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Christian L. Neufeldt
Harvard University, Extension School

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ALM Candidate, Harvard University, Extension School. Dipl.-Jur. (JD/LLB equivalent), Georg-August University, School of Law, Göttingen (Germany) 2016; LLM, Tilburg University, Law School, Tilburg (The Netherlands) 2017; Grad. Cert. in Legal Studies, Harvard University, 2018. The author would like to thank Harvard Law School's Professor Peter A. Carfagna and Richard Volante, Esq. for their support on an earlier draft of this article.

REDEEMING THE SUPREME COURT: THE STRUCTURE BEHIND THE BASEBALL TRILOGY AND THE SCOPE OF THE BASEBALL ANTITRUST EXEMPTION

Christian L. Neufeldt[1]

[1] ALM Candidate, Harvard University, Extension School. Dipl.-Jur. (JD/LLB equivalent), Georg-August University, School of Law, Göttingen (Germany) 2016; LLM, Tilburg University, Law School, Tilburg (The Netherlands) 2017; Grad. Cert. in Legal Studies, Harvard University, 2018. The author would like to thank Harvard Law School's Professor Peter A. Carfagna and Richard Volante, Esq. for their support on an earlier draft of this article.

I. INTRODUCTION

Sports commentator Shawn Krest considers Lena Blackburne's "Baseball Rubbing Mud"[2] to be "baseball's dirty secret" and its application the "strangest and least-understood ritual in baseball."[3] Admittedly, the thought that a baseball may only be used in a game after "half-naked umps" or clubhouse attendants rub mud on them appears strange.[4] Considering that Russel Aubrey Blackburne and his heirs have provided all of Major League Baseball (MLB) and Minor League Baseball (MiLB) with the same special mud since the 1930s, the fact that the reason for his nickname "Lena" is now lost to time seems the least odd aspect surrounding the mud-rubbing ritual.[5] Yet, it is not only the umpires' different techniques for applying the mud that give method to the madness. While new white and shiny baseballs might be easy targets for batters, rubbing them with mud provides the grip that certain pitchers require.[6] Still, manually covering all new baseballs in mud is "an odd, inconsistent, dirty practice."[7]

However, legal commentators might call the baseball antitrust exemption, baseball's strangest and least-understood aspect, its other "dirty secret." The creation of this exemption through three Supreme Court rulings in the "baseball trilogy,"[8] and its subsequent application by the lower courts, is a similarly "odd, inconsistent, and dirty practice." As the name implies, the baseball antitrust exemption relieves professional baseball from antitrust scrutiny. The exemption's odd and inconsistent character is made apparent since the Court unequivocally subjects other professional sports,[9] including team sports like basketball[10] or football,[11] to antitrust laws. The dirty and muddied character of

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[2] *See* LENA BLACKBURNE BASEBALL RUBBING MUD, http://baseballrubbingmud.com (last visited Sept. 25, 2019) (advertising and selling baseball rubbing mud).

[3] Shawn Krest, Comment, *Baseball's Dirty Secret*, N. ST. J. (June 13, 2018), https://nsjonline.com/article/2018/06/baseballs-dirty-secret.

[4] *Id.*; *see* OFFICIAL BASEBALL RULES, 4.01(c) (OFF. OF THE COMM'R OF BASEBALL 2018) (obligating umpires to ensure that all baseballs are "properly rubbed so that the gloss is removed").

[5] Ron Shapella, *The Real Dirt on Baseball's Secret Delaware River Mud*, PRINCETONINFO (July 1, 2015) https://princetoninfo.com/the-real-dirt-on-baseballs-secret-delaware-river-mud.

[6] Krest, *supra* note 2.

[7] *Id.*

[8] *See, e.g.*, PETER A. CARFAGNA, SPORTS AND THE LAW: EXAMINING THE LEGAL EVOLUTION OF AMERICA'S THREE "MAJOR LEAGUES" at 83 (3d ed. 2017); Rosby Carr III, Comment, *Another Failed Pickoff Attempt: The Latest Challenge to Major League Baseball's Antitrust Exemption*, 41 OHIO N.U. L. REV. 171, 172 (2014).

[9] Flood v. Kuhn, 407 U.S. 258, 279 (1972).

[10] Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204 (1971).

[11] Radovich v. Nat'l Football League, 352 U.S. 445 (1957).

the exemption is clear from its very creation. After the Court issued a clean and straightforward opinion in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,[12] muddled interpretations within scholarly discussion shrouded what the Court had initially held.[13] In *Toolson v. New York Yankees, Inc.*,[14] the Supreme Court applied this muddled opinion to *Federal Baseball*. In *Flood v. Kuhn*,[15] the Court presented the "dirty" exemption in its "game-ready" form.

As the exemption approaches its arguable centennial,[16] not only has there has been an abundance of research published on the subject by scholarly commentators,[17] but the courts themselves have repeatedly engaged with the exemption's scope as well.[18] Considering that Stuart Banner's characterization of the baseball antitrust exemption as "one of the oddest features of our legal system"[19] is among the more restrained descriptions of the exemption. Words like "odd, inconsistent, and dirty"[20] would not stand out from the legal discourse. Eldon L. Ham compares the baseball trilogy to the Salem witch trials and *Plessy v. Ferguson*,[21] concluding that "the baseball antitrust boondoggle is no less obtuse and begs for reversal."[22] He questions how one could "seriously trust the Court when it rules on abortion, voting rights, presidential elections, hanging chads, or more recently the Affordable Care Act" if it "officially pretend[s] baseball is not

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

[13] *See infra* Section I.B. (scrutinizing the changing interpretation of *Federal Baseball* between 1922 and 1953).

[14] Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) (per curiam).

[15] Flood v. Kuhn, 407 U.S. 258 (1972).

[16] *See, e.g.*, Justin B. Bryant, Note, *Analyzing the Scope of Major League Baseball's Antitrust Exemption in Light of* San Jose v. Office of the Commissioner of Baseball, 89 NOTRE DAME L. REV. 1841, 1844 (2014) (stating the "antitrust exemption was born in 1922"); Ari Khuner Haber, Comment, *Keeping the A's in Oakland: Franchise Relocation,* City of San Jose*, and the Broad Power of Baseball's Antitrust Exemption*, 22 UCLA ENT. L. REV. 1, 44 (2014) (concluding "the baseball exemption . . . was established . . . in 1922"). *But see* Joseph J. McMahon, Jr. & John P. Rossi, *A History and Analysis of Baseball's Three Antitrust Exemptions*, 2 VILL. SPORTS & ENT. L.F. 213, 214–15 (1995) (characterizing this view as commonplace but erroneous). *See generally infra* Part I (discussing different Supreme Court rulings as the exemption's origin).

[17] *Cf.* Nathaniel Grow, *Defining the "Business of Baseball": A Proposed Framework for Determining the Scope of Professional Baseball's Antitrust Exemption*, 44 U.C. DAVIS L. REV. 557, 560–61 n.8 (2010) (listing analyses of the baseball exemption in a footnote that exceeds an entire law review page).

[18] *Cf. id.* at 559–60 n.7 (listing seventeen instances when the lower courts ruled on the exemption between 1960 and 2003).

[19] STUART BANNER, THE BASEBALL TRUST: A HISTORY OF BASEBALL'S ANTITRUST EXEMPTION at xi (2013).

[20] *See* Krest, *supra* note 2.

[21] Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[22] Eldon L. Ham, *The Immaculate Deception: How the Holy Grail of Protectionism Led to the Great Steroid Era*, 19 MARQ. SPORTS L. REV. 209, 212 (2008).

a business subject to antitrust laws."[23] Judge Friendly mentioned that, "*Federal Baseball* was not one of Mr. Justice Holmes' happiest days."[24] In his concurrence in *Flood v. Kuhn*, Judge Moore found the exemption turned baseball into "an enclave or feudal barony."[25] Even the Supreme Court noted the exemption might be "unrealistic, inconsistent, [and] illogical,"[26] "an exception and an anomaly,"[27] and "an aberration."[28] Justice Douglas, who has the dubious honor of being the only justice to encounter this issue twice while on the Court, dissented in *Flood*, calling the exemption a "derelict in the stream of the law."[29] With the baseball trilogy, the Supreme Court "confounded courts and scholars for generations."[30]

This confusion led to three categories of legal articles, reflecting three distinct foci of scholarly research on the exemption. Articles in the first category focus on the exemption's origins in the baseball trilogy.[31] They either find that *Toolson* created the baseball antitrust exemption[32] or claim it did not exist before *Flood*.[33] Both sides generally ignore the implications of their findings on the exemption's scope.[34] While some notable exceptions in this category attempt to find logic behind *Federal Baseball*,[35] they still condemn the baseball trilogy *en large*.[36]

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[23] Eldon Ham, *Pretext: The Dark Side of Baseball*, 3 BERKELEY J. ENT. & SPORTS L. 1, 15 (2014).

[24] Salerno v. Am. League of Prof'l Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970).

[25] Flood v. Kuhn, 443 F.2d 264, 269 (2d Cir. 1971) (Moore, J., concurring), *aff'd,* 407 U.S. 258 (1972).

[26] Radovich v. Nat'l Football League, 352 U.S. 445, 452 (1957).

[27] Flood v. Kuhn, 407 U.S. 258, 282 (1972).

[28] *Id.*

[29] *Id.* at 286 (Douglas, J., dissenting).

[30] Bryant, *supra* note 15, at 1843.

[31] *See, e.g.*, *generally* Mitchell Nathanson, *Who Exempted Baseball, Anyway? The Curious Development of the Antitrust Exemption That Never Was*, 4 HARV. J. SPORTS & ENT. L. 1 (2013) (conducting a historical analysis of the baseball trilogy).

[32] *E.g.*, Kevin McDonald, *Antitrust and Baseball: Stealing Holmes*, J. SUP. CT. HIST., Dec. 1998, at 119–20.

[33] *E.g.*, Nathanson, *supra* note 30, at 43–44.

[34] *See, e.g.*, *id.* at 49–50 (concluding an analysis of the history of the baseball trilogy without any regard to the exemption's scope).

[35] *E.g.*, McDonald, *supra* note 31, at 89 (attempting to make sense of *Federal Baseball* with the help of Justice Holmes' legacy).

[36] *Id.* at 119–22.

Articles in the second category focus on the scope of the baseball antitrust exemption.[37] Due to a conventional simplification, based on a misinterpretation of *Toolson*,[38] articles in this category generally assume that *Federal Baseball* created the exemption in 1922.[39] Since *Federal Baseball* did not create an antitrust exemption,[40] even the most intellectually distinguished analyses based on this premise provide diverging assessments and fail to provide a workable benchmark for the courts.[41]

The third category of articles center on policy motivations for abolishing the exemption.[42] These articles largely share the erroneous presumption prevalent among articles in the second category.[43] These articles generally advocate revoking the exemption for select policy reasons.[44] This category also includes those rare articles that defend the baseball exemption, albeit purely for policy reasons.[45] A thorough literature review of even the obsolete articles failed to produce a favorable opinion of the baseball antitrust exemption per se, nor could it produce an attempt to discover some structure underlying the trilogy.[46] Even an article co-authored by the former Commissioner of Baseball, Allan H. "Bud"

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[37] *See generally* Grow, *Business of Baseball supra* note 16 (rejecting the lower courts' precedent and defining the scope of the exemption as "the business of providing baseball entertainment to the public." *Id.* at 557.).

[38] This view holds that *Federal Baseball* created the exemption and interprets *Toolson* as narrowly upholding the earlier ruling. Section I.C.4.a *infra* refutes this interpretation of *Toolson*.

[39] *See* sources cited *supra* note 16.

[40] *See infra* Section I.A.4.

[41] *See* Grow, *Business of Baseball*, *supra* note 16, at 562 (finding the literature "conflicted").

[42] *See, e.g.*, *generally* Brett Pollard, Note, *Creating Economic Equality Among Major League Baseball Franchises: The Removal of Major League Baseball's Archaic Antitrust Exemption*, 18 TEX. REV. ENT. & SPORTS L. 49 (2016) (comparing dominant baseball teams to pre-Sherman Act commercial monopolies).

[43] *See*, *e.g.*, Thor Klinker, Note, *How Justice Oliver Wendell Holmes Made It Hard for Iowans to Be Baseball Fans and Why That Might Be Changing*, 65 DRAKE L. REV. 883, 884 (2017) (noting that "[i]n 1922, . . . *Federal Baseball* . . . provided the precedent on which today's . . . antitrust exemption exists").

[44] *See*, *e.g.*, *generally id.*(citing the MLB's blackout policies for broadcasting agreements as a reason for abolishing the exemption).

[45] *See, e.g.*, *generally* Nathaniel Grow, *In Defense of Baseball's Antitrust Exemption*, 49 AM. BUS. L.J. 211 (2012) (defending the exemption for several policy reasons); *see generally* Bradley V. Murphy, Note, *Protecting America's Pastime: The Necessity of Major League Baseball's Antitrust Exemption for the Survival of Minor League Baseball*, 49 IND. L. REV. 793, 798–800 (2016) (defending it as a prerequisite for the existence of the minor leagues); *cf.* Gary Roberts, *On the Scope and Effect of Baseball's Antitrust Exclusion*, 4 SETON HALL J. SPORT L. 321, 335–36 (1994) (advising "Congress [to] disregard the largely insignificant baseball antitrust exclusion" because abolishing it "would create more legal confusion and chaos than predictable benefits").

[46] As Section II.A *infra* shows, early commentators considered *Federal Baseball* an uncontroversial and well-reasoned part of the Supreme Court's antitrust jurisprudence that created no exemption. Since *Toolson*, the courts and scholarly commentators agree in their contempt for the baseball antitrust exemption and the underlying decisions.

Selig, only looks at the effects of the antitrust exemption while abstaining from any systematic considerations.[47]

This article conducts a systematic, methodological, and historical analysis of the baseball trilogy to elucidate its underlying structure. It adds to the existing scholarship by analyzing the later decisions in the context of their predecessors and exposing the interplay within the baseball trilogy. As a result, this article argues, against nearly universal opposition, that the Supreme Court issued well-considered opinions in each case and created a logical structure that underlies the entire trilogy. This article then scrutinizes the different approaches taken by the lower courts to delimitate the baseball antitrust exemption. It uses its structural findings on the baseball trilogy to evaluate the validity of these approaches. The article then examines the valid features of each approach in order to provide a benchmark to understand the full scope of the antitrust exemption.

