

BASEBALL'S ANTICOMPETITIVE ANTITRUST EXEMPTION

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Abstract: For more than one hundred years, professional baseball has enjoyed a form of exemption from federal antitrust laws. Arising from a statement made by the game's first commissioner Kenesaw Mountain Landis that organized baseball is a national institution and not labor—and later enshrined into common law by Justice Oliver Wendell Holmes's adoption of a now-outdated definition of interstate commerce—baseball's antitrust exemption endures as “an exception, an anomaly and an aberration.”

Relying on an exemption from antitrust law, owners of Major League Baseball have become exceedingly wealthy based on their carte blanche freedom to act in their collective best interests—sometimes to the detriment of players, rival sports leagues, and fans. Even though the original basis for baseball's antitrust exemption has long since faded, courts and Congress, fearing political backlash or perhaps enjoying the perks of aggressive lobbyists seeking to curry favor, have been loath to lift the exemption.

This Article calls for reform to the treatment of professional baseball under federal antitrust laws and suggests that baseball, like all other organized sports, be held subject to competitive scrutiny. Drawing on a careful study of baseball history, legal precedent, and public policy, the Article concludes that even if organized baseball is a national institution, much like its historic use of amateur players, unbalanced schedules, and segregated leagues, the time has come to put baseball's historic antitrust exemption behind us.

INTRODUCTION

For more than one hundred years, professional baseball has enjoyed a form of exemption from federal antitrust laws.¹ During his time as a federal judge, Kenesaw Mountain Landis, the game's first commissioner, enshrined baseball as a “national institution” and not labor.² Based on this premise, Jus-

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¹ Fed. Baseball Club of Balt., Inc. v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200, 208–09 (1922).

² J.G. TAYLOR SPINK, JUDGE LANDIS AND TWENTY-FIVE YEARS OF BASEBALL 35 (1947).

tice Oliver Wendell Holmes then adopted the idea that baseball be formally excepted from antitrust law based on his now-outdated definition of interstate commerce.³ Today, baseball's antitrust exemption is "an exception, an anomaly and an aberration" that has been with us for more than a century.⁴

With no other U.S. professional sports league enjoying a similar exemption from federal antitrust law,⁵ owners of Major League Baseball ("Baseball" or "MLB") teams have become exceedingly wealthy in part due to their carte blanche freedom to act in their collective best interests—sometimes to the detriment of players, rival sports leagues, and fans.⁶ In recent years, Baseball owners have used their protection from antitrust law to merge together the American and National leagues;⁷ prevent one of the league's smallest market teams from moving to a more desirable home market;⁸ engage in the joint sale of game data;⁹ and consolidate the number of operational minor league baseball franchises.¹⁰ These behaviors have harmed both rivals and competition.¹¹

Beyond the anticompetitive effects of maintaining baseball's historic antitrust exemption, the U.S. Supreme Court ignores the seismic shift in the definition of "interstate commerce," beginning with the 1942 decision in *Wickard v. Filburn*, that would clearly bring MLB within the scope of federal antitrust laws if properly applied.¹² Although the U.S. Supreme Court has preserved stare decisis in its 1922 decision, *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, the Court has since undercut the

³ *Fed. Baseball*, 259 U.S. at 208.

⁴ *Finley v. Kuhn*, 569 F.2d 527, 537 (7th Cir. 1978) (internal citations and quotations omitted).

⁵ See Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 4–6 (1971) (observing that baseball's antitrust protections have positioned the sport uniquely among professional sports in the United States).

⁶ See *Radovich v. Nat'l Football League*, 352 U.S. 445, 451 (1957) (observing that the Supreme Court was "careful to restrict" the antitrust exemption to baseball).

⁷ See Jim Bowden, *Bowden: MLB Expansion Should Include Geographic Realignment—So Let's Build New Divisions*, THE ATHLETIC (Feb. 7, 2023), <https://theathletic.com/4159445/2023/02/07/mlb-expansion-geographic-realignment/> [<https://perma.cc/R4HN-SML9>] (discussing the radical realignment of Major League Baseball's structure).

⁸ *City of San Jose v. Off. of the Comm'r of Baseball*, 776 F.3d 686, 692 (9th Cir. 2015).

⁹ Marc Edelman & John T. Holden, *Monopolizing Sports Data*, 63 WM. & MARY L. REV. 69, 127–28 (2021).

¹⁰ David Mendez, *Minor League Baseball Teams Sue MLB Over Antitrust Exemption*, NY1 (Dec. 20, 2021), <https://www.ny1.com/nyc/all-boroughs/sports/2021/12/20/minor-league-lawsuit-mlb-antitrust-exemption/> [<https://perma.cc/W6BK-N5S3>].

¹¹ See, e.g., Neil Greenberg, *Baseball's Competitive Balance Problem Is Getting Worse*, WASH. POST (Apr. 1, 2022), <https://www.washingtonpost.com/sports/2022/04/01/mlb-payrolls-competitive-balance/> [<https://perma.cc/JY8F-Q27Y>] (observing that despite changes purported to increase competitiveness only a "handful of teams are truly competing for championships and that some, by lagging far behind in payroll, are virtually eliminating themselves from contention before the season begins").

¹² 317 U.S. 111, 111 (1942).

precedential value of *Wickard* and its progeny by allowing aspects of MLB to continue to avoid antitrust scrutiny.

This Article is a call for reform to the treatment of professional baseball under federal antitrust laws. Part I begins by exploring the development of MLB as a business.¹³ In Part II, this Article discusses the emergence of baseball's historic antitrust exemption in the U.S. Supreme Court's seminal 1922 decision *Federal Baseball*.¹⁴ Part III examines the progeny of the *Federal Baseball* decision, including the Supreme Court's later decisions in 1953, in *Toolson v. New York Yankees*, and in 1972, in *Flood v. Kuhn*, and important lower court decisions both before and after the passing of the Curt Flood Act of 1998.¹⁵ Part IV describes eight ways that baseball's historic antitrust exemption allows for Baseball to engage in potentially anticompetitive practices that otherwise would be subject to legal scrutiny.¹⁶ Part V investigates and rejects the three most prominent defenses for preserving baseball's antitrust exemption.¹⁷ Finally, the conclusion argues that, much like the use of amateur players, unbalanced schedules, and segregated leagues, the time has come to put baseball's historic antitrust exemption behind us.¹⁸

I. A BRIEF HISTORY OF PROFESSIONAL BASEBALL AND ITS BUSINESS STRUCTURE

Baseball was the first professional sport to develop in the United States, and it has subsequently enjoyed special treatment under federal antitrust law.¹⁹ This special treatment has evolved for two reasons. First, courts began to scrutinize professional baseball under federal antitrust law when the interpretation of antitrust law was still evolving—thus leading to iconoclastic antitrust precedent that treated MLB more favorably than other professional sports leagues.²⁰ Second, some Justices, even today, seek to treat Baseball differently from other professional sports leagues based on a dubious historical account of baseball

¹³ See *infra* notes 19–140 and accompanying text.

¹⁴ See *infra* notes 142–204 and accompanying text.

¹⁵ See *infra* notes 205–314 and accompanying text.

¹⁶ See *infra* notes 315–401 and accompanying text.

¹⁷ See *infra* notes 402–451 and accompanying text.

¹⁸ See *infra* notes 452–453 and accompanying text.

¹⁹ See Samuel G. Mann, Note, *In Name Only: How Major League Baseball's Reliance on Its Antitrust Exemption Is Hurting the Game*, 54 WM. & MARY L. REV. 587, 594–96 (2012) (discussing the application of baseball's antitrust exemption).

²⁰ See 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. 149, 191 (2009) (describing the D.C. Circuit's analysis as “pat and formalistic in light of modern doctrine,” and noting the Court's analysis “not on whether the defendant's conduct violated the substantive prohibition of the antitrust laws, but on whether the conduct sufficiently partook of interstate commerce to be prohibited by Congress at all”).

that intertwines the sport with American tradition in a way that was never the case.²¹

Given the false business history of MLB that continues to emanate in some court decisions, even in modern times,²² Part I of this Article provides a more realistic and historical account of how the business of baseball began and evolved. Though this departs from the typical legal analysis of law review articles, this Article requires an accurate historical account. This background is necessary to analyze meaningfully the context of American baseball found in later legal opinions.

Section A of this Part outlines the formation of organized baseball beginning in New York and expanding across the country in the mid-nineteenth century.²³ Section B details the creation and dominance of the National League as a professional sports league.²⁴ Section C explains the emergence of the American League and eventual merger of the American and National Leagues into MLB.²⁵ Section D outlines the evolution of MLB's business model.²⁶ Last, Section E unpacks unionization efforts and attempts to secure greater labor protections for players.²⁷

A. Competitive Baseball Emerges

Although legend tells us that the sport of baseball is “America’s national pastime” created by famed Civil War general Abner Doubleday, historical research presents a far different and somewhat more complex depiction of baseball’s actual origins.²⁸ Based on a review of primary and secondary sources, it is clear that many ancient civilizations played some form of a game involving sticks and balls long before Europeans arrived in the United States.²⁹ Historical

²¹ See Aaron S.J. Zelinsky, *The Supreme Court (of Baseball)*, 121 YALE L.J. ONLINE 143, 143 (2011), https://www.yalelawjournal.org/pdf/1008_x25ejbx1.pdf [<https://perma.cc/DV2J-8RB7>] (observing that Chief Justice John Roberts has compared the role of a Supreme Court Justice as being akin to an umpire).

²² See, e.g., *Loughran v. The Phillies*, 888 A.2d 872, 881 (Pa. Super. Ct. 2005) (referencing Abner Doubleday’s original intent and seeming to imply that he was the inventor of the World Series).

²³ See *infra* notes 28–50 and accompanying text.

²⁴ See *infra* notes 51–77 and accompanying text.

²⁵ See *infra* notes 78–91 and accompanying text.

²⁶ See *infra* notes 92–125 and accompanying text.

²⁷ See *infra* notes 126–141 and accompanying text.

²⁸ THOMAS W. GILBERT, *HOW BASEBALL HAPPENED: OUTRAGEOUS LIES EXPOSED! THE TRUE STORY REVEALED* 21 (2020). Doubleday was an attractive figure to build an image around, as he was a Major General who fought in the Mexican War and Civil War and served at Gettysburg. *Id.* He was an engineer by trade who secured the rights to build San Francisco’s first cable car system, but he never claimed to be the inventor of baseball. *Id.* In fact, it appears that the Doubleday myth was concocted by sporting goods manufacturer Albert Spalding. *Id.*

²⁹ GEORGE VECSEY, *BASEBALL: A HISTORY OF AMERICA’S FAVORITE GAME* 18–19 (2006).

accounts also show that there was a poem written in a 1744 children's book, published in London, making references to "base-ball" and describing a ball being struck, presumably with a bat.³⁰ A 1786 diary entry of a Princeton student named John Rhea Smith is believed to provide "textual reference" to the game now considered to be baseball in the United States.³¹

Even if these earliest historical accounts are somewhat equivocal, most historians agree that modern, organized baseball can be safely traced back to the City of New York in the 1840s. A barnstorming team called the Knickerbockers, composed of upper-class businessmen, merchants, firefighters, and other professionals, traveled around to play the game.³² Among these traveling baseball players, historians recognize Alexander Cartwright, the leader of the Knickerbockers, as perhaps the true author of the game's original written rules.³³ During Cartwright's heyday, baseball was purely an amateur sport that athletes played for enjoyment and fans watched for free.³⁴ Although the Knickerbockers traveled to different cities to introduce the game, their visits were often better known for their elaborate dinners and social parties than for the baseball games themselves.³⁵ Baseball at this time was truly a social endeavor.³⁶

By the late 1850s, however, the Knickerbockers were no longer the only traveling baseball team in the United States, and the social component of traveling baseball had taken a backseat to the games themselves and the goal of winning.³⁷ As more teams emerged, the players on these teams formed the National Association of Base Ball Players (NABBP) in 1857 to act as their governing body.³⁸ Initially, the NABBP represented teams from the area encompassing what are now all five New York boroughs, where early baseball enjoyed its strongest following.³⁹ The association thereafter expanded to include teams from other states.⁴⁰

³⁰ *Id.* at 19. This is believed to be the first literary reference to baseball. *Id.*

³¹ *Id.*; *Earliest Mention of Baseball*, LIBR. OF CONG., <https://www.loc.gov/exhibitions/baseball-american/about-this-exhibition/origins-and-early-days/baseballs-roots/earliest-mention-of-baseball/> [https://perma.cc/X2NA-NBGY].

³² VECSEY, *supra* note 29, at 45–46; *Earliest Mention of Baseball*, *supra* note 31.

³³ Monica Nucciarone, *Alexander Cartwright*, SOC'Y FOR AM. BASEBALL RSCH., <https://sabr.org/bioproj/person/alexander-cartwright/> [https://perma.cc/9JYS-YVEA].

³⁴ VECSEY, *supra* note 29, at 23.

³⁵ *Id.*

³⁶ GILBERT, *supra* note 28, at 47–51.

³⁷ VECSEY, *supra* note 29, at 23–25.

³⁸ *National Association of Base Ball Players*, BASEBALL REFERENCE, https://www.baseball-reference.com/bullpen/National_Association_of_Base_Ball_Players [https://perma.cc/WN8Z-2ABW] (Mar. 3, 2024).

³⁹ *Id.*

⁴⁰ *Id.*

The same year that the teams formed NABBP, organized baseball began to emerge as a business. According to available historical accounts, spectators had to pay an admissions fee for the first time in 1857 to view a baseball game—specifically, the league's first all-star game.⁴¹ The game attracted more than ten thousand fans, and organizers generated a profit of \$71.09.⁴²

Once teams recognized the potential for revenue derived from baseball, efforts emerged to turn baseball into a profit-making endeavor.⁴³ Teams installed turnstiles and charged attendees between \$0.10 and \$0.25 to watch exhibitions put on by traveling teams, generally from New York City, that would travel around the Northeast taking on local teams.⁴⁴ At around the same time, some teams began to compete to secure new ballplayers.

By 1869, the professionalization of baseball and the emergence of labor markets for baseball players was inevitable.⁴⁵ By this time, the dominant Cincinnati Red Stockings had just a single player from Cincinnati and eight paid players from other cities.⁴⁶ Further, the Red Stockings had a massive budget of \$10,000 and won eighty-one games in a row.⁴⁷ Consequently, they became a commercial success, playing to sold-out crowds across the country and charging admission as high as one dollar in gold at one California stop.⁴⁸ The winning streak, which would continue until midway through the following season when many more teams began paying salaries to their players, was both a gift and a curse. Once the team finally lost a game, the novelty wore off, and the Red Stockings left Cincinnati for Boston within a year.⁴⁹ The Red Stockings' move to Boston foreshadowed a trend of teams packing up and moving when fans stopped coming through the admission gates.⁵⁰

B. Emergence of the National League

The movement away from baseball as a strictly amateur endeavor accelerated through the 1870s as the sport continued to gain a business-like structure. On March 17, 1871, a delegates meeting comprised of the nine teams of

⁴¹ VECSEY, *supra* note 29, at 23.

⁴² *Id.* at 29. This profit was eventually donated to fire departments in New York and Brooklyn (then an independent city). In a way, this was not surprising given how many Knickerbockers and other early organized baseball players worked as firefighters. *Id.*

⁴³ *Id.* at 23.

⁴⁴ *Id.* at 24.

⁴⁵ *Id.* at 25.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

the NABBP⁵¹ split baseball into two factions: one professional and the other composed of amateur players.⁵² The split effectively spelled the end of the NABBP five years later—the professional teams within the NABBP split away and founded the National League, which has remained to this day.⁵³

Baseball's National League was different from any professional sports league that had existed before.⁵⁴ The league included a standardized game schedule and “a three-person panel to resolve a narrow range of disputes among club owners.”⁵⁵ The league also included standards for membership.⁵⁶ Early standards required that teams be from larger cities, with populations of at least seventy-five thousand people, with an exception made for a somewhat smaller-market team in the city of Hartford, Connecticut.⁵⁷ The league expected teams to pay a deposit to ensure the team played all contracted games, which the league then returned if they did.⁵⁸ Teams were to be run by businessmen rather than the players themselves.⁵⁹ The teams also implemented a rule that no two teams could occupy the same city, granting each team a geographic monopoly—one of the first restraints of trade to emerge in professional sports.⁶⁰

The National League was superior to the alternatives. No longer would professional teams from places like New York or Philadelphia roll into small towns to demolish uncompetitive local teams.⁶¹ Instead, the top players would

⁵¹ *Id.* at 29.

⁵² Richard Hershberger, *1871 Winter Meetings: The Winter of Three National Associations*, SOC'Y FOR AM. BASEBALL RSCH., <https://sabr.org/journal/article/1871-winter-meetings-the-winter-of-three-national-associations/> [<https://perma.cc/VY5C-6T24>].

⁵³ *Id.*; see David Bohmer, *William Hulbert: Father of Professional Sports Leagues*, SOC'Y FOR AM. BASEBALL RSCH., <https://sabr.org/journal/article/william-hulbert-father-of-professional-sports-leagues/> [<https://perma.cc/W6W9-HE8S>] (documenting Chicago baseball promoter William Hulbert's allegiance with Harry Wright of Boston, which explains why the two strong baseball markets of Chicago and Boston grounded the National League).

⁵⁴ 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, 899 (2008).

⁵⁵ *Id.*

⁵⁶ See John Thorn, *Constitution and Playing Rules of the National League of Professional Baseball Clubs*, OUR GAME (Apr. 26, 2017), <https://ourgame.mlblogs.com/constitution-and-playing-rules-of-the-national-league-of-professional-baseball-clubs-b79ee1eef3b3> [<https://perma.cc/M9E8-XNBK>] (noting that among the terms for admission were that future clubs needed to be from cities with a population greater than 75,000, and that teams had to certify to the Secretary of the League that the prospective club employed no “player who has been dismissed or expelled by the League or any club member thereof”); Michael Hauptert, *1875 Winter Meetings: The Origin of the National League*, SOC'Y FOR AM. BASEBALL RSCH., <https://sabr.org/journal/article/1875-winter-meetings-pulling-baseball-from-a-slough-of-corruption-and-disgrace-the-origin-of-the-national-league/> [<https://perma.cc/TAU7-DD3Y>].

⁵⁷ Hauptert, *supra* note 56.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

play against the top players, and any player of skill would aspire to play in the National League.⁶²

In its early years, the National League thrived. Under the leadership of Albert Spalding, the National League quickly turned profitable.⁶³ To keep labor costs down, Spalding convinced the teams to agree to a reserve system that indefinitely tied players to a single team, and he implemented an annual salary cap of \$2,000 per player.⁶⁴ Spalding also took the game abroad, including a tour of cities in Australia, England, Egypt, France and Ireland.⁶⁵ According to multiple sources, Spalding was even responsible for crafting the legend of Abner Doubleday to give baseball a patriotic aura, thus subordinating the true historic account of the game's creation and growth under earlier innovators like Cartwright.⁶⁶

Within a short time period, many startup baseball leagues unsuccessfully tried to compete against the National League.⁶⁷ Beginning in 1882, the National League began to loosely associate with a newer and less-structured league known as the American Association, which had an open system of club entry and exit.⁶⁸ Although permissive for owners, the American Association implemented significant restraints on players, including restricting players from signing with a new team unless their old team had released them.⁶⁹ In an effort to appease National League owners, the American Association blacklisted

⁶² *Id.* The owners also agreed to drive out rowdiness and drunkenness, not play on the Christian sabbath, and raise ticket prices to increase profits and promote a sense of exclusiveness for the upper classes. *Id.*

⁶³ *Id.* A starting pitcher who led the league with forty-seven wins in its inaugural season and yet somehow still may have been an even more successful businessman than a player. *Id.*

⁶⁴ John Thorn, *Spalding's Bluff: The Game's Crucial Moment*, OUR GAME (Aug. 14, 2017), <https://ourgame.mlblogs.com/spaldings-bluff-the-game-s-crucial-moment-7712ad038ef0> [<https://perma.cc/GV25-XSSL>].

⁶⁵ VECSEY, *supra* note 29, at 33.

⁶⁶ GILBERT, *supra* note 28, at 21; see Victor Salvatore, *The Man Who Didn't Invent Baseball*, AM. HERITAGE (June/July 1983), <https://www.americanheritage.com/man-who-didnt-invent-baseball> [<https://perma.cc/YYD8-T5HE>] (describing how Cartwright's grandson Bruce wrote to Baseball Commissioner Kenesaw Mountain Landis in an attempt to set the record straight that Cartwright, not Doubleday, should be honored as baseball's originator at the upcoming baseball centennial in 1939).

