baseball had developed and expanded in reliance on the assumption that it was exempt from antitrust law, and expressed a fear that reversing the Court’s prior decisions would lead to retroactivity problems.¹¹⁰ In light of those considerations, the Court was “loath . . . to overturn [*Federal Baseball* and *Toolson*] judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and . . . has clearly evinced a desire not to disapprove them legislatively.”¹¹¹

Accordingly, the *Flood* majority adhered to *Federal Baseball* and *Toolson* and affirmed baseball’s antitrust exemption. Justice Blackmun closed his opinion by quoting *Toolson*’s affirmance 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.”¹¹²

E. The Curt Flood Act of 1998

After decades spent sitting on the sidelines, Congress finally addressed baseball’s antitrust status in 1998 by passing the Curt Flood Act (“CFA”).¹¹³ The CFA repealed baseball’s antitrust exemption in a single, limited respect, namely by allowing current major league players to file antitrust suits against MLB.¹¹⁴ Specifically, Section A of the CFA permits players to file antitrust suits “to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business,” but only so long as the lawsuits related to or affected “employment of major league baseball players.”¹¹⁵ Further, Section B expressly limits the Act, providing that “[n]o court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to”: (i) litigation initiated by amateur or minor league players, (ii) “any other matter relating to organized professional

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 283.

¹¹¹ *Id.* at 283-84.

¹¹² *Id.* at 285.

¹¹³ 15 U.S.C. § 26(b) (2006).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

baseball's minor leagues," (iii) lawsuits concerning "franchise expansion, location or relocation, [or] franchise ownership issues, including ownership transfers," (iv) the employment of umpires, or (v) the acts of any "persons not in the business of organized professional major league baseball."¹¹⁶

While some might read Section B of the CFA as congressional endorsement of a broad antitrust exemption (aside from labor disputes involving current MLB players), in reality the statute remains agnostic regarding the remaining scope of the exemption. Section B specifically states that future courts shall not rely on the CFA "as a basis for changing the application of the antitrust laws,"¹¹⁷ meaning that any then-existing precedent was unaffected by the statute. Because most of the conflicting precedents regarding the scope of the exemption had already been issued by 1998, as discussed in Part II, the CFA thus leaves the various judicial interpretations of the exemption untouched.¹¹⁸

Indeed, the CFA's legislative history reveals that Congress did not intend for the statute to adopt or reject any of the conflicting interpretations of the exemption's scope post-*Flood*. Specifically, during the Senate's deliberation over the bill, Senator Paul Wellstone noted that some courts had recently narrowed the scope of the baseball exemption, and asked for confirmation that the CFA would not affect these precedents.¹¹⁹ In response, the bill's co-sponsors, Senators Orrin Hatch and Patrick Leahy, confirmed that the Act was "intended to have no effect other than to clarify the status of major league players under the antitrust laws. With regard to all other context or other persons or entities, the law will be the same after passage of the Act as it is today."¹²⁰ Accordingly, the CFA does not implicate the scope of baseball's antitrust exemption as considered in this Article, aside from the fact that it permits antitrust suits to be filed by current major league players.¹²¹

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See *infra* Part II.

¹¹⁹ 145 CONG. REC. S9621 (daily ed. July 31, 1998) (statements of Sens. Wellstone, Hatch, and Leahy).

¹²⁰ *Id.*; see Tomlinson, *supra* note 8, at 286-87 (quoting comments made on floor of Senate by Senators Wellstone, Hatch, and Leahy); see also J. Philip Calabrese, *Antitrust and Baseball*, 36 HARV. J. ON LEGIS. 531, 537 n.46 (1999) (summarizing same); Stephen F. Ross, *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 CASE W. RES. L. REV. 133, 161 n.90 (2001) (same); Sullivan, *supra* note 8, at 1285 n.119 (same).

¹²¹ For a discussion of the CFA's impact on professional baseball, see generally

F. *The Supreme Court’s Baseball Trilogy Exempted the Business of Providing Baseball Exhibitions to the Public*

With the CFA having had a minimal effect on the scope of baseball’s antitrust exemption, the Supreme Court’s decisions in *Federal Baseball*, *Toolson*, and *Flood* remain the primary authority for construing the scope of the exemption. As the above review of the Supreme Court’s precedent reveals, and as discussed in greater detail below, the Court has generally exempted the business of baseball — and not any one single facet of that business — from antitrust law. More specifically, however, the Court has itself provided a framework for delineating the bounds of the exemption through its focus in both *Federal Baseball* and *Toolson* on the business of supplying baseball entertainment to the public.

First, as noted above, the central focus of Justice Holmes’s opinion in *Federal Baseball* was on the business of providing baseball exhibitions to the public.¹²² In his opinion, Justice Holmes provided a “summary statement of the nature of the business involved,” emphasizing the fact that baseball teams “play against one another in public exhibitions for money.”¹²³ Justice Holmes repeated this focus in the next paragraph, stating that “[t]he business is giving exhibitions of base ball.”¹²⁴ This focus on the specific business of providing exhibitions of baseball was central to Justice Holmes’s reasoning in *Federal Baseball*, providing the basis for his conclusion that the games themselves were “purely state affairs” and, thus, not of the requisite interstate nature for regulation under the Sherman Act.¹²⁵ Because each baseball game was located in only a single state, and because the only way to follow the actual play-by-play results of each game in real time was by being in attendance at the stadium, Justice Holmes thus reasoned that the business was intrastate, rather than interstate, in nature.¹²⁶

Toolson affirmed *Federal Baseball*’s focus on supplying baseball entertainment to the public. In the very first sentence of its opinion, the *Toolson* Court noted that *Federal Baseball* had “held that the business of providing public baseball games for profit between clubs of

Nathaniel Grow, *Reevaluating the Curt Flood Act of 1998*, 87 NEB. L. REV. 747 (2009).

¹²² See generally *supra* Part I.A (analyzing Supreme Court’s *Federal Baseball* opinion).

¹²³ *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200, 208 (1922).

¹²⁴ *Id.*

¹²⁵ See generally *supra* Part I.A (analyzing Supreme Court’s *Federal Baseball* opinion).

¹²⁶ See *supra* notes 51-57 and accompanying text.

professional baseball players was not within the scope of the federal antitrust laws.”¹²⁷ The *Toolson* majority then went on to affirm the judgments below “[w]ithout reexamination of the underlying issues . . . on the authority of [*Federal Baseball*]”¹²⁸ While the *Toolson* opinion ultimately reinterpreted *Federal Baseball* as holding that Congress had never intended for baseball to be regulated under the Sherman Act, the decision nevertheless confirms the original scope of the *Federal Baseball* decision as being focused on the business of supplying baseball exhibitions to the public.¹²⁹

Admittedly, none of the Supreme Court’s intervening decisions between *Toolson* and *Flood* discussing the baseball exemption emphasized the business of providing baseball entertainment.¹³⁰ Instead, these opinions simply stated that the exemption protected only the “business of baseball” from antitrust law. However, because none of these cases raised an issue of the exemption’s applicability to baseball’s commercial activities, there was no need for the Court to address the specific bounds of the exemption.¹³¹ Therefore, aside from indicating that the exemption generally shields the baseball business, and not simply one single facet of that business, these intervening opinions are not particularly relevant when ascertaining the proper scope of the baseball exemption.

Finally, *Flood* provides several pieces of additional support for an exemption protecting the business of providing baseball entertainment. Although the *Flood* Court did not explicitly focus its analysis on supplying baseball exhibitions to the public, as had the *Federal Baseball* and *Toolson* Courts, it did state that it would “adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball.”¹³² This 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*.¹³³ The *Flood*

¹²⁷ *Toolson v. N.Y. Yankees*, 346 U.S. 356, 357 (1953).

¹²⁸ *Id.*

¹²⁹ See *supra* notes 72-78 and accompanying text.

¹³⁰ See generally *supra* Part I.C (analyzing Supreme Court’s intervening decisions).

¹³¹ *Haywood v. Nat’l Basketball Ass’n*, 401 U.S. 1204, 1205-06 (1971) (considering antitrust action against National Basketball Association); *Radovich v. Nat’l Football League*, 352 U.S. 445, 452 (1957) (same with respect to professional football); *United States v. Int’l Boxing Club*, 348 U.S. 236, 243 (1955) (same with respect to professional boxing); *United States v. Shubert*, 348 U.S. 222, 228 (1955) (same with respect to theater company).

¹³² *Flood v. Kuhn*, 407 U.S. 258, 284 (1972).

¹³³ *McMahon & Rossi*, *supra* note 8, at 253 (arguing that because *Flood* was “decided as a matter of law on *stare decisis* grounds, [the opinion] add[s] little (if

opinion further reveals an appreciation of *Federal Baseball’s* focus on the provision of baseball entertainment, insofar as the *Flood* Court quoted Justice Holmes’s statement that “[t]he business is giving exhibitions of base ball.”¹³⁴ Similarly, other passages of the *Flood* majority opinion state that the exemption generally covers the “business of baseball.”¹³⁵

Moreover, while certainly not dispositive, Justice Blackmun’s opening and much-maligned ode to baseball history¹³⁶ also implies an appreciation of the exemption’s historical focus on the business of providing baseball entertainment to fans.¹³⁷ Specifically, Justice Blackmun discussed the sport’s standing as the “national pastime,”¹³⁸ noting that “[m]illions have known and enjoyed baseball.”¹³⁹ Similarly, when introducing his infamous list of star players from baseball’s past,¹⁴⁰ Justice Blackmun declared that these players “have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season.”¹⁴¹ Along these same lines, Justice Blackmun later quoted from an opinion issued by the district court in *Flood* emphasizing baseball’s “unique place in our American heritage,” as well as the “fervor and pride” with which fans follow the game, concluding that “[t]he game is on higher ground; it behooves every one to keep it there.”¹⁴²

anything) to understanding the antitrust contours of the exemption”).

¹³⁴ *Flood*, 407 U.S. at 269 (quoting *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200, 208 (1922)).

¹³⁵ See *infra* notes 245-47 and accompanying text.

¹³⁶ See, e.g., Jones, *supra* note 15, at 656 (“Blackmun’s opinion would turn out to be one of the more criticized Supreme Court opinions in history.”); Richard A. Posner, *Judicial Opinion Writing: Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1434 (1995) (describing Justice Blackmun’s ode to baseball as “sophomoric”).

¹³⁷ See Ross, *supra* note 8, at 174 (finding that Part I of *Flood* majority opinion “was necessary to establish the unique role that baseball plays in American culture”).

¹³⁸ *Flood*, 407 U.S. at 264.

¹³⁹ *Id.* at 263 n.4.

¹⁴⁰ See *supra* notes 104-05 and accompanying text.

¹⁴¹ *Flood*, 407 U.S. at 262.

¹⁴² *Id.* at 266-67 (quoting *Flood v. Kuhn*, 309 F. Supp. 793, 797 (S.D.N.Y. 1970)). In its entirety, the section of the district court opinion the Supreme Court quoted in *Flood* states:

Baseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage. Major league professional baseball is avidly followed by millions of fans, looked upon with fervor and pride and provides a special source of inspiration and competitive team spirit especially for the young.

Therefore, although *Flood* does not explicitly limit the baseball exemption to only those activities related to supplying baseball entertainment to the public, based on its emphasis on *stare decisis* and its sentimental discussion of baseball's impact on the United States, the opinion nevertheless evidences an appreciation of the exemption's historical focus on shielding the business of providing baseball exhibitions from antitrust law. Future courts interpreting the scope of the baseball antitrust exemption should thus ignore the divergent, conflicting standards developed by lower courts post-*Flood*, discussed below, and instead hold that the exemption for the "business of baseball" protects from antitrust law those business activities directly related to providing baseball entertainment to the public.

II. LOWER COURTS CONSTRUING THE SCOPE OF THE BASEBALL ANTITRUST EXEMPTION HAVE FAILED TO CREATE A CONSISTENT, WORKABLE STANDARD

Although the Supreme Court's opinions in *Federal Baseball*, *Toolson*, and *Flood* collectively establish that the baseball antitrust exemption extends to the "business of baseball" — and in particular, the business of providing baseball exhibitions to the public — subsequent lower courts nevertheless have failed to develop a uniform framework consistent with the Court's precedent. Instead, lower courts applying baseball's antitrust exemption have developed their own muddled, conflicting standards, resulting in three general categories of divergent precedent.¹⁴³ First, some courts have simply held that the "business of baseball" is exempt from antitrust law, while providing few, if any, limitations to the exemption.¹⁴⁴ In contrast, a second category of courts have taken a much more restrictive view of the baseball exemption, arguing that the Supreme Court has limited the exemption

Baseball's status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody's business. To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and an escape from the ordinary to most inhabitants of this land, were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations. The game is on higher ground; it behooves every one to keep it there.

Id.

¹⁴³ See generally McMahon & Rossi, *supra* note 8, at 243-48 (discussing various standards).

¹⁴⁴ See *infra* Part II.A.

to protect only the reserve clause.¹⁴⁵ Finally, two courts have rejected both the extremely broad and narrow views of the exemption, and instead held that the exemption applies only to baseball’s “unique characteristics and needs.”¹⁴⁶

A. *Decisions Holding that the “Business of Baseball” is Exempt from Antitrust Law*

A majority of lower courts considering the scope of the baseball antitrust exemption post-*Flood* have determined that the exemption generally protects the “business of baseball.” While two of these courts have suggested that the exemption would not protect activities attenuated to the baseball business, or agreements with nonbaseball entities, most courts have simply held that the business of baseball is exempt from antitrust law, without attempting to derive any limiting parameters for the exemption.¹⁴⁷

The Seventh Circuit Court of Appeals issued the first opinion construing the scope of the baseball exemption, post-*Flood*, in *Charles O. Finley & Co. v. Kuhn*.¹⁴⁸ In *Finley*, the owner of the American League’s Oakland Athletics sued then-MLB Commissioner Bowie Kuhn, alleging, inter alia, that Kuhn had violated federal antitrust law by disapproving Oakland’s proposed sales of Athletics pitchers Joe Rudi and Rollie Fingers to the Boston Red Sox and Athletics pitcher Vida Blue to the New York Yankees during the middle of the 1976 season for several million dollars in cash.¹⁴⁹ Finley attempted to avoid dismissal of his antitrust claims pursuant to the baseball exemption by arguing that *Flood* had limited the exemption to protect only baseball’s reserve system.¹⁵⁰ The Seventh Circuit rejected this argument concluding:

Despite the two references in the *Flood* case to the reserve system, it appears clear from the entire opinions in the [Supreme Court’s] three baseball cases, as well as from

¹⁴⁵ See *infra* Part II.B.

¹⁴⁶ See *infra* Part II.C.

¹⁴⁷ See *Major League Baseball v. Crist*, 331 F.3d 1177, 1183 (11th Cir. 2003) (stating that agreements with nonbaseball entities may not be covered by exemption); *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 541 n.51 (7th Cir. 1978) (suggesting that baseball exemption does not protect activities attenuated to baseball business).

¹⁴⁸ See generally *Charles O. Finley & Co.*, 569 F.2d 527 (considering antitrust challenge to disapproval of proposed player sales).