The introduction to Part I briefly summarizes the reserve system in professional baseball, a major factual motivation in all three cases.[48] Thereafter, the article individually scrutinizes the rulings in *Federal Baseball*,[49] *Toolson*,[50] and *Flood*.[51] The analysis of the two later rulings highlights their relationship with their predecessors in order to elucidate the structure behind the baseball trilogy. The article also surveys the changing interpretation of *Federal Baseball* before *Toolson* so as to examine the exemption's origins.[52]

Part II begins with an evaluation of legislative action's impact on the scope of baseball's antitrust exemption.[53] The article then engages with the lower courts' rulings that have restricted the exemption to baseball's reserve system,[54] to the business of baseball,[55] and to baseball's unique characteristics and needs.[56] To ensure faithful representation, the article lays out the relevant cases and examines their reasoning and compliance with the baseball trilogy.

Part III derives the scope of the antitrust exemption from a consolidation of the lower courts' precedents.[57] First, it proposes a test for future courts to apply

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[47] *See* Allan H. ("Bud") Selig & Matthew J. Mitten, *Baseball Jurisprudence: Its Effects on America's Pastime and Other Professional Sports Leagues*, 50 ARIZ. ST. L.J. 1171, 1182–92 (2018).

[48] *See infra* Part I.

[49] *See infra* Section I.A.

[50] *See infra* Section I.C.

[51] *See infra* Section I.D.

[52] *See infra* Section I.B.

[53] *See infra* Part II.

[54] *See infra* Section II.A.

[55] *See infra* Section II.B.

[56] *See infra* Section II.C.

[57] *See infra* Part III.

the baseball antitrust exemption and presents a benchmark for the business of baseball.[58] Then, the article applies that test to different questions of substantive law[59] and the relationship between the exemption and general state antitrust laws.[60] Finally, Part IV concludes the article by summarizing its findings on the baseball antitrust exemption and its underlying trilogy.[61]

II. THE BASEBALL TRILOGY

All three cases in the trilogy originate in baseball's "reserve system," which emerged from an 1879 agreement between the team owners in the National League.[62] Under the reserve system, team owners had the right to "reserve" their players, making them ineligible to play for another team, and could sell reserved players at will.[63] Seemingly, the owners' rights to reserve a player were limited, for players only signed one-year contracts that gave the team a renewal option for the following year.[64] However, if a player wanted to play baseball in the second year, he had to sign a new contract with the same clause, giving the club a renewal option for the third year, and so on, *ad infinitum*.[65] Not even sitting out a year could grant baseball players free agency, which would allow them to sign with any team.[66]

Under the "National Agreement," the teams in the two dominant major leagues, the National League and the American League, respected each other's reservations.[67] Combined into "Organized Baseball,"[68] they left professional baseball players no reasonable alternative but to comply with the reserve system.[69] Baseball players were "essentially bound for life to the team that first signed [them]"[70] and could "[be] sold for as little as 25 cents and traded for a bulldog, a bird dog, a turkey, and an airplane."[71] The owners even sold celebrity

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[58] *See infra* Section III.A.

[59] *See infra* Section III.B–D.

[60] *See infra* Section III.E.

[61] *See infra* Part IV.

[62] *See* BANNER, *supra* note 18, at 1.

[63] *See id.* at 4–6.

[64] *See* Jay H. Topkis, *Monopoly in Professional Sports*, 58 YALE L.J. 691, 697 (1949).

[65] *Id.* at 697–98.

[66] BANNER, *supra* note 18, at 6.

[67] CARFAGNA, *supra* note 7, at 83.

[68] *See* Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 202, 205, 206 (1922) (showing both the plaintiff and Organized Baseball using that term).

[69] BANNER, *supra* note 18, at 23.

[70] Colleen Ganin, Note, *With* San José *at Bat,* Federal Baseball *is in the Bottom of the Ninth*, 56 ARIZ. L. REV. 1129, 1137 (2014).

[71] KENNETH M. JENNINGS, BALLS AND STRIKES: THE MONEY GAME IN PROFESSIONAL BASEBALL 181 (1990).

players without their consent or prior knowledge.[72] Consequently, in an assessment broadly shared by the general public,[73] baseball players considered the reserve system akin to chattel slavery.[74]

The system would eventually find its demise in the 1975 Messersmith-McNally arbitration, when arbitrator Seitz held that sitting out one year granted MLB players free agency.[75] Less than four years after the final ruling in the baseball trilogy, this arbitration provided MLB players with an exit from the reserve system.[76] As a result, the MLB and the Major League Baseball Players' Association (MLBPA) negotiated for the end of the system for MLB players.[77] Unfortunately, for MiLB players, the reserve system still exists.[78]

A. *FEDERAL BASEBALL CLUB OF BALTIMORE, INC. V. NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS*

Despite the plight of the players in this system, it was not a baseball player, but a team from a third major league, that carried the first antitrust suit against Organized Baseball to the Supreme Court.[79] In *Federal Base Ball Club of Baltimore,*

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[72] *See, e.g.*, *infra* Section I.D.1 (analyzing the facts behind *Flood*, including the sale of star player Curt Flood from the St. Louis Cardinals to the Philadelphia Phillies).

[73] *See* Murray Chass, *Baseball's Abraham Lincoln*, N.Y. TIMES, Sept. 25, 1979, at C13 (characterizing arbitrator Seitz, who would eventually grant free agency to MLB players after they sat out one year, as "Baseball's Abraham Lincoln"); BANNER, *supra* note 18, at 101 (citing 1949 newspaper articles that, referring to the Circuit decision analyzed in Section I.B.2 *infra*, compared Danny Gardella to a victorious Dred Scott and MLB team owners to pre-Abolishment Southern planters). *But see* Ron Briley, *Danny Gardella and Baseball's Reserve Clause*, *in* SPORTS AND THE LAW: HISTORICAL AND CULTURAL INTERSECTIONS 57, 70 (Samuel O. Regalado & Sarah K. Fields eds., 2014) (citing articles from the same period in favor of the reserve system).

[74] For example, Curt Flood referred to himself as "a well-paid slave" during the events that led to *Flood*. BANNER, *supra* note 18, at 190. An essay that has been attributed to John Ward compared the reserve system to slavery as early as 1889. National Brotherhood of Ball Players, *Brotherhood Manifesto*, *in* EARLY INNINGS: A DOCUMENTARY HISTORY OF BASEBALL 188, 188–89 (Dean A. Sullivan ed., 1997).

[75] Nat'l League of Prof'l Baseball Clubs, 66 Lab. Arb. Rep. 101, 118 (1975) (Seitz, Arb.).

[76] *Id.* at 164–65.

[77] Grow, *Business of Baseball*, *supra* note 16, at 585–86.

[78] *See* Russel Yavner, *Minor League Baseball and the Competitive Balance: Examining the Effects of Baseball's Antitrust Exemption*, 5 HARV. J. SPORTS. & ENT. L. 265, 288–94 (2014) (analyzing the MiLB reserve system).

[79] Fed. Base Ball Club of Balt., Inc. v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200 (1922). The first antitrust challenge to the reserve system, *American League Baseball Club of Chicago v. Chase*, 149 N.Y.S. 6 (N.Y. Sup. Ct. 1914), did not reach the U.S. Supreme Court.

Inc. v. National League of Professional Base Ball Clubs,[80] the first case of the baseball trilogy, the Supreme Court ruled on an antitrust claim brought by the Baltimore Terrapins,[81] a team from the now defunct Federal League, against the National and American Leagues. The Terrapins claimed a violation of federal antitrust laws, so they had to prove a "contract, combination . . . or conspiracy in restraint of trade" existed, which had been prohibited by the Sherman Act since 1890.[82] The Act makes it illegal to "monopolize, or attempt . . . or conspire . . . to monopolize . . . trade."[83] If the Sherman Act is violated, the claimant is entitled to "threefold the damages . . . sustained, and the cost of suit, including a reasonable attorney's fee" pursuant to the Clayton Act.[84]

While a literal interpretation of the Sherman Act would prohibit *any* contract or combination between separate entities in restraint of interstate commerce,[85] the Act was intended to prevent "only unreasonable restraints."[86] If the courts do not find conduct unreasonable per se, they apply the "rule of reason" test to scrutinize its legality under the Sherman Act.[87] An activity is illegal per se if it is "so plainly anticompetitive that no elaborate study of the industry is needed to establish [its] illegality."[88] For instance, a price-fixing cartel is always illegal.[89] However, the scope of the subjects that courts consider per se illegal have been decreasing.[90] Under the rule of reason test, "the factfinder weighs all of the circumstances of a case to decide whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[91]

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[80] *Fed. Base Ball*, 259 U.S. 200.

[81] *See* BANNER, *supra* note 18, at 61 (analyzing intentions and ownership structure of "the Baltimore Terrapins").

[82] Sherman Act, ch. 647, §§ 1–7, 26 Stat. 209, 209–10(1890) (current version at 15 U.S.C. §§ 1–7 (2018)).

[83] 15 U.S.C. § 2.

[84] Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. §§ 12–27 (2018)).

[85] CARFAGNA, *supra* note 7, at 120.

[86] State Oil v. Kahn, 522 U.S. 3, 10 (1997).

[87] *See* PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ 1500 (4th ed. 2017).

[88] Texaco, Inc. v. Dagher, 547 U.S. 1, 5 (2006) (quoting Nat'l Soc. of Prof Engineers v. United States, 435 U.S. 679, 692 (1978)); *see generally* AREEDA & HOVENKAMP, *supra* note 86, at ¶ 1509 (analyzing classes of commercial activity that are per se illegal).

[89] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[90] Herbert J. Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 83 (2018); *see*, *e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (subjecting prior per se illegal vertical price restraints to the rule of reason test), *overruling* Dr. Miles Med. Co. v. John D. Parks & Sons Co., 220 U.S. 373 (1911); *see also* State Oil v. Kahn, 522 U.S. 3, 7 (1997) (same for vertical maximum price fixing), *overruling* Albrecht v. Herald Co., 390 U.S. 145 (1968).

[91] Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977); *see* Standard Oil Co. v. United States 221 U.S. 1 (1911) (establishing the rule of reason); *see also* CARFAGNA, *supra* note 7, at 121–22 (discussing the rule of reason test in the context of sports law).

Nevertheless, federal antitrust jurisdiction, like all federal powers, is restricted to matters the Constitution specifically subjects to federal jurisdiction.[92] Congressional jurisdiction over antitrust matters is derived from the Commerce Clause and is thus limited to interstate commerce.[93] While the Commerce Clause grants power that "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution,"[94] the Supreme Court's definition of interstate commerce has varied significantly over time.[95] After initially distinguishing transportation within a state that is part of interstate commerce from intrastate commerce under state jurisdiction,[96] the Court extended federal jurisdiction over intrastate activities with "a close and substantial relation to interstate commerce."[97] After excluding manufacturing and agriculture from its definition of commerce,[98] the Court extended congressional power over wheat grown on a farm for consumption thereon.[99] However, when the Supreme Court ruled on *Federal Baseball*, it still interpreted the Commerce Clause with "a narrow, parochial view of commerce."[100]

1. Facts

Federal Baseball was decided in 1913 when the upstart Federal League began organizing professional baseball games. After this league was barred from joining the National Agreement, it challenged the reserve system. Competition for professional baseball players led to significant salary increases, and Organized Baseball's economic superiority snuffed out the Federal League in 1915.[101] Under a "Peace Agreement" with Organized Baseball, the owners of the Federal teams were paid to dissolve their league.[102]

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92 U.S. CONST. amend. X.

93 U.S. CONST. art. I, § 8, cl. 3.

94 Gibbons v. Ogden, 22 U.S. 1, 196 (1824).

95 *See* United States v. Lopez, 514 U.S. 549 (1995) (examining the development of Supreme Court precedent on congressional power pursuant to the Commerce Clause while restricting that power for the first time since the New Deal); *see also* Flood v. Kuhn, 407 U.S. 286 (1972) (Douglas, J., dissenting) (finding that "the whole concept of commerce has changed" between 1922 and 1953); *see generally* Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167 (1996) (analyzing the history of Supreme Court decisions on the Commerce Clause).

96 *Gibbons*, 22 U.S. 1.

97 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

98 United States v. E.C. Knight Co., 156 U.S. 1 (1895).

99 Wickard v. Filburn, 317 U.S. 111 (1942).

100 *Flood*, 407 U.S. 286 (Douglas, J., dissenting).

101 *See* Nathanson, *supra* note 30, at 8.

102 CARFAGNA, *supra* note 7, at 83.

Most Federal League teams joined that agreement, but the Baltimore Terrapins did not participate in the buyout.[103] While some commentators believe that Baltimore declined an offer from Organized Baseball,[104] the transcript from the negotiations implies that they were never offered a share of the sum paid to the owner of the Federal teams under the Peace Agreement.[105] The other Federal League teams ultimately offered Baltimore $50,000 "as its 'equitable distribution' of the league's value."[106] In comparison, Robert Ward, owner of the Brooklyn Tip-Tops, had received $400,000 for dissolving his team.[107] The Pittsburgh Rebels had agreed to $50,000, but the Terrapins were owned by approximately 600 investors from Baltimore, who were determined to bring a major league team back to their home city.[108]

To that end, they pursued the antitrust claim on their own, suing Organized Baseball. After dropping a first suit filed in Philadelphia, the Terrapins filed a second in Washington, which would eventually reach the Supreme Court.[109] After the judge's instruction that Organized Baseball was engaged in interstate commerce and "attempted to monopolize, and did monopolize, a part of that commerce, principally through what is called the 'reserve clause,'"[110] the jury only had to decide the amount of the Terrapin's damages.[111] Consequently, the jury ruled in favor of the Terrapins, fixed their damages at $80,000, and granted them a judgment of $240,000 plus $24,000 in legal fees.[112] However, the D.C. Circuit reversed on appeal, finding that professional baseball did not constitute interstate commerce.[113]

2. The Terrapins' Argument

In their antitrust claim, the Terrapins alleged several monopolistic behaviors by Organized Baseball.[114] Their main claim was that Organized Baseball had "destroyed the Federal League by buying up some of the constituent clubs and . . . inducing all those clubs except the plaintiff to leave their League. . . ."[115]

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103 BANNER, *supra* note 18, at 61; Nathanson, *supra* note 30, at 8.