⁶⁷ For instance, the Union Association was a major league that existed for one season in 1884. See *1884 Union Association Team Statistics*, BASEBALL REF., <https://www.baseball-reference.com/leagues/UA/1884.shtml> [<https://perma.cc/G8S2-BZA9>]. In 1890, the Players' League was launched in response to pay disputes, but the league would only last for one season. Gordon J. Gattie, *The Legacy of the Players' League: 1890 Chicago Pirates*, SOC'Y FOR AM. BASEBALL RSCH., <https://sabr.org/journal/article/the-legacy-of-the-players-league-1890-chicago-pirates/> [<https://perma.cc/K58K-594U>].

⁶⁸ See John Thorn, *A New Major League: The Origin of the American Association*, OUR GAME (June 6, 2019), <https://ourgame.mlblogs.com/a-new-major-league-the-origin-of-the-american-association-51cfb10d064f> [<https://perma.cc/6C8H-8ZYM>] (noting that the American Association rules allowed any club to withdraw from the Association at any time and failed to include a provision for continuation of membership).

⁶⁹ *Id.*

players punished in their league as well as banned National League players.⁷⁰ Yet, the National League never saw the American Association as its equal, and National League teams ignored contracts with American Association players.⁷¹ Eventually, the two leagues reached some form of an understanding to collaborate (or, perhaps more accurately, collude) to enforce each other's reserve systems.⁷² Ultimately, the National League swallowed up the American Association after the 1891 season.⁷³

The National League continued to subsume and deconstruct several emergent professional baseball leagues.⁷⁴ Perhaps one of the more interesting startup leagues to launch and fail during this period was the Players League, founded by National League player and Columbia Law School graduate John Montgomery Ward.⁷⁵ In 1885, Ward led the charge to organize baseball's first players union, the Brotherhood of Professional Base Ball Players.⁷⁶ In 1890, Ward tried to launch a league without owners altogether.⁷⁷ Ultimately, his efforts failed when the league found itself short of funding.

C. The National League Morphs into Major League Baseball

The lone exception to the trend of the National League driving out new startup leagues was an initially unremarkable league first called the Western League.⁷⁸ Perhaps like many other fortuitous relationships in history, the Western League came along at exactly the right time—just as the National League

⁷⁰ *Id.*

⁷¹ See Richard Hersherberger, *The First Baseball War: The American Association and the National League*, SOC'Y FOR AM. BASEBALL RSCH., <https://sabr.org/journal/article/the-first-baseball-war-the-american-association-and-the-national-league/> [<https://perma.cc/A624-MN6B>] (dubbing the refusal on the part of the National League to acknowledge outside player contracts the “principal dispute in any baseball war”).

⁷² *Id.*

⁷³ See *id.* (observing that despite being a party to the agreement, the Northwestern League was viewed as what would now be considered a minor league, whereas the National League and American Association were, at least for purposes of the agreement, largely on equal footing as top-tier leagues).

⁷⁴ See *History of Baseball in the United States*, BASEBALL REFERENCE, https://www.baseballreference.com/bulpen/History_of_baseball_in_the_United_States#Professionalism_and_the_rise_of_the_major_leagues [<https://perma.cc/XB67-UUBH>] (Feb. 17, 2024) (describing how many rival leagues in the late nineteenth century quickly rose and fell in prominence as they sought to compete with the more dominant National League).

⁷⁵ *History*, MLB PLAYERS ASS'N, <https://www.mlbplayers.com/history> [<https://perma.cc/7457-A7ZE>].

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See Bob Buege, *The Birth of the American League*, SOC'Y FOR AM. BASEBALL RSCH., <https://sabr.org/journal/article/the-birth-of-the-american-league/> [<https://perma.cc/M4GV-PV86>] (discussing how “Ban” Johnson and Charlie Comisky recruited Connie Mack from the struggling Pittsburgh Pirates to coach the Brewers in the new Western League).

was experiencing financial troubles.⁷⁹ Sensing the National League's momentary weakness, the Western League cleverly rebranded itself as the American League and proclaimed itself as an equal to the National League.⁸⁰ The National League failed in their efforts to drive the American League out of business.⁸¹ Consequently, representatives from the two leagues instead signed a non-aggression agreement where they accepted the other leagues reserve clauses and created a commission to administer the sport.⁸² They also agreed to create a two-leagued premier structure for what became Major League Baseball, which featured an end-of-season World Series between the champions of each of their respective leagues.⁸³

Between 1903 and 1913, the National and American Leagues shared the throne as the United States' two dominant professional leagues. Nevertheless, the non-aggression agreement between the leagues did not end the efforts of businesspeople to create new professional baseball leagues. If anything, it expedited efforts to create new leagues and try to join the consortium.⁸⁴

Most of these new leagues failed;⁸⁵ still, one came incredibly close to success. Originally known as the Columbian League and later renamed as the Federal League, this new, third league was composed of six teams in the Midwest that were slated to play a 120-game season.⁸⁶ By 1914, the Federal League had signed forty players away from the American and National Leagues because this new league lacked a salary cap and some of the American and National Leagues' other, more arduous restraints on player move-

⁷⁹ See *id.* (noting that the National League was in the process of consolidating its twelve extant teams into eight).

⁸⁰ See *id.* (giving an account of Charlie Comisky's successful fight with the National League to establish a rival team in Chicago).

⁸¹ *Id.*

⁸² Marc Edelman, *Can Antitrust Law Save the Minnesota Twins?* 10 SPORTS L.J. 45, 47 (2003) (citing JEROLD J. DUQUETTE, REGULATING THE NATIONAL PASTIME: BASEBALL AND ANTITRUST 8 (1999)).

⁸³ Peter Bendix, *The History of the American and National League, Part I*, BEYOND THE BOX SCORE (Nov. 18, 2008), <https://www.beyondtheboxscore.com/2008/11/18/664028/the-history-of-the-america> [<https://perma.cc/SQD3-5EFM>].

⁸⁴ See Emil H. Rothe, *Was the Federal League a Major League?*, SOC'Y FOR AM. BASEBALL RSCH., <http://research.sabr.org/journals/federal-league-a-major-league> [<https://perma.cc/S2BW-VBL3>] (describing how various wealthy manufacturers, bankers, and tycoons like James Gilmore, Robert Ward, and Albert Sinclair became involved in baseball teams and baseball associations).

⁸⁵ *History*, *supra* note 75.

⁸⁶ See Rothe, *supra* note 84 (noting that after awarding the league's first president "a vacation," the league was thereafter run by Chicago manufacturer James Gilmore and attracted the interest of wealthy businessmen, including oil tycoon Albert Sinclair).

ment.⁸⁷ The threat of a new competitor pushed the American and National Leagues to raise their own salary caps.⁸⁸

Although the Federal League's launch was a success, the ability to recruit top-level talent away from the two more competitive leagues came with a significant cost.⁸⁹ The financial toll of attempting to compete against the more established leagues saw the Federal League fall into dire financial straits by January 1915, leading the League to file an antitrust lawsuit against the teams in the American and National leagues.⁹⁰ This fighting and years of jostling for survival between the trio of major leagues formed the basis of the structure for the modern business of baseball.⁹¹

D. The Emergence of Baseball's Business Structure

Modern professional baseball is and has always been structured as a business.⁹² Like other businesses, baseball serves the financial interests of its owners first, and the needs, wants, and desires of its workers, the players, second.⁹³ Baseball's owners have always understood that collaboration and collusion would create the greatest potential for profit.⁹⁴ This realization explains the National Agreements of the late 1800s and early 1900s, where leagues that should have been competing for talented players instead entered into agreements not to sign, or otherwise induce away, players from competitive leagues.⁹⁵ By the early 1900s, the American and National Leagues had become so dominant in the player labor market that other leagues banded together and formed their own lesser association of independent leagues, which later morphed into Baseball's minor league system.⁹⁶

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *infra* notes 92–125 and accompanying text.

⁹² See generally DIRK HAYHURST, *THE BULLPEN GOSPELS: MAJOR LEAGUE DREAMS OF A MINOR LEAGUE VETERAN* 9–17 (2010) (describing the daily life of a player on the road toward the MLB).

⁹³ There was fierce competition for players during the multi-league era of the late 1800s because winning teams generated greater revenue. Accordingly, the leagues signed a collusive national agreement to limit players' ability to move between rival leagues. See J.J. Cooper, *A Complete History of the Working Agreement Between Major and Minor Leagues*, *BASEBALL AM.* (Oct. 18, 2019), <https://www.baseballamerica.com/stories/a-complete-history-of-the-working-agreement-between-major-and-minor-leagues/> [<https://perma.cc/QD2P-XJEQ>].

⁹⁴ See generally Marc Normandin, *The Past, Present, and Future of MLB Collusion*, *SB NATION*, <https://www.sbnation.com/mlb/2018/1/10/16863052/mlb-collusion-history-bud-selig-free-agency> (Jan. 10, 2018) [<https://perma.cc/M9T4-25NB>] (providing an extensive overview of owners colluding in contemporary baseball).

⁹⁵ Cooper, *supra* note 93.

⁹⁶ *Id.*

Although baseball's core business model has always centered around the on-field product built using player labor, owners have always sought to supplement ticket and concession revenue through alternative streams.⁹⁷ As early as the late 1890s, baseball owners began to monetize derivative information, beginning with the sale of telegraph rights, which were initially sold for \$300 per team in 1897.⁹⁸ Over the next hundred years, baseball owners entered into the broadcasting, licensing, and sponsorship industries.⁹⁹

Despite collaboration between the two professional leagues commencing with the first modern World Series in 1903, National League team owners continued to express disdain for the American League entities. The animosity was so significant that the 1904 World Series was not played because the National League's New York Giants refused to play the New York Highlanders to avoid legitimizing the competitor team in the city.¹⁰⁰ The American League's Highlanders, however, lost to the Boston Americans, eliminating the feared matchup and risk of legitimizing the Giants' hometown rival.¹⁰¹ Nonetheless, the Giants elected not to participate.¹⁰² By 1922, the Highlanders, which by then had changed their name to the Yankees, had left Manhattan for the Bronx.¹⁰³

The commercial growth of baseball was also infiltrated by illicit industries that looked to profit by manipulating games for gambling purposes. This practice that would eventually lead to the establishment of the Office of the Commissioner of Baseball to protect the integrity of the game and ensure its ongoing commercial viability.¹⁰⁴ Baseball team owners originally wanted to

⁹⁷ See Michael J. Hauptert, *The Economic History of Major League Baseball*, ECON. HIST. ASS'N, <https://eh.net/encyclopedia/the-economic-history-of-major-league-baseball/> [<https://perma.cc/8G3R-NNQQ>] (cataloguing the "tertiary industries [that] have grown around the demand for baseball, and sports in general, including the sports magazine trade, dedicated sports television and radio stations, tour companies specializing in sports trips, and an active memorabilia industry").

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ RJ McDaniel, *Baseball As a Business, a Historical Perspective*, HARDBALL TIMES (Feb. 23, 2018), <https://tht.fangraphs.com/baseball-as-a-business-a-historical-perspective/> [<https://perma.cc/ETA4-LRSN>].

¹⁰¹ *Id.*

¹⁰² *The Baseball Season*, N.Y. TIMES, Oct. 12, 1904, at 8, <https://timesmachine.nytimes.com/timesmachine/1904/10/12/100476210.html?pageNumber=8> [<https://perma.cc/3FNL-Z9YS>].

¹⁰³ See Steven C. Owens, *Before They Were "Yankees,"* MEDIUM (Dec. 19, 2017), <https://stowens.medium.com/before-they-were-yankees-1f0ec52d5677> [<https://perma.cc/U83G-UFDA>] (explaining how the team's relocation from the high-elevation Polo Grounds to a playing location across the Harlem River meant that "Highlanders" was no longer an appropriate moniker).

¹⁰⁴ John T. Holden & Ryan M. Rodenberg, *The Sports Bribery Act: A Law and Economics Approach*, 42 N. KY. L. REV. 453, 455–56 (2015); see John T. Holden & Marc Edelman, *A Short Treatise on Sports Gambling and the Law: How America Regulates Its Most Lucrative Vice*, 2020 WIS. L. REV. 907, 913 (noting that although many people associate baseball-related corruption with the 1919 World Series, grand jury testimony associated with the 1919 fix revealed that at least one player believed that Chicago Cubs players had fixed the 1918 World Series for a payment of \$10,000).

give the role of league commissioner to former U.S. President William Howard Taft with hopes that his positive reputation would inspire confidence in baseball with both fans and politicians alike.¹⁰⁵ Nevertheless, Taft declined the baseball job, and after twice previously declining nomination for appointment to the U.S. Supreme Court, eventually accepted President Warren G. Harding's offer for nomination to the Court.¹⁰⁶

With Taft turning down the baseball post, baseball owners scurried to find a replacement candidate who would be perceived as having similar credibility.¹⁰⁷ With no perfect candidate available, baseball owners chose a federal court judge, Kennesaw Mountain Landis, who had taken a friendly stance to them in an earlier antitrust dispute.¹⁰⁸ The owners then vested power in the sitting President of the United States to name the commissioner's successor upon his death or incapacity¹⁰⁹—a power no U.S. president has ever attempted to exercise and, perhaps, no U.S. president has even known existed.¹¹⁰

The roughly twenty-two-year period from 1921 to 1944 that Landis acted as the commissioner of professional baseball¹¹¹ defined Baseball in terms of its profitability and its business structure.¹¹² An unquestionable egomaniac and almost-certain bigot who played the unfortunate role of excluding Black players from the MLB during his lifetime,¹¹³ Landis's most redeeming quality was his ability to get things done.¹¹⁴ He, along with the American League and Na-

¹⁰⁵ Daniel R. Levitt, *Baseball's First Commissioner: The Hiring of Judge Kenesaw Mountain Landis*, SOC'Y FOR AM. BASEBALL RSCH., <https://sabr.org/research/article/baseballs-first-commissioner-the-hiring-of-judge-kenesaw-mountain-landis/> [<https://perma.cc/3SKN-TDB3>].

¹⁰⁶ Peri E. Arnold, *William Taft: Life Before the Presidency*, MILLER CTR., UNIV. VA., <https://millercenter.org/president/taft/life-before-the-presidency> [<https://perma.cc/4KWX-4EA3>].

¹⁰⁷ See Edelman, *supra* note 82, at 47–48 (explaining how MLB chose to vest power to appoint a new commissioner in the President of the United States but only in the event of the commissioner's death or incapacity).

¹⁰⁸ Frederic J. Frommer, *Baseball's First Commissioner Faced Impeachment for Taking the Job*, WASH. POST (Apr. 9, 2022), <https://www.washingtonpost.com/history/2022/04/09/kenesaw-mountain-landis-baseball-impeachment/> [<https://perma.cc/M7JB-GY6T>].

¹⁰⁹ Edelman, *supra* note 82, at 47–48 (citing DUQUETTE, *supra* note 82, at 29).

¹¹⁰ See *id.* at 49 (“Although the owners had designated to the President of the United States the power to appoint the game's commissioners, each of Landis's successors was selected unilaterally by MLB ownership.”).

¹¹¹ Elizabeth Borja, *The Many Flights of the Czar of Baseball*, SMITHSONIAN (Mar. 28, 2019), <https://airandspace.si.edu/stories/editorial/many-flights-czar-baseball> [<https://perma.cc/8BVM-XFPP>].

¹¹² Frommer, *supra* note 108.

¹¹³ See LARRY LESTER, *BASEBALL'S FIRST COLORED WORLD SERIES: THE MEETING OF THE HILLDALE GIANTS AND KANSAS CITY MONARCHS* 30 (2006) (describing Landis as an “egotistical monarch of segregated baseball”).

¹¹⁴ See Chris Lamb, *How Baseball's First Commissioner Led a Conspiracy of Silence to Preserve Baseball's Color Line*, CONVERSATION (Oct. 16, 2020), <https://theconversation.com/how-baseballs-first-commissioner-led-a-conspiracy-of-silence-to-preserve-baseballs-color-line-148076> [<https://perma.cc/4XG3-QJ9R>] (observing that Landis has had defenders, some of whom point to the lack of evidence that Landis made any overtly racist acts or statements during his lifetime).

tional League presidents who served during his tenure, played a significant role in centralizing power in professional baseball in MLB and developing a business structure that largely exists to this day.¹¹⁵ Under his leadership, minor leagues were directed to fall in line with the demands of MLB and comply with a draft system.¹¹⁶ Landis also produced greater transparency from teams and required teams to disclose transactions and transfers.¹¹⁷ This ensured that players could not be buried and hidden in minor leagues.¹¹⁸ The Landis era is also likely responsible for establishing a sense of stability around MLB and, to an extent, professionalizing MLB.¹¹⁹ Since Landis's leadership, the structure of baseball ownership has undergone significant changes; although a baseball franchise was once accessible to virtually anyone with approximately \$150 in the late 1800s, by 1920 median franchise values had skyrocketed to more than three-quarters of a million dollars.¹²⁰

Since Landis's death, Baseball has been led by nine subsequent commissioners, each of whom oversaw the continued growth of the game.¹²¹ The 1960s saw the size of Baseball expand at a fairly steady rate from sixteen to the now thirty major league teams. Rapid expansion took place across a number of cities where a potential, new professional baseball league proposed to locate its teams.¹²² In addition, the two extant major leagues continued to become further intertwined until 1999, when the positions of American League president and National League president were eliminated and the leagues truly became one and the same.¹²³

Yet, even through nine subsequent commissioners, various internal restructurings and important changes to the sport's broader legal environment left many of MLB's restraints of trade—including the sport's reserve system—largely un-

¹¹⁵ See *Kenesaw Landis*, NAT'L BASEBALL HALL OF FAME, <https://baseballhall.org/hall-of-famers/landis-kenesaw#:~:text=As%20baseball's%20first%20commissioner%2C%20Kenesaw,following%20the%20Black%20Sox%20scandal>) [<https://perma.cc/USP7-MH4Y>] (sketching many of Landis's early efforts to clean up corruption within MLB and exercise the full power of his new position).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See *id.* (observing that Landis was viewed in his time as a figure who could restore public trust in the game).

¹²⁰ See Hauptert, *supra* note 97 (noting that in 1920 the median franchise value was estimated to be \$794,000).

¹²¹ *MLB Commissioners*, ESPN, <https://www.espn.com/mlb/history/commissioners> [<https://perma.cc/8LAQ-RJSF>].

¹²² See Hauptert, *supra* note 97 (pointing out that in 2001 MLB proposed to contract two teams, a move not done in decades, because of a supposed financial crisis and a disruption in the competitive balance between teams).

¹²³ See Edelman, *supra* note 82, at 52–53 (describing the further consolidation of MLB as a single super-league under the commissionership of Bud Selig).

changed.¹²⁴ The reserve clause was a powerful tool for owners to maintain ownership of players. A player's refusal to play could result in their suspension and blacklisting, prohibiting any other team from signing the player.¹²⁵

E. Unionization Changes the Baseball Landscape

The establishment in 1953 of the Major League Baseball Players Association solved some of baseball's labor woes.¹²⁶ In 1966, the Players Association hired a former negotiator for the U.S. Steelworkers Union, Marvin Miller, to lead unionization efforts.¹²⁷ The appointment of Miller would be one of the most consequential in the history of the business of American sports. Historians credit Miller as bringing about significant change to the bargaining power of players in an industry that for nearly one hundred years had working conditions and salary largely dictated by wealthy owners.¹²⁸

Miller spearheaded a number of projects that dramatically improved the working conditions of MLB players.¹²⁹ Miller circumvented the owners' attempts to financially suffocate the union by striking a licensing agreement with Coca-Cola that allowed the use of player images on bottle caps in exchange for a fee.¹³⁰ The deal infused \$60,000 into the union, allowing it to survive, and it also touched off a series of group licensing deals that generated significant revenue for players outside of their contracts.¹³¹ Furthermore, Miller delivered a long-desired new pension plan and struck a first-of-its-kind labor agreement

¹²⁴ See Simon Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242, 244 (1956) (providing a detailed account of the web of rules governing the contractual relations between players and teams and arguing that this system of rules ultimately constrains the freedom of the market).

¹²⁵ *Id.* at 245.