¹⁴⁹ *Id.* at 531.

¹⁵⁰ *Id.* at 540.

Radovich, that the Supreme Court intended to exempt the *business of baseball*, not any particular facet of that business, from the federal antitrust laws.¹⁵¹

However, the *Finley* court tempered its conclusion by noting in a footnote that “[w]e recognize that this exemption does not apply wholesale to all cases which may have some attenuated relation to the business of baseball.”¹⁵² The *Finley* court failed to elaborate on what might constitute such attenuated circumstances, instead simply citing the 1972 district court opinion in *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*,¹⁵³ a case in which an MLB team accused a concessions company of antitrust violations, and in which the antitrust exemption was not asserted.¹⁵⁴

Four years later, the Eleventh Circuit Court of Appeals similarly construed the exemption in *Professional Baseball Schools & Clubs, Inc. v. Kuhn*.¹⁵⁵ Specifically, the plaintiff — the owner of a minor league franchise in the Carolina League — alleged violations of federal antitrust law arising from: (i) baseball’s player assignment and franchise location systems, (ii) monopolization of the business of professional baseball, and (iii) league rules forbidding member teams from staging exhibitions against teams outside of the National Association of Professional Baseball Leagues (“National Association”).¹⁵⁶ In affirming the district court’s dismissal, the Eleventh Circuit noted “the exclusion of the business of baseball from the antitrust laws is well established.”¹⁵⁷ Without specifically considering the bounds of the exemption, the court then concluded that all of the alleged activities were exempt because they “plainly concern[ed] matters that are an integral part of the business of baseball.”¹⁵⁸

¹⁵¹ *Id.* at 541 (emphasis added).

¹⁵² *Id.* at 541 n.51.

¹⁵³ See generally *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 365 F. Supp. 235 (N.D. Cal. 1972) (considering antitrust challenge by MLB team against concessions company).

¹⁵⁴ See generally *id.* (never addressing baseball antitrust exemption).

¹⁵⁵ See generally *Prof'l Baseball Sch. & Clubs, Inc. v. Kuhn*, 693 F.2d 1085 (11th Cir. 1982) (broadly construing antitrust exemption).

¹⁵⁶ *Id.* at 1085. The National Association is the organization that governs minor league baseball. See Patrick S. Baldwin, Note, *Keeping Them Down on the Farm: The Possibility of a Class Action by Former Minor League Baseball Players Against Major League Baseball for Allowing Steroid Abuse*, 43 GA. L. REV. 1195, 1227 n.180 (2009).

¹⁵⁷ *Prof'l Baseball Sch. & Clubs*, 693 F.2d at 1085-86.

¹⁵⁸ *Id.* at 1086.

The Eastern District of Louisiana reached the same conclusion twelve years later in *New Orleans Pelicans Baseball, Inc. v. National Ass’n of Professional Baseball Leagues, Inc.*¹⁵⁹ *New Orleans Pelicans* arose out of the plaintiff’s unsuccessful attempt to purchase the minor league Charlotte Knights franchise and move it to New Orleans.¹⁶⁰ Specifically, after giving the plaintiff conditional approval to purchase and move the franchise, the National Association subsequently retracted that approval, giving priority to a later-filed, competing claim for the New Orleans market by the Denver Zephyrs minor league franchise.¹⁶¹ The district court dismissed the plaintiff’s claims under state and federal antitrust law, finding that the Supreme Court had exempted the “business of baseball” from antitrust law.¹⁶² The *New Orleans Pelicans* court did not attempt to ascertain the specific limits of the exemption.¹⁶³

The court in *McCoy v. Major League Baseball*¹⁶⁴ took the same approach the next year in a class action antitrust lawsuit filed in the aftermath of the 1994 players strike by baseball fans and owners of businesses in close proximity to MLB stadia.¹⁶⁵ Like the court in *New Orleans Pelicans*, the *McCoy* court read the *Federal Baseball, Toolson*, and *Flood* trilogy as establishing that the “business of baseball” was exempt from federal antitrust law, without defining any precise boundaries for the exemption.¹⁶⁶

The next court to adopt a broad interpretation of the baseball exemption was the Supreme Court of Minnesota in *Minnesota Twins Partnership v. State*.¹⁶⁷ The suit arose when the Minnesota Attorney General issued civil investigative demands as part of its investigation of possible of state antitrust law violations in the proposed sale and relocation of the American League’s Minnesota Twins franchise to North Carolina.¹⁶⁸ Finding that Minnesota antitrust law was

¹⁵⁹ See generally *New Orleans Pelicans Baseball, Inc. v. Nat’l Ass’n of Prof’l Baseball Leagues*, No. 93-253, 1994 WL 631144 (E.D. La. Mar. 1, 1994) (broadly interpreting baseball’s antitrust exemption).

¹⁶⁰ *Id.* at *1.

¹⁶¹ *Id.* at *1-2.

¹⁶² *Id.* at *8.

¹⁶³ *Id.* at *8-9.

¹⁶⁴ *McCoy v. Major League Baseball*, 911 F. Supp. 454 (W.D. Wash. 1995).

¹⁶⁵ *Id.* at 455-56.

¹⁶⁶ *Id.* at 457.

¹⁶⁷ See generally *Minn. Twins P’ship v. State*, 592 N.W.2d 847 (Minn. 1999) (broadly interpreting baseball’s antitrust exemption).

¹⁶⁸ *Id.* at 849.

interpreted consistently with federal antitrust law,¹⁶⁹ the *Minnesota Twins* court examined the Supreme Court's baseball trilogy, determining that "the *Flood* opinion is not clear about the extent of the conduct that is exempt from antitrust laws."¹⁷⁰ Despite this lack of clarity, the court elected to side with the "great weight of federal cases" and held that "the entire business of baseball" was exempt from antitrust law.¹⁷¹ Because "the sale and relocation of a baseball franchise . . . is an integral part of the business of professional baseball," the court determined the baseball exemption foreclosed the Attorney General's antitrust investigation.¹⁷²

Finally, the most recent examination of the scope of the baseball antitrust exemption came in *Major League Baseball v. Butterworth (Butterworth II)*.¹⁷³ *Butterworth II* involved the Florida Attorney General's issuance of civil investigative demands relating to potential antitrust violations arising from MLB's proposed contraction of two of its thirty franchises.¹⁷⁴ The district court undertook a comprehensive review of the relevant Supreme Court precedent,¹⁷⁵ concluding that the "business of baseball" was exempt from federal and state antitrust law.¹⁷⁶ The court then construed the proposed contraction to be within the "business of baseball," stating that "[i]t is difficult to conceive of a decision more integral to the business of major league baseball than the number of clubs that will be allowed to compete."¹⁷⁷

¹⁶⁹ *Id.* at 851.

¹⁷⁰ *Id.* at 854.

¹⁷¹ *Id.* (internal quotation marks omitted).

¹⁷² *Id.* at 856. Specifically, the *Minnesota Twins* court concluded that the civil investigative demands were outside the Attorney General's authority, insofar as the investigation could never result in an enforcement action. *Id.*

¹⁷³ *Major League Baseball v. Butterworth (Butterworth II)*, 181 F. Supp. 2d 1316 (N.D. Fla. 2001). *Butterworth II* was the second litigation involving then-Florida Attorney General Robert Butterworth implicating baseball's antitrust exemption. In the first case, *Butterworth v. Nat'l League of Profl Baseball Clubs (Butterworth I)*, 644 So. 2d 1021 (Fla. 1994), the Florida Supreme Court held that the baseball exemption was limited to only the reserve clause, as discussed *infra. Id.* at 1025; see *infra* notes 206-11 and accompanying text.

¹⁷⁴ *Butterworth II*, 181 F. Supp. 2d at 1318-19. MLB eventually dropped its contraction plans, and remains an association of thirty franchises today. See Marc Edelman, *Can Antitrust Law Save the Minnesota Twins? Why Commissioner Selig's Contraction Plan Was Never a Sure Deal*, 10 SPORTS LAW. J. 45, 46 (2003) (noting that MLB owners agreed to table their contraction plans for four years as part of 2002 collective bargaining agreement).

¹⁷⁵ *Butterworth II*, 181 F. Supp. 2d at 1323-31.

¹⁷⁶ *Id.* at 1322.

¹⁷⁷ *Id.* at 1332.

The Attorney General appealed the *Butterworth II* case to the Eleventh Circuit, where it took the caption *Major League Baseball v. Crist*.¹⁷⁸ Noting that the scope of the baseball exemption had been “the subject of extensive litigation over the years,” the *Crist* court ultimately adopted the district court’s interpretation of the relevant authority, finding that the exemption broadly protected the “business of baseball.”¹⁷⁹ Although the court held that the exemption was not unlimited — in particular stating that the “exemption has not been held to immunize the dealings between professional baseball clubs and third parties”¹⁸⁰ — the court nevertheless believed it clear that the proposed contraction fell within the scope of the exemption, concluding 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.”¹⁸¹

Therefore, seven different courts post-*Flood* have generally construed baseball’s antitrust exemption to protect the “business of baseball” from federal antitrust law. Although two of these courts did acknowledge potential limitations on the scope of baseball’s immunity,¹⁸² none of the courts devoted much effort to delineating the boundaries of the exemption, and thus their opinions give future courts wrestling with the proper scope of the exemption little guidance upon which to rely.

B. Decisions Restricting the Baseball Antitrust Exemption to Only the Reserve Clause

In contrast to those decisions holding that baseball’s exemption broadly protects the “business of baseball” from antitrust law, three courts have taken an extremely restrictive view of the exemption, finding that it shields only baseball’s reserve clause. As previously discussed, the reserve clause was a provision that, until the mid-1970s, was included in the contracts of all players within organized baseball, restricting the players from negotiating with anyone but their current teams.¹⁸³ Because major league players ultimately freed themselves of the constraints of the reserve clause through arbitration following the

¹⁷⁸ *Major League Baseball v. Crist*, 331 F.3d 1177 (11th Cir. 2003).

¹⁷⁹ *Id.* at 1179, 1183.

¹⁸⁰ *Id.* at 1183. For more discussion of this potential limitation, see *infra* Part III.D.

¹⁸¹ *Crist*, 331 F.3d at 1179, 1183.

¹⁸² See *supra* notes 152-54, 180 and accompanying text.

¹⁸³ See *supra* note 15 and accompanying text.

1975 season,¹⁸⁴ the implication of these decisions is that baseball's antitrust exemption is now effectively obsolete.

The first court to limit the scope of baseball's antitrust exemption to the reserve clause was the Eastern District of Pennsylvania in the 1993 case of *Piazza v. Major League Baseball*.¹⁸⁵ *Piazza* arose after the aborted sale of the San Francisco Giants to an investment group led by Pennsylvania businessmen Vincent Piazza and Vincent Tirendi for \$115 million.¹⁸⁶ Piazza and Tirendi intended to move the Giants from San Francisco to Tampa Bay, Florida.¹⁸⁷ MLB rejected the proposed sale, citing concerns arising from its background check of Piazza and Tirendi.¹⁸⁸ As a result, the Giants were instead sold for only \$100 million to another investor group that kept the team in San Francisco.¹⁸⁹ Piazza and Tirendi sued MLB alleging a variety of federal and state claims, including violations of Sections One and Two of the Sherman Antitrust Act.¹⁹⁰ MLB promptly moved to dismiss the lawsuit, asserting in part that it was exempt from antitrust liability by virtue of the Supreme Court's decisions in *Federal Baseball*, *Toolson*, and *Flood*.¹⁹¹

The *Piazza* court denied MLB's motion to dismiss with respect to the antitrust claims, finding that the baseball antitrust exemption did not apply to the facts before it.¹⁹² Rather, the court determined that baseball's exemption was limited solely to the reserve clause.¹⁹³ The court reached this conclusion after reexamining the Supreme Court's three baseball-related cases, determining that each included allegations involving only the reserve clause. For example, in considering the Supreme Court's decision in *Federal Baseball*, along with the underlying decision from the D.C. Circuit,¹⁹⁴ the *Piazza* court found that the "gravamen of [the complainant's] case was the alleged anticompetitive impact of what is known as the 'reserve clause' in the yearly contracts of players" in the AL and NL.¹⁹⁵ Similarly, the *Piazza*

¹⁸⁴ See *supra* note 16 and accompanying text.

¹⁸⁵ See generally *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993) (limiting baseball's antitrust exemption to reserve clause).

¹⁸⁶ *Id.* at 422.

¹⁸⁷ *Id.* at 421-22.

¹⁸⁸ *Id.* at 422-23.

¹⁸⁹ *Id.* at 423.

¹⁹⁰ *Id.* at 423-24.

¹⁹¹ *Id.* at 421.

¹⁹² *Id.* at 441.

¹⁹³ *Id.* at 421.

¹⁹⁴ *Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Balt., Inc.*, 269 F. 681 (D.C. Cir. 1920).

¹⁹⁵ *Piazza*, 831 F. Supp. at 434 (citing *National League*, 269 F. at 687-88).

court briefly considered *Toolson*, finding that the case also involved alleged harms from the reserve clause.¹⁹⁶ Finally, the *Piazza* court determined that the reserve clause was again challenged in *Flood*.¹⁹⁷ Accordingly, the court concluded that “[i]n each of the three cases in which the Supreme Court directly addressed the exemption, the factual context involved the reserve clause.”¹⁹⁸

From there, the *Piazza* court went on to argue that *Flood* had undermined the *Federal Baseball* and *Toolson* precedents. Specifically, *Piazza* emphasized the statement in *Flood* that “[p]rofessional baseball is a business . . . engaged in interstate commerce,”¹⁹⁹ finding that this passage directly repudiated *Federal Baseball* because that case held that exhibitions of baseball were not subject to antitrust law because they were neither interstate in nature, nor commerce.²⁰⁰ Therefore, the *Piazza* court determined that *Flood* had stripped *Federal Baseball* of “any precedential value . . . beyond the particular facts there involved, i.e., the reserve clause.”²⁰¹ The *Piazza* court reached the same conclusion regarding *Toolson*, which it viewed as little more than a narrow application of the *Federal Baseball* precedent.²⁰²

With *Federal Baseball* and *Toolson* having been limited to their perceived facts (i.e., an exemption covering only the reserve clause), the *Piazza* court next turned to the Supreme Court’s decision in *Flood* to determine the remaining scope of baseball’s exemption. The *Piazza* court focused its analysis on the fact that the majority opinion in *Flood* had specifically referenced MLB’s reserve system four times,²⁰³ finding it “clear” that the *Flood* Court had intended to limit the exemption to the reserve clause.²⁰⁴ Accordingly, having concluded that *Federal Baseball*, *Toolson*, and *Flood* collectively established a continuing exemption protecting only baseball’s reserve clause, the *Piazza* court held that the antitrust exemption was inapplicable to the facts before it, as the reserve clause was not at issue.²⁰⁵

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 435.

¹⁹⁸ *Id.*

¹⁹⁹ *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

²⁰⁰ See *supra* notes 45-50 and accompanying text.

²⁰¹ *Piazza*, 831 F. Supp. at 436. The *Piazza* court’s holding was based on a distinction between rule-based and result-based stare decisis, a distinction which the court believed led to the conclusion that *Federal Baseball* and *Toolson* had been restricted to their facts. *Id.* at 437-38.