104 Grow, *Business of Baseball*, *supra* note 16, at 566.

105 Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption:* Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 34 J. SUP. CT. HIST. 183, 189 (2009).

106 *Id.*

107 *Id.*

108 BANNER, *supra* note 18, at 60.

109 *Id.* at 64–66.

110 Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Baltimore, 269 F. 681, 684 (1920).

111 Nathanson, *supra* note 30, at 8.

112 *Fed. Baseball*, 269 F. 682.

113 *Id.* at 684-88.

114 *See* Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 207 (1922) (finding the extent of alleged anticompetitive activities "unnecessary to repeat").

115 *Id.* at 207

Because Organized Baseball's monopolistic nature was undisputed, both parties centered their briefs on professional baseball's classification as interstate commerce.[116] The Terrapins' argument for professional baseball's interstate character drew lines between Organized Baseball and baseball players, and between the *business* of baseball and the *game* of baseball (which was but one part of the business), in order to determine "whether the monopoly which [the American and National Leagues] had established or attempted to establish was a monopoly of any part of interstate commerce."[117] While players who engage only in sport activities conduct no business, the leagues are "voluntary associations and corporations engaged upon a vast scale, involving the investment of millions of dollars, in the business of providing, by the transportation from State to State of baseball teams and their necessary attendants and equipment, exhibitions of professional baseball."[118] Thus, professional baseball leagues are not engaged in sports, but "in a money-making business enterprise in which all of the features of any large commercial undertaking are to be found."[119] The Terrapins showed that while commerce is ordinarily based on transporting merchandise, "there are countless forms in which it may be carried on without traffic in such articles."[120] They conceded that personal effort is not "an *article of commerce*," but claimed it could "often [be] *commerce itself*."[121]

Even the personality of each individual team has an interstate character because teams depend on each other to continuously cross state lines.[122] The Terrapins contended that if having a single distinct part in a single state would suffice to keep a business intrastate, even the American Tobacco Company would not be engaged in interstate commerce.[123] Because the short duration of each game is the only time professional baseball teams are not crossing state borders, the business of baseball is interstate in nature.[124]

The Terrapins supported this argument by stressing that millions of people follow the games from other states through newspapers and telegraphs, and

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116 *See Fed. Baseball*, 259 U.S. at 206 (showing Organized Baseball's argument that seeking to contract with every professional baseball player "is not an attempt to monopolize *commerce*" (emphasis added)); *see also infra* Section I.A.3 (analyzing Organized Baseball's argument in *Federal Baseball*).

117 *Fed. Baseball*, 259 U.S. at 201.

118 *Id.*

119 *Id.* at 202.

120 *Id.* at 203 (citing Gibbons v. Ogden, 22 U.S. 1 (1824)).

121 *Id.* (emphasis added).

122 *Id.*

123 *Id.* at 204.

124 *Id.*

some travel considerable distances to watch games in other states.[125] Additionally, the business of baseball might not be interstate simply because the National and American Leagues acquire baseballs for the supply of their respective teams. However, shipping these baseballs across state lines adds to the existing interstate character.[126] The business of baseball is interstate commerce and therefore subject to federal antitrust scrutiny.

3. Organized Baseball's Argument

Organized Baseball contested the characterization of baseball as a form of interstate commerce.[127] Lead appellate attorney George Wharton Pepper highlighted that the only court to rule on the relationship between baseball and federal antitrust laws had found baseball outside the scope of the Sherman Act.[128] He claimed that Congress had not regulated the interstate movement of baseball players and that an activity does not turn interstate "merely because people came from another State to do it."[129] In an attempt to portray Organized Baseball as "anything but a formally-structured business," Pepper generally referred to his client as "organized baseball," using the lower-case form "whenever [its] corporate structure was discussed."[130] When Supreme Court rules required the heading to his first argument to be in all-caps, he referred to his client as "ORGANIZED BASEBALL, SO CALLED."[131]

In his brief, Pepper also implored the Supreme Court to relieve baseball from federal antitrust scrutiny regardless of its character.[132] "[T]he Sherman Act should not be construed to apply to a combination absolutely essential to the existence of so obviously a wholesome and popular sporting event as the world's series."[133] Pepper "contend[ed] that in order to conduct the *business* of providing exhibitions of professional baseball," Organized Baseball would have to monopolize "every concern in that business in the whole country."[134] Pepper's plea was based on the assumption that baseball's unique characteristics and needs would justify and necessitate exemption from the antitrust laws.[135]

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125 *Id.* at 205.

126 *Id.*

127 *Id.* at 206.

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

129 *Id.* at 206–07.

130 Nathanson, *supra* note 30, at 16.

131 Brief on Behalf of Defendants In Error at 45, Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922) (No. 204).

132 *See id.* at 68–72.

133 *Id.* at 72.

134 Brief on Behalf of Plaintiff In Error at 164, Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922) (No. 204).

135 Nathanson, *supra* note 30, at 13–14.

Yet, the Supreme Court found Pepper's main argument to be that "[p]ersonal effort, not related to production, is not a subject of commerce."[136] Because baseball players do not produce any tangible goods during a game, their personal effort to win is not a subject of commerce. Thus, the Court found that the business of baseball was not a unique part of interstate commerce, but rather was not a part of interstate commerce at all.

4. The Opinion of the Court

Pepper would highlight years later that Justice Holmes adopted his phrase verbatim on personal effort when he wrote the opinion for a unanimous Court in *Federal Baseball*.[137] Even beyond that effort's legal character, Justice Holmes relied extensively on Organized Baseball's brief.[138] Consistent with this preference for the defendants' position, the Supreme Court adopted most of Pepper's arguments.[139]

The Court saw the deciding factor in *Federal Baseball* as that "of the nature of the business involved,"[140] that is, the business of baseball. If this business was uncommercial in nature, it was not under federal jurisdiction pursuant to the Commerce Clause. However, if the business of baseball constituted commerce, it was subject to the Sherman Act unless the Supreme Court issued a policy decision granting Pepper's plea for an exemption from federal antitrust scrutiny.

After laying out the leagues' general structure, Justice Holmes defined business of baseball as "giving exhibitions of base ball, which are purely state affairs,"[141] that is, as being intrastate, not interstate, in nature. Quoting Pepper's "personal effort" phrase and finding that playing baseball is not related to production, the Court held that a baseball game does not qualify as commerce.[142] Because the essential part of the business of baseball is organizing games, which are neither interstate nor commerce in nature, the business of baseball does not constitute interstate commerce.

Furthermore, in the same way that a law firm does not engage in interstate commerce by sending a lawyer across state borders to argue a single case, transporting baseball players to another state to play a game, by its very nature,

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136 Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 206 (1922).

137 Lee Allen, *Radio and Video Have Not Altered Game, Says Pepper*, SPORTING NEWS, Nov. 25, 1953, at 3; *see Fed. Baseball*, 259 U.S. at 209 (showing Justice Holmes quoting Pepper's phrase), *see also id.* at 206 (showing the phrase in Pepper's argument).

138 *See* Nathanson, *supra* note 30, at 14–19 (analyzing Organized Baseball's brief in *Federal Baseball* and its influence on the Court's opinion).

139 *Id.* at 19–20.

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

141 *Id.*

142 *Id.* at 209.

does not alter the character of the underlying business.[143] Thus, "the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business."[144]

Finally, the Court held that "[a]ccording to the distinction insisted upon in *Hooper v. California* . . . the transport is a mere incident, not the essential thing."[145] Furthermore, "[t]hat which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place."[146] Even if transportation across state borders did affect the character of an activity, the transportation of baseball players would be too peripheral to the fundamental game of baseball to have any effect on the business's intrastate nature.

In short, the Supreme Court found that the *business* of baseball does not constitute interstate commerce because its essential part, the *game* of baseball, is neither interstate nor commerce. The only cross-border activity in the business of baseball, transporting players to the games, is alone insufficient to affect the character of that business. Even if transportation *did* alter the nature of a business, transporting baseball players to other states is too incidental to the business to change its character. Because the business of baseball did not constitute interstate commerce, Organized Baseball was *excepted* from all federal antitrust laws, including the Sherman Act. However, the Court did *not* hold Organized Baseball exempt from federal antitrust scrutiny or endow professional baseball with any rights *sui generis*.

B. THE EVOLUTION OF *FEDERAL BASEBALL*

The Court's opinion in this respect is consistent with modern analyses of *Federal Baseball* that simply consider the case as an interpretation of the Commerce Clause.[147] Eventually, the dominant opinion interpreted *Federal Baseball* as having created an antitrust exemption.[148] It "must surely have been a surprise to the commentators of the 1920s and '30, who paid the case little

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[143] *Id.*

[144] *Id.* at 208–09.

[145] *Id.* at 209 (citing Hooper v. California, 155 U.S. 648, 655 (1895)) (internal citations omitted).

[146] *Id.*

[147] *See* Nathanson, *supra* note 30, at 20–24; Edgar Bronson Tolman, *Review of Recent Supreme Court Decisions*, 8 A.B.A.J. 490, 494 (1922) (stating the Supreme Court ruled in *Federal Baseball* that professional baseball is not subject to the Sherman Act because it does not constitute interstate commerce); *see also* Gilbert H. Montague, *Anti-Trust Laws and the Federal Trade Commission, 1914–1927*, 27 COLUM. L. REV. 650, 668–69 (1927) (finding the Supreme Court's ruling on *Federal Baseball* consistent with its other rulings on the Commerce Clause).

[148] *See infra* Section I.B.1.

mind"[149] when even the Supreme Court adopted this interpretation of *Federal Baseball* "and render[ed] it, three decades hence, the most significant baseball-related decision in American jurisprudence."[150]

1. Scholarly Debate

The shift in scholarly interpretation of *Federal Baseball* originated not in changes to the law but in economic and societal factors unrelated to the baseball antitrust exemption, namely, the Great Depression.[151] The resulting labor movement led to the Wagner Act, which incentivizes employers to collectively bargain with organized labor unions.[152] Under these circumstances, the public began to view professional baseball players as laborers instead of just athletes.[153] In 1937, when the U.S. Attorney General opined that Organized Baseball was not subject to federal antitrust scrutiny, Congressman Raymond Cannon introduced a resolution on the House floor, proposing that baseball players be treated as organized laborers and inquiring into Organized Baseball's labor practices.[154] While this resolution did not lead to definitive congressional action, it started a debate as to whether *Federal Baseball* had created an antitrust exemption for professional baseball or merely acknowledged its intrastate character.[155]

In 1941, Marcus Cohn compared professional baseball to other types of entertainment without acknowledging a general exemption.[156] His article scrutinizes a 1918 ruling, which held the business model of the American Society of Composers, Authors and Publishers (ASCAP) did not constitute restraint of trade.[157] Cohn highlights that an interstate activity is only subject to the Sherman Act if it constitutes commerce.[158] Thus, by holding that entertainment businesses such as that of the ASCAP are "personal effort," not "commerce," the Court

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[149] Nathanson, supra note 30, at 32; *see infra* Sections I.C–D (analyzing the subsequent rulings in the baseball trilogy).

[150] Nathanson, *supra* note 30, at 40.

[151] *Id.* at 24.

[152] *See* 29 U.S.C. §§ 151–69 (1935) (current version at 29 U.S.C. §§ 151–69 (2018).

[153] Nathanson, *supra* note 30, at 24.

[154] *Id.* at 24–25.

[155] *Id.* at 25.

[156] Marcus Cohn, *Music, Radio Broadcasters and the Sherman Act*, 29 GEO. L.J. 407 (1941).

[157] 174th St. & St. Nicholas Ave. Amusement Co. v. Maxwell, 169 N.Y. Supp. 895 (N.Y. Sup. Ct. 1918).

[158] Cohn, *supra* note 155, at 426.

excludes them from the Sherman Act.[159] However, Cohn contends that the way "[r]adio and theatrical entertainment"[160] had changed in the decade preceding his article "may well lead a court to rule that the performance of music is now commerce."[161] By presenting baseball as another example for an entertainment business based on "artistic or literary expression,"[162] Cohn implies that *Federal Baseball* might be similarly obsolete.[163]

Yet, five years later, Bernard Reich found in a similar analysis that "[v]ague reference to new conditions and the expanding scope of interstate commerce" were insufficient reasons to apply the Sherman Act to professional baseball without overruling *Federal Baseball* outright.[164] Despite not using the term "exemption," his article argues that technological and societal advances would not affect the inapplicability of federal antitrust laws to professional baseball under *Federal Baseball*.[165] One year after Reich's analysis, John W. Neville again argued that "*Federal Baseball* . . . [was] a decision on baseball of another age" and provided no reason to "maintain that baseball is not commerce, and is therefore exempt from antitrust law enforcement."[166] While Neville rejected the notion that baseball would be "exempt" from antitrust scrutiny, he was the first to use that term in regard to *Federal Baseball*.[167]

2. Gardella v. Chandler

Before the Supreme Court exempted professional baseball from antitrust scrutiny in *Toolson*,[168] the case of Danny Gardella "spurred [a] flurry of interest in the meaning of *Federal Baseball* . . . crystallize[d] the debate and set the stage for the *Toolson* decision."[169] In February of 1947, Gardella was the first MLB player to sign with a Mexican team, and was consequently banned from playing for Organized Baseball when he returned to the U.S.[170] When Gardella sued for reinstatement, Judge Goddard dismissed the case, albeit not without acknowledging the dilemma between the precedent of *Federal Baseball* and the

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159 *Id.* at 426-27.

160 *Id.* at 427.

161 *Id.* at 428.

162 *Id.* at 427.

163 Nathanson, *supra* note 30, at 26.

164 Bernard Reich, *The Entertainment Industry and the Federal Antitrust Laws*, 20 S. CAL. L. REV. 1, 34 (1946).

165 Nathanson, *supra* note 30, at 27.

166 John W. Neville, *Baseball and the Antitrust Laws*, 16 FORDHAM L. REV. 208, 230 (1947).

167 Nathanson, *supra* note 30, at 27–28.

168 *See infra* Sections I.C.4.c-d (showing that *Toolson* created the baseball antitrust exemption); *but see* sources cited *supra* note 15 (arguing that the exemption exists since 1922 when the Supreme Court ruled on *Federal Baseball*).

169 *Id.* at 28.