¹²⁶ See Haupt, *supra* note 97 (listing some of the early gains the union achieved, including increases in minimum player salary and pension contributions by the owners). The union would become a formidable force within MLB by the 1970s. *Id.*

¹²⁷ *Id.*

¹²⁸ See Richard Goldstein, *Marvin Miller, Union Leader Who Changed Baseball, Dies at 95*, N.Y. TIMES (Nov. 27, 2012), <https://www.nytimes.com/2012/11/28/sports/baseball/marvin-miller-union-leader-who-changed-baseball-dies-at-95.html> [<https://perma.cc/MWC6-2W6T>] (describing the significance of Marvin Miller to baseball and professional sports more broadly).

¹²⁹ See generally Bob Nightengale, *Opinion: Baseball Hall of Fame Assures MLBPA Founder Marvin Miller Will Never Be Forgotten*, USA TODAY, <https://www.usatoday.com/story/sports/mlb/columnist/bob-nightengale/2019/12/08/hall-fame-marvin-miller-rightful-place-baseball-history/4379210002/> (Dec. 9, 2019) [<https://perma.cc/529S-RJ86>] (describing the legacy of Marvin Miller).

¹³⁰ See Michael Haupt, *Marvin Miller and the Birth of the MLBPA*, SOC'Y FOR AM. BASEBALL RSCH., <https://sabr.org/journal/article/marvin-miller-and-the-birth-of-the-mlbpa/> [<https://perma.cc/VUF6-QSMY>].

¹³¹ *Id.*

in sports.¹³² Miller would go on to have many significant accomplishments: orchestrating the end of the reserve rule, securing arbitration for salary disputes and disciplinary matters, and increasing player salaries by nearly two thousand percent during his tenure.¹³³ Baseball's strong players union ended up being a boon for owners' bank accounts—baseball's broadcast revenues eclipsed \$1 billion per year by the turn of the millennium.¹³⁴ In 2022, ten teams generated more than \$320 million in revenue, and more than half the teams in professional baseball had an estimated market value exceeding \$2 billion.¹³⁵

As baseball has modernized, the owners and the players have found increasingly diverse means of supplementing income. Ticket sales and broadcast revenue remain significant contributors to bottom lines, including the running of multimedia operations and significant licensing endeavors.¹³⁶ Unlike the other three major professional sports leagues in the United States—the National Basketball Association, the National Football League, and the National Hockey League—Baseball owners and players do not have a salary cap based on revenues.¹³⁷

Still, MLB enjoys a protection that the other sports leagues do not,¹³⁸ one that has long allowed the league owners to behave in a way that would be for-

¹³² *Id.* The first baseball collective bargaining agreement was a landmark agreement because it not only established a uniform player contract, but included a significant raise in the minimum player salary from \$6,000 to \$10,000 and also limited the amount by which a player's salary could be cut the next season. The first agreement also included significant improvements to per diem amounts and a guarantee of "first-class travel and hotel accommodations." The introduction of a collective bargaining agreement also created a system whereby players could file grievances. Marc Normandin, *50 Years Ago, Marvin Miller and the MLBPA Changed Sports Forever*, SB NATION (June 11, 2018), <https://www.sbnation.com/mlb/2018/6/11/17437624/mlb-mlbpa-cba-marvin-miller-robert-cannon> [<https://perma.cc/QSS7-RPKV>].

¹³³ Hauptert, *supra* note 130.

¹³⁴ Hauptert, *supra* note 97.

¹³⁵ Julia Elbaba, *Most Valuable MLB Franchises Heading into 2023 Season*, NBC SPORTS, <https://www.nbcsportsbayarea.com/mlb/san-francisco-giants/most-valuable-mlb-franchises-heading-into-2023-season/1440179/> [<https://perma.cc/DST8-U596>] (Mar. 23, 2023); Mike Ozanian & Justin Teitelbaum, *Baseball's Most Valuable Teams 2023: Price Tags Are Up 12% Despite Regional TV Woes*, FORBES (Mar. 23, 2023), <https://www.forbes.com/sites/mikeozanian/2023/03/23/baseballs-most-valuable-teams-2023-price-tags-are-up-12-despite-regional-tv-woes/?sh=395ce75b6501> [<https://perma.cc/TE4X-B3VF>].

¹³⁶ *Fitch Rates Major League Baseball Trust Term Notes 'A'; Outlook Stable*, FITCH RATINGS (Dec. 21, 2022), <https://www.fitchratings.com/research/infrastructure-project-finance/fitch-rates-major-league-baseball-trust-term-notes-a-outlook-stable-21-12-2022> [<https://perma.cc/C5KS-PV5L>].

¹³⁷ Ken Rosenthal & Evan Drellich, *MLB Revenue-Sharing Plan Is a Non-Starter for the Players Association*, THE ATHLETIC (May 11, 2020), <https://theathletic.com/1806964/2020/05/11/mlb-revenue-sharing-plan-is-a-nonstarter-for-the-players-association/> [<https://perma.cc/Z3JU-ER23>].

¹³⁸ John T. Holden & Thomas A. Baker III, *The Econtractor? Defining the Esports Employment Relationship*, 56 AM. BUS. L.J. 391, 424 n.172 (2019).

bidden in virtually any other industry: an antitrust exemption.¹³⁹ Since 1922, professional baseball has been allowed to behave in an anti-competitive manner with little fear of judicial sanction. The current labor relationship between MLB and its players has curtailed Baseball's ability to exploit this exemption to the detriment of its players. Nevertheless, much like baseball pre-Miller, MLB has often exerted its power to inflict economic harm on those with the weakest bargaining position, including minor league players.¹⁴⁰ The following Part discusses the origin of baseball's antitrust exemption.¹⁴¹

II. FEDERAL BASEBALL: THE EMERGENCE OF BASEBALL'S ANTITRUST EXEMPTION

For a game that is known as America's national pastime and followed by millions of adoring fans, baseball's antitrust exemption has long created confusion even for those who take the game seriously.¹⁴² Unlike any other professional sports league, Baseball has long enjoyed a per se exemption from aspects of the Sherman and Clayton Acts. This antitrust exemption was not created initially through congressional action,¹⁴³ but instead stems from a nearly nine-hundred-word Supreme Court opinion based upon a now-outdated legal argument.¹⁴⁴ Justice Oliver Wendell Holmes's anachronistic description of baseball as "purely state affairs"¹⁴⁵ has resulted in more than a century of protection for organized baseball from antitrust laws.

Not only is this shield enjoyed by no other professional sports league, it is also not enjoyed by virtually any other industry in the country.¹⁴⁶ This Part describes the emergence of baseball's antitrust exemption through the Supreme

¹³⁹ See, e.g., Lucas W. Loafman & John T. Holden, *Stepping Up to the Plate: Minor Leaguers Attempt to Remedy Their Unconscionable Plight*, 60 AM. BUS. L.J. 289, 294–305 (2023) (describing the judicial protection afforded to MLB over the last century).

¹⁴⁰ *Id.*; see Adam Wells, *Report: MLB Teams Exploiting Latin American Prospects as Young as 12 Years Old*, BLEACHER REP. (June 16, 2020), <https://bleacherreport.com/articles/2896429-report-mlb-teams-exploiting-latin-american-prospects-as-young-as-12-years-old> [<https://perma.cc/ZT89-GGZU>] (describing MLB's international signing rules and illustrating some of the challenges players in Latin America face).

¹⁴¹ See *infra* Part II.

¹⁴² See generally Nathaniel Grow, *Baseball's Antitrust Exemption: A Primer*, FANGRAPHS (June 4, 2015), <https://blogs.fangraphs.com/baseballs-antitrust-exemption-a-primer/> [<https://perma.cc/85U9-FZDR>] (describing and debunking some of the myths around the exemption).

¹⁴³ *Id.*

¹⁴⁴ *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Pro. Baseball Clubs*, 259 U.S. 200, 207–09 (1922).

¹⁴⁵ *Id.* at 208.

¹⁴⁶ See J. Gordon Hylton, *Why Baseball's Antitrust Exemption Still Survives*, 9 MARQ. SPORTS L.J. 391, 392 (1999) (describing the frequent observation that the antitrust exemption is "anomalous").

Court's 1922 decision in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*.¹⁴⁷

Section A of this Part describes the legal landscape that existed for baseball before the *Federal Baseball* decision.¹⁴⁸ Section B examines the background giving rise to *Federal Baseball* and the case's litigation history.¹⁴⁹ Last, Section C explains the arguments that both parties raised in front of the Supreme Court and unpacks the Court's decision.¹⁵⁰

A. Before Federal Baseball

Organized baseball had engaged in anticompetitive practices even before Congress passed the Sherman Act in 1890.¹⁵¹ The reserve system treated players as a type of property owned by teams.¹⁵² It tied players to teams, and an interleague agreement barred leagues from playing any team that signed a player who had been reserved by another team.¹⁵³ The reserve rule added roster certainty to baseball at a time when it was easy to start up a new team, but the system also artificially kept player salaries low.¹⁵⁴ Despite the National Agreement that enforced the reserve system and provided a degree of stability among the three-party leagues, by 1914, players began pushing back against the interleague enforcement of the reserve clause and the emergence of a professional baseball monopoly.¹⁵⁵

In 1914, the American League Baseball Club of Chicago sued Hal Chase, an established professional baseball player. The team alleged that Chase's efforts to sign with Buffalo of the Federal League violated the National Agreement, despite the Chicago team having informed Chase that the team was canceling his contract.¹⁵⁶ Although the team secured a preliminary injunction, which would be overturned, the New York court found that: "[o]rganized base-

¹⁴⁷ 259 U.S. at 207–08.

¹⁴⁸ See *infra* notes 151–158 and accompanying text.

¹⁴⁹ See *infra* notes 159–180 and accompanying text.

¹⁵⁰ See *infra* notes 181–204 and accompanying text.

¹⁵¹ See STUART BANNER, *THE BASEBALL TRUST: A HISTORY OF BASEBALL'S ANTITRUST EXEMPTION* 3–4 (2013) (dating the earliest anticompetitive practices to 1879, when the National League team owners first agreed on an early version of the reserve clause).

¹⁵² See Luke Hasskamp, *Baseball and Antitrust Laws Part I: The Origins of the Reserve Clause*, ANTITRUST ATT'Y BLOG (Oct. 4, 2019), <https://www.theantitrustattorney.com/baseball-and-the-antitrust-laws-part-i-the-origins-of-the-reserve-clause/> [<https://perma.cc/69PR-TYNN>] (commenting on the one-sidedness of early baseball contracts, which essentially controlled a player for their whole playing career).

¹⁵³ Joseph J. McMahon, Jr. & John P. Rossi, *A History and Analysis of Baseball's Three Antitrust Exemptions*, 2 VILL. SPORTS & ENT. L.J. 213, 223 (1995).

¹⁵⁴ *Id.*

¹⁵⁵ See *id.* at 231–32 (describing the first antitrust challenge against organized baseball).

¹⁵⁶ *Id.*; *Am. League Baseball Club of Chi. v. Chase*, 149 N.Y.S. 6, 7 (Sup. Ct. 1914).

ball is now as complete a monopoly of the baseball business for profit as any monopoly can be made,” and that “[i]t is in contravention of the common law, in that . . . it is a combination to restrain and control the exercise of a profession or calling.”¹⁵⁷ This decision, at least for a moment, gave rise to the hope that organized baseball would not only be held subject to federal antitrust laws but would also be held in violation of those laws. The promise, however, never materialized.

In the years that followed, there were grumblings of formal challenges to baseball’s practices under federal antitrust law, but it took some time for a test case to materialize. That test case emerged in the form of a scorned team from Baltimore that had played in the Federal League: the same league Chase had sought to join as a player.¹⁵⁸

B. Federal Baseball *Litigation Arises*

The Federal League was formed in 1913 with little initial interest in competing against the more established American and National leagues for either business or players.¹⁵⁹ After the 1913 season, however, the league charted a more ambitious path.¹⁶⁰ Going into the 1914 season, the Federal League expanded from six to eight teams, with the two expansion teams in Baltimore and Buffalo being publicly owned.¹⁶¹ The Federal League’s gamble to expand and compete against the more established major leagues was expensive and, by the end of the following season, the Federal League was in dire financial straits.¹⁶² In 1914, the Federal League sued the National League, the American League, all sixteen team presidents, as well as the National Commission.¹⁶³

A complaint filed in the Northern District of Illinois alleged that the agreements between leagues and teams violated the Sherman Act.¹⁶⁴ Judge Landis, a well-known trustbuster and Baseball sympathizer, took the case.¹⁶⁵

¹⁵⁷ *Chase*, 149 N.Y.S. at 17.

¹⁵⁸ See *infra* notes 159–180 and accompanying text.

¹⁵⁹ Samuel A. Alito, Jr., *Alito: The Origin of the Baseball Antitrust Exemption*, SOC’Y FOR AM. BASEBALL RSCH., <https://sabr.org/journal/article/alito-the-origin-of-the-baseball-antitrust-exemption/> [<https://perma.cc/AA3C-P4RX>].

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Bill of Complaint at 21–22, *Fed. League of Pro. Baseball Clubs v. Nat’l League of Pro. Baseball Clubs* (1915), <https://app.box.com/s/jp24641h2d130ybtfrfz/file/9180021785> [<https://perma.cc/9LNE-9MG5>]. There is a belief among some historians that the Federal League filed the case in the Northern District of Illinois so it was assigned to Judge Kenesaw Landis, who had a history of cracking down on monopolists. See Alito, *supra* note 159.

¹⁶⁵ See Andrew Glass, *Supreme Court Exempts Baseball from Antitrust Law*, May 29, 2022, POLITICO (May 29, 2018), <https://www.politico.com/story/2018/05/29/supreme-court-exempts-baseball->

Landis suggested that the playing of baseball was recreation rather than labor, and that “any blows at the thing called baseball would be regarded by this court as a blow to a national institution.”¹⁶⁶ The case, however, never reached a ruling as the three rival leagues reached a settlement among themselves.¹⁶⁷ Landis, meanwhile, went on to become the first commissioner of Baseball.¹⁶⁸

All was not well, however, as the Federal League continued to struggle financially.¹⁶⁹ Further, the settlement that mooted the majority of the case in the Northern District of Illinois had managed to attract all the necessary signatories except one holdout, the Federal Club of Baltimore.¹⁷⁰ The club brought suit in 1917¹⁷¹ against the National and American leagues and their individual teams, alleging violation of Section 4 of the Clayton Act.¹⁷² After a jury trial, the Baltimore Club was awarded \$80,000 in damages, which as permitted by statute were trebled.¹⁷³ The defendants appealed the \$240,000 judgment to the U.S. Court of Appeals for the District of Columbia Circuit in 1920.¹⁷⁴ The court sought to examine whether the “giving of exhibitions of baseball, under the circumstances disclosed in the record, constitute trade or commerce within the meaning of the Sherman Act.”¹⁷⁵

In examining what constitutes “trade and commerce,” the court held that, for there to be “trade and commerce,” something needed to be transferred.¹⁷⁶ The court further noted that a game of baseball “is not susceptible of being

from-antitrust-law-may-29-1922-609758 [https://perma.cc/QZL5-HGLU] (“The league chose the U.S. District Court presided over by Judge Kenesaw Mountain Landis, a reputed trustbuster, to hear their case. It turned out, however, that Landis was an ardent Chicago Cubs fan who was loath to do anything that might, in his eyes, damage his beloved national sport.”).

¹⁶⁶ SPINK, *supra* note 2, at 44.

¹⁶⁷ Alito, *supra* note 159.

¹⁶⁸ See *Kenesaw Mountain Landis: First Commissioner of Baseball*, MLB, <https://www.mlb.com/official-information/about-mlb/commissioners/kenesaw-landis> [https://perma.cc/7ETT-CFGP] (noting that Landis accepted the post on the condition that he retain his job as a judge and that his commissioner salary of \$50,000 be reduced by his judicial salary of \$7,500).

¹⁶⁹ Loafman & Holden, *supra* note 139, at 296.

¹⁷⁰ *Id.*

¹⁷¹ NATHANIEL GROW, *BASEBALL ON TRIAL: THE ORIGIN OF BASEBALL'S ANTITRUST EXEMPTION* 114–33 (2014). The Federal Club of Baltimore originally filed the case in Philadelphia on March 29, 1916, against both the National and American Leagues, as well as the sixteen team owners. *Id.* A trial even began in June 1917. *Id.* During the defense's case, lawyers for the Baltimore team decided to terminate the case so that they could refile in the District of Columbia. *Id.*

¹⁷² Loafman & Holden, *supra* note 139, at 297. Section 4 permits recovery by “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.” 15 U.S.C. § 15(a).

¹⁷³ Loafman & Holden, *supra* note 139, at 297.

¹⁷⁴ *Nat'l League of Pro. Baseball Clubs v. Fed. Baseball Club of Balt., Inc.*, 269 F. 681, 682 (D.C. Cir. 1920).

¹⁷⁵ *Id.* at 684.

¹⁷⁶ *Id.*

transferred,” thus reasoning that interstate commerce could not exist.¹⁷⁷ The D.C. Circuit relied upon various cases involving insurance companies,¹⁷⁸ and one involving the Metropolitan Opera, to conclude that baseball games were not interstate commerce even though there were underlying aspects of baseball that traveled interstate.¹⁷⁹ The defeated Baltimore Club then appealed to the Supreme Court.¹⁸⁰

C. Federal Baseball at the Supreme Court

Following the decision of the D.C. Circuit, on December 6, 1920, the Club sought a reversal at the Supreme Court.¹⁸¹ In its brief, the Baltimore Club argued that it was entitled to damages for the respondents’ monopolistic practices in “providing exhibitions of professional baseball” and “a conspiracy on their part to restrain interstate commerce,” as well as damages for “the actual wrecking and destruction of the Federal League.”¹⁸² The Baltimore Club argued that organizing baseball games was interstate commerce and that its business was “intersectional, intercity, and interstate.”¹⁸³ Specifically, it argued that the business of baseball encompasses not only interstate travel but also “communication, intercourse and commerce.”¹⁸⁴ The Club articulated that the D.C. Circuit misunderstood the fundamental nature of the business of baseball in concluding that organized baseball’s control over the industry was only incidental to interstate commerce.¹⁸⁵

The Baltimore Club noted that the defendants were not baseball players, but instead large, wealthy sports leagues, who traveled between states transporting the people, equipment, and other items required to put on baseball games.¹⁸⁶ The Club argued that the Court should direct less attention to the playing of baseball games and more to the complex business behind the operation of those games.¹⁸⁷ The “indispensable and predominant” interstate nature of the Federal League was demonstrated by the fundamental feature of teams

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 685 (first citing *Hooper v. California*, 155 U.S. 648 (1895); and then citing *N.Y. Life Ins. Co. v. Cravens*, 178 U.S. 389 (1900)).

¹⁷⁹ *Id.* at 686 (citing *Metro. Opera Co. v. Hammerstein*, 147 N.Y.S. 532 (App. Div. 1914)).

¹⁸⁰ See *Alito*, *supra* note 159 (charting the movement of the case from district court trial to Supreme Court appeal).

¹⁸¹ Brief of Plaintiff in Error at 13, *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Pro. Baseball Clubs*, 259 U.S. 200 (1922) (No. 204).

¹⁸² *Id.*

¹⁸³ *Id.* at 2.

¹⁸⁴ *Id.* at 14.

¹⁸⁵ *Id.* at 13–14.

¹⁸⁶ *Id.* at 16.

¹⁸⁷ See *id.* (conceding that the actions of baseball players on the field is only part of the business of baseball).

being located in different states.¹⁸⁸ The Club argued that the financial success of the teams depended not only on local attendance but also on the visiting teams travelling from out of state.¹⁸⁹ Visiting teams attracted diverse spectators, and the Federal League encouraged greater attendance by pooling and distributing gate revenues among teams.¹⁹⁰ The Baltimore Club further argued that baseball has a greater reliance on interstate activities than many other industries.¹⁹¹

The defendants, the conglomeration of baseball entities, argued that baseball was not interstate commerce and therefore there was not a prohibited monopoly subject to the Sherman Act.¹⁹² The National League and co-defendants advanced three arguments as to why organized baseball was insufficiently interstate to merit application of the Sherman Act.¹⁹³ The first argument was that making money based on local exertion of “human effort and skill” does not become interstate commerce merely by the fact that the individuals travel from state to state.¹⁹⁴ The second was that local regulation was more appropriate for public sports leagues.¹⁹⁵ The final argument was that the Sherman Act is intended only to apply to industries where business “might be conducted with or without restraints.”¹⁹⁶

The Court delivered the decision, authored by Justice Holmes, just over a month after oral arguments.¹⁹⁷ The opinion recounts the decisions of the lower courts and notes that if the D.C. Circuit ruling that the defendants were outside the scope of the Sherman Act is “correct [it] makes it unnecessary to consider other serious difficulties in the way of the plaintiff’s recovery.”¹⁹⁸ The Court held that the business of baseball is not an interstate activity even though the leagues are comprised of teams in different cities and states, which requires interstate travel.¹⁹⁹ The so-called exhibitions, which are performed for money,

¹⁸⁸ *Id.* at 118–19.