²⁰² *Id.* at 436.

²⁰³ *Id.* at 437.

²⁰⁴ *Id.* at 436.

²⁰⁵ *Id.* at 438.

Following *Piazza's* novel limitation of baseball's antitrust exemption, courts in two subsequent cases shortly thereafter followed suit by similarly restricting baseball's antitrust exemption to only the reserve clause. First, in *Butterworth v. National League of Professional Baseball Clubs (Butterworth I)*,²⁰⁶ the Supreme Court of Florida considered whether the baseball exemption prevented Florida's Attorney General from issuing civil investigative demands to MLB as part of an antitrust investigation arising out of the same failed attempt to bring the San Francisco Giants to Tampa Bay that was at issue in *Piazza*.²⁰⁷ The *Butterworth I* court examined *Piazza* and found its interpretation of *Flood* to be persuasive. Specifically, *Butterworth I* agreed with the *Piazza* court that *Flood* "seriously undercut[] the precedential value of both *Federal Baseball* and *Toolson*"²⁰⁸ and, therefore, had limited both cases to an exemption protecting only the reserve clause.²⁰⁹ The *Butterworth I* majority also followed *Piazza* by similarly focusing on *Flood's* passing references to the reserve clause,²¹⁰ concluding that *Flood* should be read as limiting the baseball exemption to only the reserve system.²¹¹

A year after *Butterworth I*, the Second District Court of Appeal of Florida heard *Morsani v. Major League Baseball*, an antitrust lawsuit arising out of other failed attempts to bring an MLB team to Tampa Bay.²¹² In particular, the *Morsani* plaintiffs alleged, inter alia, that MLB had violated federal and state antitrust laws by blocking their attempted purchase and relocation of the Minnesota Twins in 1984 and the Texas Rangers in 1988, as well as by foiling an attempt to obtain an expansion franchise for Tampa Bay in 1993.²¹³ In ruling that baseball's antitrust exemption extended to only the reserve system, the *Morsani* court did not undertake an analysis of either the Supreme Court's trilogy of cases or the *Piazza* decision. Instead, it simply deferred to the Florida Supreme Court's binding authority in *Butterworth I*.²¹⁴

²⁰⁶ *Butterworth v. Nat'l League of Prof'l Baseball Clubs (Butterworth I)*, 644 So. 2d 1021 (Fla. 1994).

²⁰⁷ *Id.* at 1022.

²⁰⁸ *Id.* at 1025.

²⁰⁹ *Id.* at 1024.

²¹⁰ *Id.* at 1025.

²¹¹ *Id.* ("Based upon the language and the findings in *Flood*, we come to the same conclusion as the *Piazza* court: baseball's antitrust exemption extends only to the reserve system.").

²¹² *Morsani v. Major League Baseball*, 663 So. 2d 653, 655 (Fla. Dist. Ct. App. 1995).

²¹³ *Id.* at 655-56.

²¹⁴ *Id.* at 657.

Therefore, those courts limiting the baseball exemption to only the reserve clause have generally based their opinions on a narrow interpretation of the Supreme Court’s baseball trilogy. Given that it was the first time that a court had specifically held that the Supreme Court’s baseball trilogy was limited to an exemption covering only the reserve clause, the *Piazza* opinion has been quite controversial. The decision has generated a split of opinion among scholars, with some commentators concluding that the case was properly decided,²¹⁵ while others have suggested that the opinion may be “intellectually infirm”²¹⁶ or “flawed.”²¹⁷ This Article asserts that the critics of the *Piazza* opinion have the better argument, for the reasons discussed in Part III.A below.

C. *Decisions Adopting a “Unique Characteristics and Needs” Standard for the Exemption*

Finally, two courts have rejected both the extremely broad and restrictive views of baseball’s antitrust exemption adopted by the lower courts discussed above, and instead determined that while the exemption shields more than simply the reserve clause from antitrust law, it is not so expansive as to protect all aspects of the business of baseball. Specifically, these courts have drawn upon a single passage in *Flood* when holding that the baseball exemption is limited to the sport’s “unique characteristics and needs.”²¹⁸ However, even these courts have themselves been unable to agree on a uniform application of their common standard.

The first court to adopt such an approach was the United States District Court for the Southern District of Texas in the 1982 case of *Henderson Broadcasting Corp. v. Houston Sports Ass’n*.²¹⁹ In *Henderson*, a Houston radio station alleged that the Houston Astros had violated both federal and state antitrust law by canceling the station’s contract to broadcast Astros games in order to give a different radio station

²¹⁵ See, e.g., Burns, *supra* note 8, at 532-34 (arguing that *Piazza* was correctly decided); Lafferty, *supra* note 8, at 1288 (same); Nathanson, *supra* note 8, at 6 (same); Tomlinson, *supra* note 8, at 310 (same); see also Mack & Blau, *supra* note 8, at 212 (reaching same conclusion several months prior to *Piazza* decision).

²¹⁶ MICHAEL J. COZZILLO & MARK S. LEVINSTEIN, *SPORTS LAW: CASES AND MATERIALS* 342 (1997).

²¹⁷ Scibilia, *supra* note 8, at 416-17; see also Guarisco, *supra* note 8, at 661-62; McMahon & Rossi, *supra* note 8, at 255-56; Weinberger, *supra* note 8, at 88.

²¹⁸ *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

²¹⁹ *Henderson Broad. Corp. v. Hous. Sports Ass’n*, 541 F. Supp. 263 (S.D. Tex. 1982).

exclusive broadcast rights in Houston.²²⁰ In its defense, the Astros argued that the Supreme Court's decisions in *Federal Baseball*, *Toolson*, and *Flood* exempted its actions.²²¹ The *Henderson* court disagreed, citing *Flood* for the proposition that the exemption was intended to protect only baseball's "unique characteristics and needs."²²² As a result, the exemption was held to shield "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."²²³ Because "[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," the court concluded that the baseball exemption did not shield the Astros from antitrust liability.²²⁴

Ten years later in *Postema v. National League of Professional Baseball Clubs*, the Southern District of New York itself adopted a limited view of baseball's antitrust exemption.²²⁵ In *Postema*, a former female minor league umpire filed suit asserting both employment discrimination and state law antitrust claims arising from her allegedly wrongful termination.²²⁶ In analyzing the claim under state antitrust law, the *Postema* court considered whether the baseball antitrust exemption had preempted state antitrust regulation of professional baseball, concluding that preemption would only arise if the state law conflicted with the federal exemption.²²⁷ The court considered the Supreme Court's decisions in *Federal Baseball*, *Toolson*, and *Flood*, and determined that the exemption only immunized baseball "from antitrust challenges to its league structure and its reserve system . . . [not] anti-competitive behavior in every context in which it operates."²²⁸ Thus, because "[a]nti-competitive conduct toward umpires is not an essential part of baseball" the court concluded that "the baseball exemption does not encompass umpire employment relations," enabling *Postema* to proceed with her state antitrust allegation.²²⁹

²²⁰ *Id.* at 264.

²²¹ *See id.*

²²² *Id.* at 268-69.

²²³ *Id.* at 265.

²²⁴ *Id.* at 269.

²²⁵ *Postema v. Nat'l League of Prof'l Baseball Clubs*, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992).

²²⁶ *Id.* at 1477.

²²⁷ *Id.* at 1488.

²²⁸ *Id.* at 1488-89.

²²⁹ *Id.*

Therefore, although the *Houston Broadcasting* and *Postema* courts both adopted a “unique characteristics and needs” standard for baseball’s antitrust exemption, they did not agree on exactly how that standard should apply. Specifically, the court in *Henderson Broadcasting* suggested that matters involving umpires would fall within the scope of the exemption,²³⁰ while the *Postema* court nevertheless held that MLB’s relations with its umpires are not exempt from federal antitrust law.²³¹

III. FUTURE COURTS SHOULD REJECT THE FLAWED EXISTING LOWER COURT PRECEDENT

Despite the varied lower courts approaches to construing baseball’s antitrust exemption, none of these approaches have established a satisfactory standard for future courts to apply when determining the scope of the exemption. Courts limiting the exemption to the reserve clause or baseball’s “unique characteristics and needs” have generally misconstrued the Supreme Court’s relevant precedent, resulting in overly narrow interpretations of the exemption. Meanwhile, while the majority of opinions holding that the “business of baseball” is exempt from antitrust law are generally consistent with the Supreme Court’s precedent, these opinions nevertheless fail to provide any standard for determining whether a particular business practice falls within the scope of the exemption. Notably, these courts have failed to appreciate the Supreme Court’s specific focus on the business of providing baseball exhibitions to the public, a focus that was the basis for the *Federal Baseball* decision and then explicitly affirmed in *Toolson*. Therefore, future courts analyzing the scope of the exemption should reject each of the prior lower court approaches and instead hold that only those activities directly related to the business of providing baseball entertainment to the public are exempt from antitrust law.

A. *The Decisions Limiting Baseball’s Antitrust Exemption to Only the Reserve Clause Were Wrongly Decided*

As an initial matter, those opinions limiting baseball’s antitrust exemption to the reserve clause are fundamentally flawed. Most notably, the court in *Piazza v. Major League Baseball* — the first court to limit the exemption to the reserve clause — erred in several

²³⁰ *Henderson Broad. Corp. v. Hous. Sports Ass’n*, 541 F. Supp. 263, 269 (S.D. Tex. 1982).

²³¹ *Postema*, 799 F. Supp. at 1489.

respects.²³² First, the *Piazza* court misread *Flood*, wrongly interpreting the opinion as holding that only the reserve clause was exempt, when in reality the decision provides no such limitation. Second, the *Piazza* court failed to appreciate that *Toolson* provided a new, broader justification for baseball's antitrust exemption untouched by *Flood*, and thus cannot be dispatched simply as a routine application of the *Federal Baseball* precedent. Finally, *Piazza* incorrectly determined that *Federal Baseball* and *Toolson* each involved only the reserve clause, when in reality both cases included other allegations of anticompetitive conduct.

Both *Butterworth I*²³³ and *Morsani*²³⁴ suffer from the same flaws as *Piazza*. As in *Piazza*, the *Butterworth I* court misread *Flood*, overemphasizing the opinion's few passing references to the reserve clause.²³⁵ Likewise, the *Butterworth I* court also failed to appreciate that *Toolson* had reformulated *Federal Baseball* and thus was not controverted by *Flood*.²³⁶ Meanwhile, because the *Morsani* court simply deferred to *Butterworth I*, it is by implication flawed for the same reasons as the other two cases. Therefore, although the discussion below specifically considers the analysis in *Piazza*, it applies with equal force to both *Butterworth I* and *Morsani*.

1. The *Piazza* Court Misinterpreted *Flood*

First, the *Piazza* court's conclusion that baseball's antitrust exemption protects only the reserve clause is flawed because the *Piazza* court misconstrued the intent and holding of the Supreme Court's majority opinion in *Flood v. Kuhn*. In particular, the *Piazza* court concluded that *Flood* "made clear" that the baseball exemption was "limited to the reserve clause."²³⁷ The *Piazza* court premised this finding on the fact that the *Flood* majority opinion specifically mentions the "reserve clause at least *four* times."²³⁸ For example, *Piazza* emphasized the *Flood* Court's reference to the reserve clause in the opening sentence of its opinion,²³⁹ and quoted three other

²³² See generally *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993) (erroneously limiting baseball's antitrust exemption to reserve clause).

²³³ *Butterworth I*, 644 So. 2d 1021 (Fla. 1994).

²³⁴ *Morsani v. Major League Baseball*, 663 So. 2d 653 (Fla. Dist. Ct. App. 1995).

²³⁵ See *supra* notes 206-11 and accompanying text.

²³⁶ See *supra* notes 206-11 and accompanying text.

²³⁷ *Piazza*, 831 F. Supp. at 436 ("Thus in 1972, the Supreme Court made clear that the *Federal Baseball* exemption is limited to the reserve clause.").

²³⁸ *Id.* at 437.

²³⁹ *Flood* begins by stating: "For the third time in 50 years the Court is asked

references to the reserve system in *Flood*.²⁴⁰ Based on these references, *Piazza* held that *Flood* had limited the antitrust exemption to protect only the reserve clause.²⁴¹

The *Piazza* court read too much into *Flood*'s few passing references to baseball's reserve system. Because the reserve clause was the sole anticompetitive restraint at issue in the case, it was only natural that the *Flood* majority would reference the clause in its opinion.²⁴² As one subsequent court has noted, “[t]he reserve clause was merely the incident-driven catalyst for the Court’s inquiry.”²⁴³ Such references do not mean that the Court intended to limit the scope of the baseball exemption to only the reserve clause. Indeed, nowhere in *Flood* did the Court specifically express its intent to limit the baseball exemption to the reserve clause.²⁴⁴

In fact, one can just as easily create a list of passages from *Flood* that indicate that the exemption broadly applies to the business of baseball, and not simply the reserve clause. Most significant among these references is the closing passage of *Flood*, which stated:

We repeat for this case what was said in *Toolson*: “Without re-examination of the underlying issues, the (judgment) below (is) affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, *supra*, so far as that decision determines that Congress had no

specifically to rule that professional baseball's reserve system is within the reach of the federal antitrust laws.” *Flood v. Kuhn*, 407 U.S. 258, 259 (1972).

²⁴⁰ *Piazza* quoted the following passages from *Flood*: “[B]aseball was left alone to develop for [three decades] upon the understanding that the reserve system was not subject to existing antitrust laws”; “Congress as yet has had no intention to subject baseball's *reserve system* to the reach of the antitrust statutes”; and “with its *reserve system* enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and anomaly.” *Piazza*, 831 F. Supp. at 436 (quoting *Flood*, 407 U.S. at 273-74, 282, 283).

²⁴¹ See *id.* at 438 (stating that “[f]or these reasons, I conclude that the antitrust exemption created by *Federal Baseball* is limited to baseball's reserve system”).

²⁴² See generally *Flood*, 407 U.S. 258 (considering antitrust challenge to reserve clause).

²⁴³ *New Orleans Pelicans Baseball, Inc. v. Nat'l Ass'n of Prof'l Baseball Leagues*, No. 93-253, 1994 WL 631144, at *9 n.4 (E.D. La. Mar. 1, 1994).