170 BANNER, *supra* note 18, at 97–98.

Supreme Court's changed definition of interstate commerce.[171]

That dilemma became even more apparent as *Gardella v. Chandler* reached the Second Circuit.[172] Before ruling on the case, Judge Chase stated that *Federal Baseball* had not been overruled and was therefore binding for the Circuit.[173] Conversely, Judge Frank gave examples of "a lower court announcing that a Supreme Court decision is dead," which would allow the Circuit to overrule *Federal Baseball*, but then admitted that was irrelevant because professional baseball had since become interstate commerce.[174] Both judges adhered to their respective opinions when ruling on the case, with Judge Chase finding it their "duty as a subordinate court . . . to follow the Federal Base Ball Club Case"[175] and Judge Frank calling *Federal Baseball* an "impotent zombi [sic]" without any legal effect.[176]

The decision now depended on Judge Learned Hand, who took the intermediate position.[177] In his memorandum, he agreed with Judge Frank that the lower courts may occasionally rule against obsolete Supreme Court precedent.[178] Yet, he emphasized the unanimity in that opinion as an argument against finding *Federal Baseball* obsolete.[179] Moreover, the unsystematic Supreme Court antitrust precedent made any prediction on how the Court would rule, "a game of blind-man's-bluff."[180] Thus, Judge Hand initially voted with Judge Chase.[181] Yet, when the court published its decision, he found the issue was not a legal question, but a factual one, of whether the business of baseball had become interstate commerce, proceeding to vote with Judge Frank.[182] After the Circuit remanded the case to the trial court, Gardella settled out of court and received $60,000 in exchange for dropping his suit.[183]

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171 Gardella v. Chandler, 79 F. Supp. 260, 263 (S.D.N.Y. 1948); *see* BANNER, *supra* note 18, at 98 (analyzing the reasoning of Judge Goddard); *see also supra* note 94 and accompanying text (analyzing the historical development of the Supreme Court's definition of interstate commerce).

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

173 *See* BANNER, *supra* note 18, at 98–99 (analyzing the Chase memorandum on *Gardella*).

174 *See id.* at 99 (analyzing the Frank memorandum on *Gardella*).

175 *Gardella*, 172 F.2d at 405.

176 *Id.* at 408–09 (Frank, J., concurring).

177 *See* BANNER, *supra* note 18, at 99–101.

178 *Id.* at 99–100.

179 *Id.* at 100.

180 *See id.* at 99–100 (quoting the Hand memorandum on *Gardella*).

181 *Id.* at 99.

182 *Gardella*, 172 F.2d at 407–08 (Hand, J., concurring).

183 BANNER, *supra* note 18, at 103.

As the first successful antitrust claim against Organized Baseball since 1922, *Gardella* "struck terror in the hearts of club owners," who feared for the end of the reserve system.[184] Yet, the legal community was divided in its assessment. For instance, Robert S. Gottesmann concluded in 1952 that, after *Gardella*, "Organized Baseball's present interstate features combined with its monopolistic practices are sufficient to bring it within the antitrust acts. Future exemptions from these statutes . . . should be made by Congressional enactment and not by the courts."[185] Similarly, Alison Reppy found in a 1949 article that as a result of the advent of radio and television, *Gardella* held that "modern organized baseball was engaged in interstate commerce."[186] She dismissed the reasoning in Judge Chase's dissent as being "hardly tenable, [considering] the common law concept of restraint."[187]

John Eckler, in contrast, seconded Judge Chase one year later, even if first conceding that baseball might have become an interstate activity by 1950.[188] Eckler added, however, that "[b]y no standard, however elastic, can baseball be considered such 'trade or commerce' as regulated by the Sherman Act."[189] Therefore, baseball cannot become subject to antitrust scrutiny, societal and technological advances notwithstanding. *Federal Baseball* created a unique exemption from antitrust scrutiny that is required for the very existence of "baseball as we know it."[190] Eventually, this "revisionist" interpretation would begin to prevail.[191]

C. *TOOLSON V. NEW YORK YANKEES, INC.*

Because baseball's antitrust exemption was to stand "[u]ntil . . . overruled or distinguished,"[192] the Supreme Court had three options when it ruled on *Toolson v. New York Yankees, Inc.*,[193] the second case in the baseball trilogy. First, it could uphold *Federal Baseball*. Because *Federal Baseball* was a constitutional decision,[194] this option would have effectively created a perpetual exemption since the Court's power of judicial review bars Congress from overruling constitutional

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184 *Id.* at 101.

185 Robert S. Gottesmann, *Monopolies–Interstate Commerce–Organized Baseball*, 1 BUFF. L. REV. 342, 344 (1952).

186 Alison Reppy, *Constitutional Law*, 24 N.Y.U.L.Q. REV. 956, 974 (1949).

187 *Id.*

188 John Eckler, *Baseball— Sport or Commerce?*, 17 U. CHI. L. REV. 56, 65 (1950).

189 *Id.* at 66.

190 *Id.* at 78.

191 Nathanson, *supra* note 30, at 31.

192 Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576, 609 (1953).

193 Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) (per curiam).

194 *See supra* Section I.A.4.

decisions.[195] Thus, an exemption based on *Federal Baseball* would have been outside of congressional jurisdiction.

Moreover, overruling that exemption without violating fundamental principles of law and logic would have been nearly impossible for the Supreme Court. During the period between *Federal Baseball* and *Toolson*, the nation was experiencing great socioeconomic change, including the advent of radio and television,[196] and the Depression-era extension of federal jurisdiction pursuant to the Commerce Clause.[197] By upholding *Federal Baseball*, the Supreme Court would have implicitly held these developments insufficient to render the case obsolete. Hence, the Court could only abolish the exemption after socioeconomic changes with even further reaching consequences. In turn, abolishing the exemption would impact Organized Baseball even more powerfully at the time of *Toolson* than it would have during the *Federal Baseball* decision itself.

Second, the Court could overrule *Federal Baseball*. Because "[j]udicial decisions have had retrospective operation for near a thousand years,"[198] this would allow thousands of players to sue under the Sherman Act for threefold the damages received due to their lack of negotiation power, potentially ruining Organized Baseball.[199] Third, the *Toolson* Court could have found *Federal Baseball* obsolete and abolished the exemption.

1. Facts

Toolson originated in 1949 when George Earl Toolson was a pitcher for the Newark Bears, a AAA affiliate of the New York Yankees.[200] The Bears folded after the 1949 season, and the Yankees assigned Toolson to their A affiliate, the Binghamton Triplets.[201] After he sat out of the 1950 season in an attempt to gain free agency, Toolson filed suit against the Yankees in Los Angeles, claiming that they violated the Sherman Act by not letting him play for a team other than the Triplets.[202] The trial court dismissed his claim, as did the trial court in Gardella's

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195 Marbury v. Madison, 5 U.S. 137, 176 (1803).

196 *See* McDonald, *supra* note 31, at 112–13 (analyzing the growing importance of radio and television for professional baseball between 1922 and 1953).

197 *See* sources cited *supra* note 94 (analyzing the development of the Supreme Court's Commerce Clause jurisprudence).

198 Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting).

199 BANNER, *supra* note 18, at 121–22.

200 *Id.* at 112.

201 *Id.*

202 *Id.*

case. Unlike *Gardella* though, the Circuit affirmed the dismissal.[203] The ensuing circuit split supported Toolson's plea for certiorari; that plea was successful, and the Supreme Court heard his case.[204]

2. Toolson's Argument

Toolson's primary argument was the same one Judge Frank had made in *Gardella*.[205] Toolson claimed that technological and societal changes that occurred between 1922 and 1953 had rendered *Federal Baseball* obsolete.[206] The technological advances brought by the advent of radio and television enabled baseball fans to follow the game from another state. The societal changes following the Great Depression and the New Deal, as well as a broader interpretation of the Commerce Clause, required the extension of federal antitrust scrutiny to professional baseball. Thus, "[e]ven if the *Federal Baseball Club* case . . . were correctly decided on its facts it [was] not applicable to the . . . situation and facts" of 1953.[207] Toolson's secondary argument, however, contended that *Federal Baseball* was not even correctly decided at the time.[208]

In his main argument, Toolson highlighted that Congress did not consider *Federal Baseball* important when the 82nd Congressional House Subcommittee on the Study of Monopoly Power found the decision did not bar it from investigating and regulating professional baseball.[209] If Congress assumed that *Federal Baseball* excluded professional baseball from the scope of the Commerce Clause, the Subcommittee could not have started investigations due to lack of jurisdiction. By engaging with the subject, Congress showed that it found *Federal Baseball* to only mean professional baseball did not qualify as interstate commerce in 1922.

Toolson then disputed whether baseball's unique characteristics and needs warranted exemption from antitrust scrutiny,[210] countering not only the Yankees' argument in his case but also Pepper's final argument in *Federal Baseball*,

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[203] *Toolson*, 346 U.S. at 356–57.

[204] *See* Nathanson, *supra* note 30, at 32 ("By the time the Supreme Court's briefing schedule had been established, the petitioners were swimming upstream against a heavy current. . . . [Toolson] framed the issue as a fundamental circuit split.").

[205] *See supra* notes 172-73 and accompanying text (analyzing Judge Frank's reasoning in *Gardella*).

[206] Petition for Writ of Certiorari at 12, Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) (per curiam) (No. 647).

[207] Brief in Support of the Petition for Writ of Certiorari at 22, Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) (per curiam) (internal citation omitted).

[208] Petition for Writ of Certiorari, *supra* note 205, at 11–12.

[209] *Id.* at 13.

[210] *See* Petitioner's Opening Brief on Writ of Certiorari at 47, Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) (per curiam) (No. 18) (quoting *Gardella v. Chandler*, 172 F.2d. 402, 409 (2d Cir. 1949) (Frank, J., concurring).

unadopted by Justice Holmes.[211] Toolson argued that baseball was like any other kind of entertainment and was subject to antitrust scrutiny.[212] Again quoting Judge Frank's opinion in *Gardella*, Toolson claimed 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."[213]

As far as Toolson followed Judge Frank's lead from *Gardella*, he simply had to show that the economic and societal changes between 1922 and 1953 made *Federal Baseball* inapplicable to his case. Toolson also claimed in his plea for certiorari, however, that *Federal Baseball* had been wrong in 1922.[214] By asking the Supreme Court to overrule its own precedent, he raised the threshold for his case and laid the foundation for the Yankees' argument that *Federal Baseball* had been an exceptional ruling because it recognized baseball's unique characteristics and needs.[215]

3. The Yankees' Argument

The Yankees relied heavily on these characteristics and needs, rejecting Toolson's argument that the broadening commerce clause ended baseball's exemption from antitrust scrutiny and asserting that the continued existence of the exemption only emphasized baseball's unique character.[216] They argued that because baseball clubs are "almost as interested in the financial success of the others in the league as" in their own, applying the same rules to them as to "commercial enterprises" would be an "absurdity."[217] Regarding baseball's continuing exemption from antitrust scrutiny, the Yankees had proof for one baseball team's interest in another team's success: The Boston Red Sox had filed an amicus brief supporting the Yankees' assumption that *Federal Baseball* had been a policy decision to create an antitrust exemption because of baseball's unique

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[211] *See supra* Section I.A.3 (analyzing Pepper's argument in *Federal Baseball*); *see also infra* Section I.C.3 (analyzing the Yankees' argument in *Toolson*).

[212] Petitioner's Opening Brief on Writ of Certiorari, *supra* note 209, at 35–37.

[213] *Id.* at 47 (quoting Gardella v. Chandler, 172 F.2d 402, 409 (2d Cir. 1949) (Frank, J., concurring).

[214] Petition for Writ of Certiorari, *supra* note 205, at 11–12.

[215] *See* Nathanson, *supra* note 30, at 32–33.

[216] Brief for Respondents in Opposition to Petition for Certiorari at 17, Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) (per curiam) (No. 647).

[217] Brief for Respondents at 24, Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) (per curiam) (No. 18).

character and that the teams had relied on this exemption since.[218] Following Pepper's all-or-nothing approach in *Federal Baseball*,[219] the Yankees argued that the Supreme Court could either uphold the claimed exemption entirely or abolish professional baseball along with the exemption, *tertium non datur*.[220]

Using Toolson's secondary argument, the Yankees stressed the importance of stare decisis, emphasizing the "large investments. . . made on the strength of Mr. Justice Holmes' opinion in the Federal Baseball Club case."[221] While this would generally present a strong argument for the exemption, the Yankees misrepresented, or misunderstood, the opinion in *Federal Baseball*. Justice Holmes had not adopted Pepper's argument regarding baseball's unique characteristics and needs.[222] Likely by mistake, the Yankees based their brief on the importance of stare decisis on a theory the Court had not actually adopted.[223]

The Yankees also framed baseball's relation to the Sherman Act as a statutory question.[224] *Federal Baseball* notwithstanding, Congress had always held the power to regulate professional baseball.[225] Yet, because of baseball's unique characteristics and needs, only those laws that explicitly acknowledge baseball apply to its business. Congressional silence since *Federal Baseball* showed that Congress agreed to the exemption.[226]

The Yankees supported this argument by contrasting professional baseball to the insurance industry.[227] The Supreme Court had consistently upheld state laws regulating insurances by finding that the insurance business, like that of baseball, does not constitute commerce.[228] However, the Court in *United States v. South-Eastern Underwriters Association*[229] found that "legal formulae devised to uphold

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[218] Brief for Boston Am. League Base Ball Co. as Amicus Curiae at 2, Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) (per curiam) (No. 18).

[219] *See supra* Section I.A.3 (analyzing Pepper's arguments).

[220] Brief for Respondents, *supra* note 216, at 66.

[221] Brief for Respondents in Opposition to Petition for Certiorari, *supra* note 215, at 30 (quoting Toolson v. New York Yankees, Inc., 101 F. Supp. 93 (S.D. Cal. 1951)).

[222] *See supra* Section I.A.4.

[223] Nathanson, *supra* note 30, at 37. *But see infra* Part I.C.4 (analyzing the Supreme Court's opinion in *Toolson* and its impact on the legal character of the baseball antitrust exemption).

[224] *See* Brief for Respondents, *supra* note 216, at 63.

[225] *Id.*

[226] *Cf.* Brief for Respondents, *supra* note 216, at 66 (If "Congress . . . enact[s] such regulatory measures as it believes necessary for the preservation of the game and the protection of the public interest," no congressional action regarding the exemption since *Federal Baseball* means Congress believes no regulatory adjustment necessary, i.e., Congress agrees to the existing exemption).