¹⁸⁹ *See id.* at 121 (“When, for instance, the New York Club in the American League sends its team upon a journey to Washington, on a given day, it does not send it there without having known from the beginning of the playing season that the Washington Club’s team is going to be there to meet it.”).

¹⁹⁰ *Id.* at 121–22 (explaining how the Baltimore team would benefit indirectly if the New York team increased its attendance).

¹⁹¹ *See id.* at 122 (noting in flowery language that although each club has a “local legal *habitat*, yet from a practical business standpoint it is primarily an ambulatory organization”).

¹⁹² Brief of Defendant in Error at 46, *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Pro. Baseball Clubs*, 259 U.S. 200 (1922) (No. 204).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *See id.* (bemoaning that the Sherman Act should not be interpreted in such a way as to turn such a “great and popular event” as the World Series—which requires “the restraint of elaborate inter-league organizations”—into an impossibility).

¹⁹⁷ *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Pro. Baseball Clubs*, 259 U.S. 200 (1922).

¹⁹⁸ *Id.* at 208.

¹⁹⁹ *Id.*

are not “trade or commerce.”²⁰⁰ The Court further noted that law firms sending a lawyer to argue a case in another state or an educational institution sending out a lecturer across state lines to speak does not give rise to an activity that constitutes commerce within the scope of the Commerce Clause.²⁰¹

The effect of the *Federal Baseball* decision has been to establish an anti-trust exemption for organized baseball.²⁰² Although the wisdom of this decision has been questioned now for many years, it is important to remember that the consensus view as to the scope of the Commerce Clause in 1922 was significantly different from today.²⁰³ Thus, perhaps the Court’s conclusion in 1922 made some sense for its time.²⁰⁴

III. THE BASEBALL EXEMPTION SURVIVES AS INTERSTATE COMMERCE EVOLVES

Although the Supreme Court’s decision in *Federal Baseball* established precedent that was perhaps reasonable at the time, both the business of organized baseball and the definition of interstate commerce changed meaningfully after 1922.²⁰⁵ By the end of the 1920s, the United States had entered the Great Depression, and then, just as the Depression was ending, World War II began. Both the Great Depression and World War II led to the Supreme Court granting Congress greater leeway to implement legislation.²⁰⁶ An expanded definition of “interstate commerce” emerged, and this definition became the constitution-

²⁰⁰ *Id.* at 209.

²⁰¹ *Id.* One of the interesting anomalies of the *Federal Baseball* decision is that in 1922, a statute required the Supreme Court to hear all matters received on appeal. Scholars have asserted that, had the case happened a few years later when the Court had the ability to grant certiorari on a permissive basis for most appeals, the Court likely never would have heard the case. See BANNER, *supra* note 151, at 81 (stating “*Federal Baseball Club* would probably never have reached the Supreme Court if it had taken place a few years later”).

²⁰² BANNER, *supra* note 151, at 89.

²⁰³ *See id.* at 81 (noting that at the time there was some degree of disagreement as to the reach of federal power).

²⁰⁴ See Kevin McDonald, *Antitrust and Baseball: Stealing Holmes*, 1998 J. SUP. CT. HIST. 89, 93–97 (providing a detailed analysis of Justice Holmes’s decision in *Federal Baseball*).

²⁰⁵ Expansion of the scope of the Interstate Commerce Clause is typically traced to the Supreme Court’s decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). In this case, the Court held that the Commerce Clause could regulate intrastate commerce that had a substantial economic impact or a cumulative effect on interstate commerce. *Id.* (holding that “[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control”).

²⁰⁶ After facing early challenges to his New Deal programs, President Roosevelt considered expanding the Supreme Court to increase the number of Justices favorable to his policies. See generally William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt’s “Court-Packing” Plan*, 1966 SUP. CT. REV. 347, 347–49 (describing the origins of the constitutional crisis of 1937).

al hook that allowed the Court to recognize congressional regulatory power over a broader range of business activities, including under federal antitrust laws.²⁰⁷ In a series of important Supreme Court decisions, the most notable of which was *Wickard v. Filburn* in 1942, the Supreme Court rewrote the definition of “interstate commerce” in a manner that remains law to this day.²⁰⁸

Under the modern definition of “interstate commerce,” organized baseball, and especially MLB, is within its scope.²⁰⁹ Nevertheless, the Court’s two post-*Wickard* rulings involving MLB and antitrust law doubled down on the holding of *Federal Baseball* and maintained at least some version of an antitrust exemption for organized baseball.²¹⁰ Rather than recognizing that the evolved definition of interstate commerce called for a second look at its treatment of organized baseball under antitrust law, the Court prioritized MLB’s so-called “reliance interest” on the now outdated view.²¹¹

This Part explores how the Supreme Court sustained baseball’s historic antitrust exemption despite the original basis for this exemption—a narrow definition of interstate commerce—having been fully eradicated. Section A begins with a discussion of *Wickard* and its effect on the scope of what constitutes interstate commerce.²¹² Section B then turns to the second wave of baseball antitrust cases, beginning with the 1942 case *Gardella v. Chandler* out of the Second Circuit and ending with the Supreme Court’s 1953 decision in *Toolson v. New York Yankees*.²¹³ Section C discusses the period between *Toolson* and *Flood v. Kuhn*.²¹⁴ Section D moves on to describe the importance of the *Flood* decision.²¹⁵ Last, Section E highlights the key challenges to baseball’s antitrust exemption after *Flood*.²¹⁶

²⁰⁷ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (extending the scope of interstate commerce to include intrastate activities having a substantial effect on interstate commerce); see also *United States v. Darby*, 312 U.S. 100, 118 (1941) (holding that “[t]he power of Congress over interstate commerce . . . extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end”).

²⁰⁸ 371 U.S. 111 (1942). Indeed, *Wickard* continues to be cited by the Court to this day for Congress’s ability to regulate activity affecting interstate commerce. See, e.g., *Sackett v. EPA*, 598 U.S. 651, 696 (2023) (Thomas & Gorsuch, JJ., concurring) (citing *Wickard*).

²⁰⁹ See *Flood v. Kuhn*, 407 U.S. 258, 291 (1972) (Marshall J., dissenting) (highlighting that “baseball is interstate commerce”).

²¹⁰ *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 364–65 (1953) (per curiam); *Flood*, 407 U.S. at 282–85.

²¹¹ *Flood*, 407 U.S. at 282–85.

²¹² See *infra* notes 217–224 and accompanying text.

²¹³ See *infra* notes 225–243 and accompanying text.

²¹⁴ See *infra* notes 244–261 and accompanying text.

²¹⁵ See *infra* notes 262–288 and accompanying text.

²¹⁶ See *infra* notes 289–314 and accompanying text.

A. *Wickard v. Filburn: The Commerce Clause Scope Widens*

The Supreme Court decision in *Wickard* is one of the most well-known decisions in legal jurisprudence. For many years, Mr. Filburn grew wheat, raised poultry, kept a herd of cattle, and sold milk from his small farm in Montgomery County, Ohio.²¹⁷ In July 1940, Mr. Filburn received notice that his 1941 wheat acreage allotment, pursuant to the 1938 Agricultural Adjustment Act, was a mere 11.1 acres.²¹⁸ Mr. Filburn, however, sowed 23 acres, around 12 acres of wheat more than his allotment.²¹⁹ Under the amended Agricultural Adjustment Act, Mr. Filburn was subject to a \$0.48 tariff on each of his excess bushels of wheat, a penalty that totaled \$117.11.²²⁰ Mr. Filburn sued the Secretary of Agriculture, arguing that the excess wheat he had produced was for use on his own farm and was therefore unconnected to interstate commerce.²²¹

The Supreme Court in its landmark decision disagreed. The Court unanimously sided in favor of the Secretary of Agriculture, expanding the scope of the Commerce Clause to include even wholly intrastate activities where the aggregate effect could have a substantial impact on interstate commerce.²²² In doing so, the Court departed from the narrow understanding of interstate commerce as applied in *Federal Baseball* in favor of an expansive view of the law.²²³ This decision thus marked a pivotal and historic change in the legal definition of interstate commerce.

The *Wickard* decision should have affected the future legal treatment of Baseball.²²⁴ Nevertheless, despite the seemingly obvious evolution of the scope of the commerce clause, the *Wickard* holding has not impacted subsequent antitrust decisions involving MLB.

B. *From Gardella v. Chandler to Toolson v. New York Yankees*

Although the Supreme Court's decision in *Wickard* did not mention baseball, or even antitrust law, its broadened definition of interstate commerce sig-

²¹⁷ *Wickard v. Filburn*, 317 U.S. 111, 114 (1942).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 115.

²²¹ *Id.* at 118.

²²² *Id.* at 125.

²²³ *Id.* at 130; see *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Pro. Baseball Clubs*, 259 U.S. 200, 208 (1922) (holding that the business of giving exhibitions of baseball does not become inter-state commerce merely because free persons cross state lines, since transport is merely incidental and not the essential component).

²²⁴ John W. Neville, *Baseball and the Antitrust Laws*, 16 FORDHAM L. REV. 208, 230 (1947). John W. Neville, a Special Attorney in the Antitrust Division of the Department of Justice, wrote just five years after *Wickard* that the *Federal Baseball* case was decided in a different era: one where the Court used a "legalistic approach rather than [a] realistic" approach. *Id.*

naled to baseball players the potential opportunity to once again challenge MLB's conduct under federal antitrust principles. In 1949, Daniel Gardella emerged as one of several baseball players to challenge a league-wide agreement under antitrust law after he was blacklisted from MLB for playing baseball professionally in Mexico.²²⁵ Gardella surmised that under the new, broader definition of interstate commerce, MLB would not be able to evade substantive review of league conduct under antitrust law as it had in 1921 in *Federal Baseball*.²²⁶

The district court, applying an arguably pre-*Wickard* standard, dismissed Gardella's case for want of jurisdiction.²²⁷ Nevertheless, the Second Circuit Court of Appeals reversed and remanded the case for trial, observing that the jurisprudence that led to *Federal Baseball* had evolved since then.²²⁸ Judge Jerome Frank, who along with Judge Learned Hand wrote in concurrence with the majority opinion, described the reserve clause as "shockingly repugnant," and drew an association between the clause and the necessity for passage of the Thirteenth Amendment—a very strong statement in favor of applying anti-trust law to Baseball.²²⁹

Despite Judge Frank's strong foreboding, there would never be a final ruling in *Gardella v. Chandler*. Sensing the possibility of unfavorable precedent, MLB preempted an influential decision by settling that case²³⁰ as well as settling the cases involving two other blacklisted players.²³⁰ These settlements temporarily ended the threat of a cascade of litigation challenging *Federal Base-*

²²⁵ *Gardella v. Chandler*, 172 F.2d 402, 403 (2d Cir. 1949).

²²⁶ *Id.*

²²⁷ *Gardella v. Chandler*, 79 F. Supp. 260, 261–62 (S.D.N.Y. 1948), *rev'd*, 172 F.2d 402 (2d Cir. 1949).

²²⁸ *Gardella*, 172 F.2d at 403.

²²⁹ *See id.* at 408–10 (Frank, J., concurring in judgment) (noting that the reserve system resembles "peonage of the baseball player," and the nature of the contracts are "so opposed to the public policy of the United States"). Elsewhere in his concurrence, he writes: "I may add that, if the players be regarded as quasi-peons, it is of no moment that they are well paid; only the totalitarian-minded will believe that high pay excuses virtual slavery." *Id.*; see John T. Holden, *Owning Shares of Athletes and the 13th Amendment*, 3 MISS. SPORTS L. REV. 153, 165 (2014) (noting that the connection between the reserve clause and peonage, as well as slavery, would continue to be drawn in both baseball and football for decades).

²³⁰ Charles Gromley, *Baseball and the Anti-Trust Laws*, 34 NEB. L. REV. 597, 603 (1955); see *Martin v. Nat'l League Baseball Club*, 174 F.2d 917, 917 (2d Cir. 1949) (detailing plaintiffs' request for an injunction to remove them from the "suspended" list). Although the scope of the settlements was not known at the time, the litigation had reportedly cost the commissioner, American League, and National League more than \$450,000 across three years. Gromley, *supra*. With the benefit of time, it has been revealed that Gardella settled for \$60,000, or roughly the equivalent of \$700,000 in 2021. Elizabeth Muratore, *#GoingDeep: Gardella's Lawsuit Pushed Baseball's Labor Boundaries*, NAT'L BASEBALL HALL OF FAME, <https://baseballhall.org/discover/going-deep/gardellas-lawsuit-pushed-baseballs-labor-boundaries> [<https://perma.cc/B9WJ-XPZQ>]. The settlement equated to one of the highest salaries for any player in 1949. *Id.*

ball.²³¹ As expected, Congress renewed its interest in baseball's monopoly and introduced several new bills by the early 1950s,²³² though these bills were largely viewed as favorable to baseball's monopoly.²³³ In 1952, the House Subcommittee on the Study of Monopoly Power issued a report that concluded that the modern scope of the Commerce Clause permitted Congress to investigate and regulate organized baseball.²³⁴ Yet, despite the congressional attention directed to baseball's antitrust exemption, no legislation passed.

Congressional inaction spurred other players, emulating Gardella, to continue filing antitrust lawsuits against organized baseball. A mounting circuit split prompted the Supreme Court to grant certiorari in *Toolson v. New York Yankees* in 1953 to finally review the status of baseball under federal antitrust laws, subsequent to *Wickard*.²³⁵ *Toolson* was technically the consolidation of three separate cases—*Toolson*, *Kowalski v. Chandler*, and *Corbett v. Chandler*—and it implicitly also addressed *Gardella*, even though that case had already settled.²³⁶ The decision further enshrined Baseball's antitrust exemption in a one-paragraph per curiam opinion.²³⁷ The majority in *Toolson* held that baseball remained guarded by the *Federal Baseball* decision, and it is not in the Court's province to disturb the antitrust immunity.²³⁸ The Court instead directed the petitioner to Congress, which it noted had taken the issue under consideration but had not taken action.²³⁹ The Court did observe that baseball had undergone a substantial evolution as a business, but the Court remained bound by *Federal Baseball*.²⁴⁰

Justice Burton and Justice Reed dissented, citing the more than two-hundred-page 1952 House Report and highlighting the congressional finding that of the fifty-two leagues that constituted organized baseball, thirty-nine of

²³¹ Gromley, *supra* note 230, at 603.

²³² See *Radovich v. Nat'l Football League*, 352 U.S. 445, 450 n.7 (1957) (noting that Congress considered extending the baseball rule to other sports, but none of the bills introduced in 1951 were passed); see also H.R. 4229, 82d Cong. (1951) (exempting organized professional sports from antitrust laws); 4230, 82d Cong. (1951) (same); 4231, 82d Cong. (1951) (same); S. 1526, 82d Cong. (1951) (same).

²³³ Gromley, *supra* note 230, at 604.

²³⁴ *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 361 (1953) (per curiam) (Burton & Reed, JJ., dissenting) (noting that in 1952 the House Subcommittee on the Study of Monopoly Power issued a report that took the position that "the Congress has power to investigate, and pass legislation dealing with professional baseball, or more particularly 'organized baseball,' if that business is, or affects, interstate commerce").

²³⁵ *Id.* (majority opinion) (per curiam).

²³⁶ *Id.*

²³⁷ *Id.* at 357.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ See *id.* (stating that the "[baseball] business has thus been left for thirty years to develop, on the understanding that it was not subject to antitrust legislation").

them “were interstate in nature.”²⁴¹ The dissenting Justices would have reversed the lower courts and allowed the trial court to resolve the question of whether there was a violation of the Sherman Act.²⁴² Nevertheless, being in the minority, the issue of baseball’s historic antitrust exemption, again, reverted back to the domain of Congress.²⁴³

C. Congress in the Years Between Toolson and Flood

After *Toolson*, the burden of addressing the treatment of baseball under antitrust law shifted back to Congress, which held new hearings in 1957.²⁴⁴ These hearings, which followed the Supreme Court’s 1957 decision in *Radovich v. NFL*,²⁴⁵ established that federal antitrust laws apply to professional football, unlike organized baseball.²⁴⁶ Naturally, the three other major American professional sports leagues envied the special status that baseball enjoyed and wanted the same preferential treatment.²⁴⁷ Like previous congressional inquiries, the post-*Radovich* hearings brought about no change. In fact, the hearings did not even result in a vote on the proposed legislation.²⁴⁸ Professor Stuart Banner, recounting the legislative efforts to change the status of professional sports leagues, observed that “the remarkable thing about Congress’s failure to enact sports antitrust legislation is that scarcely anyone favored the status quo.”²⁴⁹ In over a decade of hearings, Congress did not hear from any witness that advocated for baseball to be treated differently than other professional sports leagues; nonetheless, nothing happened.²⁵⁰

Despite congressional indecision on extending baseball’s antitrust exemption to other sports, Congress moved forward with a more limited antitrust protection, in the form of the Sports Broadcasting Act of 1961.²⁵¹ The Sports Broadcasting Act responded to a 1961 case out of the U.S. District Court for

²⁴¹ *Id.* at 359 (Burton & Reed, JJ., dissenting) (directly quoting the House Report, H.R. REP. NO. 82-2002 (1952)).

²⁴² *Id.*

²⁴³ See *infra* notes 244–261 and accompanying text.

²⁴⁴ See generally *Bills to Amend the Antitrust Laws to Protect Trade and Commerce Against Unlawful Restraints and Monopolies: Hearings on H.R. 5307, H.R. 5319, H.R. 5383, H.R. 6876, H.R. 6877, H.R. 8023, and H.R. 8124 Before the Antitrust Subcomm. of the H. Comm. on the Judiciary, 85th Cong.* (1957).

²⁴⁵ 352 U.S. 445 (1957).

²⁴⁶ See *id.* at 452 (holding that the “volume of interstate business involved in organized professional football places it within the provisions of the [Sherman] Act”).

²⁴⁷ BANNER, *supra* note 151, at 146.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ Sports Broadcasting Act of 1961, Pub. L. 87-331, 75 Stat. 732 (codified as amended at 15 U.S.C. §§ 1291–1295).

the Eastern District of Pennsylvania, *United States v. National Football League*,²⁵² that challenged the pooling of NFL television broadcast rights as a violation of the Sherman Act.²⁵³ The passage of the law demonstrated that Congress could take action if necessary. The Sports Broadcasting Act, however, did not generate further traction in the push to modify the treatment of professional sports under the nation's antitrust laws.

While Congress was either inept or unwilling to alter the status quo, some plaintiffs sought alternatives to federal antitrust law as a means of suing MLB for anticompetitive practices during the 1960s.²⁵⁴ When the State of Wisconsin looked for a way to keep the Milwaukee Braves from moving to Atlanta, the State turned to state antitrust law in the 1965 case *State v. Milwaukee Braves*.²⁵⁵ The Wisconsin suit followed the lead of the *Chase* lawsuit from 1914 by seeking to prove that there was an organized monopoly that had conspired to lead the Braves away from Milwaukee.²⁵⁶ MLB was represented by New York lawyer and future commissioner Bowie Kuhn.²⁵⁷ The Wisconsin court found that the National League, as well as the league's member clubs, had violated the antitrust laws of Wisconsin in combining and conspiring to "monopolize the business of Major League professional baseball within the State of Wisconsin."²⁵⁸ The order was stayed pending an appeal to the Wisconsin Supreme Court.²⁵⁹ Nevertheless, the Wisconsin Supreme Court overturned the ruling in a 4-3 decision, allowing the Braves to move to Atlanta, and perhaps providing an even greater gift to MLB by concluding that the state's antitrust laws, like the federal antitrust laws, did not apply to baseball.²⁶⁰

Nevertheless, with neither Congress nor state courts seeking to ensure the application of federal antitrust laws to MLB, the stage was set for the Supreme Court to visit the issue for yet a third time.²⁶¹

²⁵² 196 F. Supp. 445 (E.D. Pa. 1961).

²⁵³ *Id.* at 446.

²⁵⁴ BANNER, *supra* note 151, at 169.

²⁵⁵ *Id.* at 170.

²⁵⁶ *Id.* at 175-76.

²⁵⁷ *Id.* at 176-78 (noting that the decision came a single day after the Atlanta Braves opened the season at home with an extra-innings loss to the Pittsburgh Pirates).