²⁴⁴ See generally *Flood*, 407 U.S. 258 (failing to expressly limit scope of baseball's antitrust exemption to reserve clause); see also *Butterworth II*, 181 F. Supp. 3d 1316, 1327 (N.D. Fla. 2001) (“Not once did the [*Flood*] Court intimate in any way that it was only the reserve clause that was exempt.”).

intention of including the *business of baseball* within the scope of the federal antitrust laws.”²⁴⁵

Similarly, the *Flood* majority opinion stated, “since 1922 *baseball* . . . has been allowed to develop and to expand unhindered by federal legislative action,”²⁴⁶ and noted that it would “adhere once again to *Federal Baseball* and *Toolson* and to their application to *professional baseball*.”²⁴⁷

Also instructive in this regard is the *Flood* majority opinion’s review of the Supreme Court’s prior precedent considering baseball’s antitrust status.²⁴⁸ Nowhere in this summary does *Flood* specifically construe an earlier opinion as exempting only the reserve clause.²⁴⁹ Instead, the opinion quotes several prior opinions construing the exemption as generally covering the business of baseball. For example, *Flood* noted that in *Toolson* the Court had held that “Congress had no intention to include *baseball* within the reach of the federal antitrust laws.”²⁵⁰ Then while reviewing *Shubert*,²⁵¹ *Flood* praised the Court’s “meticulous[.]” analysis before quoting it for the proposition that *Federal Baseball* dealt “with the *business of baseball* and nothing else.”²⁵² Finally, the *Flood* Court quoted the passage in *Radovich*²⁵³ “specifically limit[ing] the rule . . . established [in *Federal Baseball* and *Toolson*] to the facts there involved, i.e., the *business of organized professional baseball*.”²⁵⁴

Along these same lines, the *Flood* Court cited two more recent lower court cases, both of which applied MLB’s antitrust exemption to allegedly anticompetitive conduct beyond the reserve clause. First,

²⁴⁵ *Flood*, 407 U.S. at 285 (emphasis added) (quoting *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953)).

²⁴⁶ *Id.* at 283 (emphasis added).

²⁴⁷ *Id.* at 284 (emphasis added).

²⁴⁸ *Id.* at 269-82.

²⁴⁹ *See id.* At one point in the *Flood* majority opinion, Justice Blackmun did identify four primary factors supporting the Court’s opinion in *Toolson*, including “(b) The fact that baseball was left alone to develop for [three decades] upon the understanding that the reserve system was not subject to existing federal antitrust laws.” *Id.* at 274. However, that sentence was quickly followed with the observation that “[t]he emphasis in *Toolson* was on the determination . . . that Congress had no intention to include *baseball* within the reach of the federal antitrust laws.” *Id.* (emphasis added); *see also Butterworth II*, 181 F. Supp. 2d at 1327 n.11 (noting same observation in *Flood*).

²⁵⁰ *Flood*, 407 U.S. at 274 (emphasis added).

²⁵¹ *United States v. Shubert*, 348 U.S. 222 (1955).

²⁵² *Flood*, 407 U.S. at 275 (emphasis added) (quoting *Shubert*, 348 U.S. at 228).

²⁵³ *Radovich v. Nat’l Football League*, 352 U.S. 445, 451 (1957).

²⁵⁴ *Flood*, 407 U.S. at 279 (emphasis added).

Flood cited the Second Circuit Court of Appeals’s opinion in *Salerno v. American League of Professional Baseball Clubs*, a case decided only two years earlier, in which the court dismissed an antitrust suit brought by American League umpires under the authority of *Federal Baseball* and *Toolson*, even though the reserve clause was not at issue.²⁵⁵ Similarly, *Flood* also cited *State v. Milwaukee Braves, Inc.*,²⁵⁶ a case in which the Wisconsin Supreme Court held the proposed move of the Milwaukee Braves to Atlanta exempt from antitrust law on the basis of the Supreme Court’s two baseball opinions despite the reserve clause again not being at issue.²⁵⁷ *Flood*’s citations of *Salerno* and *Milwaukee Braves* without criticism thus illustrates that the Court understood that the baseball exemption applied to a variety of aspects of the baseball business — including umpire relations and franchise relocations — beyond simply the reserve clause.²⁵⁸ Indeed, had the Court intended to veer from the commonly understood meaning of its prior precedent, it would have recognized the need to do so expressly.

Therefore, the entirety of the *Flood* majority opinion simply does not support the *Piazza* court’s conclusion that *Flood* “clearly” limited baseball’s antitrust exemption to the reserve clause. Despite the few passing references to baseball’s reserve system in *Flood*, a review of the majority opinion in its entirety does not evidence the Court’s intent to limit baseball’s exemption to the reserve clause, but rather reveals that the Court intended to maintain a broader exemption for the baseball business.

2. The *Piazza* Court Failed to Appreciate the Significance of *Toolson*

In addition to misinterpreting *Flood*, the *Piazza* court also failed to appreciate the significance of *Toolson*. Far from simply being “a narrow application of the doctrine of *stare decisis*,” as suggested in *Piazza*, *Toolson* actually reinterpreted *Federal Baseball*, providing a new basis for the baseball exemption.²⁵⁹ *Toolson* thus cannot simply be dispatched along with *Federal Baseball* on the basis of *Flood*, as the

²⁵⁵ See generally *Salerno v. Am. League of Prof'l Baseball Clubs*, 429 F.2d 1003 (2d Cir. 1970) (considering antitrust challenge not involving reserve clause).

²⁵⁶ *State v. Milwaukee Braves, Inc.*, 144 N.W.2d 1 (Wis. 1966).

²⁵⁷ *Id.* at 2, 15, 18.

²⁵⁸ See *Butterworth II*, 181 F. Supp. 2d 1316, 1327 (N.D. Fla. 2001) (noting same with respect to *Milwaukee Braves*).

²⁵⁹ *Piazza v. Major League Baseball*, 831 F. Supp. 420, 436 (E.D. Pa. 1993) (quoting *Flood v. Kuhn*, 407 U.S. 258, 276 (1972)); see also *supra* notes 72-78 and accompanying text.

Piazza court believed. To the contrary, *Flood* in fact explicitly affirmed *Toolson*'s reinterpretation and expansion of *Federal Baseball*.²⁶⁰ Therefore, *Toolson* remains fully binding authority, undermining *Piazza*'s attempt to limit the exemption.

While the *Piazza* court may be correct that *Flood*'s acknowledgement that "[p]rofessional baseball is a business . . . engaged in interstate commerce"²⁶¹ undermined the reasoning of *Federal Baseball*,²⁶² this acknowledgement did not disturb the fundamental holding of *Toolson*. Although *Toolson* affirmed baseball's antitrust exemption on the authority of *Federal Baseball*,²⁶³ it did not rely on the explicit reasoning of *Federal Baseball*, which had held that exhibitions of baseball were not interstate commerce.²⁶⁴ Indeed, the majority in *Toolson* never opined on baseball's status as interstate commerce.²⁶⁵ Rather, the one-paragraph majority opinion in *Toolson* reformulated the *Federal Baseball* holding, concluding: "Without reexamination of the underlying issues, 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."²⁶⁶ Thus, the *Toolson* Court premised its decision on a new interpretation of *Federal Baseball*, construing the case as having held that Congress never intended to regulate baseball under the Sherman Act.

Failing to appreciate that *Toolson* had fundamentally altered the basis for baseball's antitrust exemption, *Piazza* minimized the case by quoting *Flood* for the proposition that *Toolson* was simply "a narrow

²⁶⁰ See *infra* note 270 and accompanying text.

²⁶¹ *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

²⁶² *Piazza*, 831 F. Supp. at 436. However, as noted by the district court in *Butterworth II*, the *Flood* Court itself had stated that the baseball aberration, presumably including *Federal Baseball*, was "fully entitled to the benefit of stare decisis." *Butterworth II*, 181 F. Supp. 2d at 1329 (quoting *Flood*, 407 U.S. at 282); see also *Flood*, 407 U.S. at 283-84 (stating that "[w]e continue to be loath, 50 years after *Federal Baseball* . . . to overturn [that decision] judicially when Congress, by its positive inaction, has allowed [the decision] to stand for so long").

²⁶³ *Toolson v. N.Y. Yankees*, 346 U.S. 356, 356-57 (1953).

²⁶⁴ See *supra* notes 45-50 and accompanying text; see also *Salerno v. Am. League of Prof'l Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970) ("But 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.").

²⁶⁵ See *Sica*, *supra* note 8, at 386 n.701 (noting that *Toolson* failed "to discuss the rationale of *Federal Baseball*"); see also *Toolson*, 346 U.S. at 357.

²⁶⁶ *Toolson*, 346 U.S. at 357 (emphasis added).

application of the doctrine of *stare decisis*.²⁶⁷ Although it is true that the Supreme Court had described *Toolson* in this manner — in both *Flood* and *Shubert*²⁶⁸ — the *Piazza* court failed to place this quotation in the proper context. Read in its entirety, the passage from which the quotation originates discussed the fact that *Toolson* had “adhered to *Federal Base Ball* ‘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.’ In short, *Toolson* was a narrow application of the rule of *stare decisis*.”²⁶⁹ In other words, the *Shubert* and *Flood* Courts did not interpret *Toolson* as a simple application of the *Federal Baseball* holding that baseball was not interstate commerce. Instead, both Courts considered *Toolson* to be an application of *stare decisis* only insofar as it reinterpreted *Federal Baseball* into a statement of Congressional intent.

Indeed, *Piazza* wholly neglected to acknowledge the concluding passage of the *Flood* majority opinion, which explicitly affirmed *Toolson*’s reinterpretation of *Federal Baseball*.²⁷⁰ Nor did the *Piazza* court acknowledge that the *Flood* Court had stated it was “loath . . . almost two decades after *Toolson*, to overturn [that decision] judicially when Congress, by its positive inaction, has allowed th[is] decision[] to stand for so long and . . . has clearly evinced a desire not to disapprove [it] legislatively.”²⁷¹

Therefore, far from overruling *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*. Instead, *Toolson* remains

²⁶⁷ *Piazza*, 831 F. Supp. at 436 (quoting *Flood*, 407 U.S. at 276).

²⁶⁸ *United States v. Shubert*, 348 U.S. 222, 229-30 (1955).

²⁶⁹ *Flood v. Kuhn*, 407 U.S. 258, 275-76 (1972) (quoting *Shubert*, 348 U.S. 228-30).

²⁷⁰ Specifically, as discussed above, the *Flood* Court concluded its opinion in part by stating:

We repeat for this case what was said in *Toolson*: “Without re-examination of the underlying issues, the [judgment] below [is] affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, *supra*, 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.”

Flood, 407 U.S. at 285 (alterations in original) (quoting *Toolson*, 346 U.S. at 357); see also *McCoy v. Major League Baseball*, 911 F. Supp. 454, 457 (W.D. Wash. 1995) (noting that *Piazza* ignored *Flood*’s concluding paragraph).

²⁷¹ *Flood*, 407 U.S. at 283-84.

binding authority, providing a broad exemption for the business of providing baseball entertainment to the public.

3. The *Piazza* Court Misunderstood the Facts of *Federal Baseball* and *Toolson*

Finally, even if one were to accept the *Piazza* court's holding that *Flood* had stripped both "*Federal Baseball* and *Toolson* [of] any precedential value those cases may have had beyond the particular facts there involved,"²⁷² the court nevertheless erred in concluding that *Federal Baseball* and *Toolson* were both limited to allegations involving only the reserve clause. Indeed, contrary to the *Piazza* court's belief,²⁷³ both *Federal Baseball* and *Toolson* involved claims of anticompetitive conduct above and beyond the reserve clause.²⁷⁴ Therefore, even if constrained to their facts by *Flood*, the lasting legacy of both *Federal Baseball* and *Toolson* nevertheless exempts more than just baseball's reserve system from federal antitrust law.

First, a close reading of the Supreme Court's *Federal Baseball* opinion shows that *Piazza*'s interpretation of the case is simply incorrect.²⁷⁵ In *Federal Baseball*, the Court specifically noted that the plaintiff alleged that the defendants violated antitrust law by destroying "the Federal League by buying up some of the constituent clubs and in one way or another inducing all those clubs except the plaintiff to leave their League"²⁷⁶ This allegation clearly extends beyond just the reserve clause, instead implicating organized baseball's settlement with seven of the eight Federal League franchises. The Court went on to state that it was "unnecessary to repeat" each of the means by which the plaintiff alleged the AL and NL had conspired to monopolize the business of baseball, a statement which evidences not only that there were multiple theories of anticompetitive conduct before the Court, but also that the Court did not intend to limit its holding solely to a particular allegation.²⁷⁷

²⁷² *Piazza*, 831 F. Supp. at 436.

²⁷³ *See id.* at 435 ("In each of the three cases in which the Supreme Court directly addressed the exemption, the factual context involved the reserve clause.").

²⁷⁴ *See infra* notes 275-79 and accompanying text.

²⁷⁵ *See Butterworth II*, 181 F. Supp. 2d 1316, 1324 (N.D. Fla. 2001) ("The assertion that [*Federal Baseball*] was solely a reserve clause case is simply not true.").

²⁷⁶ *Id.*; *see also* Picher, *supra* note 8, at 14 (same); Tomlinson, *supra* note 8, at 282.

²⁷⁷ *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 207 (1922). One such other means of monopolization alleged by the Baltimore franchise was the National Agreement governing the operation and relationship between all AL and NL teams. *McMahon & Rossi*, *supra* note 8, at 251-52.

Moreover, nowhere in the Supreme Court’s *Federal Baseball* opinion is the phrase “reserve clause” ever used.²⁷⁸ Presumably the Court would have mentioned the reserve clause at least once in its opinion had the clause in fact been the sole — or even primary — focus of the Court’s decision. Although it is true that the D.C. Circuit’s earlier opinion in *Federal Baseball* discussed the clause,²⁷⁹ a fact that the *Piazza* court relied heavily upon, that court’s description of the case does not trump the Supreme Court’s own recitation.²⁸⁰ Therefore, a close reading of the Supreme Court’s decision in *Federal Baseball* shows that the Court clearly understood the plaintiff to be alleging anticompetitive conduct beyond just the reserve clause.

Similarly, the majority opinion in *Toolson* also never mentioned the reserve clause.²⁸¹ While *Toolson* did involve an allegation that the clause violated federal antitrust law, the complainant in *Toolson* also alleged that the defendants had conspired to monopolize the professional baseball industry.²⁸² Moreover, one of the two *Toolson* companion cases, *Corbett v. Chandler*,²⁸³ also included a general allegation that the teams in organized baseball had conspired to monopolize the business.²⁸⁴ Because the *Toolson* opinion applies with equal force to *Corbett*,²⁸⁵ any suggestion that *Toolson* dealt only with the reserve clause must be rejected.

²⁷⁸ See *Fed. Baseball*, 259 U.S. at 207-09; *Butterworth II*, 181 F. Supp. 2d at 1323 (noting that *Federal Baseball* court “gave no indication [its] result had anything to do with the reserve clause”); Mack & Blau, *supra* note 8, at 213. Admittedly, the final sentence of Justice Holmes’s opinion does mention “restrictions by contract that prevented the plaintiff from getting players to break their bargains,” but it is unclear whether that statement referred to the reserve clause’s restrictions on signing future contracts, or simply basic contract principles preventing players from breaking their existing contracts. In any event, that statement itself is immediately followed by a mention of the “other conduct charged against the defendants . . .” *Fed. Baseball*, 259 U.S. at 209.

²⁷⁹ Nat’l League of Prof’l Baseball Clubs v. Fed. Baseball Club of Balt., Inc., 269 F. 681, 684, 687 (D.C. Cir. 1920); see also Mack & Blau, *supra* note 8, at 213.

²⁸⁰ *Butterworth II*, 181 F. Supp. 2d at 1324 n.9 (“It is an odd approach to interpreting Supreme Court cases to disregard that Court’s own description of a case in favor of a lower court’s description.”).