[227] Brief for Respondents in Opposition to Petition for Certiorari, *supra* note 215, at 17.

[228] *See* N.Y. Life Ins. Co. v. Deer Lodge County, 231 U.S. 495, 510-12 (1913); Hooper v. California, 155 U.S. 648, 653-54 (1895); Paul v. Virginia, 75 U.S. 168 (1869); Larry D. Carlson, *Insurance Exemption from the Antitrust Laws*, 57 TEX. L. REV. 1127, 1129 n.16 (1979) (analyzing how the Commerce Clause restricts state jurisdiction over the insurance business).

[229] United States v. S.-E. Underwriters Ass'n, 322 U.S. 533 (1944).

state power cannot uncritically be accepted as trustworthy guides to determine Congressional power under the Commerce Clause."[230] Hence, it held insurances subject to the Sherman Act.[231]

The Yankees argued that *South-Eastern Underwriters* would not apply to baseball, though, because the decision was based on the character of insurance that is "essential to all modern business" whereas professional baseball "contains no element of either trade or commerce."[232] They contended that the Supreme Court should uphold *Federal Baseball* because the decision remained unaffected by any subsequent Supreme Court rulings,[233] and the factual differences from 1922 did not change the fact that "a baseball game is inherently local in character."[234] The Yankees concluded that *Federal Baseball* was correctly decided and that only Congress should make changes to the baseball antitrust exemption.[235]

4. The Opinion of the Court

Toolson is the most complex case in the baseball trilogy, even though the Court only issued a one-paragraph per curiam opinion. In *Federal Baseball*, the Supreme Court held that Congress had no jurisdiction over professional baseball because the business of baseball did not constitute interstate commerce under the Court's definition in 1922.[236] The *Toolson* Court interpreted this as holding that "the business of providing public baseball games . . . was not within the scope of the federal antitrust laws."[237] Notably, the Court adopted the Yankees' argument that congressional inaction on the exemption equated to congressional approval of the exemption.[238] The Court went on to say that by not acting upon the exemption, Congress had allowed professional baseball's business organizations to disregard antitrust laws for thirty years.[239] In *Toolson*, the Court then contrasted the prospective effects of legislation with the retroactive effects of adjudication to find that only Congress should revoke the baseball antitrust exemption.[240] The Court concluded by affirming the lower court opinions on the "authority of

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[230] *Id.* at 545.

[231] *Id.* at 553-62.

[232] Brief for Respondents in Opposition to Petition for Certiorari, *supra* note 215, at 17.

[233] *See id.* at 20-24 (analyzing the impact of post-*Federal Baseball* rulings on the relationship between Organized Baseball and the Sherman Act).

[234] *Id.* at 26.

[235] Brief for Respondents, *supra* note 216, at 84.

[236] *See supra* Section I.A.4.

[237] Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953) (per curiam).

[238] *Id.*

[239] *Id.*

[240] *Id.*

Federal Baseball . . . so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."[241]

The existing literature is divided in its assessment of *Toolson*'s majority opinion. A "narrow" approach accepts the *Toolson* Court's claim to uphold *Federal Baseball* without any changes.[242] This view sees *Toolson* as only "reaffirm[ing] baseball's antitrust exemption" as created in *Federal Baseball*.[243] Thus, it considers *Toolson* of little legal value.[244] The predominant view recognizes divergences between what the *Toolson* Court purported to hold and what it effectively held. This view contests any intentional structure behind the *Toolson* opinion and maintains that the Court's misinterpretation of *Federal Baseball* caused the divergences.[245] It considers the reasoning in *Toolson* ahistorical and claims that the Court "looked backwards at the opinion from its 1953 perch and substituted the prevailing contemporary interpretation of the case for the [original] interpretation."[246] A considerable number of analyses following this approach derive *Toolson*'s structure from its opening, stating that the Supreme Court intended to respect congressional inaction and avoid a retroactive application of the Sherman Act to Organized Baseball.[247] A complimentary view argues that the closing statement in *Toolson* changed the meaning of *Federal Baseball* as part of "the greatest bait-and-switch scheme in the history of the Supreme Court."[248]

a. Federal Baseball and Congressional Intent

Toolson rests on two assertions regarding congressional intent. First, the Supreme Court notes that "Congress has had the [*Federal Baseball*] ruling under

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[241] *Id.* (internal citation omitted).

[242] *See* Walter T. Champion, Jr., *"Mixed Metaphors," Revisionist History and Post-Hypnotic Suggestions on the Interpretation of Sports Antitrust Exemptions: The Second Circuit's Use in* Clarett *of a* Piazza*-like "Innovative Reinterpretation of Supreme Court Dogma,"* 20 MARQ. SPORTS L. REV. 55, 63 (2009); Murphy, *supra* note 44, at 808.

[243] John Tehranian, *It'll Break Your Heart Every Time: Race, Romanticism and the Struggle for Civil Rights in Litigating Baseball's Antitrust Exemption*, 46 HOFSTRA L. REV. 947, 961 n.73.

[244] *See*, e.g., *id.*, makes only five passing remarks to *Toolson* in its analysis of the exemption.

[245] *See, e.g.*, Nathanson, *supra* note 30, at 40 (finding *Toolson* a "misreading of *Federal Baseball*" that approved the revisionist view); David L. Snyder, *Anatomy of an Aberration: An Examination of the Attempts to Apply Antitrust Law to Major League Baseball through* Flood v. Kuhn (1972), 4 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 177, 192 (2008) (finding that "*Toolson* completely misapplied the precedent of *Federal Baseball*").

[246] Nathanson, *supra* note 30, at 41.

[247] *E.g.*, BANNER, *supra* note 18, at 121–22 (arguing that before *Toolson*, the Court had waited for Congress to act and vice versa, and that the retroactive effect prevented a more decisive ruling); *see also* D. Logan Kutcher, Note, *Overcoming an "Aberration":* San Jose *Challenges Major League Baseball's Longstanding Antitrust Exemption*, 40 J. CORP. L. 233, 251–52 (2014) (summarizing *Toolson* as based on congressional silence and retroactivity concerns); Philip R. Bautista, Note, *Congress Says, "Yooou're Out!!!" to the Antitrust Exemption of Professional Baseball: A Discussion of the Current State of Player-Owner Collective Bargaining and the Impact of the Curt Flood Act of 1998*, 15 OHIO ST. J. ON DISP. RESOL. 445, 451 (2000) (same).

[248] McDonald, *supra* note 31, at 100—01.

consideration . . . for thirty years" without subjecting professional baseball to antitrust scrutiny.[249] Second, "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."[250]

The Supreme Court could only draw conclusions from congressional inaction if the Court had been aware that Congress knowingly had jurisdiction over the matter. If Congress had been unaware of baseball's antitrust exemption, the Court could not have construed congressional inaction as intent. Unless Congress also knew about its jurisdiction over professional baseball, inaction might only result from constitutional concerns. For some time after *Federal Baseball*, Congress had presumed jurisdiction over professional baseball but perceived an exemption as nonexistent.[251] However, when the 82nd Congress House Subcommittee on the Study of Monopoly Power considered exempting professional sports from antitrust scrutiny, its members were aware of *Federal Baseball*.[252] Additionally, even Toolson conceded congressional knowledge of the exemption.[253]

According to the original interpretation, however, *Federal Baseball* was a constitutional decision.[254] Therefore, congressional jurisdiction over professional baseball required either *Federal Baseball*'s obsoletion or adoption of the revisionist interpretation. Sixty-six years after *Toolson*, legal commentators remain divided on the correct interpretation of *Federal Baseball*.[255] Before *Toolson*, Congress had no reason to believe the Court would adopt the revisionist interpretation. Despite the economic and societal changes following 1922,[256] the *Gardella* case and its scholarly interpretation displays a general confusion over *Federal Baseball*'s obsoletion in 1953.[257] Hence, Congress had no reason to presume jurisdiction over professional baseball pre-*Toolson*. Knowing that Congress *could not* act, the Court could not deduce from the fact that Congress *did not* act that Congress *did*

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[249] Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953) (per curiam).

[250] *Id.*

[251] Nathanson, *supra* note 30, at 41; *see also supra* notes 153–54 and accompanying text (analyzing congressional consideration of the matter during the Great Depression).

[252] BANNER, *supra* note 18, at 120 n.57.

[253] *See* Petition for Writ of Certiorari, *supra* note 205 and accompanying text.

[254] *See supra* Section I.A.4.

[255] *Compare* Grow, *Business of Baseball*, *supra* note 16, 567–69 (finding that *Federal Baseball* held professional baseball outside federal jurisdiction pursuant to the Commerce Clause) *and* Nathanson, *supra* note 30, at 20 (same) *with* Ham, *supra* note 22, at 213 (finding that *Federal Baseball* "virtually exempted" professional baseball from federal antitrust scrutiny) *and* Haber, *supra* note 15, at 7 (finding that *Federal Baseball* created the exemption).

[256] *See supra* Section I.B. (analyzing how these changes led to the expectation that *Toolson* would overrule *Federal Baseball*).

[257] *See supra* Section I.B.2. (analyzing *Gardella* and its reception in the literature).

not want to act. Moreover, congressional silence does not affect the Supreme Court's power to overrule its own precedent.[258] Therefore, congressional silence *here* did not obligate the Court to uphold the exemption.

The second assertion relies on *Federal Baseball* holding that Congress had no intention of placing baseball under the Sherman Act in 1890.[259] "As an empirical, historical matter," the idea that Congress considered baseball at all when enacting the Sherman Act "was almost certainly wrong."[260] Accordingly, the *Federal Baseball* Court did not consider congressional intent.[261] The facts support neither of the *Toolson* Court's assertions regarding congressional intent.

b. Narrow Interpretation

The narrow approach ignores the discrepancies between the facts and what the Court *presents* as facts. It originates in the ruling from *Piazza v. Major League Baseball*,[262] that considers *Toolson* as simply upholding *Federal Baseball*.[263] The narrow approach highlights the Supreme Court's subsequent definition of *Toolson* as "a *narrow* application of the rule of *stare decisis*."[264] A literal interpretation of *Toolson* in this context suggests that *Toolson* upheld *Federal Baseball* narrowly, that is, without any alterations.[265] However, interpreting *Toolson* as narrowly fitted on *Federal Baseball*'s precedent oversimplifies *Toolson*'s structure.[266] *Toolson* was a narrow case of stare decisis only in that its closing statement upheld *Federal Baseball*,[267] that is, "only insofar as it reinterpreted *Federal Baseball* into a statement

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[258] Helvering v. Hallock, 309 U.S. 106, 121–22 (1940) (holding that the Supreme "Court . . . has from the beginning rejected a doctrine of disability at self-correction. . . . [b]y imputing to Congress a hypothetical recognition[,] . . . we cannot evade our own responsibility for reconsidering, in the light of further experience, the validity of distinctions which this Court has itself created); *see also* Girouard v. United States, 328 U.S. 61, 69–70 (1946) (citing *Hallock* that congressional silence does not bar the Court from overruling precedent); *see generally* State Oil v. Kahn, 522 U.S. 3, 20–21 (1997) (emphasizing the diminutive role of precedent in antitrust cases); *but see* Flood v. Kuhn, 407 U.S. 258, 283–84 (1972) (considering "positive inaction" different from "mere congressional silence and passivity").

[259] Grow, *Business of Baseball*, *supra* note 16, at 570.

[260] BANNER, *supra* note 18, at 120; *accord* McDonald, *supra* note 31, at 101; *see also Toolson*, 346 U.S. at 364 (Burton, J., dissenting) (arguing that "Congress . . . has enacted no express exemption of organized baseball from the Sherman Act").

[261] Grow, *Business of Baseball*, *supra* note 16, at 571; *see supra* Section I.A.4. (finding no reference to congressional intent in *Federal Baseball*).

[262] Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993); *see generally infra* Section II.A.1. (analyzing *Piazza*).

[263] *Piazza*, 831 F. Supp. at 436 (quoting Flood v. Kuhn, 407 U.S. 258, 276 (1972)).

[264] *Flood*, 407 U.S. at 275–76 (quoting United States v. Shubert, 348 U.S. 222, 228–30 (1955)) (first emphasis added).

[265] *Piazza*, 831 F. Supp. at 436; Champion, *supra* note 241, at 63; *see infra* Section II.A.2. (analyzing the reasoning in *Piazza*).

[266] *See infra* Section I.C.4.d (showing the complex structure behind *Toolson*).

[267] *Flood*, 407 U.S. at 275–76 (quoting *Shubert*, 348 U.S. at 228–30).

of Congressional intent."[268] *Toolson* did not uphold *Federal Baseball* narrowly, but rather, only a narrow part of *Toolson* upheld *Federal Baseball*. The narrow approach violates the Supreme Court precedent in *Toolson*.

c. Formalist Interpretation

Had *Toolson* actually relied on the facts stated therein, the ruling would have abrogated *Federal Baseball*. Since Congress did not consider professional baseball in 1890, and *Federal Baseball* did not acknowledge congressional intent, *Toolson* would have eliminated the scope of *Federal Baseball*. A contemporary analyst similarly concludes, "*Toolson* would then seem to reaffirm nothing."[269]

The predominant view attributes any discrepancy between *Federal Baseball* and *Toolson*'s interpretation of it to the Supreme Court's perceived incompetence.[270] It claims the *Toolson* Court could not recognize the different perspective of *Federal Baseball*. Consequently, some commentators have claimed that the *Toolson* Court substituted its own viewpoint and misinterpreted the earlier case.[271] *Toolson*'s instrumentalist approach does not rely on empirical facts,[272] and its justifications for upholding the antitrust exemption from *Federal Baseball* actually modifies that case, creating the exact kind of exemption necessary for the Court's intentions in *Toolson*. Conversely, "[f]ormalists infer the doctrine from . . . empirical evidence."[273] They "rely on the facts as recorded by the judge" and otherwise "ignore fact-finding, treating it as uncontroversial."[274] Because formalists acknowledge that judges are "fallible at discerning the doctrine," they "treat cases of 'first impression' (where no previous precedent exists) with caution."[275] Furthermore, they acknowledge that doctrine is not absolute but relative to a certain time and place and affected by economic and societal changes.[276] Considering that *Federal Baseball* was a case of first impression, removed from

[268] Grow, *Business of Baseball*, *supra* note 16, at 597.