²⁵⁸ *Id.* at 178.

²⁵⁹ *Id.*

²⁶⁰ *See State v. Milwaukee Braves, Inc.*, 144 N.W.2d 1, 18 (Wis. 1966) (holding that "[a] majority of this court (though not in complete agreement as to which of the two theories just stated is controlling), conclude that the Wisconsin antitrust statute cannot, because of requirements of the federal constitution, be applied to concerted action by the defendants in moving the Braves from Milwaukee and refusing applications by others for a franchise").

²⁶¹ *See infra* notes 262-288 and accompanying text.

D. Flood v. Kuhn: A Final Swing at the Exemption

In the years following *Toolson*, courts continued to treat MLB as immune from antitrust scrutiny, while denying the team owners of other U.S. sports leagues the holy grail of an all-encompassing exemption.²⁶² With Congress repeatedly failing to intervene, Baseball seemed to be on strong footing to continue to rely on an antitrust exemption for years to come. Nevertheless, one MLB team, the St. Louis Cardinals, engaged in a misstep that may have attempted to take baseball's favorable treatment under the law a step too far. In 1972, in *Flood v. Kuhn*, the MLB found the legal status of its historic antitrust exemption back in the court—this time facing off against a plaintiff represented by former Supreme Court Justice Arthur Goldberg.²⁶³

The facts giving rise to the *Flood* litigation are so shocking that they remain memorable years later to baseball fans and sports lawyers alike. At 4:00 AM on October 8, 1969, veteran St. Louis Cardinals outfielder Curt Flood answered the phone to a sportswriter asking him for a comment on news that he had just been traded to Philadelphia—a trade that Flood knew nothing about at the time.²⁶⁴ Later that morning, the twelve-year veteran—who was also the team's co-captain and a seven-time Gold Glove winner—received official notification confirming the trade from an individual he described as akin to a middle manager from the team's front office.²⁶⁵

Flood did not want to go to Philadelphia.²⁶⁶ Instead of accepting the trade, he announced his intention to retire.²⁶⁷ Flood chose to take a vacation to Denmark, but upon his return, he called the Players' Association leader Marvin Miller and pitched the idea of filing a lawsuit.²⁶⁸ Although Miller conveyed to Flood that there was a small chance the Court might reverse *Federal Baseball*, he “wouldn't bet any money on it.”²⁶⁹

Despite these reservations about the chances of success, Flood filed his lawsuit against MLB Commissioner Bowie Kuhn on January 16, 1970, in the

²⁶² See, e.g., *Radovich v. Nat'l Football League*, 352 U.S. 445, 451 (1957) (noting that the Supreme Court was “careful to restrict” MLB's antitrust protection only to baseball and not extend it to other professional sports).

²⁶³ 407 U.S. 258, 258 (1972).

²⁶⁴ BRAD SNYDER, *A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS* 1 (2006); Barton J. Menitove, *Baseball's Antitrust Exemption: The Limits of Stare Decisis*, 12 B.C. L. REV. 737, 738–39 (1971) (discussing facts of *Flood* in the context of *Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003 (2d Cir. 1970)).

²⁶⁵ See SNYDER, *supra* note 264 (quoting Flood as calling the man “a middle-echelon coffee drinker from the front office”).

²⁶⁶ *Id.* at 3.

²⁶⁷ *Id.* at 5.

²⁶⁸ *Id.* at 16.

²⁶⁹ *Id.*

U.S. District Court for the Southern District of New York.²⁷⁰ In the suit, Flood alleged violations of both federal and state law.²⁷¹ The district court followed precedent on the federal antitrust law claims, and the court adopted the reasoning of the Wisconsin Supreme Court in *Milwaukee Braves* on the state antitrust claim.²⁷² The Second Circuit Court of Appeals affirmed the lower court's dismissal and again reiterated that it was bound by *Federal Baseball* even though both baseball and the scope of the Commerce Clause had changed.²⁷³ The Second Circuit's decision left Flood with the Supreme Court as his option of last resort.

After the Supreme Court granted Flood's writ of certiorari, the case *Flood v. Kuhn* was argued before the U.S. Supreme Court on March 20, 1972, with the Court issuing its opinion almost three months later.²⁷⁴ The majority decision, written by Justice Harry Blackmun, began with a somewhat embellished description of baseball's history.²⁷⁵ Nevertheless, even though Justice Blackmun seemed to go to great lengths to maintain the status quo in terms of MLB's antitrust exemption, he could not altogether ignore the realities that the definition of interstate commerce had changed from the days of *Federal Baseball* or that other sports leagues today were treated differently from Baseball.²⁷⁶ All of these points were cited carefully in his opinion.²⁷⁷

Section V of the *Flood* decision includes the Court's conclusions of law.²⁷⁸ Section V(1) acknowledges that "[p]rofessional baseball is a business and it is engaged in interstate commerce."²⁷⁹ This sentence, in a vacuum, seems to mark a reversal of *Federal Baseball* and *Toolson* and a recognition of the precedential value of *Wickard*.²⁸⁰ Nevertheless, Section V(2) then states "[w]ith its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly."²⁸¹ This, on its own, makes clear that even if the historical reasoning for baseball's antitrust exemption is now gone, some form of an exemption still remains.²⁸²

²⁷⁰ *Flood v. Kuhn*, 316 F. Supp. 271, 272 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258.

²⁷¹ *See id.* at 278 (referencing Flood's state and federal law claims).

²⁷² *See id.* at 278–80 (relying on both *State v. Milwaukee Braves, Inc.*, 144 N.W.2d 1 (Wis. 1966) and *Toolson v. New York Yankees*, 346 U.S. 356 (1953) (per curiam)).

²⁷³ *Flood v. Kuhn*, 443 F.2d 264, 268 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

²⁷⁴ *Flood v. Kuhn*, 407 U.S. 258, 258 (1972).

²⁷⁵ *Id.* at 262, 260–64. Justice Blackmun nostalgically lists more than fifty former players who, in his words, "have sparked the diamond and its environs and that have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversations in-season and off-season." *Id.*

²⁷⁶ *See id.* at 278 (comparing the legal treatment of MLB with that of boxing and football).

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 282–85.

²⁷⁹ *Id.* at 282.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

In the aftermath of *Flood*, the scope of the remaining baseball antitrust exemption remains unclear. Given that the subject of *Flood* was baseball's reserve system, there emerge two plausible meanings of Sections V(1) and V(2) taken together. Under one interpretation, the post-*Flood* world considers baseball to be interstate commerce but carves out Baseball's reserve system as an antitrust exemption.²⁸³ The other possible reading of these two clauses is that an exemption remains for all of baseball despite the sport being deemed interstate commerce and the *Flood* dispute centering on Baseball's reserve system. To this day, the Supreme Court has not resolved this uncertainty.²⁸⁴

Further, the Supreme Court recognized that baseball constitutes interstate commerce even as it weakly justified maintaining at least some form of antitrust exemption for Baseball. The Court reasoned that congressional inaction on this exemption demonstrates that Congress does not intend on eliminating this judicial exemption.²⁸⁵ In essence, this language seems to once again punt the issue of baseball's antitrust exemption back to Congress.

Finally, the Supreme Court in *Flood* solidified the holding of the Wisconsin Supreme Court by concluding that the federal antitrust exemption preempts state antitrust law, which leaves Congress as the only venue for reform of baseball's anticompetitive practices.²⁸⁶ The dissent would have sent the case back to the district court for consideration as to whether Curt Flood could assert a claim under antitrust law despite the existence of the collective bargaining agreement. Accordingly, the National Labor Relations Board may have been the proper venue for a challenge to the reserve clause per the dissenters.²⁸⁷

The 1972 decision in *Flood* was the last time that the Supreme Court heard arguments challenging baseball's antitrust exemption. Though, it was far from the last time the wisdom of the exemption was questioned. The following Section discusses several of the post-*Flood* efforts to reevaluate baseball's antitrust exemption.²⁸⁸

²⁸³ *Id.*

²⁸⁴ See generally, e.g., Brief for the United States of America as Amicus Curiae in Support of Neither Party, *Nostalgic Partners, LLC v. Off. of the Comm'r Baseball*, (2d Cir. Jan. 30, 2023) (No. 22-2859) (acknowledging the continued existence of MLB's antitrust protection).

²⁸⁵ *Flood*, 407 U.S. at 283–84 (“We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.”).

²⁸⁶ *Id.* at 284–85.

²⁸⁷ *Id.* at 295–96 (Marshall, J., dissenting).

²⁸⁸ See *infra* notes 289–314 and accompanying text.

E. After Flood

Although Curt Flood lost at the Supreme Court, baseball players gained some economic freedom three years later. An arbitrator found that the reserve clause, as currently written into the standard player contract, was not stated with the “explicit clarity” required to make clubs’ renewable clause in the contract a perpetual option.²⁸⁹

The arbitrators thus opened the door for free agency and created an opportunity for owners and players to negotiate player movement on a more equal footing. Under the guidance of the MLB players union, pitchers Andy Messersmith and Dave McNally refused to sign new contracts and instead played out the 1975 season based on their team’s exercise of the reserve clause in the standard player contract. This set the stage for them to argue to a labor arbitrator that the contract should be interpreted as only allowing for a team to apply this clause once, and, thus, they were now free agents who should be allowed to sign with any team of their choosing.²⁹⁰ Of course, MLB could have attempted to bargain a more appropriately worded perpetual reserve system into their collective bargaining agreement and standard player contract, but that never came to pass.

The narrowing of baseball’s reserve clause had effectively resolved the greatest source of dispute over MLB’s antitrust exemption from the previous half-century. Nonetheless, a wide range of other anticompetitive practices remained core to the sport’s business operations,²⁹¹ and Baseball’s antitrust exemption has continued appear in the crosshairs. Although all lower courts have since been forced to follow the Supreme Court’s precedent in *Flood*, a few courts have interpreted *Flood* as limiting baseball’s antitrust exemption to the “reserve system.”²⁹² These courts have been willing to hear the substantive merits of antitrust cases related to the business of baseball but unrelated to restraints on player movement. For example, in the 1993 case, *Piazza v. Major League Baseball*, the U.S. District Court for the Eastern District of Pennsylvania refused to dismiss an antitrust case filed by two potential purchasers of the San Francisco Giants who argued they had been prevented from owning a team based on their Italian heritage. This case ultimately reached a private settle-

²⁸⁹ *In re Twelve Clubs Comprising the Nat’l League of Pro. Baseball Clubs & Twelve Clubs Comprising the Am. League of Pro. Baseball Clubs v. Major League Baseball Players Ass’n*, 66 Lab. Arb. Rep. (BNA) 101, at *1 (1975) (Seitz, Arb.); *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass’n*, 532 F.2d 615, 617 (8th Cir. 1976) (affirming Seitz’s decision).

²⁹⁰ Nathaniel Grow, *In Defense of Baseball’s Antitrust Exemption*, 49 AM. BUS. L.J. 211, 241–42 (2012).

²⁹¹ BANNER, *supra* note 151, at 243.

²⁹² See, e.g., *Butterworth v. Nat’l League of Pro. Baseball Clubs*, 644 So. 2d 1021, 1022 (Fla. 1994).

ment.²⁹³ Other courts, meanwhile, continued to adopt the view that anything even broadly related to the sport of baseball was fully immune from antitrust scrutiny.²⁹⁴

Congress has continued to hold periodic hearings to examine the wisdom of Baseball's antitrust exemption and consider its deleterious effects on MLB players and its other constituents. Congress went so far as to form a House Select Committee in 1976 to discuss professional sports with antitrust being a key focus.²⁹⁵ The report generated by the Select Committee, even after several hearings, produced little beyond putting the current business status of the major professional sports leagues into the congressional record for perpetuity.²⁹⁶ The Select Committee heard a series of congressional hearings on professional sports and antitrust law throughout the 1980s, but these failed to move baseball's exemption.²⁹⁷

Congress appeared to have a renewed interest in stripping Baseball of some of its protected status in the aftermath of the 1994 work stoppage in Baseball, including the cancellation of that season's World Series, and the failed legal attempt by MLB owners to unilaterally change the business structure of baseball to require the negotiation of all player contracts at the league level.²⁹⁸ In 1997, Senator Orrin Hatch of Utah introduced a bipartisan bill, Senate Bill 53, that would have put baseball in a position similar to all other professional sports leagues regarding labor-side antitrust claims filed by players.²⁹⁹ The Bill, however, carved out from the act "[a]ny conduct . . . relating to or affecting franchise expansion, location or relocation, franchise ownership issues [and] franchise ownership issues," as well as those pertaining to the mi-

²⁹³ 831 F. Supp. 420, 422 (E.D. Pa. 1993).

²⁹⁴ *City of San Jose v. Off. of the Comm'r of Baseball*, 776 F.3d 686, 690 (9th Cir. 2015) (applying the exemption to franchise relocation); *Right Field Rooftops, LLC v. Chi. Baseball Holdings, LLC*, 87 F. Supp. 3d 874, 881–85 (N.D. Ill. 2015) (extending baseball's exemption to an agreement between the Chicago Cubs and third parties to sell tickets); *Wyckoff v. Off. of the Comm'r of Baseball*, 211 F. Supp. 3d 615, 627–28 (S.D.N.Y. 2016) (extending the exemption to contracts for scouts).

²⁹⁵ See generally INQUIRY INTO PROFESSIONAL SPORTS: FINAL MEETINGS OF THE HOUSE SELECT COMMITTEE ON PROFESSIONAL SPORTS, H.R. Doc. No. 81-582 (1976–1977).

²⁹⁶ See generally PROFESSIONAL SPORTS AND THE LAW: A STUDY BY THE SELECT COMMITTEE ON PROFESSIONAL SPORTS, H.R. DOC. No. 75-496 (1976).

²⁹⁷ See generally, e.g., *Antitrust Policy and Professional Sports: Oversight Hearings on H.R. 823, H.R. 3287, and H.R. 6467 Before the Subcomm. on Monopolies and Commercial Law, H. Comm. on the Judiciary*, 97th Cong. (1982); *Professional Sports Antitrust Immunity: Hearings on S. 172, S. 259, and S. 298 Before the S. Comm. on the Judiciary*, 99th Cong. (1985); *Antitrust Implications of the Recent NFL Television Contract: Hearing on S. Res. 291 before the Subcomm. on Antitrust, Monopolies and Business Rights of the S. Comm. on the Judiciary*, 100th Cong. (1987).

²⁹⁸ See generally *Major League Baseball Antitrust Reform: Hearing on S. 53 Before the S. Comm. on the Judiciary*, 105th Cong. (1997).

²⁹⁹ Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (1998) (originally codified at 15 U.S.C. § 27a, now at 15 U.S.C. § 26b).

nor leagues and sports broadcasting.³⁰⁰ President Bill Clinton signed the legislation, dubbed the Curt Flood Act, into law in 1998.³⁰¹ The final language of the Act, however, is so convoluted that neither judges nor law professors are quite sure what exactly it means.³⁰²

The confusing nature of the Curt Flood Act is emblematic of the draftsmanship of individuals who cannot agree as to what the proper remedy is for MLB's unique antitrust status.³⁰³ To point out the kind of circular statements set forth in the act, subsection (a) of the act, entitled "MLB Subject to Antitrust Laws" states that:

Subject to subsections (b) through (d) of this section, the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws 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 affecting interstate commerce.³⁰⁴

But then, subsection (b), entitled "Limitation of Section," begins by stating that "[n]o court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices or agreements other than those set forth in subsection (a)."³⁰⁵ As one of the authors of this Article explained in his 3L law review note written more than twenty years ago: "Beyond the obvious problem of a circular reference between sections (a) and (b), the gist of these two clauses read together implies that any issue not discussed in subsection (b) of this Act is to be treated by the courts in the same manner as the courts would have treated it prior to enactment of the Act."³⁰⁶ But as illustrated by certain decisions reached by lower courts shortly before passage of the Curt Flood Act, including in particular the

³⁰⁰ See *id.* at 1–2 (providing the statement of Sen. Orrin Hatch); see also 15 U.S.C. § 26b (1998) (providing the quoted statutory language).

³⁰¹ Curt Flood Act of 1998; Statement on Signing the Curt Flood Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2150 (Oct. 27, 1998) (containing President Bill Clinton's statement upon signing the Curt Flood Act).

³⁰² Sam C. Ehrlich, *Probing for Holes in the 100-Year-Old Baseball Exemption: A New Post-Alston Challenge*, 90 U. CIN. L. REV. 1172, 1188–90 (2022).

³⁰³ 15 U.S.C. § 26b.

³⁰⁴ *Id.* § 26b(a).

³⁰⁵ *Id.* § 26b(b).

³⁰⁶ Edelman, *supra* note 82, at 59–60.

Piazza decision, there were already splits among the circuits in terms of how to interpret the Supreme Court's decision in *Flood*.³⁰⁷

Perhaps as a result of such ambiguities in MLB's antitrust exemption, this preferred status of Baseball remains as it was after the Supreme Court handed down *Federal Baseball* in 1922.³⁰⁸ Although the Curt Flood Act provided some reprieve to players at the Major League level from abusive labor tactics, minor leaguers still suffered.³⁰⁹ The minor leagues continued to be susceptible to the whims of Major League owners until Major League owners allowed the minor league to unionize.³¹⁰ Moreover, owners and the commissioner's office have continued to use their outsized power to hold cities hostage, seek ever more favorable terms for relocating teams, and pressure cities into new stadium construction using public money, all while raking in record revenues.³¹¹ Times have changed significantly since 1922, and baseball today is not only an interstate business, but is also an international multi-billion dollar business.³¹² Despite its industrial and commercial success, the antitrust exemption remains in place. Furthermore, even though Congress periodically uses the exemption as a carrot to induce action, it has outlived its usefulness—a fact that seemingly everyone except the Commissioner of Baseball's office seems to acknowledge.³¹³ The next Part of this Article examines the practical implications of baseball's antitrust exemption today.³¹⁴

³⁰⁷ *Piazza v. Major League Baseball*, 831 F. Supp. 420, 439–41 (E.D. Pa. 1993).

³⁰⁸ BANNER, *supra* note 151, at 241.

³⁰⁹ See, e.g., Dirk Hayhurst, *An Inside Look into the Harsh Conditions of Minor League Baseball*, BLEACHER REP. (May 14, 2014), <https://bleacherreport.com/articles/2062307-an-inside-look-into-the-harsh-conditions-of-minor-league-baseball> [<https://perma.cc/TN7X-ATCX>] (noting the paltry conditions of minor league players—the player referred to in the article was only paid \$800 a month, which after paying for housing, taxes, clubhouse fees, and insurance amounted to \$300).

³¹⁰ Chelsea Janes, *For the First Time in History, Minor League Baseball Players Have a Union*, WASH. POST (Sept. 14, 2022), <https://www.washingtonpost.com/sports/2022/09/14/minor-league-baseball-union/> [<https://perma.cc/P864-KJXH>].

³¹¹ See Dayn Perry, *Rob Manfred "Sorry" for A's Fans, but Says "Attendance Has Never Been Outstanding" in Defense of Possible Move*, CBS SPORTS (Apr. 24, 2023), <https://www.cbssports.com/mlb/news/rob-manfred-sorry-for-as-fans-but-says-attendance-has-never-been-outstanding-in-defense-of-possible-move/> [<https://perma.cc/TR7R-K7JS>] (noting that "[i]n the end the motivation for relocation threats is always to extort promises of public money from one locale or another, and it almost always works"); Maury Brown, *MLB Sets New Revenue Record, Exceeding \$10.8 Billion for 2022*, FORBES (Jan. 10, 2023), <https://www.forbes.com/sites/maurybrown/2023/01/10/mlb-sets-new-revenue-record-exceeding-108-billion-for-2022/?sh=3f83b04c77ee> [<https://perma.cc/VDG4-P8A5>].

³¹² See *supra* notes 134–135 and accompanying text (describing the current size of the baseball industry).

³¹³ [The Department of Justice has even filed a brief at the Second Circuit Court of Appeals arguing that "[t]he *Federal Baseball* exemption is 'of dubious validity' and should not be extended." See Brief of the United States as Amicus Curiae in Support of Neither Party, *supra* note 284.

³¹⁴ See *infra* Part IV.