²⁸¹ See *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953).

²⁸² *Id.* at 364 n.10 (Burton, J., dissenting).

²⁸³ See generally *Corbett v. Chandler*, 345 U.S. 963 (1953) (deciding companion antitrust case).

²⁸⁴ *Toolson*, 346 U.S. at 364 (Burton, J., dissenting).

²⁸⁵ *Flood v. Kuhn*, 407 U.S. 258, 273 (1972) (noting that *Toolson* “affirmed the judgments of the respective courts of appeals in” *Toolson*, *Kowalski*, and *Corbett*); see also Sullivan, *supra* note 8, at 1296 (stating that it appeared *Toolson* Court “understood the exemption to extend beyond the reserve clause”).

Accordingly, even if the *Piazza* court correctly held that *Flood* had limited both *Federal Baseball* and *Toolson* to their facts, it nevertheless erred when concluding that those cases dealt simply with the reserve clause. In actuality, both cases involved more extensive allegations of anticompetitive conduct, meaning that neither case can properly be limited to cover only the reserve clause.²⁸⁶ Thus, the *Piazza*, *Butterworth*, and *Morsani* opinions are contrary to the Supreme Court's existing precedent and should not be followed by future courts.

B. *The Decisions Adopting a "Unique Characteristics and Needs" Standard for the Baseball Exemption Are Also Flawed*

Similarly, those courts holding that the baseball exemption shields only the "unique characteristics and needs" of professional baseball have also misconstrued the Supreme Court's precedent. Both the *Henderson Broadcasting Corp. v. Houston Sports Ass'n, Inc.*²⁸⁷ and *Postema v. National League of Professional Baseball Clubs*²⁸⁸ courts relied upon a single passage in *Flood*, in which the Supreme Court stated that the baseball exemption "rests on a recognition and an acceptance of baseball's unique characteristics and needs," when articulating this standard.²⁸⁹ The *Henderson* court believed that this language rendered the exemption inapplicable to radio broadcasting, while the *Postema* court concluded that baseball's umpire relations were also thus outside the scope of its antitrust exemption.²⁹⁰

Both the *Henderson* and *Postema* courts overemphasized this single passage in *Flood*, and in the process misinterpreted the Supreme Court's opinion. Read in its entirety, the passage in question discusses the fact that the baseball exemption is an established aberration that has been recognized by the Supreme Court five times over the course of a half-century.²⁹¹ Only after noting this history did *Flood* state that the exemption "rests on a recognition and an acceptance of baseball's unique characteristics and needs."²⁹² Thus, the *Flood* Court does not appear to have intended to place a new limitation upon the exemption with the inclusion of this passage — one that the Supreme Court had

²⁸⁶ See *supra* notes 275-85 and accompanying text.

²⁸⁷ *Henderson Broad. Corp. v. Hous. Sports Ass'n*, 541 F. Supp. 263 (S.D. Tex. 1982).

²⁸⁸ *Postema v. Nat'l League of Prof'l Baseball Clubs*, 799 F. Supp. 1475 (S.D.N.Y. 1992).

²⁸⁹ *Flood*, 407 U.S. at 282.

²⁹⁰ *Postema*, 799 F. Supp. at 1489; *Henderson*, 541 F. Supp. at 271.

²⁹¹ *Flood*, 407 U.S. at 282.

²⁹² *Id.*

not recognized in any of its five prior decisions considered in *Flood* — but rather simply provide a justification for it.

That the *Flood* Court did not intend to limit the exemption to only baseball’s “unique characteristics and needs” is also evidenced by the fact that the Court never specifically considered the necessity of the anticompetitive conduct there at issue — i.e., the reserve clause — under the standard proposed in *Henderson* and *Postema*. Rather than consider whether the reserve clause constituted a unique characteristic or need of baseball, the *Flood* Court instead rejected petitioner’s antitrust claims by emphasizing MLB’s reliance on the long-standing exemption, along with Congress’s failure to overturn the exemption through legislation.²⁹³ Indeed, as noted above, the Court concluded its opinion by quoting *Toolson* for the proposition that “Congress had no intention of including the *business of baseball* within the scope of the federal antitrust laws,” without any indication that it intended to limit the exemption to baseball’s unique characteristics and needs.²⁹⁴ Presumably, the *Flood* Court would have either applied the “unique characteristics and needs” standard itself or expressly restricted the exception to that benchmark, had it intended to so limit the baseball exemption.

Therefore, both the *Henderson* and *Postema* courts misinterpreted *Flood*, wrongly construing the opinion as limiting baseball’s antitrust exemption to only the sport’s “unique characteristics and needs.”²⁹⁵ Because those two opinions misapply the Supreme Court’s relevant precedent, future courts should not follow them when considering the scope of the baseball exemption.

C. *The Decisions Generally Holding that the “Business of Baseball” Is Exempt from Antitrust Law Fail to Provide a Workable Standard*

Although the majority of lower court decisions following *Flood* — those holding that the “business of baseball” is exempt from federal antitrust law — do not directly conflict with the existing Supreme Court precedent, they fail to provide any reasonable limiting factors for future courts to apply when considering the bounds of the exemption.²⁹⁶ Therefore, because these opinions do not provide a readily applicable standard, additional guidance regarding the scope of the exemption is necessary.

²⁹³ *Id.* at 283-84.

²⁹⁴ *Id.* at 285 (emphasis added).

²⁹⁵ See *supra* note 290 and accompanying text.

²⁹⁶ See generally *supra* Part II.A (discussing majority of lower court decisions).

Indeed, although a literal interpretation of the Supreme Court's precedents might exempt the entire "business of baseball" — all business activities by professional baseball teams — it stands to reason that the exemption does not universally protect all such conduct.²⁹⁷ For instance, the court in *Charles O. Finley & Co. v. Kuhn*²⁹⁸ stated that the exemption did not apply to those activities having only an "attenuated relation to the business of baseball."²⁹⁹ Surely this is correct, as extending the exemption to every potential facet of a baseball team's business could lead to absurd results. For instance, if MLB decided to purchase every gas station operating within each market hosting an MLB team, that monopoly interest in gasoline distribution would not reasonably be viewed as part of the business of baseball, even though most baseball fans consume gasoline in order to drive to games. Thus, just because a professional baseball team engages in a business activity alone should not be enough to hold that activity exempt from antitrust law.

Therefore, those opinions holding simply that the "business of baseball" is exempt from antitrust law, while not in direct conflict with the Supreme Court's precedent, nevertheless fail to provide future courts with a workable standard to apply when deciding whether allegedly anticompetitive conduct falls within the bounds of baseball's antitrust exemption. Those lower courts have not recognized that the Supreme Court has itself provided such a limiting factor in *Federal Baseball* and *Toolson*, focusing the exemption specifically on the business of providing baseball exhibitions to the public.³⁰⁰ Therefore, future courts considering the scope of the baseball exemption should adopt the approach this Article advocates, and hold that the antitrust exemption for the "business of baseball" is

²⁹⁷ As discussed *supra*, the majority opinions in *Toolson* and *Flood* both concluded by affirming *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." *Toolson v. N.Y. Yankees*, 346 U.S. 356, 357 (1953) (emphasis added); *see also Flood*, 407 U.S. at 285. Similarly, in *United States v. Shubert*, the Court construed *Federal Baseball* as providing an exemption for "the business of baseball and nothing else," *United States v. Shubert*, 348 U.S. 222, 228 (1955), while in *Radovich v. National Football League*, the Court specifically limited *Federal Baseball* and *Toolson* "to the facts there involved, i.e., the business of organized professional baseball." *Radovich v. Nat'l Football League*, 352 U.S. 445, 451 (1957).

²⁹⁸ *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978).

²⁹⁹ *Id.* at 541 n.51.

³⁰⁰ *See generally supra* Part I.F (discussing focus of Supreme Court's *Federal Baseball* and *Toolson* opinions).

limited to only those activities directly related to supplying baseball entertainment to the public.

D. The Suggestion that Baseball’s Antitrust Exemption Does Not Extend to Agreements with Nonbaseball Entities Lacks a Basis in the Supreme Court’s Existing Precedent

Two of the courts discussed above have imposed an additional limitation on baseball’s antitrust exemption that warrants consideration. Specifically, both the *Henderson Broadcasting Corp. v. Houston Sports Ass’n, Inc.*³⁰¹ and *Major League Baseball v. Crist*³⁰² courts suggested that baseball entities lose their antitrust exemption when contracting with nonbaseball entities, a limitation that some scholars have also recognized.³⁰³ For example, in the conclusion to its opinion, the court in *Henderson* noted that it was persuaded by the argument that “an exempt baseball team, like a labor union or agricultural cooperative which is exempted from the Sherman Act by statute, loses its exemption when it combines with a non-exempt radio station.”³⁰⁴ Similarly, the Eleventh Circuit in *Crist* stated twenty-one years later that “[i]t is true that the antitrust exemption has not been held to immunize the dealings between professional baseball clubs and third parties.”³⁰⁵

Such a limitation is unwarranted, as the Supreme Court has never suggested that baseball loses its exemption when contracting with a non-exempt entity.³⁰⁶ In fact, the Court has ruled in a somewhat similar context that an antitrust exemption could apply in cases involving allegedly anticompetitive agreements between exempt and non-exempt entities. Specifically, in *Union Labor Life Insurance Co. v. Pireno*,³⁰⁷ the Supreme Court considered the scope of the McCarran-Ferguson Act exemption for the “business of insurance” — a phrasing analogous to that of the “business of baseball” considered in this

³⁰¹ *Henderson Broad. Corp. v. Hous. Sports Ass’n Inc.*, 541 F. Supp. 263 (S.D. Tex. 1982).

³⁰² *Major League Baseball v. Crist*, 331 F.3d 1177 (11th Cir. 2003).

³⁰³ *See supra* note 19.

³⁰⁴ *Henderson*, 541 F. Supp. at 271 n.9.

³⁰⁵ *Crist*, 331 F.3d at 1183.

³⁰⁶ *See generally* *Flood v. Kuhn*, 407 U.S. 258 (1972) (omitting any suggestion that baseball loses its antitrust exemption when contracting with non-exempt entity); *Toolson v. N.Y. Yankees*, 346 U.S. 356 (1953) (same); *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200 (1922) (same).

³⁰⁷ *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982).

Article — from federal antitrust law.³⁰⁸ The Court considered its earlier jurisprudence on the issue and derived a three-factor test for future courts to apply when determining whether a challenged activity constituted the “business of insurance.” The final factor of the test was “whether the practice is limited to entities within the insurance industry.”³⁰⁹ However, in its very next sentence, the *Pireno* majority specifically stated that none of the three factors “is necessarily determinative in itself.”³¹⁰ Therefore, although the fact that an insurance company and a non-insurance company formed the challenged agreement may certainly indicate that the agreement falls outside the “business of insurance,” contracting with a non-exempt entity is not itself enough to displace an insurance company’s exemption under the McCarran-Ferguson Act.

Courts applying the baseball exemption should follow the Supreme Court’s guidance in *Pireno* and reject the proposition that a baseball entity automatically forfeits its antitrust exemption when contracting with a traditionally non-exempt entity. While the fact that both a baseball and nonbaseball entity entered a challenged agreement will in many circumstances indicate that the activity falls outside the proper bounds of the exemption — the business of providing exhibitions of baseball to the public — that factor alone should not drive a court’s analysis.³¹¹ Indeed, in some circumstances, such as broadcasting, an agreement with a nonbaseball entity may directly relate to the business of supplying baseball entertainment to fans.³¹²

Thus, the *Henderson* and *Crist* courts improperly concluded that baseball’s antitrust exemption did not apply to agreements between baseball and nonbaseball entities. Although that factor may indicate that an agreement falls outside the scope of the exemption, it should not alone determine whether the baseball exemption applies in a given case.

³⁰⁸ *Id.* at 129; see also 15 U.S.C. §§ 1011–1015 (2006). Specifically, the McCarran-Ferguson Act limits the application of federal antitrust law to “the business of insurance to the extent that such business is not regulated by State Law.” *Id.* § 1012(b).

³⁰⁹ *Pireno*, 458 U.S. at 129. The first two factors identified in *Pireno* were “whether the practice has the effect of transferring or spreading a policyholder’s risk” and “whether the practice is an integral part of the policy relationship between the insurer and the insured.” *Id.*

³¹⁰ *Id.*

³¹¹ For instance, as discussed below, intellectual property licensing and concessions agreements would be examples of agreements with nonbaseball entities falling outside the scope of baseball’s antitrust exemption. See *infra* Part IV.E.

³¹² See *infra* Part IV.C.

IV. APPLYING BASEBALL’S ANTITRUST EXEMPTION TO ONLY THOSE
ACTIVITIES DIRECTLY RELATED TO PROVIDING BASEBALL
ENTERTAINMENT TO THE PUBLIC PROVIDES A CONSISTENT, PREDICTABLE
STANDARD

In view of the divergent opinions and general uncertainty surrounding the scope of baseball’s antitrust exemption, a uniform standard for the exemption is sorely needed. Future courts should reject the existing lower court precedents and hold that baseball’s antitrust exemption extends to those activities directly related to the business of providing baseball entertainment to the public. Not only is this standard consistent with the focus of the Supreme Court’s baseball decisions, but it also provides a workable and predictable standard that allows parties reliably to gauge whether a particular activity is likely to be within the scope of the exemption.³¹³ Moreover, while generally consistent with the outcomes of the majority of subsequent lower court precedents — those cases holding that the “business of baseball” is exempt from antitrust law — the proposed standard offers a more precise framework than those largely boundless opinions.

Under the proposed standard, exempt activities directly related to the business of providing professional baseball entertainment to the public would include league rule making, decisions regarding the league structure (including franchise ownership and location, at both the major and minor league levels), broadcasting agreements, and labor disputes with umpires, managers, coaches, and minor league players.³¹⁴ Meanwhile, tangential activities not exempt under the proposed standard include licensing, concessions, and sponsorship agreements.

A. Rule Making

One activity falling within the scope of the proposed standard for baseball’s antitrust exemption is league rule making. Specifically, MLB has established a thorough set of formal rules that govern professional baseball games.³¹⁵ For example, the official MLB rules define everything from the game’s basic principles of runs and outs,³¹⁶ to the

³¹³ See generally *supra* Part I.F (discussing focus of Supreme Court’s prior baseball opinions).

³¹⁴ Labor disputes with current major league players would fall outside the bounds of the exemption pursuant to the Curt Flood Act. See *supra* Part I.E.

³¹⁵ See MAJOR LEAGUE BASEBALL, OFFICIAL RULES (2008), available at http://mlb.mlb.com/mlb/official_info/official_rules/foreword.jsp.