[269] Professional Football Immune from Sherman Act as a Team Sport not Constituting Interstate Commerce, 105 U. PA. L. REV. 110, 112–13 n.24 (1956).

[270] *See* sources cited *supra* note 257.

[271] Nathanson, *supra* note 30, at 40–41.

[272] *See infra* Section II.C.4.d.

[273] Paul Troop, *Why Legal Formalism is not a Stupid Thing*, 31 RATIO JURIS 428, 431 (2018); *see generally* Steven M. Quevedo, Comment, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 CALIF. L. REV. 119 (1985) (comparing legal formalism, instrumentalism, and realism).

[274] *Id.* at 432.

[275] *Id.* at 430.

[276] *Id.* at 429–30.

Toolson not just by three decades but by the advent of radio and television, the Great Depression, and the New Deal,[277] formalists would likely have favored overruling the elder decision. Because formalists rely on the judge to impartially provide the facts, proponents of the ahistorical view cannot fathom that Justice Black deliberately misrepresented the facts in *Toolson* when he claimed that Congress had considered professional baseball when enacting the Sherman Act. Their perspective prohibits considering a controversial fact-finding process anything but flawed lawmaking and a "misreading."[278] Notably, the dominant view contends that *Toolson* "made sense only if one ignored the realities and circumstances surrounding *Federal Baseball*."[279] Since "[f]ormalists assume that the doctrine is complete in that there is always a right answer to the question of how a judge will respond to a particular factual scenario,"[280] they can comprehend the peculiar reasoning in *Toolson* only by attributing the Court's opinion to invalid doctrinal framework.[281] They cannot correctly assess the opinion in *Toolson* and fail to even perceive the different perspectives. *Toolson* did not, as some claim, "declare[] the revisionists the victor in the battle over the meaning of *Federal Baseball*,"[282] but used the general acceptance and overall structure of that interpretation to further its own goals. The Supreme Court did not adopt a revisionist interpretation because the Justices could not recall the original meaning of *Federal Baseball* but because it provided the most efficient way towards the Court's objective in *Toolson*.[283]

Therefore, the Court not only subjected professional baseball to congressional jurisdiction but also created the baseball antitrust exemption. When the Supreme Court claimed congressional inaction was a reason to uphold baseball's exemption, it implied that Congress had jurisdiction over professional baseball. By holding that the exemption originated in congressional intention to exempt baseball from the Sherman Act, the closing statement in *Toolson* Court found that baseball had been within congressional reach even before *Federal Baseball*.[284] Thus, both parts of *Toolson* individually extended congressional jurisdiction over the business of baseball. Because Congress cannot overrule constitutional decisions, the Court implicitly based the baseball exemption on a policy decision by putting it within congressional reach.

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[277] *See supra* Section I.B.1. (analyzing the socioeconomic changes between 1922 and 1953).

[278] Nathanson, *supra* note 30, at 40 (referring to *Toolson*'s interpretation of *Federal Baseball*).

[279] *Id.*

[280] Troop, *supra* note 272, at 429.

[281] *See* Nathanson, *supra* note 30, at 41 (finding that the *Toolson* Court wrongly employed the 1953 interpretation of *Federal Baseball* instead of that from 1922).

[282] *Id.*

[283] *See infra* Section II.C.4.d.

[284] *See infra* note 259.

d. Instrumentalist Interpretation

Formalist commentators contend that the above arguments comprise the entire impact of *Toolson*.[285] Yet, an opinion that accepts that *Toolson* implicitly changed the law cannot logically reject the change that inevitably follows. Because the Court had exempted baseball from federal antitrust laws, the underlying policy decision was a statutory interpretation of the Sherman Act. If baseball's antitrust exemption was based on an interpretation of the Sherman Act, the business of baseball must otherwise be subject to that Act. Pursuant to the Commerce Clause, only interstate commerce is subject to the Sherman Act. Hence, *Toolson* implicitly acknowledges the character of the business of baseball as interstate commerce. In addition, the *Toolson* Court had held *Federal Baseball* to find that "Congress had *no intention*" to extend federal antitrust scrutiny over professional baseball.[286] Effectively, this requires that the 51st Congress had the *intention* to *not* include baseball under the Sherman Act in 1890.[287] This hypothetical intention requires at least an abstract justification. One such justification was baseball's unique characteristics and needs for an antitrust exemption—an idea that was first introduced by Pepper in *Federal Baseball*.[288] Thus, *Toolson* implicitly accepted baseball's unique characteristics and needs as the rationale for upholding an exemption.

Understanding *Toolson*'s system of interdependent implications requires acknowledgment of the Warren Court's instrumentalist approach.[289] Any fundamental critique of that approach notwithstanding, "this remarkable Court" used the law as a means to an end.[290] The *Toolson* majority resorted to the bait-and-switch scheme not because of a gross misinterpretation of *Federal Baseball*, but because the justices fully appreciated the earlier case and adjusted the opinion according to their instrumentalist views. Soon afterwards, the same Court would issue a no less controversial opinion in *Brown v. Board of Education*.[291] These rulings

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[285] *E.g.*, Nathanson, *supra* note 30, at 40–41.

[286] Toolson v. New York Yankees, 346 U.S. 356, 357 (1953) (per curiam) (emphasis added).

[287] *See* McDonald, *supra* note 31, at 101 (insinuating the *Toolson* Court assumed such congressional intent in 1890).

[288] *See supra* Sections I.A.3., I.C.3. (analyzing the respective defendants' arguments in *Federal Baseball* and *Toolson*).

[289] *See* BANNER, *supra* note 18, at 122; Robert Henry, *The Players and the* Play, *in* THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION? 13 (Bernard Schwartz, ed.,1998).

[290] Henry, *supra* note 288, at 13–14.

[291] Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see* Robert G. McCloskey & Sanford Levinson, *The Modern Court and Postwar America: 1937–1959*, *in* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 120, 144 (2016) (calling the reaction to *Brown* in the South "noisy and stubborn").

appear to be unrelated, for *Flood* upheld the precedent and left the matter to legislation, whereas *Brown* overruled *Plessy v. Ferguson*,[292] deciding the matter through judicial rulemaking.[293] Yet, the *Brown* Court ignored concerns in fact and law to further its policy goals.[294] In the same way the *Toolson* opinion is subordinate to its ends, *Brown* overruled the "separate but equal" doctrine not "in form" but because of the increasing importance of public education.[295] Eventually, in *Miranda v. Arizona*,[296] the Warren Court famously required police to inform a suspect in their custody of his rights.[297] As *Toolson* changed the character of *Federal Baseball* to a decision about congressional intent,[298] the ruling in *Dickerson v. United States*[299] shows that the character of *Miranda* remains debatable.[300] Instrumentalists might question if a ruling that entirely changes what it claims to uphold is "[i]ntellectually honest."[301] Yet, *Toolson* was neither the only nor the last example of "a radical revision of the most significant element of" an earlier case found in an opinion purportedly reaffirming said case.[302] Like *Brown* after it, *Toolson* adjusted the facts to fit its policy goals. Like *Dickerson* would eventually change the character of *Miranda*, *Toolson* changed the character of *Federal Baseball* over policy concerns. Thus, *Toolson* was an "early example[] of the pragmatic, instrumentalist nature of the Warren Court, a willingness to justify decisions on explicit policy grounds."[303]

The reason the *Toolson* Court engaged in its long-winded, albeit, creative, "bait-and-switch scheme"[304] was the different effects of legislative and judicial rulemaking.[305] Legislative rulemaking has a prospective effect, whereas the effects of judicial rulemaking are retroactive.[306] Because "[j]udicial decisions have

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[292] Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by Brown*, 347 U.S. 483.

[293] *See* BANNER, *supra* note 18, at 122.

[294] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32–33 (1959).

[295] *Brown*, 347 U.S. 483, 488.

[296] Miranda v. Arizona, 384 U.S. 436 (1966).

[297] *Id.*.

[298] *See supra* Section I.C.4.b.

[299] Dickerson v. United States, 530 U.S. 428 (2000).

[300] *Compare id.* at 432 ("*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress"); *with id.* at 456 (Scalia, J., dissenting) (citing Supreme Court precedent showing "that *Miranda* is *not* required by the Constitution"); *and id.* at 445 (Scalia, J., dissenting) (highlighting that justices in the majority had earlier acknowledged "that a violation of *Miranda* is *not* a violation of the Constitution").

[301] Grow, *Business of Baseball*, *supra* note 16, at 571.

[302] *See Dickerson*, 530 U.S. at 445 (Scalia, J., dissenting) (presenting the *Dickerson* opinion as a later example of this phenomenon).

[303] BANNER, *supra* note 18, at 122.

[304] McDonald, *supra* note 31, at 100.

[305] BANNER, *supra* note 18, at 121–22.

[306] Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953).

had retrospective operation for near a thousand years,"[307] the Supreme Court ostensibly had three options when ruling on *Toolson*. The ruling most beneficial to professional baseball players would have been to overrule *Federal Baseball* and retrospectively subject Organized Baseball to antitrust laws. Following this path, the Court would have allowed thousands of players to sue under the Sherman Act for threefold the damages received from not being able to negotiate their salaries, thereby potentially ruining Organized Baseball.[308] Organized Baseball would have benefited most if *Toolson* upheld *Federal Baseball* in spite of any economic and societal shifts between 1922 and 1953. The Supreme Court would have effectively created a perpetual exemption. This decision would have held that the advent of radio and television, combined with the Depression-era extension of federal jurisdiction pursuant to the Commerce Clause, was insufficient to affect the intrastate character of the business of baseball. Only socioeconomic changes with even further reaching consequences could have extended congressional reach over the business of baseball. Following this logic, the only other option would be for the Supreme Court to submit baseball to antitrust scrutiny, imperiling the game by retroactively revoking the entire exemption. An intermediary position would have found *Federal Baseball* obsolete. The Court could have ended the exemption before ever creating it. *Toolson* would have granted professional baseball players an antitrust exemption for the future and protected Organized Baseball from ruinous claims based in the past. The justices considered the reserve system and actions that had been lawful at the time similarly unfair but aimed to remove the Court as the power responsible.[309] Based on these considerations, the first two options would have yielded unsatisfactory results.

Despite this, the Supreme Court chose not the intermediate option but the bait-and-switch scheme, which only provided the desired results through a series of abstract and interwoven implications. Adopting the Yankees' claim that professional baseball could either be exempt from federal antitrust laws entirely or would cease to exist in its current form,[310] formalists assert that the Supreme Court found itself between the Scylla of terminating professional baseball and the Charybdis of perpetuating the antitrust exemption.[311] Because this view denies the *Toolson* Court really knew the original meaning of *Federal Baseball*, it claims that the Court was unaware of the third option, and thus, that the bait-

[307] Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting).

[308] BANNER, *supra* note 18, at 121–22.

[309] *Id.* at 122.

[310] *See supra* notes 218-19 and accompanying text (analyzing that argument).

[311] *See* BANNER, *supra* note 18, at 121–22 (comparing only the reserve system to retroactive antitrust liability).

and-switch scheme was nothing but an act of desperation by a Supreme Court incapable of understanding its own precedent.

A desperate and inept Supreme Court would certainly support the narrative of a crude and accidental antitrust exemption.[312] Yet, that thesis finds no stronger support in the facts than Congress considering baseball in 1890. Rather, Chief Justice Warren urged Justice Black to add the closing statement because the justices were employing the initial interpretation of *Federal Baseball*, that the business of baseball was not interstate commerce.[313] Since federal jurisdiction pursuant to the Commerce Clause is limited to interstate commerce, the Court could not have extended congressional jurisdiction over the existing antitrust exemption.[314] While Justice Black considered any distinction between baseball in 1922 and in 1953 unrealistic, the predominant point of agreement among the justices was that Congress should have jurisdiction over Organized Baseball and decide when to subject its business practices to the Sherman Act.[315] Thus, the Court intended to not only enable Congress to regulate the business of baseball, but also to leave the extent this business should become subject to the antitrust laws to congressional discretion. However, even the intermediate option would have extended federal antitrust scrutiny over professional baseball from the moment the Court issued its opinion, as Supreme Court rulings apply from the moment the Court issues them.

The archives show that Justice Black only added the closing statement to *Toolson* on the insistence of Chief Justice Warren to make abundantly clear that Congress had jurisdiction over the business of baseball.[316] This requires that the antitrust exemption originate from a policy decision. That, in turn, was only possible if Congress had always meant to exclude professional baseball from federal antitrust scrutiny. Therefore, the ruling in *Toolson* was not conditional on *Federal Baseball* determining Congress had acknowledged professional baseball when enacting the Sherman Act. The Supreme Court was not demonstrating any lack of historical understanding in *Toolson*.[317] Rather, the *Toolson* Court extended congressional jurisdiction over Organized Baseball by use of the legal fiction that Congress considered baseball in 1890 and that *Federal Baseball* recognized these

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[312] *See, e.g.*, Nathanson, *supra* note 30, at 40 (finding *Toolson* "an opinion that made sense only if one ignored the realities and circumstances surrounding *Federal Baseball*"); *see also id.* at 44 (finding the *Flood* Court "entwined in the suppositions and assumptions surrounding *Federal Baseball*" and that opinion "muddled . . . by the Court's confusion over the nature and scope of its own precedent"); *see also* McDonald, *supra* note 31, at 122 (finding *Toolson* and *Flood* "wrongly decided" and their respective final sentences "equally . . . unrooted in the words of *Federal Baseball*").

[313] BANNER, *supra* note 18, at 119.

[314] *Id.*

[315] *Id.* at 118–19.

[316] *Id.* at 119.