IV. EIGHT PRACTICAL IMPLICATIONS OF BASEBALL'S ANTITRUST EXEMPTION TODAY

Baseball's antitrust exemption may be historic and well-ingrained in the fiber of the sport, but it also continues to negatively affect competition within the sport. Although the Curt Flood Act has blunted the force of the baseball exemption in MLB player labor markets, Baseball's antitrust exemption continues to serve as an important way for MLB owners to stave off new competition in a wide variety of other labor and business markets. This Part describes eight ways that baseball's historic antitrust exemption allows MLB to engage in potentially anticompetitive practices that otherwise would be subject to legal scrutiny under federal antitrust law.³¹⁵

Section A of this Part explains how the antitrust exemption permits MLB to unfairly limit the number of teams in large cities.³¹⁶ Section B discusses how this exemption would allow MLB to reduce the number of MLB teams—something Baseball has threatened to do in the past.³¹⁷ Section C discusses how this exemption grants MLB the right to cut the number of minor league baseball teams.³¹⁸ Section D reports how this exemption enables mergers and acquisitions of rival leagues without antitrust scrutiny.³¹⁹ Section E describes how this exemption grants MLB the right to boycott managers, coaches, and staff, particularly those who associate with rival leagues.³²⁰ Section F unpacks how this exemption grants MLB the right to carry out anticompetitive trademark practices.³²¹ Section G relays how this exemption allows MLB to monopolize its game data.³²² Last, Section H demonstrates how this exemption may give MLB the right to participate in anticompetitive broadcasting agreements.³²³

A. Protects Exclusive Territory Restraints

One of the most noticeable anticompetitive effects of baseball's historic antitrust exemption relates to MLB's ability to maintain an inefficient allocation of teams to metropolitan areas—a type of restraint that seems quite clearly preserved by baseball's antitrust exemption, even in the aftermath of the Curt

³¹⁵ See *infra* notes 315–401 and accompanying text.

³¹⁶ See *infra* notes 324–339 and accompanying text.

³¹⁷ See *infra* notes 340–350 and accompanying text.

³¹⁸ See *infra* notes 351–359 and accompanying text.

³¹⁹ See *infra* notes 360–371 and accompanying text.

³²⁰ See *infra* notes 372–378 and accompanying text.

³²¹ See *infra* notes 379–386 and accompanying text.

³²² See *infra* notes 387–396 and accompanying text.

³²³ See *infra* notes 397–401 and accompanying text.

Flood Act.³²⁴ At present, the New York City metropolitan area, which is the largest in the United States with a population of just over 19.2 million, has just two Major League Baseball teams (or, stated another way, just one team per 9.6 million people).³²⁵ Similarly, the Los Angeles-Anaheim metropolitan area, which is the second-largest, has just two teams for its population of 13.2 million (or one team per 6.6 million people).³²⁶ Meanwhile, the Dallas-Fort Worth metropolitan area, which is the fourth largest metropolitan area, has just one team for its 7.5 million residents.³²⁷ Based on historic attendance patterns and ticket prices, there is a strong argument that each of these metropolitan areas could sustain additional MLB teams. Nevertheless, MLB has not added new expansion teams to these markets, preferring to keep regional and shared monopolies in place.³²⁸

At the same time, there are presently MLB teams that play in metropolitan areas with populations below 2.5 million, many of which comparatively struggle with the larger-market teams to raise revenues.³²⁹ For example, five of Major League Baseball's midwestern teams—the Pittsburgh Pirates, Cincinnati Reds, Kansas City Royals, Cleveland Guardians, and Milwaukee Brewers—play in metropolitan areas with populations below 2.5 million.³³⁰ Often referred to as baseball's "small market teams," a number of these teams rely heavily on revenue sharing, collectively bargained luxury taxes on player salaries, and other forms of internal league aid.³³¹ In a truly free market, one would

³²⁴ See Grow, *supra* note 290, at 232–33 (acknowledging, despite the author's broader overall defense of Baseball's antitrust exemption, that relocation restraints "is one area where baseball's exemption has actually given MLB an advantage over the other professional sports leagues," and that "[s]pecifically, baseball's exemption allows MLB to place greater restrictions on franchise relocations than the other leagues, whose ability to regulate relocation has been curtailed by various antitrust rulings").

³²⁵ *Map of America's 50 Largest Metropolitan Areas by Populations*, VIVID MAPS (Feb. 7, 2017), <https://vividmaps.com/map-of-largest-metropolitan-areas/#::~:~:text=1%20New%20York-Newark-Jersey%20City%2C%20NY-NJ-PA%20MSA.%20%E2%80%93%2019%2C216%2C182,Lauderdale-Pompano%20Beach%2C%20FL%20MSA.%20%E2%80%93%206%2C166%2C488%20More%20items> [https://perma.cc/NU9A-SWPU].

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ See generally Andrew Zimbalist, *Baseball Economics and Antitrust Immunity*, 4 SETON HALL J. SPORT. L. 287, 312 (1994) (explaining that "MLB behaves like a standard monopoly in restricting supply (the number of teams) below the demand for teams from economically viable cities").

³²⁹ Tyler O'Shea, *Breaking Down the Smallest Market Teams in Major League Baseball*, JOKERMAG (May 9, 2022), <https://jokermag.com/smallest-market-teams-mlb/> [https://perma.cc/5WWH-ZHAS].

³³⁰ *Map of America's 50 Largest Metropolitan Areas by Populations*, *supra* note 325.

³³¹ See Maury Brown, *MLB 2022 Luxury Tax Payrolls Exceed \$5 Billion for First Time; Six Clubs Pay Penalties*, FORBES (Jan. 19, 2023), <https://www.forbes.com/sites/maurybrown/2023/01/19/mlb-2022-luxury-tax-payrolls-exceed-5-billion-for-first-time-six-clubs-pay-penalties/?sh=1a5976976efe> [https://perma.cc/86MQ-HX5S] (describing the functionality of Baseball's luxury tax).

expect the ownership groups of some of these smaller-market Midwestern teams to relocate to markets where there is the greatest opportunity for them to make money, such as large market cities like New York, Los Angeles, or Dallas.³³² For example, with the New York Yankees playing in the most northern New York borough (the Bronx) and the New York Mets playing in the eastern most borough (Queens), one could expect it to be highly lucrative for an existing Baseball team to move to either Brooklyn or Manhattan.³³³ A move of this nature would likely be profitable for the existing club owners in allowing them to earn more money from ticket sales and regional television broadcast deals while, at the same time, reducing the cost for fans to attend baseball games within the larger metropolitan area and increasing their choice of which games to attend.³³⁴

One of the reasons there have not been MLB teams flooding into the big-city markets, however, is that under the MLB Constitution, the thirty Major League Baseball teams each agree to maintain a geographical market restraint through self-imposed territorial restrictions.³³⁵ Thus, an affirmative vote is needed from three-fourths of MLB team owners to allow an existing team to move to a new market or otherwise amend the territorial restrictions in the league constitution.³³⁶ Some courts, in other sports contexts, have recognized that territorial restraints may constitute illegal restraints of trade under antitrust law. For example, a court decision involving this topic first permitted the NFL's Oakland Raiders to move to Los Angeles.³³⁷ The reasonableness of

³³² See, e.g., Jake Singer, *Major League Baseball: 10 Cities That Deserve a Team*, BLEACHER REP. (Dec. 18, 2012), <https://bleacherreport.com/articles/1447886-major-league-baseball-10-cities-that-deserve-a-team> [<https://perma.cc/6N9B-NBWF>] (observing that New York City's population could support an additional team).

³³³ *Id.*

³³⁴ See Ken Rosenthal, *Rosenthal: Despite Some Financial Incentives, MLB Expansion Is on Hold. Here's Why*, THE ATHLETIC (Jan. 11, 2021), <https://theathletic.com/2315404/2021/01/11/Rosenthal-mlb-expansion-on-hold/> [<https://perma.cc/W5KJ-M8VQ>] (noting that expansion would likely increase revenues).

³³⁵ MLB, MAJOR LEAGUE CONSTITUTION 10–12 (1921), <https://www.documentcloud.org/documents/6784510-MLB-Constitution> [<https://perma.cc/95Z8-ZUHF>].

³³⁶ See Phillip L. Gregory & Donald J. Polden, *The Baseball Exemption: An Anomaly Whose Time Has Run*, 24 COMPETITION: J. ANTITRUST & UNFAIR COMP. L. SEC'Y ST. BAR CAL. 154, 156–57 (2015) (outlining the MLB constitution).

³³⁷ See, e.g., L.A. Memorial Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1401 (9th Cir. 1984) (enjoining the NFL from preventing the Oakland Raiders from moving to Los Angeles). Courts have routinely held antitrust law prohibits territorial restraints. See, e.g., United States v. TOPCO Assocs., Inc., 405 U.S. 596, 608 (1972) (“This Court has reiterated time and time again that ‘(h)orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.’” (omission in original) (citation omitted)).

MLB's territorial restraints is, however, exempted from legal scrutiny under baseball's historic antitrust exemption.³³⁸

Consequently, both small-market MLB owners, who cannot sue for permission to move the home location of their team to a more financially advantageous market, and baseball fans, particularly those in the largest markets like New York who encounter higher ticket prices, are harmed by the undersupply of teams.³³⁹

B. Artificially Deflates the Number of Major League Baseball Teams

In addition to allowing for the inefficient allocation of teams to metropolitan areas, baseball's antitrust exemption—depending upon how broadly a court interprets this exemption in the aftermath of the Flood Act and relevant labor law—might allow for the contraction of MLB teams from certain markets.³⁴⁰ Although the thought of baseball contraction might seem far-fetched at present, as recently as 2002, Commissioner Bud Selig discussed the potential for contracting two of the smaller-market MLB teams, the Minnesota Twins and the Montreal Expos, neither of which the league wanted moving to a large market city such as New York to boost profitability.³⁴¹

Selig's proposed contraction plan twenty years ago never materialized, as the baseball players union contended that contraction was a mandatory topic of collective bargaining during the process of ongoing negotiations over a new collective bargaining agreement.³⁴² Ultimately, as part of this new agreement, MLB teams agreed to pull contraction off the table for the time being, with the Montreal Expos ultimately moving to Washington D.C. to become the Nation-

³³⁸ See *City of San Jose v. Off. of the Comm'r of Baseball*, 776 F.3d 686, 690 (9th Cir. 2015) (holding that MLB's antitrust exemption bars the City of San Jose from challenging MLB efforts to stop a baseball team from relocating).

³³⁹ Singer, *supra* note 332. Interestingly, in a co-authored law review article, former MLB owner and commissioner, Bud Selig, claims that without an antitrust exemption, MLB would not be able to protect franchise stability and keep teams viable in their longstanding home markets. See Allen H. ("Bud") Selig, Thomas J. Ostertag & Matthew J. Mitten, *Baseball's Antitrust Exemption for Franchise Decisions: Its Justifications and Antitrust Law Implications for Other Professional Leagues*, 2019 WIS. L. REV. 421, 433. But, lest we forget, Bud Selig was the same Commissioner who in 2001 and 2002 called for the contraction of two MLB teams, the Minnesota Twins and Montreal Expos—all under the color of protection from Baseball's antitrust exemption—because he deemed them no longer viable in their home cities. *Selig Says Baseball Will Try Again in 2003*, ESPN, <https://www.espn.com/mlb/news/2002/0205/1323166.html> [<https://perma.cc/2E4T-Q5ZZ>] (Feb. 13, 2002). Thus, the hypocrisy in his stated justification for maintaining baseball's antitrust exemption cannot be over-emphasized.

³⁴⁰ For a much more detailed look at the antitrust issues surrounding the contraction of an MLB team, see generally, for example, Edelman, *supra* note 82.

³⁴¹ See *id.* at 45–46 (noting that in 2001 MLB was operating at a \$500 million loss and that the Twins were ranked next to last among MLB's thirty teams in terms of local revenue).

³⁴² *Id.* at 46.

als, and the Twins' purported financial struggles largely solved upon receipt of a new, publicly funded stadium.³⁴³ But, like so many discarded business and legal strategies, the threat of contracting an MLB team is likely to one day return and, depending on how broadly one interprets the scope of baseball's anti-trust exemption, the league may have a potential affirmative defense to reviewing any such contraction on its competitive merits.³⁴⁴

This is troubling because a contraction plan today would likely produce anticompetitive effects in both product and labor markets.³⁴⁵ In terms of a product-side claim, a concerted reduction in the number of MLB teams is likely to harm competition by reducing the total output of MLB games available for consumers below that of the number of games that would be played in a free market.³⁴⁶ It would also create further territorial exclusivity for surviving teams, strengthening geographical monopolies that already exist and potentially driving up the cost of tickets in areas where fans have even fewer choices about where to watch a game. Moreover, in terms of labor markets, contraction would constitute a concerted attempt among employers in an industry to reduce the number of jobs in that industry, which would reduce competition for work and likely drive down employee wages.³⁴⁷

And yet, according to at least some interpretations of MLB's antitrust exemption, an antitrust challenge to the proposed contraction of an MLB team might be precluded.³⁴⁸ Indeed, reasonable minds may argue whether contraction might be protected from antitrust scrutiny by subsection (b)(3) of the Curt Flood Act, which carves out "franchise location" and "ownership issues" from

³⁴³ As an interesting historical note on the inefficiency of publicly funded stadiums, the Montreal Expos stadium, which was built in 1976, was not fully paid off until a year after the team left for Washington. *Quebec's Big Owe Stadium Debt Is Over*, CBC NEWS, <https://www.cbc.ca/news/canada/montreal/quebec-s-big-owe-stadium-debt-is-over-1.602530> [https://perma.cc/NT2A-J4JW] (Dec. 19, 2006).

³⁴⁴ Indeed, Baseball did contract 25% of its minor league franchises in 2021. Evan Drellich, *Lawsuit Alleges Minor League Owners Enriched Themselves During MLB Contraction*, THE ATHLETIC (Apr. 22, 2023), <https://theathletic.com/4438383/2023/04/22/mlb-contraction-lawsuit-owners-volcanoes/> [https://perma.cc/P4FX-4D7K].

³⁴⁵ See Jeff Dominique, *Maybe It Is Time for MLB Contraction*, L.A. DODGER TALK (Jan. 25, 2020), <https://ladodgertalk.com/2020/01/25/maybe-it-is-time-for-mlb-contraction/> [https://perma.cc/Y632-2DVP] (proposing a contraction of those MLB teams which fail to spend their revenue-sharing funds to make themselves more competitive and develop their players).

³⁴⁶ See Edelman, *supra* note 82, at 64–65 (explaining that "[i]f the Minnesota Twins were contracted, twenty-five players would lose their jobs," and that "[b]ased on supply and demand analysis, competition for the final roster positions on the remaining twenty-nine major league teams would intensify based on the reduced number of total roster spots, an effect that would deflate salaries of players on all remaining teams").

³⁴⁷ *Id.*

³⁴⁸ See John T. Wolohan, *Major League Baseball Contraction and Antitrust Law*, 10 VILL. SPORTS & ENT. L.J. 5, 19–23 (2003) (offering an interpretation of the Curt Flood Act as not interfering with the extant case law creating the baseball exemption).

the equal treatment provision of the sports leagues.³⁴⁹ Although there is a relatively strong argument that the contraction of baseball teams is not intended to be within baseball's remaining carveout from antitrust scrutiny, it would be better if this were not even a topic that necessitated legal debate.³⁵⁰

C. Artificially Deflates the Number of Minor League Baseball Teams

The possibility of MLB seeking to contract the number of teams under the color of an antitrust exemption is not, however, limited to just the contraction of Major League teams; there is also the threat of shutting down certain minor league affiliates. Of course, the contraction of minor league baseball teams, much like the contraction of MLB teams, is likely anticompetitive.³⁵¹ In a truly free market, each MLB team could partner with as many (or as few) minor league baseball teams as they wanted in seeking to develop young, MLB talent.³⁵² Nevertheless, MLB teams, perhaps believing they have an antitrust exemption for such behavior, announced in September 2020 a plan to limit each team's number of minor league affiliates from six to four.³⁵³ This decreased the number of opportunities to host MLB-partnered baseball games, as well as the number of jobs available to MLB-affiliated minor league baseball teams.³⁵⁴ MLB then proceeded to unilaterally terminate roughly forty minor league teams—driving them out of business.³⁵⁵

MLB's collective reduction in the number of minor league teams is arguably anticompetitive for several reasons. In terms of local product markets, it reduces competition to secure fans between MLB and minor league teams, among minor league teams, and possibly even between minor league teams and NCAA Division-I college baseball teams. This has the effect of reducing the

³⁴⁹ 15 U.S.C. § 26b; see Edelman, *supra* note 82, at 60 (analyzing the statutory language).

³⁵⁰ 15 U.S.C. § 26b (originally contained at § 27a).

³⁵¹ Neil DeMause, *Why MLB Declared War on the Minor Leagues*, SLATE (Dec. 19, 2019), <https://slate.com/culture/2019/12/mlb-minor-league-baseball-contraction-kill-milb-teams-collusion.html> [<https://perma.cc/L67E-9XFV>].

³⁵² In fact, a free minor league system would likely more closely resemble a period in the 1940s where MLB teams would go out and contract development agreements with independent minor league teams. See Cooper, *supra* note 93.

³⁵³ Steve Gardner, *Minor League Baseball Finally Resumes After Lost 2020 Season*, USA TODAY, <https://www.usatoday.com/story/sports/mlb/minors/2021/05/04/minor-league-baseball-season-begins-new-rules-structure/4926769001/> [<https://perma.cc/8D4Z-KAF4>] (May 4, 2021).

³⁵⁴ See Nostalgic Partners, LLC v. Off. of the Comm'r of Baseball, 637 F. Supp. 3d 45, 48 (S.D.N.Y. 2022) (noting that cooperation between the major league teams and their affiliates in the minor leagues is a benefit to fans because it allows them to see more professional baseball games in more areas of the country), *aff'd*, No. 22-2859, 2023 WL 4072836, at *1 (2d. Cir. June 20), *cert. denied*, 144 S. Ct. 389 (mem.) (2023).

³⁵⁵ Jeff Tracy, *Baseball's Shrinking Minor Leagues*, AXIOS (Sept. 9, 2020), <https://www.axios.com/2020/09/09/minor-league-baseball-contraction-affiliate-status> [<https://perma.cc/LDL2-TNLU>].

number of jobs in the minor leagues and lessening the competition among MLB teams to develop new, young baseball players through their farm systems.

As a result of the collective, and likely anticompetitive, action of the thirty MLB teams, a number of the contracted minor league baseball team owners filed suit in *Nostalgic Partners, LLC v. Office of the Commissioner of Baseball* in 2022.³⁵⁶ The minor league owners alleged in the U.S. District Court for the Southern District of New York that their contraction amounted to a horizontal restraint of trade that curtailed competition for minor league affiliations between minor league teams and between MLB teams.³⁵⁷ Nevertheless, both the U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit ruled in favor of the MLB defendants, holding that the restraint was insulated from antitrust scrutiny based on baseball's longstanding antitrust exemption.³⁵⁸ If not for baseball's historic antitrust exemption, the concerted restriction on the number of MLB-affiliated minor league baseball teams reasonably may have been determined to be an output restraint in violation of federal antitrust laws.³⁵⁹

D. Facilitates Mergers and Acquisitions of Potential Rival Leagues

Another way that baseball's historic antitrust exemption has thwarted market competition is by facilitating mergers and acquisitions of rival leagues, thus precluding the emergence of new interleague competition.³⁶⁰ For example, the original ramifications of the Supreme Court's 1922 holding that baseball lies outside the scope of antitrust laws was that it insulated an agreement by

³⁵⁶ *Nostalgic Partners*, 637 F. Supp. 3d at 48.

³⁵⁷ *See id.* at 51 (describing the restraint as “serv[ing] to reduce competition between rivals by preventing [the contracted minor league baseball teams] from competing with each other for affiliations and preventing MLB clubs from competing with each other to affiliate with more minor league teams”).

³⁵⁸ *See id.* at 55 (holding that “[e]ven analyzing the [baseball] exemption narrowly, the exemption is wide enough to encompass the claim here”); *see also Nostalgic Partners*, 2023 WL 4072836, at *1 (holding that the court must apply baseball's historic antitrust exemption and dismiss plaintiff's antitrust claims against MLB “unless and until [the baseball exemption] is overruled by the Supreme Court”).

³⁵⁹ *Nostalgic Partners*, 637 F. Supp. 3d at 48; *Output Restraints*, TECH. & IP L. GLOSSARY (June 4, 2013), <https://www.ipglossary.com/glossary/output-restraints/> [<https://perma.cc/VGD9-APNQ>] (defining output restraints as “[a]greements between manufacturers to limit their output of certain goods or services, so as to reduce competition and raise prices” that are “[u]sually under Antitrust, Competition, or unfair trade/competition laws”).