³¹⁶ *Id.* at r. 2.0.

more arcane infield fly rule.³¹⁷ League rules also regulate the equipment used during games — bats, balls, gloves, uniforms, helmets, protective padding, etc. — not only to provide an equal playing field, but also to protect the safety of both players and fans.³¹⁸ These rules apply to games played at the major league level, as well as most minor league games.³¹⁹

The establishment of these playing rules is essential to the business of providing baseball entertainment to fans. Without such rules, staging even a single exhibition, let alone a full season of championship competition, would be impossible — two teams could not play a game if they disagreed about how many outs would be allowed in an inning or how many innings would be played in a game. Indeed, both courts and commentators have noted that agreement upon uniform rules of the game is a central aspect of all professional sports leagues.³²⁰ Therefore, because league rule making is an essential element of the business of providing baseball exhibitions to fans, courts should hold that it falls within the scope of baseball's antitrust exemption.

B. Decisions Regarding the League Structure

Disputes regarding the league structure have been the single most common source of antitrust litigation involving professional

³¹⁷ *Id.*; see also *Aside, The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474, 1477-78 (1975) (discussing history of rule).

³¹⁸ See Matzura, *supra* note 8, at 1029 (noting that “MLB’s motivation for implementing a bat restriction is for fan and player safety”).

³¹⁹ See MAJOR LEAGUE BASEBALL, *supra* note 315 (noting that rules govern baseball games played by minor “leagues that are members of the National Association”).

³²⁰ See, e.g., *Sullivan v. Nat’l Football League*, 34 F.3d 1091, 1097 (1st Cir. 1994) (“The NFL correctly points out that member clubs must cooperate in a variety of ways, and may do so lawfully, in order to make the football league a success.”); Gabriel Feldman, *The Puzzling Persistence of the Single Entity Argument for Sports Leagues: American Needle and the Supreme Court’s Opportunity to Reject a Flawed Defense*, 2009 WIS. L. REV. 835, 844-45 (2009) (stating that “two teams cannot play a game unless they agree on a time and place to play the game and the rules governing the game itself”); Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25, 32 (1991) (recognizing that sports leagues must agree upon “procedural rules for administering the League . . . schedules of exhibition, regular-season, and playoff games . . . [rules governing] the conduct of the games themselves . . . and a system of player allocation”); McCann, *supra* note 26, at 730 (noting that NFL teams must agree “on game rules . . . if teams disagreed as to whether a first down requires 10 yards or 15 yards of advancement, they could not play each other”).

baseball.³²¹ These cases have involved decisions regarding how many teams will be allowed to compete in a league, who will own those teams, and where those teams will be located.³²² In deciding these cases, a majority of courts have correctly concluded that decisions regarding baseball’s league structure are integral to the business of baseball and, thus, that baseball’s antitrust exemption protects them.³²³

Notably, baseball’s antitrust exemption itself originates from a case involving issues regarding the league structure. As discussed above, the plaintiff in *Federal Baseball* filed suit after the parties in the initial, league-wide litigation entered a settlement agreement that did not provide Baltimore with a major league team.³²⁴ The plaintiff in *Federal Baseball* directly challenged the prior settlement agreement, under which the AL and NL agreed to buy out some Federal League owners while allowing others to purchase interests in an existing major league franchise.³²⁵ Thus, decisions regarding the number of teams allowed to

³²¹ See generally *Major League Baseball v. Crist*, 331 F.3d 1177 (11th Cir. 2003) (deciding antitrust challenge implicating league structure); *Profl Baseball Sch. & Clubs, Inc. v. Kuhn*, 693 F.2d 1085 (11th Cir. 1982) (same); *Butterworth II*, 181 F. Supp. 2d 1316 (N.D. Fla. 2001) (same); *New Orleans Pelicans Baseball, Inc. v. Nat’l Ass’n of Profl Baseball Leagues*, No. 93-253, 1994 WL 631144 (E.D. La. Mar. 1, 1994) (same); *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993) (same); *Butterworth I*, 644 So. 2d 1021 (Fla. 1994) (same); *Morsani v. Major League Baseball*, 663 So. 2d 653 (Fla. Dist. Ct. App. 1995) (same); *Minn. Twins P’ship v. State*, 592 N.W.2d 847 (Minn. 1999) (same); *State v. Milwaukee Braves, Inc.*, 144 N.W.2d 1 (Wis. 1966) (same).

³²² For an explanation and history of MLB’s franchise location rules, see Mark S. Nagel et al., *Major League Baseball Anti-Trust Immunity: Examining the Legal and Financial Implications of Relocation Rules*, ENT. & SPORTS L.J. (Jan. 2007), <http://go.warwick.ac.uk/eslj/issues/volume4/number3/nagel/>.

³²³ See, e.g., *Butterworth II*, 181 F. Supp. 2d at 1332 (“It is difficult to conceive of a decision more integral to the business of major league baseball than the number of clubs that will be allowed to compete.”); *New Orleans Pelicans Baseball*, 1994 WL 631144, at *9 (“One of the central features of [the business of baseball] is the power to decide who can play where.”); *Minn. Twins*, 592 N.W.2d at 856 (noting that “the sale and relocation of a baseball franchise, like the reserve clause discussed in *Flood*, is an integral part of the business of professional baseball and falls within the exemption”); see also *Postema v. Nat’l League of Profl Baseball Clubs*, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992) (stating that “the baseball exemption does immunize baseball from antitrust challenges to its league structure and its reserve system”). While these courts did not specifically construe the Supreme Court’s precedent in the manner advocated in this article, and thus did not consider whether disputes involving the league structure fell within the scope of the exemption covering the business of providing baseball exhibitions, this consensus of opinion is nevertheless instructive.

³²⁴ See *supra* note 41 and accompanying text.

³²⁵ ABRAMS, LEGAL BASES, *supra* note 8, at 55-56; ANDREW ZIMBALIST, BASEBALL AND BILLIONS 9-10 (2d ed. 1994); Borteck, *supra* note 8, at 1076 n.30.

compete in the major leagues, as well as issues of franchise location and ownership, were central to *Federal Baseball*.

Indeed, issues involving the league structure are critical to the business of providing baseball exhibitions to the public. First, the number of teams admitted into a league has a direct impact on the distribution and quality of the product the league produces. At the most basic level, the number of teams in a league determines how much baseball will be produced. Moreover, because there are a finite number of professional caliber baseball players, leagues must guard against over-expansion so that their end product does not become too diluted.³²⁶ Otherwise, the level of play may slip below the standard that fans have become accustomed to seeing at professional games. As noted by the court in *Butterworth II*, “[i]t is difficult to conceive of a decision more integral to the business of major league baseball than the number of clubs that will be allowed to compete.”³²⁷

Similarly, ownership restrictions play an important role in the provision of baseball entertainment, helping provide the necessary element of franchise stability. Unless a league takes steps to ensure that all of its franchise owners have the requisite financial means needed to run a team successfully, the league risks having poorly financed or managed franchises disband, perhaps even in mid-season.³²⁸ Alternatively, even if undercapitalized teams do not disband, the league may still have to support franchises that are unable to make the investments necessary to compete successfully.³²⁹ As a result,

³²⁶ See Ted Curtis, *The Curt Flood Act: The Flood Act's Place in Baseball Legal History*, 9 MARQ. SPORTS L.J. 403, 411 (1999) (noting that “addition of two new teams arguably diluted the Major League Baseball talent pool”); Guarisco, *supra* note 8, at 676 (finding that MLB’s 1992 expansion diluted talent pool, leading “to sloppy play and poorly contested games”); Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219, 280 n.210 (1984) (noting that leagues might decide not to expand for fear that “the quality of the entertainment product would diminish if it added teams which would dilute player talent or create too many low quality teams and lopsided games”); Kimberly S. Schimmel et al., *Professional Team Sport and the American City: Urban Politics and Franchise Relocations*, in *SPORT IN SOCIAL DEVELOPMENT* 211, 222 (Alan G. Ingham & John W. Loy eds., 1993) (noting that league members are resistant to expansion “because increasing the number of franchises in the league dilutes . . . the player talent pool”).

³²⁷ *Butterworth II*, 181 F. Supp. 2d at 1332.

³²⁸ See Nathaniel Grow, *There's No "I" in "League": Professional Sports Leagues and the Single Entity Defense*, 105 MICH. L. REV. 183, 198 (2006).

³²⁹ *Id.* at 198-99.

competitive balance could suffer, reducing the quality and attractiveness of the league’s product as a whole.³³⁰

Likewise, franchise location decisions also directly impact the business of providing baseball entertainment to the public. Most significantly, such decisions enable leagues to allocate teams throughout the country and, thus, ensure that the league distributes its product sufficiently evenly nationwide. Moreover, franchise location can also have an impact on competitive balance, as there are a limited number of cities with populations large enough to support one or more professional franchises.³³¹ Thus, maintaining control over franchise location decisions not only allows leagues to ensure that franchises are located only in cities large enough to support a team financially, but also that those cities are not overpopulated with too many teams.

This protection properly extends not only to decisions regarding the league structure at the major league level, but in the minor leagues as well. The minor leagues are a significant component of the business of

³³⁰ Competitive balance has long been recognized as an important interest for professional sports leagues to pursue. See, e.g., *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 117 (1984) (agreeing that in sports-related antitrust cases “interest in maintaining a competitive balance . . . is legitimate and important”); James L. Brock, Jr., *A Substantive Test For Sherman Act Plurality: Applications for Professional Sports Leagues*, 52 U. CHI. L. REV. 999, 1014 (1985) (“Competitive balance on the playing field also increases overall revenues for the clubs in the league by making contests less predictable and more interesting to fans.”); Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1355 (stating that “no team has an economic interest in vanquishing all the other teams . . . teams benefit when the league has competitive balance and the sporting contests are close, thereby maximizing fan interest”); Jacob F. Lamme, *The Twelve Year Rain Delay: Why a Change in Leadership Will Benefit the Game of Baseball*, 68 ALB. L. REV. 155, 168 (2004) (“If there is competitive balance in the game, not only will fan interest rise, but so will the generated revenue. When the game lacks competitive balance, however, fans become disinterested and take their money to other forms of entertainment.”); Thomas M. Schiera, *Balancing Act: Will the European Commission Allow European Football to Reestablish the Competitive Balance that It Helped Destroy?*, 32 BROOK. J. INT’L L. 709, 710 (2007) (“Within the professional sporting world it is generally accepted that there must be a competitive balance among teams in order to preserve the integrity of sporting competition, the interest of fans, and in turn, commercial success.”).

³³¹ See G. Scott Thomas, *Economic Clout Makes L.A. Sports Team Choice*, AM. CITY BUS. J. (Oct. 4, 2004), http://sacramento.bizjournals.com/edit_special/3.html (noting that no city presently without MLB team “meets the income requirements” necessary for successfully hosting MLB franchise); cf. Andrew Zimbalist, *Baseball Economics and Antitrust Immunity*, 4 SETON HALL J. SPORT L. 287, 316 (1994) (arguing that “[t]here are enough economically-viable cities to support a gradual expansion to forty teams by the year 2004”).

providing baseball entertainment to the public. Whereas there are only thirty major league franchises, minor league baseball contains more than 175 teams.³³² Although major league games typically outdraw the cumulative total attendance at minor league games in a given season, the minor leagues still generate significant attendance. For example, in 2008 alone, minor league baseball attracted over 43 million fans.³³³ Moreover, these minor league teams are predominantly located in smaller communities and, thus, provide live baseball entertainment to fans that would otherwise be forced to travel to major cities to see live professional baseball.³³⁴

It is unclear whether the present minor league structure would survive absent the antitrust exemption.³³⁵ Presently, each MLB franchise maintains close contractual relationships with five or six different minor league teams, collectively comprising the MLB franchise's "farm system."³³⁶ In addition to assigning players to each of

³³² See *General History*, MiLB.COM (Oct. 8, 2009), http://web.minorleaguebaseball.com/milb/history/general_history.jsp. In addition to the more than 175 teams belonging to the National Association of Professional Baseball Clubs, independent minor leagues also exist which are unaffiliated with the National Association. See Marc Edelman, *How to Curb Professional Sports' Bargaining Power Vis-À-Vis the American City*, 2 VA. SPORTS & ENT. L.J. 280, 302 (2003) (noting existence of independent leagues).

³³³ See *General History*, *supra* note 332 (reporting that minor league teams drew total of 43,263,740 fans in 2008).

³³⁴ Jones, *supra* note 15, at 641 (noting that minor league baseball is "a source of civic pride to small town America and an enduring part of the nation's heritage").

³³⁵ Compare Jeff Friedman, *Antitrust Exemption Vital for Minor League Survival: MLB & Parent Clubs Must Put Money Behind 1991 Stadium Standards*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 118 (2003) (arguing that "antitrust exemption is crucial to Minor League Baseball's existence" and that revocation of exemption "would probably lead to the failure of several [minor league] teams and a decreased interest in baseball altogether"), Jones, *supra* note 15, at 684 (noting that "vitality of the minor league farm system [would be] in doubt" should federal antitrust law apply), and Turland, *supra* note 8, at 1376-78 (stating that "[r]emoving baseball's exemption would negatively effect the Minor League system in two ways: (1) the number of teams would decrease, and (2) the quality of player talent available for the Major League teams would decline"), with Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 690-95 (1989) (arguing that antitrust immunity is unnecessary to preserve minor leagues).

³³⁶ See Gary, *supra* note 37, at 296 n.25 (quoting LIONEL S. SOBEL, *PROFESSIONAL SPORTS AND THE LAW* 21 (1977)) ("A farm system is a collection of baseball clubs structured so that a 'major league baseball club exercises control by means of either stock ownership or contract, over the activities of several minor league clubs"); see also James R. Devine, *The Racial Re-Integration of Major League Baseball: A Business Rather than Moral Decision; Why Motive Matters*, 11 SETON HALL J. SPORT L. 1, 27-39 (2001) (discussing history of farm system); Jones, *supra* note 15, at 649-53 (same).

their minor league teams,³³⁷ MLB franchises also typically provide substantial financial subsidies to their minor league affiliates.³³⁸ Recognizing that the minor league structure could present antitrust issues, Congress — at the behest of lobbying efforts by minor league baseball — specifically drafted the Curt Flood Act of 1998 to avoid any chance that it might be read to revoke the baseball antitrust exemption with respect to the minor leagues.³³⁹ Therefore, because the CFA expressly did not disrupt the antitrust exemption as it applies to the minor leagues,³⁴⁰ and because a considerable number of fans consume baseball entertainment by attending minor league games,³⁴¹ courts should hold that lawsuits involving the structure of the minor leagues fall within the scope of the proposed standard for baseball’s antitrust exemption.

Accordingly, because decisions relating to the league structure were the primary impetus leading to *Federal Baseball*, and because they directly affect the business of providing baseball exhibitions, those decisions properly fall within the scope of the baseball exemption at both the major league and minor league levels.

C. Broadcasting

One facet of the business of providing baseball entertainment to the public that largely did not exist at the time of *Federal Baseball* is broadcasts of games over television, radio, and even the Internet, activities that have become increasingly important over the ensuing decades. Indeed, broadcasting has fundamentally changed the way fans follow baseball. As one commentator has noted, “[i]t is difficult to overestimate the role of broadcasting in the rise of baseball . . . in the American cultural consciousness.”³⁴²

Television broadcasting is now the primary means by which fans consume baseball entertainment. During the 2009 season, an

³³⁷ See Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519, 558 (1997) (discussing rules governing MLB teams’ assignment of players to minor leagues).

³³⁸ See Friedman, *supra* note 335, at 119.