[317] *But see* McDonald, *supra* note 31, at 101 (implying the *Toolson* Court intentionally disregarded the legislative history behind the Sherman Act).

considerations, making a policy-decision thereupon. Because the majority opinion did not rely on the true facts but presented as fact that which would further its goals, Organized Baseball could not have deceived the justices in any meaningful way. Based on Chief Justice Warren's insistence, the intention of the closing statement was to "send[] a message to Congress that it had the power to subject baseball to the antitrust laws."[318] The entire opinion looked to serve this goal. Because of the instrumentalist character of the Warren Court,[319] "no internal limitation . . . would require the law to conform to objective reality."[320]

This instrumentalist view explains the Court's apparently illogical reliance on congressional inaction. After *Toolson* created the fiction that Congress had enjoyed jurisdiction over Organized Baseball since 1890, the Court could attribute congressional inaction to intent. If Congress had created the antitrust exemption, legislative inaction on the issues would indeed imply congressional consent. By holding that the baseball antitrust exemption was not obsolete, but that Congress always had jurisdiction over the matter, the Court removed any possible uncertainties that affected congressional decision-making between *Federal Baseball* and *Toolson*.[321] *Toolson*'s entire structure is adjusted to further the Supreme Court's objective of submitting the baseball antitrust exemption to congressional discretion. Contrafactual claims do not reflect the Supreme Court's ignorance of historic events, but instead allow the exemption to best support the Court's intention. The *Toolson* Court thus brought Organized Baseball into congressional jurisdiction but not into the scope of the Sherman Act, because "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation."[322]

D. *FLOOD V. KUHN*

Nevertheless, the Supreme Court faced the "evils in this field" once more when it ruled on *Flood v. Kuhn*,[323] the final case in the baseball trilogy. *Flood* was the sole post-*Toolson* Supreme Court decision on the relationship between baseball and antitrust laws, but was not the last on the baseball antitrust exemption. Just two years after *Toolson*, the Court refused to relieve a theater

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318 BANNER, *supra* note 18, at 121.

319 *See* sources cited *supra* note 289.

320 Matthew S. Akers, *Unmoored from Its Foundation*, 5 AVE MARIA L. REV. 339, 345 (2007) (reviewing BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW (2006)).

321 BANNER, *supra* note 18, at 121.

322 Toolson v. New York Yankees, Inc. 346 U.S. 356, 357 (1953) (per curiam).

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

company from antitrust scrutiny in *United States v. Shubert*.[324] The *Shubert* Court held that *Federal Baseball* exempted "the business of baseball and nothing else" from the Sherman Act.[325] That same year, the Supreme Court held professional boxing subject to federal antitrust scrutiny when it ruled on *United States v. International Boxing Club*.[326] Two years after that, the Court ruled in *Radovich v. National Football League* on the relationship between professional football and federal antitrust laws.[327] Instead of applying baseball's exemption to another team sport, the Court limited *Toolson* and *Federal Baseball* to "the facts there involved, i.e., the business of organized professional baseball."[328] Fourteen years later and six years before *Flood*, the Supreme Court similarly refused to extend the antitrust exemption to professional basketball in *Haywood v. National Basketball Association*.[329] In *Flood*, the Court consolidated these rulings with *Toolson* and expressly laid out the baseball antitrust exemption's scope.[330]

1. Facts

The *Flood* case originated in 1969 when the St. Louis Cardinals traded their center fielder Curt Flood to the Philadelphia Phillies without his prior knowledge or consent.[331] In addition to its legal impact, the case was of significant cultural importance.[332] Flood was an All-Star player close to the peak of his career, drawing more attention to his case than the "the earlier antitrust challenges, which had been brought by obscure players and by a moribund team in a defunct league."[333] Before the lawsuit, Flood was known as one of the best outfielders of the 1960s. He had won the Gold Glove as one of the National League's three best defensive outfielders every year between 1963 and 1969 and had led in putouts in four of those years.[334] Nevertheless, at the end of the 1969 season, Flood was sold in a deal between the St. Louis Cardinals and the Philadelphia Phillies involving six other players.[335] Unlike the others, he refused to play for

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[324] United States v. Shubert, 348 U.S. 222 (1955).

[325] *Id.* at 228.

[326] United States v. Int'l Boxing Club, 348 U.S. 236 (1955).

[327] Radovich v. Nat'l Football League, 352 U.S. 445 (1957).

[328] *Id.* at 451.

[329] Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204 (1971).

[330] *See infra* Section I.D.4.

[331] Flood v. Kuhn, 407 U.S. 258, 264-655 (1972).

[332] *See* BANNER, *supra* note 18, at 187–91 (showing how *Flood* reflects race and labor relations and the generation gap of the 1960s); Tehranian, *supra* note 242, at 954 (finding that *Flood* "both reflected and touched upon the broader civil rights struggle of the time"); *see generally* James R. Devine, *Curt Flood and the Triumph of the Show Me Spirit*, 77 MO. L. REV. 9 (2012) (analyzing the facts that led to *Flood* and its cultural impact).

[333] BANNER, *supra* note 18, at 187.

[334] *Id.* at 188.

[335] *Id.* at 189.

his new team. After an unsuccessful plea to Commissioner Bowie Kuhn to grant him free agency, Flood filed suit.[336] With *Federal Baseball* and *Toolson* in mind, Flood anticipated losses at the lower courts as necessary to argue his case in front of the Supreme Court.[337] His presumptions proved right, and the lower courts ruled in favor of Organized Baseball as represented by Commissioner Kuhn, but the Supreme Court granted certiorari.[338]

2. Flood's Argument

In his brief, Flood stressed the original meaning of *Federal Baseball*. He argued that the Court had not held baseball exempt from antitrust scrutiny because of its unique character, but because in 1922 personal effort did not constitute commerce, and transportation across state borders was in itself insufficient to make an activity interstate.[339] Addressing the argument from *Toolson* that congressional inactivity signaled approval, Flood contended that the Supreme Court had "quickly stripped *Federal Baseball Club* of precedential force, removing the impetus for legislative tinkering with the Sherman Act."[340] He claimed that by implementing a draft system, the MLB had made the reserve system "drastically more severe."[341] At the times of *Federal Baseball* and *Toolson*, baseball players submitted to the reserve system by freely negotiating their first contract. Under the post-1965 draft system, players were bound to the team that drafted them.[342] By prohibiting baseball players from freely negotiating even their entry into the reserve system, Flood argued, Organized Baseball had "substantially diminished whatever precedential value *Toolson* had."[343]

3. Kuhn's Argument

Contrariwise, Kuhn's brief stressed how stare decisis compelled the Supreme Court to uphold the exemption.[344] He supported this argument by citing the Court's precedent in *Radovich* that "'more harm would be done in overruling'" the prior decisions than in adhering to them.[345] Kuhn also claimed that *Federal Baseball* was based on "the unique characteristics and needs of professional

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[336] *Id.* at 189–90.

[337] *Id.* at 192.

[338] Flood v. Kuhn, 407 U.S. 258, 258 (1972).

[339] Brief for Petitioner at 19, Flood v. Kuhn, 407 U.S. 258 (1972).

[340] *Id.* at 29.

[341] *Id.* at 23.

[342] *Id.*

[343] *Id.*

[344] Brief for Respondents at 1–2, 21, Flood v. Kuhn, 407 U.S. 258 (1972).

[345] *Id.* at 28 (citing Radovich v. Nat'l Football League, 352 U.S. 445, 450–51 (1957)).

baseball."[346] He argued that "*Federal Baseball* and *Toolson* have provided baseball clubs with a clear guide for conduct for decades."[347] Continuing congressional silence indicated "affirmative support" for the baseball antitrust exemption, which "was plainly intended to stand unless and until disturbed by Congress."[348]

4. The Opinion of the Court

Again, the Supreme Court ruled in favor of Organized Baseball and upheld the exemption.[349] When Justice Blackmun wrote the majority opinion, he displayed a certain fondness for the game. In fact, he might have revealed a slight bias against Flood and any ruling that would put professional baseball in peril.[350] The presentation of Flood in Part II, entitled "The Petitioner," barely exceeds two pages but spends extensive space accentuating his considerable salaries.[351] It only concedes in a footnote that Flood had the support of the MLBPA.[352] By contrast, Part I, "The Game," is a roughly four-page-long ode to baseball.[353] It includes a list of eighty-eight baseball players, "celebrated for one reason or another, that have sparked the diamond and its environs and that have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season,"[354] and ends with excerpts from poems on the "national pastime,"[355] or, quoting George Bernard Shaw, "the great American tragedy."[356]

In spite of his fervent support for the game of baseball, Justice Blackmun considered its exemption one of the Supreme Court's great tragedies and an "aberration."[357] He based this assessment on a comprehensive review of Supreme Court precedent.[358] Despite the exemption's "inconsistency and illogic," he found the Court bound to the precedent of *Federal Baseball* and

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[346] *Id.* at 24.

[347] *Id.* at 30.

[348] *Id.* at 32–33.

[349] Flood v. Kuhn, 407 U.S. 258, 285 (1972).

[350] *Compare id.* at 260-64 (celebrating the game of baseball) *with id.* at 264-66 (characterizing Flood through his significant salaries).

[351] *See id.*, at 264–66.

[352] *Id.* at 265 n.7.

[353] *See id.* at 260–64.

[354] *Id.* at 262–63.

[355] *Id.* at 263–64 & nn.4–5 (quoting the poems).

[356] *Id.* at 264 n.6 (quoting George Bernard Shaw, THE SPORTING NEWS, May 27, 1943, at 15, col. 4).

[357] *Id.* at 282.

[358] *See id.* at 269–81.

Toolson.[359] Justice Blackmun then outlined certain aspects of the baseball antitrust exemption:

> 1. Professional *Baseball is a business* and it is *engaged in interstate commerce*.
> 2. With *its reserve system enjoying exemption* from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball.
> 3. Even though others might regard this as "unrealistic, inconsistent, or illogical, . . . [i]t is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of *baseball's unique characteristics and needs*.
> 4. Other professional sports operating interstate . . . are not so exempt.
> 5. The advent of radio and television . . . has not occasioned an overruling of *Federal Baseball* and *Toolson*.
> 6. The Court has emphasized that since 1922 baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action . . . The Court, accordingly, has concluded that *Congress as yet has had no intention* to subject baseball's reserve system to the reach of the antitrust statutes. This, obviously, has been deemed to be something other than mere congressional silence and passivity. . . .
> 7. The Court has expressed concerns about the confusion and the *retroactivity* problems that inevitably would result with a judicial overturning of *Federal Baseball*. It has voiced a preference that if any change is to be made, it come by legislative action that, by its nature, is only prospective in operation.
> 8. The Court noted in *Radovich* . . . that the slate with respect to baseball is not clean. Indeed, it has not been clean for half a century.
> . . . 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

[359] *Id.* at 284.

> decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.[360]

Here, the Supreme Court expressly acknowledged for the first time that professional baseball is exempt from federal antitrust laws. What the *Toolson* Court implicitly held,[361] *Flood* explicitly stated: The business of baseball is interstate commerce and therefore within congressional jurisdiction. However, the antitrust exemption results from baseball's unique characteristics and needs. Consequently, it remains unaffected by economic and societal changes such as "[t]he advent of radio and television"[362] and the Court's broader definition of interstate commerce.[363] Baseball's exemption had existed for more than fifty years and is protected by the principle of stare decisis. The Supreme Court would not revoke the exemption because of continuing congressional approval through "positive inaction," which is "something other than mere congressional silence and passivity."[364] Moreover, concerns about retroactivity prevented the Court from modifying the exemption. Because of the prospective nature of legislative action, the Court left changing or abolishing baseball's exemption to Congress.[365]In addition to explicitly stating what *Toolson* had only implied, *Flood* acknowledged Supreme Court precedent beyond the baseball trilogy. Since *Shubert*, the Court had held non-baseball entertainment subject to federal antitrust scrutiny.[366] In *Radovich*, the Court clarified that baseball's exemption did not apply to other professional sports.[367] Thus, *Flood* clearly laid out the aspects of the baseball antitrust exemption and consolidated the entire relevant precedent. Justice Blackmun concluded the majority opinion in *Flood* by quoting the closing statement in *Toolson* and affirming the judgment below on the authority of *Federal Baseball,* "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."[368]

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360 *Id.* at 282–84 (emphases added) (footnotes omitted) (citations omitted).

361 *See supra* Section I.C.4.d.

362 *See Flood*, 407 U.S. at 283.

363 *Cf. id.* at 286 (Douglas, J., dissenting) (finding that between *Federal Baseball* and *Toolson*, "the whole concept of commerce ha[d] changed").

364 *See id.* at 283.

365 *Id.*

366 *See supra* notes 323-24 and accompanying text.

367 *See supra* notes 326-27 and accompanying text.

368 *Flood*, 407 U.S. at 285 (quoting Toolson v. New York Yankees, 346 U.S. 356, 357 (1953) (per curiam)).

In spite of Justice Blackmun's preference for Organized Baseball,[369] one view finds that *Flood* restricted the baseball antitrust exemption to its reserve system.[370] Another view argues that only *Flood* created the exemption because this case *made* law of what before was only *perceived as* law.[371] A third opinion, which is consistent with the Supreme Court's stated intention since *Toolson*, namely, that only Congress should further regulate the baseball antitrust exemption, dispute that *Flood* has legal value. As Mitchell Nathanson highlights in his refutation, that view perceives *Flood* as "little more than a useless appendage to the baseball trilogy . . . and consider[s the case] to add little to what had already been said in *Federal Baseball* and *Toolson*."[372] Similarly, some commentators consider *Toolson* and *Flood* "the most frequently criticized example of excessively strict stare decisis for statutory precedents."[373]

a. Restriction to the Reserve System

The first view rests on three premises. First, the facts involved in *Federal Baseball* and in *Toolson* were limited to the reserve system. Second, *Flood* reduced the precedential value of its predecessors to their facts. Third, *Flood* only held the reserve system exempt from antitrust scrutiny.[374]

Reading *Federal Baseball* in conjunction with the underlying decision from the D.C. Circuit, the restrictive view finds that "[t]he gravamen of Federal Baseball's case was the alleged anticompetitive impact of what is known as the 'reserve clause.'"[375] The facts in *Federal Baseball* were not limited to the reserve system, however: The Terrapins had alleged *several* anticompetitive behaviors by Organized Baseball. The Peace Agreement between Organized Baseball and the

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[369] *Compare supra* notes 352-55 and accompanying text (analyzing Justice Blackmun's view on baseball); *with supra* notes 318–19 and accompanying text (analyzing his view on Curt Flood).

[370] *See* Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993); Joseph A. Kohm, Jr., *Baseball's Antitrust Exemption: It's Going, Going … Gone!*, 20 NOVA L. REV. 1231, 1240–41 (1996); Stephen F. Ross, *Reconsidering* Flood v. Kuhn, 12 U. MIAMI ENT. & SPORTS L. REV. 169, 184 (1994); *see also infra* Section II.A. (refuting the reasoning in *Piazza* and two subsequent rulings that adopted this view).