³⁶⁰ MLB first introduced interleague play in 1997 and has subsequently been expanded several times to increase the frequency of interleague games. *See Interleague Play*, BASEBALL REFERENCE, https://www.baseball-reference.com/bullpen/Interleague_play (Feb. 21, 2023) [<https://perma.cc/8GMC-3AAG>].

the American League and National League teams to buy out and divest from teams in the emerging rival Federal League.³⁶¹

Baseball's antitrust exemption has stifled any emerging leagues and molded the American and National Leagues into a single league. The slow, nearly one hundred-year merger between the American League and National League allowed these leagues to transform from competitors into a single joint venture, where intraleague and interleague competition was essentially one and the same.³⁶² In September 1999, absent any antitrust scrutiny, MLB owners unanimously eliminated the separate positions of American League and National League president and centralized all responsibilities into a single commissioner.³⁶³ Around the same time, MLB also began "regular season ticket revenue sharing via interleague play,"³⁶⁴ and since then, two MLB teams, the Houston Astros and Milwaukee Brewers, have switched leagues for realignment purposes.³⁶⁵ Presently, there is no longer any financial incentive for Baseball's American League and National League to compete for ticket sales, broadcasting contacts, or new home territories. The two leagues are truly now the same entity.³⁶⁶

Outside of the sport of baseball, it has not historically been as easy for professional sports leagues to merge. It took a congressional amendment to the Sports Broadcasting Act of 1961, subsequently signed into law by President Lyndon B. Johnson, to enable the National Football League and the American Football League to merge without antitrust scrutiny.³⁶⁷ Even there, Congress amended the Act in such a way as to ensure that the merged entity contained more, rather than fewer, teams.³⁶⁸ Thus, the public policy served to enhance intraleague competition for players' services, albeit to the detriment of broad-

³⁶¹ See *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Pro. Baseball Clubs*, 259 U.S. 200, 207–08 (1922) (noting that the defendants included the National League and American League as well as the presidents of both leagues and the National Commission: an entity "having considerable powers in carrying out an agreement between the two Leagues").

³⁶² See Bill Nowlin, *Did MLB Exist Before the Year 2000?*, SOC'Y FOR AM. BASEBALL RSCH., <https://sabr.org/journal/article/did-mlb-exist-before-the-year-2000/> [<https://perma.cc/E6FK-YBUY>] (observing that before the merger of the American League and National League, it was perhaps a fair, though likely academic, question as to whether there was really a singular league operating under the title of MLB).

³⁶³ Edelman, *supra* note 82, at 52–53.

³⁶⁴ *Id.* at 53.

³⁶⁵ Victor Mather, *How the Astros Became an American League Team*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/sports/baseball/astros-american-league.html> [<https://perma.cc/7Q28-A345>].

³⁶⁶ *Revenue Sharing*, BASEBALL REFERENCE, https://www.baseball-reference.com/bullpen/Revenue_sharing [<https://perma.cc/WBL4-NUJG>] (June 16, 2020).

³⁶⁷ Sports Broadcasting Act of 1961, Pub. L. No. 87-331, 75 Stat. 732 (codified as amended at 15 U.S.C. §§ 1291–1295).

³⁶⁸ 15 U.S.C. § 1291 (1961) (amended 1966).

er, interleague competition.³⁶⁹ Similarly, courts for several years held up the National Basketball Association's proposed acquisition of the American Basketball Association, until the point when many of the American Basketball Association teams had become failing businesses.³⁷⁰ And, at present, the Department of Justice is currently investigating the proposed merger of the two major world golf tours: the PGA Tour and LIV Golf.³⁷¹ Baseball's silent merger of the National and American leagues faced no such restraints.

E. Allows for Leaguewide Boycott of Potential Managers, Coaches, and Staff

Baseball's historic antitrust exemption also allows for MLB clubs to collectively boycott potential new team managers, coaches, and other staff—namely, classes of personnel that are not explicitly protected by the Curt Flood Act.³⁷² Historically, sports owners have boycotted individuals for numerous reasons.³⁷³ Insulating MLB clubs' collective boycott of prospective managers, coaches, and staff has a chilling effect on these individuals behaving in ways that owners dislike, including accepting work in a rival, startup baseball league. This reality makes it difficult for an emergent baseball league to form.³⁷⁴

Outside of MLB, courts have repeatedly determined that team owners in a professional sports league who collectively agree to boycott a particular worker or class of workers violate antitrust law.³⁷⁵ Courts have even enjoined sports leagues' concerted refusals to deal with athletes who have joined or attempted

³⁶⁹ Marc Edelman, Opinion, *Single-Entity Status Must Pass Legal Test*, SPORTS BUS. J., Apr.–May 2008, at 24, 24, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1531230 [<https://perma.cc/K854-WAK8>].

³⁷⁰ See, e.g., *Robertson v. Nat'l Basketball Ass'n*, 389 F. Supp. 867, 867 (S.D.N.Y. 1975) (holding the NBA not exempt from antitrust laws).

³⁷¹ Kevin Breuninger & Jessica Golden, *Justice Department to Probe PGA Tour Deal with Saudi-Funded LIV Golf*, CNBC, <https://www.cnn.com/2023/06/15/pga-tour-liv-golf-merger-justice-department-to-investigate.html> [<https://perma.cc/H8Q3-USHA>] (June 16, 2023).

³⁷² Cf. Grow, *supra* note 290, at 240–41 (correctly noting that “following Congress’s passage of the Curt Flood Act of 1998, baseball’s antitrust exemption no longer applies to antitrust lawsuits filed by current major league players, giving MLB players the right to challenge anticompetitive labor practices in court under antitrust law” (footnotes omitted)).

³⁷³ See J. Gordon Hylton, *The Historical Origins of Professional Grievance Arbitration*, 11 MARQ. SPORTS L. REV. 175, 176 (2001) (describing the effects of being blacklisted).

³⁷⁴ See *id.* (observing that those blacklisted could effectively beg for mercy, try to find a position outside of organized baseball, or try suing to get off the blacklist).

³⁷⁵ See, e.g., Marc Edelman, *Are Commissioner Suspensions Really Any Different from Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade*, 58 CATH. U. L. REV. 631, 648–49 (2009) (enumerating court cases outside of either baseball or a collective bargaining relationship where the group boycott of a player or class of player was held to violate federal antitrust laws).

to join rival leagues.³⁷⁶ Nevertheless, presuming the MLB continues to enjoy an antitrust exemption, there would be no legal remedy against league-wide boycotts, blacklists, or other forms of refusing to deal with potential league managers, coaches, and staff.³⁷⁷ Thus, these individuals are readily subject to what former baseball arbitrator George Nicolau has referred to as the “ultimate sanction,” denial of the right to practice one’s profession and earn a living anywhere in the United States.³⁷⁸

F. Allows for Anticompetitive Trademark Licensing Policies

Baseball’s antitrust exemption has also allowed for teams in Baseball to collectivize their trademarks and other intellectual property rights, creating exclusive leaguewide suppliers of apparel and other merchandise in a manner that would otherwise likely violate antitrust laws. For example, in the 2010 case *American Needle, Inc. v. National Football League*, the Supreme Court unanimously held that the NFL’s collectivizing of the rights to use individual team marks on branded apparel represented a form of concerted action, subject to scrutiny under Section 1 of the Sherman Act.³⁷⁹ Upon remand, the U.S. District Court for the Northern District of Illinois held that the plaintiff in that case, American Needle, had presented a bona fide issue of material fact as to whether the NFL teams had collectively restrained trade in the wholesale market for NFL trademarked hats.³⁸⁰ NFL teams in the league had imposed a requirement that hat manufacturers exclusively negotiate for a license to use one or more NFL team marks at the central league level.³⁸¹ Although the courts never ruled on the underlying merits of American Needle’s challenges, on remand the NFL privately settled its antitrust case and revised its practices for

³⁷⁶ See, e.g., *Radovich v. Nat’l Football League*, 352 U.S. 445, 454 (1957); *In re Haywood v. Nat’l Basketball Ass’n*, 401 U.S. 1204, 1204 (1971).

³⁷⁷ In 2023, MLB scouts sued alleging they were blacklisted due to their age. Bill Shaikin & Mike DiGiovanna, *Scouts Sue MLB for Age Discrimination, Claiming the League Has a ‘Blacklist,’* L.A. TIMES, <https://www.latimes.com/sports/story/2023-06-21/scout-mlb-lawsuit> [<https://perma.cc/3QJB-4ZNE>] (June 21, 2023). Although the scouts may prevail, it seems more than likely that MLB will once again seek refuge in the shelter of its antitrust exemption.

³⁷⁸ Jason M. Pollack, *Take My Arbitrator, Please: Commissioner “Best Interests” Disciplinary Authority in Professional Sports*, 67 FORDHAM L. REV. 1645, 1693 (1999).

³⁷⁹ See Edelman & Holden, *supra* note 9, at 115 (citing *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 186 (2010)).

³⁸⁰ See *id.* at 119 (discussing the remand of *American Needle*).

³⁸¹ *Am. Needle, Inc. v. New Orleans La. Saints*, No. 04-cv-7806, 2014 WL 1364022, at *2 (N.D. Ill. Apr. 7, 2014); see Edelman & Holden, *supra* note 9, at 119.

licensing team marks to end the practice of having a single, exclusive distributor of all NFL team apparel.³⁸²

Baseball's historic antitrust exemption, however, protects MLB's trademark licensing practices.³⁸³ Thus, there is presently no legal restraint to prevent the thirty Baseball teams from selecting a single apparel manufacturer, baseball card manufacturer, or manufacturer of just about any category of trademarked goods.³⁸⁴ Stated differently, there is nothing to stop the MLB from requiring prospective manufacturers of New York Mets hats to also purchase a license to make hats for the other twenty-nine teams.³⁸⁵ And, MLB, unlike the NFL and other sports leagues, could clearly license the exclusive rights to make MLB fan merchandise for all thirty teams to a single bidder—thus driving up the price of these rights and excluding all other manufacturers from Baseball apparel merchandise altogether.³⁸⁶ Indeed, unlike other U.S. professional sports leagues such as the NFL, MLB owners would not even need to defend their collective and exclusive practices on their competitive merits.

G. Allows Collectivizing Game Data and Other Federally Unprotected Property

MLB's unfettered ability to centralize team property rights based on its historic antitrust exemption also extends beyond the realm of intellectual property rights and into the realm of access to non-federally protected property, including gambling-related data.³⁸⁷ For example, MLB teams have collectivized the ownership rights in game data at the league level and collectively resold the data of all thirty teams together, without offering gambling businesses the option to buy the data of any single team without purchasing the full league data.³⁸⁸ This approach prevents new startup companies in the gaming space from purchasing data from just a single MLB team or a small subsection

³⁸² Ken Belson, *N.F.L. and American Needle Agree to Settle Lawsuit*, N.Y. TIMES (Feb. 18, 2015), <https://www.nytimes.com/2015/02/19/sports/football/nfl-and-american-needle-agree-to-settle-lawsuit.html> [<https://perma.cc/FPH7-5JE4>].

³⁸³ The Supreme Court held that this practice violated antitrust law when the NFL attempted a similar scheme. *Am. Needle, Inc.*, 560 U.S. at 183.

³⁸⁴ *See id.* (discussing how the NFL shifted from granting nonexclusive licenses to giving exclusive licenses to Reebok).

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ Edelman & Holden, *supra* note 9, at 112.

³⁸⁸ *See id.* at 112–28 (providing an antitrust analysis under Section 1 of the Sherman Act of sports teams aggregating and reselling team game data at the league level).

of teams.³⁸⁹ In addition, it chills any competition between the MLB teams themselves to collect and sell sports gambling data in competition against one another.³⁹⁰ Absent a special antitrust exemption, collectivizing such data rights at the league level would likely be subject to scrutiny under Section 1 of the Sherman Act.³⁹¹

MLB has also monopolized game data by “imped[ing] private companies from independently collecting and selling or licensing game data” in competition with what MLB teams describe as “official data.”³⁹² For example, multiple public sources report that MLB teams, in addition to collectivizing their sports data rights, have agreed to make sportsbooks that use exclusively their data into “Authorized Gaming Operators” by giving them exclusive rights to “media and content extension opportunities and product integration through MLB.TV.”³⁹³ In an earlier article entitled *Monopolizing Sports Data*, the authors concluded that, by engaging in these practices, “MLB is, in essence, precluding those sportsbooks that seek to acquire their sports data from other sources from purchasing media extensions and product integrations without also buying MLB’s data.”³⁹⁴ Absent a special exemption from federal antitrust law, this reasonably may amount to exclusionary behavior that violates Section 2 of the Sherman Act.³⁹⁵ Again, sports league aggregation of game data represents a novel topic, and there has been little litigation to date against MLB or any other U.S. professional sports league on this issue. Nevertheless, access to an antitrust exemption here likely prevents a plaintiff from even challenging Baseball’s emerging data practices, irrespective of their net competitive merits.³⁹⁶

H. Possibly Allows League-Wide Broadcast Restraints Beyond Those Permitted by the Sports Broadcasting Act

Finally, baseball’s antitrust exemption might even grant teams additional authority to engage in anticompetitive broadcasting agreements. Analyzing the effects of Baseball’s antitrust exemption on broadcast markets is complicated for two reasons. First, Congress in the Sports Broadcasting Act of 1961 award-

³⁸⁹ See Matt Rybaltowski, *Here’s How Much ‘Official’ League Data Actually Costs*, SPORTS HANDLE (Mar. 12, 2019), <https://sportshandle.com/sports-betting-official-data-cost/> [<https://perma.cc/WT7Q-UMWU>] (describing the costs of data packages).

³⁹⁰ Edelman & Holden, *supra* note 9, at 113.

³⁹¹ *Id.* at 112.

³⁹² *Id.* at 128–29.

³⁹³ *Id.* at 133.

³⁹⁴ *Id.*

³⁹⁵ *Id.*; 15 U.S.C. § 2 (providing for a fine or imprisonment to “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce”).

³⁹⁶ Edelman & Holden, *supra* note 9, at 128.

ed all four of the premier U.S. professional sports leagues additional leeway to sign collective broadcasting contracts for “sponsored telecasting of their games”—protecting certain baseball conduct even outside of MLB’s antitrust exemption.³⁹⁷ Second, because broadcasting is somewhat removed from the core business of baseball, some courts have concluded that only the Act, and not baseball’s historic antitrust exemption, could insulate activities in the market for broadcasting baseball games from antitrust scrutiny.³⁹⁸

There is a situation where the baseball exemption could theoretically permit MLB teams to engage in anticompetitive broadcasting conduct unprotected by the Sports Broadcasting Act. This would occur if MLB teams came together to sign a collective broadcast contract with a cable television network or over-the-top Internet provider (rather than a sponsored telecast station) in a jurisdiction that has adopted one of the comparatively more inclusive interpretations of baseball’s exemption.³⁹⁹ One legal scholar suggests that the U.S. Department of Justice and Federal Trade Commission are unconcerned with sports leagues that engage in collective licensing of broadcast rights even in markets beyond sponsored telecasts.⁴⁰⁰ Nevertheless, a private plaintiff, including, for example, a scorned television station or a consumer who wants alternatives to purchasing a specific baseball television package might, but for a broadly interpreted baseball exemption, be well positioned to bring suit.⁴⁰¹

V. WHY ARGUMENTS IN FAVOR OF MAINTAINING BASEBALL’S EXEMPTION DO NOT HOLD MUCH WEIGHT

Recognizing that baseball’s antitrust exemption is inconsistent with values of modern antitrust law, the final question this Article asks is whether there is a strong enough countervailing public policy argument for still preserving baseball’s historic antitrust exemption. The two most frequently cited, albeit closely related, legal arguments in favor maintaining baseball’s antitrust exemption are: (1) *stare decisis*, and (2) the Court’s intent to leave a determination of baseball’s exemption to Congress (both as referenced in *Toolson* and

³⁹⁷ 15 U.S.C. §§ 1291–1295 (1961).

³⁹⁸ See, e.g., *Henderson Broad. Corp. v. Houston Sports Ass’n, Inc.*, 541 F. Supp. 263 (S.D. Tex. 1982); *Garber v. Off. of the Comm’r of Baseball*, 120 F. Supp. 3d 334, 339–40 (S.D.N.Y. 2014); *Laumann v. Nat’l Hockey League*, 56 F. Supp. 3d 280, 291–94 (S.D.N.Y. 2014).

³⁹⁹ There was a lawsuit over MLB telecasts; it, however, was settled in 2016. Eriq Gardner, *Baseball Fans Reach Settlement Over MLB Telecasts on Verge of Antitrust Trial*, HOLLYWOOD REP. (Jan. 19, 2016), <https://www.hollywoodreporter.com/business/business-news/baseball-fans-reach-settlement-mlb-857077/> [https://perma.cc/5RL3-QJMD].

⁴⁰⁰ Grow, *supra* note 290, at 249.

⁴⁰¹ See Evan Drellich, *The Future of MLBTV Blackouts: Is An All-30 Team Streaming Service Possible?*, THE ATHLETIC (Apr. 14, 2023), <https://theathletic.com/4409306/2023/04/14/mlb-streaming-tv-blackouts/> [https://perma.cc/B8AK-TH49] (describing potential changes to MLB’s television package).

Flood).⁴⁰² A third argument—that Congress's threat of repealing baseball's antitrust exemption actually does more to promote procompetitive behavior by MLB owners than would repealing the exemption—has also been contended by one prominent legal scholar in the space.⁴⁰³ Nevertheless, none of these reasons should be seen as a sufficient basis for perpetually allowing the custodians of a professional baseball monopoly to perpetually escape antitrust scrutiny in the federal courts. This Part addresses each of these three arguments in favor of maintaining the baseball exemption from antitrust law, rejecting each one in turn.⁴⁰⁴

Section A of this Part addresses and rejects the argument that *stare decisis* should leave the antitrust exemption in place.⁴⁰⁵ Section B of this Part unpacks and dismisses the notion that Congress should decide whether this antitrust exemption should exist.⁴⁰⁶ Last, Section C of this Part examines and casts aside the idea that threatening to remove this exemption would actually spur more competition than the removal of this privilege.⁴⁰⁷

A. *Stare Decisis*

The doctrine of *stare decisis* comes from the longer Latin phrase of *stare decisis et non quieta movere*, which means “stand by the thing decided and do not disturb the calm.”⁴⁰⁸ In more colloquial terms, it calls for courts to let previous decisions stand, generally without reversing or interrupting them. The doctrine developed in English common law and thereafter American Jurisprudence adopted it for its “fairness, stability, predictability and efficiency.”⁴⁰⁹ In addition, from an *ex ante* perspective, people's trust in knowing what is and will continue to be the law “encourages them to make deals and to arrange their affairs with confidence.”⁴¹⁰

MLB and various legal academics have repeatedly invoked *stare decisis* in arguing to preserve Baseball's antitrust exemption.⁴¹¹ In all cases, those

⁴⁰² *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953) (per curiam); *Flood v. Kuhn*, 407 U.S. 258, 277 (1972).

⁴⁰³ Grow, *supra* note 290, at 215.

⁴⁰⁴ See *infra* notes 402–451 and accompanying text.

⁴⁰⁵ See *infra* notes 408–417 and accompanying text.

⁴⁰⁶ See *infra* notes 418–423 and accompanying text.

⁴⁰⁷ See *infra* notes 424–451 and accompanying text.

⁴⁰⁸ James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986).

⁴⁰⁹ *Id.*; see Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1016 (2003) (discussing the history and preclusive effect of *stare decisis*).

⁴¹⁰ Rehnquist, *supra* note 408, at 348.

⁴¹¹ Selig et al., *supra* note 339, at 433; Leah Farzin, *On the Antitrust Exemption for Professional Sports in the United States and Europe*, 22 JEFFREY S. MOORAD SPORTS L.J. 75, 87–88 (2015);

promoting these exemptions have emphasized the reliance interest of MLB teams in previous rulings. For example, in a recent pleading in a case involving Baseball's historic antitrust exemption, MLB emphasizes that courts should not reverse course now because the rules and policies governing baseball have been left alone by both Congress and the courts for over one hundred years.⁴¹²

Nevertheless, the doctrine of stare decisis is not unyielding, even for enduring precedents, and the Supreme Court has overturned precedents various times.⁴¹³ In addition, applying the doctrine of stare decisis to Baseball's historic antitrust exemption is also more complicated because allowing the Supreme Court's decision in *Federal Baseball* to stand means ignoring the Court's precedent in *Wickard* regarding the definition of interstate commerce.⁴¹⁴ Thus, courts must determine which precedents to apply when considering questions of baseball and antitrust law: that of the Court's past decisions involving baseball or the Court's broader 1942 definition of interstate commerce adopted in *Wickard*.⁴¹⁵ It simply cannot be both.