³³⁹ See Edmund P. Edmonds, *The Curt Flood Act of 1998: A Hollow Gesture After All These Years?*, 9 MARQ. SPORTS L.J. 315, 328-29 (1999); Gary R. Roberts, *The Curt Flood Act: A Brief Appraisal of the Curt Flood Act of 1998 from the Minor League Perspective*, 9 MARQ. SPORTS L.J. 413, 417-19 (1999) [hereinafter *Curt Flood Act*].

³⁴⁰ See Roberts, *Curt Flood Act*, *supra* note 339, at 419-21.

³⁴¹ See Turland, *supra* note 8, at 1377 (noting that “[m]inor [l]eague teams have become increasingly popular over the last decade”).

³⁴² McDonald, *supra* note 8, at 112.

estimated 77,000 households watched a typical local television broadcast of a MLB game,³⁴³ a total more than two and a half times the average in-stadium attendance of roughly 30,000 fans per game.³⁴⁴ Moreover, this estimate accounts for only local broadcasts of regular season MLB games and does not include households watching regular season and postseason games televised nationally on Fox, ESPN, TBS, or MLB's own "MLB Network," telecasts that can draw audiences of up to 3 million fans per game.³⁴⁵ The local broadcast estimate also fails to account for the more than one million fans that watch games via subscriptions to either MLB's "Extra Innings" pay-per-view television package,³⁴⁶ or MLB's "MLB.tv" Internet service.³⁴⁷ Radio broadcasts of MLB games also routinely attract audiences larger than those attending games in-person at the stadium.³⁴⁸ Because broadcasting baseball games via the television, radio, and Internet is today the most significant means by which baseball entertainment is provided to fans, MLB's broadcast agreements are an integral aspect of the business of providing baseball exhibitions to the public.

The rise in the importance of broadcasting is not a recent development for professional baseball. Although baseball radio broadcasting was only in its infancy at the time of *Federal Baseball*,³⁴⁹

³⁴³ Rhett Bollinger, *Baseball's TV Ratings Holding Steady*, MLB.COM (June 11, 2009), http://mlb.mlb.com/news/article.jsp?ymd=20090611&content_id=5277364&rvk.

³⁴⁴ See *MLB Attendance Report - 2009*, ESPN.COM, http://espn.go.com/mlb/attendance/_/year/2009.

³⁴⁵ See John Ourand, *Diamond Ratings Fail to Shine*, SPORTS BUS. J. (Oct. 13, 2008), <http://www.sportsbusinessjournal.com/article/60253>.

³⁴⁶ The Extra Innings package allows fans to watch games that would otherwise not be broadcast in their local market. For instance, by subscribing to Extra Innings, Detroit Tigers fans located in Connecticut can watch the vast majority of their team's games, despite not being able to receive any Detroit-area television stations as part of their local cable package. See Tomlinson, *supra* note 8, at 307; see also *IN Demand Offers to Match DirecTV's MLB Offer*, ESPN.COM (Mar. 21, 2007), <http://sports.espn.go.com/mlb/news/story?id=2806948> (reporting that more than 500,000 fans subscribed to Extra Innings package for 2006 MLB season).

³⁴⁷ MLB.tv is similar to the Extra Innings package, discussed *supra* in note 346, but offers fans access to out-of-market broadcasts over the Internet, rather than via cable television. See Tomlinson, *supra* note 8, at 304; see also *MLB.TV Premium and NHL GameCenter LIVE Available Via a Combo Subscription Package*, REUTERS, Feb. 9, 2009, available at <http://www.reuters.com/article/pressRelease/idUS144281+09-Feb-2009+PRN20090209> (noting that MLB.tv had more than 500,000 subscribers in 2008).

³⁴⁸ Paul Farhi, *From the Basement, It's No Wonder Radio Reception Is Poor*, WASH. POST, Aug. 26, 2008, at C01 (noting that MLB's Washington Nationals had "unusual distinction of being a team that has far more people watching its games in person (average attendance has been 29,990 per game) than listening to them on radio").

³⁴⁹ The first experimental radio broadcasts of baseball games occurred as early as

the petitioner noted in its briefing that the results of professional baseball games were regularly relayed across state lines via a somewhat analogous technology, the telegraph.³⁵⁰ Moreover, the use of broadcasting as a means for delivering baseball entertainment had become well established by 1953 when the Supreme Court decided *Toolson*.³⁵¹ Indeed, four years before *Toolson*, Judge Learned Hand considered the impact of broadcasting on the baseball exemption in the Second Circuit’s high profile decision in *Gardella v. Chandler*,³⁵² stating that broadcasts of baseball games had become “part of the business itself, for that consists in giving public entertainments; the players are the actors, the radio listeners and the television spectators are the audience; together they form as indivisible a unit as do actors and spectators in a theatre.”³⁵³ Meanwhile, the plaintiff in *Toolson* emphasized such broadcasts in his brief to the Court,³⁵⁴ while the *Toolson* dissent specifically noted that radio and television broadcasts were the “fastest-growing source of revenue for major league clubs.”³⁵⁵

The use of telegraphing and broadcasting thus were well established at the time of *Federal Baseball* and *Toolson*, respectively, and in fact were emphasized by the petitioner in each case. Therefore, because neither Court specifically distinguished the telegraphing or broadcasting of baseball from the business of providing baseball exhibitions to the public, baseball’s broadcasting activities are properly within the scope of its antitrust exemption, insofar as they have become central to the business of providing baseball entertainment to the public.³⁵⁶

1921, although games were not routinely broadcast until the 1930s and 1940s. See *supra* note 55. These radio broadcasts became especially popular following World War II. McMahon & Rossi, *supra* note 8, at 237; see also McDonald, *supra* note 8, at 112 (noting that “[r]adio coverage began to define the game in the 1940s”). Television broadcasts of baseball games started shortly thereafter, beginning with the 1947 World Series. *Id.* at 113.

³⁵⁰ Brief of Plaintiff in Error at 123, *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200 (1922) (No. 1922-204); see also *Nat’l League of Prof’l Baseball Clubs v. Fed. Baseball Club of Balt., Inc.*, 269 F. 681, 683 (D.C. Cir. 1920) (stating that “each league had a contract with a telegraph company for service, and had an income sufficient only to meet necessary expenses”).

³⁵¹ See *infra* notes 353-55 and accompanying text.

³⁵² *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949).

³⁵³ *Id.* at 407-08.

³⁵⁴ Brief of Petitioner at 38-44, *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953) (No. 1953-0018).

³⁵⁵ *Toolson*, 346 U.S. at 359 n.3 (Burton, J., dissenting).

³⁵⁶ See generally *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200 (1922) (failing to distinguish telegraphing from business of

The first court specifically to consider the status of baseball's broadcasting activities under its antitrust exemption decided the case consistently with the proposed rule. In 1958, the district court for the Northern District of Texas considered an antitrust challenge to the broadcasting of baseball in *Hale v. Brooklyn Baseball Club, Inc.*³⁵⁷ and held that the baseball exemption covered broadcasts of baseball games, reasoning:

The telecasting simply lifts the horizon, so to speak, and brings in another set of viewers of the same identical game that those present in the grandstand are seeing at the same time, ordinarily, and I believe its straining reality to suggest that this television business has become a new facet of activity that you can look at apart from the ordinary business of baseball; and I can't follow that because there couldn't be such broadcasting except for the old-fashioned baseball game being played somewhere – the very gist and essence of the baseball business.³⁵⁸

However, another court subsequently held that broadcasting is not within the scope of the exemption. Specifically, in *Henderson Broadcasting Corp. v. Houston Sports Association, Inc.*, the court ruled that baseball's antitrust exemption did not shield a broadcast agreement between the owner of the Houston Astros franchise and a local radio station.³⁵⁹ In addition to applying an erroneous standard, as discussed above, the *Henderson* court also rested its holding on several faulty considerations.³⁶⁰

First, the *Henderson* court believed that the Supreme Court had “implied that broadcasting is not central enough to baseball to be encompassed in the baseball exemption.”³⁶¹ The *Henderson* court based this conclusion on two grounds. Initially, the court emphasized that neither the *Toolson* nor *Flood* majority opinions cited the Second Circuit's decision in *Gardella v. Chandler*.³⁶² Second, the *Henderson*

baseball); *Toolson*, 346 U.S. 356 (same with respect to broadcasting).

³⁵⁷ *Hale v. Brooklyn Baseball Club, Inc.*, Civ. Action No. 1294 (N.D. Tex. 1958) (cited in *Henderson Broad. Corp. v. Hous. Sports Ass'n*, 541 F. Supp. 263, 268 n.7 (S.D. Tex. 1982)).

³⁵⁸ *Henderson Broad. Corp. v. Hous. Sports Ass'n*, 541 F. Supp. 263, 268 n.7 (quoting *Hale*, Civ. Action No. 1294).

³⁵⁹ *Henderson*, 541 F. Supp. at 264-65.

³⁶⁰ See *supra* Part III.B (discussing erroneous “unique characteristics and needs” standard applied by *Henderson* court).

³⁶¹ *Henderson*, 541 F. Supp. at 265.

³⁶² *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949).

court found that the baseball exemption did not encompass broadcasting because the Supreme Court had subsequently refused “to extend the exemption to other professional sports, in part because of the interstate broadcasting of the sports.”³⁶³

Neither basis identified by the *Henderson* court compels a finding that broadcast agreements are outside the scope of the baseball antitrust exemption. As an initial matter, the fact that the *Toolson* and *Flood* majorities did not cite *Gardella* does not imply that the Supreme Court views broadcasting as being outside the scope of the exemption. If anything, it implies the opposite — considering that Judge Hand in *Gardella* found that broadcasting had become an indivisible part of baseball itself, the *Toolson* and *Flood* majorities would have addressed *Gardella* if they in fact believed that broadcasting did not fall within the exemption.³⁶⁴ By affirming the exemption without mentioning *Gardella*, the Court implicitly signaled that it did not intend to distinguish between the business of providing live exhibitions of baseball and the broadcasting of those exhibitions. Indeed, the *Flood* majority specifically noted that “[t]he advent of radio and television, with their consequent increased coverage and additional revenues, has not occasioned an overruling of *Federal Baseball* and *Toolson*.”³⁶⁵ Had the *Flood* Court intended to limit the exemption in a manner not including broadcasting, it presumably would have done so explicitly. Therefore, the *Henderson* court erred by interpreting the Supreme Court’s failure to discuss *Gardella* in *Toolson* and *Flood* as implying that broadcasting agreements are outside the scope of the exemption.

Similarly, the *Henderson* court also erred by interpreting the Supreme Court’s opinions in *International Boxing* and *Radovich* as implying the same.³⁶⁶ While it is true that the Supreme Court considered interstate broadcasting when refusing to extend the baseball exemption to boxing and football, that does not mean that broadcasting is outside the scope of the baseball antitrust exemption. In *International Boxing*, the court specifically distinguished its consideration of boxing from the existence of the baseball exemption, noting “[t]he issue confronting us is, therefore, not whether a previously granted exemption should continue, but whether an exemption should be granted in the first instance.”³⁶⁷ Meanwhile, in

³⁶³ *Henderson*, 541 F. Supp. at 267.

³⁶⁴ See *Gardella*, 172 F.2d at 407-08.

³⁶⁵ *Flood v. Kuhn*, 407 U.S. 258, 283 (1972).

³⁶⁶ See *Henderson*, 541 F. Supp. at 267-68.

³⁶⁷ *United States v. Int’l Boxing Club*, 348 U.S. 236, 243 (1955).

Radovich, the Court expressly limited *Federal Baseball* and *Toolson* “to the facts there involved, i.e., the business of organized professional baseball.”³⁶⁸ Thus, both *International Boxing* and *Radovich* establish that the baseball exemption is simply different from the rules applying to other sports. Accordingly, it does not reason that because interstate broadcasting rendered boxing and football susceptible to antitrust regulation, baseball’s broadcast agreements are outside the scope of the baseball exemption. Rather, these cases simply illustrate that baseball is an anomaly.

In addition to misinterpreting the Supreme Court’s precedent, the *Henderson* court found that “Congressional action does not support an extension of the exemption to radio broadcasting.”³⁶⁹ The court reached this conclusion in view of the Sports Broadcasting Act of 1961 (“SBA”).³⁷⁰ In the SBA, Congress provided an express exemption for professional sports leagues that collectively negotiate network television broadcast agreements.³⁷¹ The *Henderson* court focused on the fact that Congress treated baseball no differently than football, basketball, or hockey in the SBA, and also emphasized its belief that Congress’s primary concern in passing the SBA was preserving the league structure, based on a portion of the legislative history.³⁷² Because the SBA does not cover local radio agreements, and because the Astros’ radio broadcast agreement did not directly implicate the league structure, the court determined Congress’s enactment of the SBA did not support the defendant’s position.³⁷³

The *Henderson* court’s analysis with regard to the SBA was lacking in at least one significant respect. While it is true that Congress did not explicitly exempt all baseball broadcasting in the SBA, the *Henderson* court failed to recognize that the SBA contains a provision expressly stating that the Act does not “change, determine, or otherwise affect the applicability or nonapplicability of the antitrust laws” with respect to anything other than jointly negotiated television contracts by professional sports leagues.³⁷⁴ Therefore, reliance on the SBA as

³⁶⁸ *Radovich v. Nat’l Football League*, 352 U.S. 445, 451 (1957).

³⁶⁹ *Henderson*, 541 F. Supp. at 265.

³⁷⁰ 15 U.S.C. § 1291 (2006).

³⁷¹ *Id.*; see also Lacie L. Kaiser, *Revisiting the Sports Broadcasting Act of 1961: A Call for Equitable Antitrust Immunity from Section One of the Sherman Act for All Professional Sports Leagues*, 54 DEPAUL L. REV. 1237, 1245-47 (2005); Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463, 468-71 (1990).

³⁷² *Henderson*, 541 F. Supp. at 269-70.

³⁷³ *Id.* at 270.

³⁷⁴ 15 U.S.C. § 1294 (2006). That provision states in its entirety:

evidence of the scope of baseball’s antitrust exemption is misplaced. The SBA expressly does not alter MLB’s antitrust status in any way, aside from providing an express exemption to the league when it negotiates league-wide television broadcast agreements.

Finally, the *Henderson* court also relied on judicial interpretations of the baseball antitrust exemption from other jurisdictions. Here, the *Henderson* court particularly emphasized the fact that other courts did not apply the exemption in cases involving concession agreements,³⁷⁵ and licensing agreements for baseball cards,³⁷⁶ concluding that “the exemption is no more applicable to an antitrust suit on a broadcasting contract than it” was in those cases.³⁷⁷ The *Henderson* court’s reliance on these opinions was misplaced. As an initial matter, none of the parties in either case even asserted the antitrust exemption.³⁷⁸ More significantly, though, unlike a broadcasting agreement, neither a concession agreement nor a baseball card licensing agreement are directly related to the business of providing baseball entertainment to fans, as will be discussed below, and, therefore, both are fundamentally different from broadcasting agreements for the purpose of applying the baseball exemption.³⁷⁹

Thus, for all these reasons, future courts should not follow the *Henderson* precedent.³⁸⁰ Instead, because broadcasting games via the television and radio has been central to the business of providing baseball exhibitions to the public for well over sixty years, and today represents the single most significant means by which fans consume

Nothing contained in this chapter shall be deemed to change, determine, or otherwise affect the applicability or nonapplicability of the antitrust laws to any act, contract, agreement, rule, course of conduct, or other activity by, between, or among persons engaging in, conducting, or participating in the organized professional team sports of football, baseball, basketball, or hockey, except the agreements to which section 1291 of this title shall apply.

Id.

³⁷⁵ *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 365 F. Supp. 235, 237-38 (N.D. Cal. 1972).

³⁷⁶ *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 140 (3d Cir. 1981).

³⁷⁷ *Henderson*, 541 F. Supp. at 271.

³⁷⁸ See generally *Twin City Sportservice*, 365 F. Supp. 235 (never considering baseball’s antitrust exemption); *Fleer*, 658 F.2d 139 (same).

³⁷⁹ See generally *infra* Part IV.E (discussing concession and licensing agreements).

³⁸⁰ In the conclusion to its opinion, the *Henderson* court further noted that the exemption might be lost when a baseball team contracts with a non-exempt radio station. *Henderson*, 541 F. Supp. at 271 n.9. However, as noted above, the suggestion that that baseball’s exemption is lost when contracting with a non-exempt entity is inconsistent with the Supreme Court’s precedent. See *supra* Part III.D.

baseball entertainment, courts should hold that baseball broadcasting agreements fall within the scope of baseball's antitrust exemption.

D. Labor Disputes

Aside from antitrust challenges to the league structure, no other area has generated more antitrust litigation for professional baseball than have labor disputes. Both players and umpires have brought antitrust suits against MLB, generally alleging that the league has unreasonably restrained trade in the market for their respective services.³⁸¹ Following the Curt Flood Act of 1998, it is clear that antitrust suits brought by current MLB players are no longer shielded by the baseball exemption.³⁸² However, because the CFA does not apply to suits brought by umpires, managers, coaches, or minor league players, the applicability of the antitrust exemption to those suits is less settled.³⁸³

Suits brought by umpires, managers, coaches, and minor league players all properly fall within the scope of baseball's antitrust exemption because the services of these employees are integral to the business of providing exhibitions of baseball. Indeed, it would be impossible to stage minor league baseball games without players because there would be no one left to play the game. Similarly, umpires provide the requisite neutral rule-enforcement essential for fair and orderly exhibitions. Management — both of the on-field and front office variety — is also necessary in order to assemble teams, determine which players will be in the starting lineup for a particular game, which positions they will play, the order in which they will bat, and whether any substitutions will be made.³⁸⁴ Indeed, each of these professions exists only because of the business of providing baseball exhibitions to the public. If not for professional baseball, the market for the services of professional baseball players, umpires, managers, or coaches would be substantially smaller, if not altogether non-existent.

³⁸¹ For suits involving players, see *Flood v. Kuhn*, 407 U.S. 258, 264 (1972); *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953); *Gardella v. Chandler*, 172 F.2d 402, 403 (2d Cir. 1949); *Am. League Baseball Club of Chi. v. Chase*, 149 N.Y.S. 6, 7 (N.Y. Sup. Ct. 1914). For suits initiated by umpires, see *Salerno v. Am. League of Prof'l Baseball*, 429 F.2d 1003, 1004 (2d Cir. 1970); *Postema v. Nat'l League of Prof'l Baseball Clubs*, 799 F. Supp. 1475, 1477 (S.D.N.Y. 1992).

³⁸² See generally *supra* Part I.E (discussing effect of Curt Flood Act).

³⁸³ See *supra* Part I.E.

³⁸⁴ Admittedly, some of these functions could be filled by a dual player-manager, as has occasionally been the case throughout baseball history. See Paul Weiler, *From Grand Slams to Grand Juries: Performance-Enhancing Drug Use in Sports*, 40 NEW ENG. L. REV. 809, 809 (2006) (noting that Cincinnati's Pete Rose was "baseball's first player-manager in decades").

Not surprisingly then, most courts considering whether to apply the baseball exemption to antitrust suits brought by players or umpires have held that such suits fall within the bounds of the exemption.³⁸⁵ For example, the Supreme Court applied the exemption to a suit brought by minor league players in *Toolson*,³⁸⁶ and similarly rejected a challenge brought by a major league player in *Flood*.³⁸⁷ Meanwhile, the Second Circuit applied the antitrust exemption to a suit brought by American League umpires in *Salerno v. American League of Professional Baseball*.³⁸⁸

In fact, the only case brought by a player or umpire post-*Toolson* in which a court has refused to apply the antitrust exemption was *Postema v. National League of Professional Baseball Clubs*, a suit filed by a former minor league umpire.³⁸⁹ As noted above, the *Postema* court held that the baseball exemption did not apply because “baseball’s relations with non-players are not a unique characteristic or need of the game”³⁹⁰ and, thus, applied an erroneous standard based on a misinterpretation of *Flood*.³⁹¹ The *Postema* court further erred by disregarding the Second Circuit’s binding precedent in *Salerno* regarding the applicability of the baseball exemption to suits brought by umpires, finding that “there is a substantial question whether *Salerno* would be decided similarly” post-*Flood*.³⁹² However, the *Postema* court overlooked the fact that *Flood* cited the Second Circuit’s opinion in *Salerno* without ever suggesting that the opinion was wrongly decided.³⁹³ Surely the *Flood* Court would have noted any disagreement it may have had with the *Salerno* ruling — an opinion issued only two years earlier — had it intended to exclude baseball’s umpire relations from the scope of its antitrust exemption. Thus, in addition to misinterpreting and misapplying *Flood*, the *Postema* court had no reasonable basis for departing from the binding *Salerno* precedent, a case the Supreme Court directly cited with approval in *Flood*.

³⁸⁵ To date, no antitrust suit has ever been filed by a manager or coach against professional baseball.

³⁸⁶ See *supra* note 61 and accompanying text.

³⁸⁷ See *Flood v. Kuhn*, 407 U.S. 258, 264 (1972).

³⁸⁸ *Salerno v. Am. League of Prof'l Baseball*, 429 F.2d 1003, 1004-05 (2d Cir. 1970).

³⁸⁹ *Postema v. Nat'l League of Prof'l Baseball Clubs*, 799 F. Supp. 1475, 1477 (S.D.N.Y. 1992).

³⁹⁰ *Id.* at 1489.

³⁹¹ See generally *supra* Part III.B (discussing erroneous analysis of *Postema* court).

³⁹² *Postema*, 799 F. Supp. at 1489.

³⁹³ *Flood v. Kuhn*, 407 U.S. 258, 268 n.9, 272 n.12 (1972); see also *supra* notes 255-58 and accompanying text.

Therefore, future courts should disregard the *Postema* precedent and instead hold that suits brought by umpires, managers, coaches, and minor league players fall within the bounds of baseball's antitrust exemption.

E. Non-Exempt Activities

Although this Article has asserted that a number of facets of the baseball business are directly related to supplying exhibitions of baseball to the public and, thus, properly fall within the scope of baseball's antitrust exemption, the proposed standard does not shield all of baseball's commercial activity. Indeed, there are several facets of the "business of baseball," which do not directly concern providing baseball entertainment to fans and, therefore, are not properly exempt from antitrust law.

One significant aspect of MLB's operations that would not be exempt under the proposed standard is merchandising. Specifically, MLB teams license their names, logos, and trademarks for use on MLB-related merchandise. MLB has officially licensed over 4,000 different products,³⁹⁴ ranging from the traditional t-shirts, hats, and baseball cards, to billiards tables³⁹⁵ and swimming pool toys.³⁹⁶ These licensing efforts represent one of the largest sources of revenue for MLB,³⁹⁷ totaling over \$125 million per year.³⁹⁸

Despite the significant profitability of MLB's licensing and merchandising operations, courts should not hold that these activities are immune from antitrust law pursuant to the baseball exemption. Unlike broadcasting, labor disputes, and decisions regarding the league structure and rules, MLB's merchandising activities do not directly relate to the business of providing exhibitions of baseball.³⁹⁹

³⁹⁴ Major League Baseball Props., Inc. v. Salvino, 542 F.3d 290, 298 (2d Cir. 2008).

³⁹⁵ *Imperial 64-2004 - X Cleveland Indians MLB Pool Table*, AMAZON.COM, <http://www.amazon.com/Imperial-64-2004-Cleveland-Indians-Table/dp/B0028XZOD0>.

³⁹⁶ *Detroit Tigers Pool & Patio*, MLB.COM (Oct. 8, 2009), <http://shop.mlb.com/family/index.jsp?categoryId=3495748&cp=1452351.1452757>.

³⁹⁷ Weinberger, *supra* note 8, at 75.

³⁹⁸ See Darren Rovell, *Seven Licensees Will Pay the Bulk of the Fees*, ESPN.COM (Aug. 6, 2003), <http://espn.go.com/sportsbusiness/news/2003/0804/1590167.html> (reporting that MLB signed licensing agreements guaranteeing it \$500 million from 2005–2009).

³⁹⁹ Several justices noted this distinction during the United States Supreme Court's oral argument in *American Needle, Inc. v. National Football League*. See generally Transcript of Oral Argument, *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010) (No. 08-661) (noting distinction between sports league's merchandising activities and other functions more closely related to providing sports entertainment). *American Needle* involved the applicability of Section One of the Sherman Act to an

Although the popularity of the baseball games themselves admittedly drives the sales of MLB-licensed merchandise, the licensing revenue is nevertheless generated separately from the actual exhibitions. Indeed, merchandise licensing does not affect the experience of a fan watching a baseball game, nor does it help deliver baseball entertainment to the public.

Moreover, exempting MLB’s licensing activities from antitrust law would be inconsistent with MLB’s own course of conduct in its licensing-related antitrust suits. For example, in the 2008 case of *Major League Baseball Properties, Inc. v. Salvino*, MLB Properties — MLB’s licensing entity — was sued by a merchandise manufacturer alleging that MLB’s licensing activities violated the Sherman Act.⁴⁰⁰ Despite the existence of the long-standing baseball antitrust exemption, MLB Properties did not assert that it was exempt from antitrust law, but instead successfully moved for summary judgment on the merits of the case.⁴⁰¹ Similarly, the co-defendant MLB Players’ Association also did not assert the antitrust exemption in *Fleer Corp. v. Topps Chewing Gum, Inc.*,⁴⁰² a case involving an antitrust challenge to a licensing agreement between it and a baseball card manufacturer.⁴⁰³ Thus, because MLB and its players’ union have both implicitly acknowledged that their licensing activities are outside the scope of its antitrust exemption, extending the exemption to such activities in the future would be inappropriate.

Other sources of MLB revenue such as concessions and sponsorship agreements also do not fall within the scope of the exemption immunizing the business of providing baseball entertainment. Baseball teams earn significant profits by selling concessions such as food and beverages to fans in attendance at the stadium.⁴⁰⁴ They also generate

exclusive trademark license agreement between the NFL and Reebok, in which the NFL granted Reebok the sole right to manufacture NFL-logoed merchandise. *See generally* Feldman, *supra* note 320 (discussing *American Needle* litigation); McCann, *supra* note 26 (same).

MLB’s antitrust exemption was not addressed in the Court’s opinion in *American Needle* and, thus, the decision does not implicate the scope of the *Federal Baseball*, *Toolson*, and *Flood* decisions. *See generally* Am. Needle, Inc. v. Nat’l Football League, 130 S. Ct. 2201 (2010) (never addressing baseball’s antitrust exemption).

⁴⁰⁰ *Major League Baseball Props., Inc. v. Salvino*, 542 F.3d 290, 293-94 (2d Cir. 2008); *see* *Major League Baseball Props., Inc. v. Salvino*, 420 F. Supp. 2d 212, 216 (S.D.N.Y. 2005) (discussing facts of case).

⁴⁰¹ *Salvino*, 420 F. Supp. at 218-21.

⁴⁰² *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981).

⁴⁰³ *Id.* at 140.

⁴⁰⁴ *See* Robert A. Schmoll, *NAFTA Chapter 11 and Professional Sports in Canada*, 36 VAND. J. TRANSNAT’L L. 1027, 1037 (2003) (stating that “[c]oncessions sold at the

considerable revenue by selling sponsorship rights, including stadium-naming rights, to companies seeking to advertise their businesses to these fans. For example, the New York Mets recently entered a twenty-year agreement with Citibank selling the bank the naming rights to the Mets' new stadium for \$20 million per season.⁴⁰⁵

Like the merchandising revenues discussed above, the popularity of the actual baseball exhibitions themselves drives both concessions and sponsorship revenues. Indeed, greater attendance leads to increased sales of food and beverages,⁴⁰⁶ while sponsorship revenues also increase as in-stadium attendance grows, because companies pay more for advertisements reaching a larger number of fans.⁴⁰⁷

Nevertheless, courts should not shield these activities from antitrust liability. As was the case with merchandising, MLB's concessions and sponsorship activities are only tangentially related to the baseball exhibitions themselves. Indeed, unlike other aspects of the baseball business, such as the league structure, rule making, and player and umpire relations, neither the existence nor quality of the actual on-field competition would necessarily change should concessions and sponsorship agreements cease to exist. Nor do concessions and sponsorships help deliver baseball entertainment to fans in the manner that broadcasting does. Therefore, because MLB's licensing, concessions, and sponsorship activities are all tangential to the business of providing baseball entertainment to the public, future courts should hold that they do not fall within the scope of baseball's antitrust exemption.

CONCLUSION

This Article has highlighted the need for courts to apply a single, uniform standard when considering the applicability of baseball's antitrust exemption. The existing lower court opinions are inconsistent and muddled, and fail to recognize the true focus of the

stadium on game day also generate significant revenues").

⁴⁰⁵ Marc Edelman, *Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 891, 914 (2008).

⁴⁰⁶ See Chris Isidore, *Baseball Close to Catching NFL as Top \$ Sport*, *CNNMONEY.COM* (Oct. 25 2007), <http://money.cnn.com/2007/10/25/commentary/sportsbiz/index.htm> (noting that reducing number of unused tickets increases concessions sales).

⁴⁰⁷ See *Major League Baseball Signs New Sponsorship Deals*, *REUTERS*, Apr. 14, 2009, available at <http://www.reuters.com/article/companyNews/idUKN1444007720090414> (reporting that when consumers buy fewer tickets to sporting events, companies in turn spend less on sponsorships).

applicable Supreme Court precedent. Future courts should reject the divergent approaches utilized in the existing lower court decisions and instead hold that the baseball exemption shields only those activities directly related to the business of providing baseball exhibitions to the public. Facets of the baseball business exempt under the proposed standard include baseball's rule-making, league structure (at both the major and minor league levels), broadcasting, and most labor disputes. Conversely, baseball's licensing, concessions, and sponsorship agreements do not directly impact the provision of baseball entertainment and, thus, courts should not hold them exempt from antitrust liability. Adoption of the proposed standard will enable future courts to provide clarity and predictability to leagues and stakeholders, while remaining consistent with the relevant Supreme Court precedent.