Further, perhaps an argument might even go so far as to suggest that in the case of Baseball's historic antitrust exemption, there is a bona fide conflict about which precedent to follow. The argument might be that the Court's decision in *Wickard* implicitly reversed *Federal Baseball* and should serve as the proper precedent for courts to follow when addressing the treatment of baseball under antitrust law.⁴¹⁶ The U.S. Supreme Court even seems to recognize in *Flood* that *Wickard* trumps *Federal Baseball* when it concedes that MLB today falls within the classification of interstate commerce (while still upholding some form of a baseball exemption on reliance grounds).⁴¹⁷

B. Congressional Intent and Statutory Preemption

Somewhat overlapping with the doctrine of stare decisis is a broader argument involving congressional intent and statutory preemption. In a recent legal pleading in defense of baseball's antitrust exemption, MLB argues that "[t]he

Grow, *supra* note 290. *Contra* Menitove, *supra* note 264, at 744–46 (discussing problems with rigidly applying stare decisis to professional baseball).

⁴¹² See Brief for Defendant-Appellee at 29–32, *Nostalgic Partners, LLC v. Off. of the Comm'r of Baseball*, No. 22-2859, 2023 WL 4072836 (2d Cir. June 20, 2023) (discussing both the Supreme Court and Congress's past hesitance to scale back baseball's antitrust exemption).

⁴¹³ Rehnquist, *supra* note 408, at 349.

⁴¹⁴ *Wickard v. Filburn*, 317 U.S. 111, 123–27 (1942).

⁴¹⁵ See *id.* at 125 (holding “even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect’”).

⁴¹⁶ *Id.*

⁴¹⁷ *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

Supreme Court has repeatedly emphasized that any reconsideration of [Baseball's] exemption is for Congress," and that "Congress did that in 1998 when it passed the Curt Flood Act and specifically preserved the exemption."⁴¹⁸ As such, MLB argues that baseball's antitrust exemption is not just Supreme Court precedent but also "accepted and ratified" by the federal legislature.⁴¹⁹

Although MLB is correct that greater deference is owed to a Supreme Court decision that has approval from the legislature in a subsequent enactment, it is doubtful that the Curt Flood Act provides approval for a broad antitrust exemption for baseball. To the contrary, the Curt Flood Act closes one part of the MLB antitrust exemption, related to claims by players, and states that "no court shall rely on [the passing of the Curt Flood Act] as a basis for changing the application of the antitrust laws to any [other] conduct."⁴²⁰

But, to be clear, the application of the antitrust law to non-player restraints at the time Congress passed the Curt Flood Act was far from certain.⁴²¹ Indeed, recent lower court decisions, including *Piazza*, interpreted the *Flood* decision as already substantially narrowing the scope of baseball's historic antitrust exemption.⁴²² As such, a better reading of the quoted language in the Curt Flood Act was that it was merely an attempt by Congress to punt these other issues back to the courts, and not a legislative endorsement of the Court's pre-*Flood* rulings in *Federal Baseball* and *Toolson*.⁴²³

C. Threat of Repeal Being More Powerful Than Actual Repeal

Although both the stare decisis and the congressional intent arguments for maintaining baseball's historic antitrust exemption are relatively mundane arguments that ignore the present economics of Baseball, the final argument for maintaining the sport's antitrust exemption is somewhat more intriguing. Nathaniel Grow, a professor at Indiana University's Kelley School of Business, suggested that it is important to maintain Baseball's antitrust exemption because congressional threats of abolishing this exemption provide Congress "considera-

⁴¹⁸ Brief for Defendant Appellee, *supra* note 412, at *19.

⁴¹⁹ *Id.* at *22–23.

⁴²⁰ 15 U.S.C. § 26b(b).

⁴²¹ *Piazza v. Major League Baseball*, 831 F. Supp. 420, 435–38 (E.D. Pa. 1993).

⁴²² *Id.* (discussing how in *Flood* the U.S. Supreme Court "stripped from *Federal Baseball* and *Toolson* any precedential value those cases may have had beyond the particular facts there involved, i.e., the reserve clause," and, thus: "[t]he only aspect of *Federal Baseball* and *Toolson* that remains to be followed is the result or disposition based upon the facts there involved, which the Court in *Flood* determined to be the exemption of the reserve system from the antitrust laws"); see also *Butterworth v. Nat'l League of Pro. Baseball Clubs*, 644 So. 2d 1021 (Fla. 1994) (discussing *Piazza* and similarly reasoning that "baseball's antitrust exemption extends only to the reserve system").

⁴²³ 15 U.S.C. § 26b(b).

ble leverage” over MLB.”⁴²⁴ Grow states that congressional threats have secured numerous “procompetitive concessions” from MLB, none of which could have been obtained through “antitrust litigation alone.”⁴²⁵ Thus, Grow seems to argue that the mere threat of losing an antitrust exemption does more to keep MLB owners in line than would the actual enforcement of Sherman Act principles against MLB.⁴²⁶ Although Grow’s point in certain circumstances may have merit, we argue his conclusions fail to incorporate the entire picture.

Indeed, the most recent congressional threats to strip baseball of its antitrust exemption have been less about trying to promote pro-competitive league behavior, and more about highlighting partisan political causes, including trying to end the league’s public support of LBGTQIA+ rights,⁴²⁷ voting reform,⁴²⁸ opening Cuban borders,⁴²⁹ and other left-leaning causes.⁴³⁰ Even where certain Senators on ideological extremes of the spectrum give lip service to competitive concerns involving baseball-related markets, it is still typically a second thought on their part.⁴³¹ In Grow’s defense, these more recent threats have emerged subsequent to the publication of his article, but they still give pause when considering his conclusions.

⁴²⁴ Grow, *supra* note 290, at 215.

⁴²⁵ *Id.*

⁴²⁶ *See id.* (“[T]he existing scholarly literature has largely overlooked the fact that Congress has obtained considerable leverage over baseball throughout the years by threatening to revoke the sport’s antitrust exemption. Congress has used this power to help extract various procompetitive concessions from MLB, benefits that would not have been directly obtained via antitrust litigation alone.”).

⁴²⁷ *See* House Judiciary GOP, @judiciaryGOP, X (formerly TWITTER) (May 24, 2023, 9:40 A.M.), <https://twitter.com/JudiciaryGOP/status/1661381650280841221?s=20> [<https://perma.cc/2LZN-YKQT>] (stating “[t]ime to reconsider @MLB’s antitrust exemption” after a group perceived as anti-Catholic was invited to participate in Pride events at Dodger Stadium).

⁴²⁸ Abby Livingston, *MLB Took Its All-Star Game Out of Georgia to Protest Voting Restrictions. Now Ted Cruz Wants to Strip It of Its Anti-Trust Immunity*, TEX. TRIB. (Apr. 13, 2021), <https://www.texastribune.org/2021/04/13/ted-cruz-major-league-baseball-georgia-anti-trust/> [<https://perma.cc/5C65-TV7B>].

⁴²⁹ *See* Press Release, U.S. Congressman Jeff Duncan, Duncan and Lee File Legislation to Strip MLB Antitrust Exemption (Apr. 14, 2021), <https://jeffduncan.house.gov/media/press-releases/duncan-and-lee-file-legislation-strip-mlb-antitrust-exemption> [<https://perma.cc/H76X-N5TU>] (quoting Georgia representative Andrew Clyde’s support for lifting Baseball’s antitrust exemption, “we won’t be bullied by ‘woke’ mega-corporations like Major League Baseball who do business with totalitarian communist regimes like China and Cuba,” “[i]f MLB wants to play hard ball, I am happy to oblige”).

⁴³⁰ *See id.* (characterizing the desire to end Major League Baseball’s antitrust exemption as a means of fighting the league’s purported “go woke” agenda).

⁴³¹ *See* Gabe Lacques, *What Is MLB’s Antitrust Exemption? Ted Cruz, Josh Hawley Using Baseball’s Century-Old Golden Goose as Political Cudgel*, USA TODAY, <https://www.usatoday.com/story/sports/mlb/2021/04/13/mlb-antitrust-exemption-immunity-ted-cruz-josh-hawley-baseball-all-star-game/7211552002/> [<https://perma.cc/XXU9-SN7Z>] (Apr. 14, 2021) (describing how both liberal and conservative politicians threaten to end the antitrust exemption for non-competitive decisions that MLB has made that they disagree with).

Moreover, Grow's claim in his same article that MLB does not exercise its antitrust exemption to "significantly reduce output" comparatively more than other sports leagues is questionable.⁴³² Although Grow is correct to point out that Baseball teams play more games in a season than teams in other professional sports leagues, MLB does not have more teams than any of the three other professional leagues. If MLB's 2002 plans to contract the Minnesota Twins and Montreal Expos had succeeded, MLB would have fewer teams than any of their counterparts, and remain the only premier, professional sports league to have contracted a major league team in the modern era.⁴³³ And, in recent years, MLB teams have even contracted some of their minor-league counterparts.⁴³⁴

Additionally, although Grow is correct that Congress has regularly investigated baseball, Congress has rarely done anything substantively to rein in MLB's behavior.⁴³⁵ For example, even though Congress "has held more than sixty hearings considering baseball's antitrust status,"⁴³⁶ none of these hearings have ended with demands on MLB to take certain, specific actions to maintain an antitrust exemption. Grow credits congressional pressure in the 1950s as the motivating factor for Baseball to move teams westward and in the 1960s for motivating baseball to expand its total number of teams.⁴³⁷ But there are alternative explanations for each event that better explain these outcomes. MLB teams in the 1950s moved to new markets such as Los Angeles and San Francisco not because Congress wanted them to do so, but because the local municipalities offered free stadiums and other important concessions to lure them westward.⁴³⁸ Meanwhile, MLB expanded into new markets in the 1960s due to very credible threats that if they did not do so first, a new, well-funded competitor league, the Continental League, would launch and target these mar-

⁴³² Grow, *supra* note 290, at 218.

⁴³³ *Baseball Contraction Unlikely for 2002*, ABC NEWS (Dec. 5, 2001), <https://abcnews.go.com/Business/story?id=87511&page=1> [<https://perma.cc/X5BY-2322>].

⁴³⁴ Joan Niesen, *Following Contraction, Minor League Baseball Is Smaller. But Is It Better?*, GLOB. SPORT MATTERS (Oct. 19, 2021), <https://globalsportmatters.com/business/2021/10/19/minor-league-baseball-contraction-smaller-better-union-mlb-housing/> [<https://perma.cc/KJ54-HTJL>].

⁴³⁵ See Karen M. Lent & Anthony J. Dreyer, *The Current State of MLB's Antitrust Exemption*, REUTERS, <https://www.reuters.com/legal/legalindustry/current-state-major-league-baseballs-antitrust-exemption-2023-07-20/> [<https://perma.cc/Q9CT-LS29>] (July 20, 2023) (noting that with the small carveouts of the Flood Act and MLBPA-MLB agreements, baseball's immunity remains largely intact).

⁴³⁶ Grow, *supra* note 290, at 260.

⁴³⁷ *Id.* at 261–64.

⁴³⁸ Chris Landers, *Just Why Did the Dodgers and Giants Move from New York to California?*, CUT4 (Jan. 25, 2019), <https://www.mlb.com/cut4/why-did-the-dodgers-and-giants-move-to-california-c303090362> [<https://perma.cc/53PH-CR89>].

kets.⁴³⁹ As such, MLB's mass expansion in the 1960s, if anything, could be seen as anticompetitive. Similarly, Grow credits Congress with pushing MLB in 1995 to announce that it would be adding expansion teams in Tampa Bay and Arizona and in February 2002 to announce that it would no longer pursue contracting two Baseball teams.⁴⁴⁰ But, in the first instance, the two-team expansion was likely more about quickly recouping lost revenues from the cancellation of the 1994 World Series.⁴⁴¹ In the second instance, the contraction plan came off the table as a concession during collective bargaining negotiations and, in part, due to the fear of facing an unfair labor practices grievance.⁴⁴²

Finally, one can even doubt whether MLB, as a monopoly, is restrained by the fear of garnering the wrath of legislators who can take away their monopoly, or whether the fear factor runs in the opposite direction, with legislators being fearful of MLB as an omnipotent and uncontrollable monopoly.⁴⁴³ One recent anecdote helps illustrate the point that legislators may be more fearful than the other way around. On May 9, 2018, a team of lawyers from various professional sports organizations, including MLB, descended on an administrative building in Charleston, West Virginia to lobby the state's lottery officials for a share of revenue derived from legalized gambling.⁴⁴⁴ According to various sources, the deputy commissioner for MLB, Dan Halem, told lottery officials that the West Virginia sports gambling bill "was one of the poorest bills in the United States."⁴⁴⁵ Halem allegedly issued something that read like an ultimatum to the West Virginia authorities to fix the bill so that the sports leagues get a piece of the gambling pie or "face consequences."⁴⁴⁶ Halem even reportedly threatened that if

⁴³⁹ Warren Corbett, *Rickey's Folly: How the Continental League Forced Baseball Expansion*, SOC'Y FOR AM. BASEBALL RSCH., <https://sabr.org/journal/article/rickeys-folly-how-the-continental-league-forced-baseball-expansion/> [https://perma.cc/EU3Z-ZZRH].

⁴⁴⁰ Grow, *supra* note 290, at 267–68.

⁴⁴¹ Doug Greenberg, *MLB's Last Work Stoppage in 1994–95 Proved Costly*, FRONT OFF. SPORTS, <https://frontofficesports.com/mlbs-last-work-stoppage-in-1994-95-proved-costly/> [https://perma.cc/B79C-VM8B] (Mar. 2, 2022).

⁴⁴² Craig Calcaterra, *People Are Still Claiming, with a Straight Face, That the Twins Were Going to Be Contracted in 2002*, NBC SPORTS (July 14, 2014), <https://www.nbcsports.com/mlb/news/people-are-still-claiming-with-a-straight-face-that-the-twins-were-going-to-be-contracted-in-2002> [https://perma.cc/R8W6-LJ2M].

⁴⁴³ Indeed, Congress has never sought to hold a vote on repealing baseball's antitrust exemption in more than one hundred years. See Mann, *supra* note 19, at 591 (observing that Congress has never expressly tried to codify or reject the court-created baseball exemption).

⁴⁴⁴ Joe Vardon, *How MLB, the NBA, and the PGA Used 'Negotiation by Bayonet' to Get a Slice of State Gambling Revenue*, THE ATHLETIC (Jan. 16, 2020), <https://theathletic.com/1530989/2020/01/16/how-mlb-the-nba-and-the-pga-used-negotiation-by-bayonet-to-get-a-slice-of-state-gambling-revenue/> [https://perma.cc/WRE4-8JD9].

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.* Although representatives from both the NBA and PGA Tour were also present at the meeting and made requests, neither behaved in a manner similar to how Halem reportedly behaved. The

MLB's "issues" were not addressed, "then we won't do business in this state and we'll leave."⁴⁴⁷ Despite the pressures and not-so-veiled threats from MLB, the state lottery officials held firm.⁴⁴⁸ Almost two years to the day from that meeting, MLB announced that roughly forty minor league baseball teams were slated to be eliminated by the following season. Among those teams on the elimination list was the Charleston-based West Virginia Power,⁴⁴⁹ along with three other minor league teams from West Virginia.⁴⁵⁰ Whether the meeting in May 2018 played a role in the contraction of the West Virginia teams cannot be proven; nonetheless, the decision to cut the few professional teams existing in West Virginia out of MLB does have an appearance of calculation.⁴⁵¹

CONCLUSION

From its earliest days as a social game played by barnstorming New Yorkers to its status today as one of four highly commercialized team sports in the United States, baseball has long held a special place in the minds and hearts of Americans, including the authors of this Article. Nevertheless, effective legal systems are not built on gut feelings, personal sentiment, or inertia. The law is intended to apply equally to those who are similarly situated, for the benefit of society.

For over one hundred years, the club owners in MLB all have argued for different treatment than other U.S. professional sports teams based on reasons no greater than legal accident. The result of their disparate antitrust treatment has been the opportunity, if not the actuality, of implementing rules to support their own financial interest, to the detriment of consumers. That is untenable in a well-functioning legal system.

Although MLB team owners have avoided most scrutiny under antitrust laws for more than one hundred years, Justice Holmes, the very author of the Court decision giving rise to baseball's antitrust exemption, once wrote in a

tone of the meeting was such that the PGA Tour's representative went out of his way to apologize to some of the attendees. *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ David Kahn, *Official Statement from the West Virginia Power*, MINOR LEAGUE BASEBALL (Apr. 26, 2020), <https://www.milb.com/news/west-virginia-power-official-statement> [<https://perma.cc/SK6S-MT4Q>].

⁴⁵⁰ Gabe Lacques, *Major League Baseball Issues Invites for Major League Baseball Affiliates; Here Are the Teams That Didn't Make the Cut*, USA TODAY, <https://www.usatoday.com/story/sports/mlb/2020/12/09/mlb-announces-minor-league-affiliate-invites-some-teams-miss-cut/3805929001/> [<https://perma.cc/VW72-3DAM>] (Dec. 10, 2020).

⁴⁵¹ John W. Miller, *West Virginia Officially Loses All 4 of Its Minor League Baseball Teams*, MOUNDSVILLE: PBS FILM & MAG. (Dec. 10, 2020), <https://moundsville.org/2020/12/10/west-virginia-officially-loses-all-4-of-its-minor-league-baseball-teams/> [<https://perma.cc/9BM8-MATV>].

Harvard Law Review article that “[it] is revolting to have no better reason for a rule of law than that so it was laid down during the time of Henry IV,” and “[i]t is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”⁴⁵² That message should be taken to heart with respect to Baseball’s historic antitrust exemption.

There are many reasons why it is in the societal interest to remove Baseball’s historic exemption from antitrust law. Not only would doing so place MLB team owners on equal footing with other professional sports league owners, but it would also benefit fans by ensuring that baseball clubs’ business decisions are driven by free market factors. Removing baseball’s antitrust exemption could have numerous positive ramifications: it could very likely lead to an increase of MLB teams in large market cities that can sustain these teams; bring an end to the threatened contraction of MLB and minor league teams; somewhat facilitate the emergence of new professional baseball leagues; inhibit the potential boycott of league personnel; and, call into doubt certain Baseball trademark licensing, data licensing, and perhaps cable and over-the-top Internet broadcast policies.

At the same time, even though undoing Baseball’s antitrust exemption would perhaps override *stare decisis* with respect to *Federal Baseball* and its progeny, this removal would actually respect the *Wickard* precedent and its progeny, which is perhaps a more well-reasoned and encompassing line of cases. In addition, it would not read an implied intent into the decisions of Congress twenty-five years ago where no such intent can reasonably be derived, and it would recognize that actual enforcement of antitrust laws is a better way to reign in anticompetitive behavior than merely empty threatening to do so.

In some ways, the game of baseball is like Heraclitus’s river: always changing, and yet always the same.⁴⁵³ Baseball is no longer the sport reserved for white men, as Kennesaw Mountain Landis tried to make it, nor is it only

⁴⁵² Oliver Wendell Holmes, Jr., Justice of the Supreme Judicial Court of Massachusetts, *The Path of the Law*, Address at the Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 469 (1887–1897); see PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW: TEXT, CASES, PROBLEMS* 156 (3d. ed. 2004) (referencing this same Justice Holmes quote to express the irony of maintaining the baseball antitrust exemption that he first set forth).

⁴⁵³ See Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 754 n.59 (2002) (noting that although few of Heraclitus’s writings have survived, he remains famous for the phrase “you cannot step into the same river twice”); see also *Indianapolis Colts, Inc. v. Metro. Balt. Football Club*, 34 F.3d 410, 413 (7th Cir. 1994) (remarking that “[a] professional sports team is like Heraclitus’s river: always changing, yet always the same”), *abrogation recognized* by *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796 (7th Cir. 2014).

played by amateurs in Eastern states during the day in a system with two or more high-level leagues. Still, baseball is the same as it always was.

The same will almost certainly be true if Baseball becomes subject to antitrust laws, even despite some people's fears to the contrary. Holding MLB subject to the same antitrust laws that must be followed by other U.S. sports leagues may indeed force baseball team owners to behave in a more economically competitive manner and avoid making decisions to the detriment of certain consumers. In its essence, baseball will still be baseball. It might become a slightly more just and economically acceptable version of baseball, but the game as we know it will endure.