[371] Nathanson, *supra* note 30, at 44.

[372] *Id.* at 43.

[373] William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1380 (1988); *accord* Champion, *supra* note 241, at 55–56, 64.

[374] Piazza v. Major League Baseball, 831 F. Supp. 420, 436 (E.D. Pa. 1993).

[375] *Id.* at 434 (citing Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Balt., Inc., 269 F. 681, 687–88 (D.C. Cir. 1920)).

Federal teams, not the reserve system, was most central to their claim.[376] In fact, the Court's opinion in *Federal Baseball* contains neither the phrase "reserve clause" nor any other reference to the reserve system.[377] The "*Piazza* . . . court concluded that *Federal Baseball* was really just a reserve clause case, citing the opinion of the lower court."[378] However, "the Supreme Court thought *Federal Baseball* dealt with other issues over and above the reserve clause."[379] Even if the Court incorporated the reserve system into its opinion as one of several anticompetitive behaviors alleged by the Terrapins deemed "unnecessary to repeat,"[380] that system provided neither the sole nor the principle facts of the case.

As Justice Burton acknowledged in his dissent, behavior concerning the reserve system was the disputed conduct in *Toolson*.[381] Nevertheless, the majority in *Toolson* decided "[w]ithout [any] re-examination of the underlying issue[]."[382] Because the Court found the difference between the alleged anticompetitive behaviors in *Toolson* and in *Federal Baseball* irrelevant, the deciding fact could only be whether the conduct in question was part of the "business [of] . . . giving exhibitions of base ball";[383] that is, "the business of providing public baseball games."[384] Additionally, *Toolson* applies with equal force to its two companion cases. Because the plaintiff in *Corbett v. Chandler*,[385] one of those cases, also alleged that Organized Baseball violated federal antitrust laws by monopolizing the business of baseball,[386] reserve system behavior was not the only conduct in question in *Toolson*.[387] Flood noted that the *Radovich* Court, citing *Toolson* and *Federal Baseball* for support, "specifically limit[ed] the rule there established to the facts there involved, *i.e.*, the business of organized professional baseball," not just the reserve system.[388]

Nevertheless, even if the facts in *Federal Baseball* and *Toolson* were not limited to the reserve system, *Flood* could have "stripped from *Federal Baseball* and *Toolson*

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376 *See supra* notes 80-81 and accompanying text (analyzing the Terrapins' allegations).

377 *See* Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922); *see also* Grow, *Business of Baseball*, *supra* note 16, at 599 (finding no reference to the reserve clause in the majority opinion in *Federal Baseball*).

378 Major League Baseball v. Butterworth (*Butterworth II*), 181 F. Supp. 2d 1316, 1324 n.9 (N.D. Fla. 2001).

379 *Id.*

380 *Fed. Baseball*, 259 U.S. at 207.

381 Toolson v. New York Yankees, 346 U.S. 356, 362–64 (1953) (per curiam) (Burton, J., dissenting).

382 *Id.* at 357.

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

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

385 Corbett v. Chandler, 345 U.S. 963 (1953) (mem.) (deciding companion antitrust case), *cert. granted*, 202 F.2d 428 (6th Cir. 1953)(mem.).

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

387 Grow, *Business of Baseball*, *supra* note 16, at 599.

388 *See* Flood v. Kuhn, 407 U.S. 258, 279 (1972) (quoting Radovich v. Nat'l Football League, 352 U.S. 445, 450–52 (1957)).

any precedential value those cases may have had beyond the particular facts there involved" like the *Piazza* court claimed.[389] *Piazza* contrasts with *Federal Baseball*, holding that the business of baseball is not interstate commerce, while *Flood* found that "[p]rofessional baseball is a business . . . engaged in interstate commerce."[390] Under the American legal system's approach of "rule stare decisis", precedent binds the courts to uphold both the results and the rationale of the preceding case.[391] *Flood* "entirely undercut the precedential value of the *reasoning* of *Federal Baseball*."[392] If *Toolson* depended on the reasoning in *Federal Baseball*, *Flood* would have restricted the precedential value of both rulings to their results, that is, the facts involved therein. Thus, *Federal Baseball* needs *Toolson* to remain valid.[393] Because *Toolson* implicitly acknowledged the business of baseball as interstate commerce and modified the holding in *Federal Baseball* accordingly,[394] *Flood* could not affect their combined precedential value: *Flood* restricts neither *Federal Baseball* nor *Toolson*.[395]

Hence, the restrictive view depends on *Flood* holding "that the . . . exemption is limited to the reserve clause."[396] Unlike the earlier opinions, *Flood* "refers to the reserve clause at least four times."[397] Yet, a purely numerical analysis provides little legal information useful in resolving this dispute.[398] *Flood* acknowledges a broader scope of the baseball antitrust exemption at least six times.[399] A quantitative analysis suggests a broader antitrust exemption but is insufficient to determine its scope.

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

390 *Id.* at 435–36 (quoting Flood v. Kuhn, 407 U.S. 258, 282 (1972)) (alteration in original).

391 *Id.* at 437–38.

392 *Id.* at 436.

393 *Supra* Section I.C.4.a.

394 *Supra* Section I.C.4.b.

395 *See, e.g.,* Major League Baseball v. Crist, 331 F.3d. 1177, 1183 (11th Cir. 2003); Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 541 (7th Cir. 1978); *see also* Grow, *Business of Baseball*, *supra* note 16, at 598–600 (arguing that the *Piazza* court erred by restricting *Federal Baseball* and *Toolson* to the reserve system).

396 *Piazza*, 831 F. Supp. at 436.

397 *Id.* at 437.

398 *See* Grow, *Business of Baseball*, *supra* note 16, at 593 ("In fact, one could just as easily create a list of passages from *Flood* that indicate that the exemption broadly applies to the business of baseball.").

399 Flood v. Kuhn, 407 U.S. 258, 274 (1972) (recognizing *Toolson*'s emphasis "that Congress had no intention to include baseball within the reach of federal antitrust laws"); *id.* at 275 (quoting United States v. Shubert, 348 U.S. 222, 228 (1955)); *id.* at 279 ("[W]e now specifically limit the rule [*Federal Baseball* and *Toolson*] established to . . . the business of organized professional baseball.")(quoting Radovich v. Nat'l Football League, 352 U.S. 445, 450–52 (1957)); *id.* at 283 (stating how the Court has concluded Congress has never shown an intention

Therefore, the restricting interpretation quotes *Flood* that baseball's "*reserve system* enjoy[s] exemption from the federal antitrust laws."[400] Supposedly, this means that *only* the reserve system enjoys antitrust exemption pursuant to *Flood*. Yet, such an interpretation "read[s] too much into *Flood*'s few passing references to baseball's reserve system."[401] Because the facts in *Flood* originated in the reserve system, that system is also the starting point for the majority opinion.[402] Still, it "was merely the incident-driven catalyst for the Court's inquiry."[403] *Flood* begins at the reserve system but concludes by citing *Toolson* and excluding "'the business of baseball'" from "'the scope of the federal antitrust laws.'"[404] The *Flood* Court's review of the relevant precedent finds *Shubert* "meticulously spelling out"[405] that "*Federal Baseball* . . . was dealing with the business of baseball."[406] *Flood* considers the reserve system merely one part of that business.[407] Moreover, the Court approvingly cited *Salerno v. American League of Professional Baseball Clubs*,[408] a case that involved the employment terms of umpires, not the reserve system.[409] *Flood* also cited *State v. Milwaukee Braves, Inc.*,[410] a case involving franchise relocation, as correctly applying the baseball exemption.[411]

b. Creating the Exemption

The second view acknowledges that *Federal Baseball* did not create an antitrust exemption.[412] Because the exemption "did not originate with *Federal Baseball* and was not explicitly created within *Toolson* either,"[413] this view holds that the *Flood* Court exempted baseball from federal antitrust scrutiny.[414] Yet, while *Toolson* created no explicit antitrust exemption, the Court's instrumentalist approach

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of subjecting the reserve system to antitrust law); *id.* at 284 (explaining how consistency demands a broad view of the exemption and that Congress, not the courts, should remedy this view otherwise); *id.* at 285 ("Congress had no intention of including the business of baseball within the scope of . . . federal antitrust laws.") (quoting *Toolson*, 346 U.S. at 357).

400 *Piazza*, 831 F. Supp. at 436 (quoting *Flood*, 407 U.S. at 282).

401 Grow, *Business of Baseball*, *supra* note 16, at 593.

402 *See id.*

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

404 Flood v. Kuhn, 407 U.S. 258, 285 (1972) (quoting *Toolson*, 346 U.S. at 357).

405 *Id.* at 275.

406 *Id.* (quoting United States v. Shubert, 348 U.S. 222, 228 (1955)).

407 *Id.* (examining *Shubert,* 348 U.S. at 228).

408 *Id.* at 268 n.9 (citing Salerno v. Am. League of Prof'l Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970)).

409 *Salerno*, 429 F.2d 1003.

410 State v. Milwaukee Braves, Inc., 144 N.W.2d 1 (Wis. 1966), *overruled by* Olstad v. Microsoft Corp., 700 N.W.2d 139 (Wis. 2005).

411 *Flood*, 407 U.S. at 272 n.13, 284 n.21 (citing *Milwaukee Braves*, 144 N.W.2.d 1).

412 *See* Nathanson, *supra* note 30, at 20.

413 *Id.* at 41.

414 *See id.* at 44 (considering *Flood* "a decision that did everything most people by then had assumed *Federal Baseball* had already done").

allowed the creation of an implicit exemption.[415] Since *Flood* could not establish an exemption that already existed, the second interpretation is invalid.

c. Excessive Stare Decisis

The view that stresses the importance of stare decisis for *Flood* is correct in that that the case brings few legal changes. Still, the existing variants ignore the Supreme Court's intentions after *Toolson*. *Flood* is not useless, as some commentators have claimed, nor is the principle of stare decisis the entire reason behind the majority opinion. Understanding *Flood* requires an acknowledgment of the majority opinion's position in the framework of the baseball trilogy and the general context of the Burger Court.

Like the Warren Court before it, the Burger Court generally "misused precedent, failed to develop a principle of law for neutral application, and failed to provide guidance to lower courts when reaching the holding of the case."[416] Considering that the Court could not create an exemption in *Flood* that had existed since *Toolson*, the opinion indeed appears to be useless. Yet, in *Flood*, the Court expressed for the first time what it had previously only implicitly held and provided the lower courts with guidance on the holding of *Toolson*. Since "[t]he Supreme Court sets broad policy,"[417] its guidelines are by nature more general than lower courts' opinions answering single questions. The *Flood* guidelines allow the lower courts to delimit the baseball antitrust exemption's scope.[418] Even if the *Flood* Court did not develop a neutral principle of law, it did present the precedent in the most neutral way possible. *Toolson* established the principle that professional baseball is exempt from antitrust scrutiny. A peculiar principle, as baseball's exemption is as neutral as an exemption can be. An exemption for all professional team sports would not have been less biased against professional boxing. Exempting all professional sports from antitrust scrutiny would not be neutral towards other forms of entertainment.[419] Congressional modifications notwithstanding,[420] the exemption applies to the major and minor leagues and

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[415] *See supra* Section I.C.4. (analyzing the majority opinion in *Toolson*).

[416] Erwin O. Switzer, *Applying Criticisms of the Warren Court to the Burger Court: A Case Study of* Richmond Newspapers, Inc. v. Virginia, 5 U. ARK. LITTLE ROCK L. REV. 203, 228 (1982).

[417] Judith M. Stinson, *Why Dicta Becomes Holding and Why it Matters*, 76 BROOK. L. REV. 219, 221 (2010).

[418] *See infra* Part II (presenting the scope of the antitrust exemption as defined by the lower courts).

[419] *See supra* notes 323-28 and accompanying text (analyzing how the Supreme Court held a theater company, professional boxing, professional football, and professional basketball subject to antitrust scrutiny).

[420] *See infra* notes 440–48 and accompanying text (analyzing how Congress limited the scope of baseball's exemption through the Curt Flood Act of 1998).

all of their respective teams alike and provides a neutral principle within its narrow scope.

Ostensibly, a systematic analysis of the Supreme Court's unique position and function in the legal system paints *Flood* as an example of *excessively* strict stare decisis. The Court has acknowledged that stare decisis provides reliability and stability that are of "fundamental importance to the rule of law."[421] Consequently, it considers its own prior decisions "entitled to deference or a presumption of correctness."[422] Nevertheless, the Supreme Court has the power and occasionally the obligation to overrule its own precedent.[423] Deciding *Flood* exclusively by the principle of stare decisis would arguably have been excessive. Furthermore, Justice Blackmun, who wrote the majority opinion in *Flood*, "was hardly one to stick dogmatically to precedent."[424] Shortly after *Flood*, he authored the majority opinion in *Roe v. Wade* and constituted a conditional "right of personal privacy" that "includes . . . abortion."[425] Since Justice Blackmun had been struggling with *Roe* for months, *Flood* presented "a welcome respite from his troubles with the constitutional law of abortion."[426] Eventually, Justice Blackmun would admit that *Flood* was his favorite opinion to write.[427] Justice Douglas may have considered the exemption "a derelict in the stream of the law" and a "mistake[]."[428] and Justice Marshall may have called the exemption an "error" the Court must "correct."[429] Justice Blackmun, however, upheld the exemption not because of a dogmatical adherence to the principle of stare decisis, but out of fear "that if the antitrust laws were applied to baseball, its unique position as the national pastime would be undermined."[430] While baseball's reserve system may have been akin to slavery,[431] Justice Blackmun found its antitrust exemption was not a necessary evil but, in fact, a positive good.

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421 Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991) (citing Welch v. Texas Dep't of Highways and Public Transp., 483 U.S. 468, 494 (1987)).

422 Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 156 (2006).

423 *See* Flood v. Kuhn, 407 U.S. 258, 292–93 (1972) (Marshall, J., dissenting); Stinson, *supra* note 416, at 242–43; Kerlin's Lessee v. Bull 1 U.S. 175, 178 (1786) (providing the courts with discretion regarding the value of precedent); Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U.L. REV. 1069, 1069–70 (2006) (refuting Chief Justice Roberts's analogy during his confirmation hearing that Justices had to apply existing rules like baseball umpires).

424 Tehranian, *supra* note 242, at 963–64.

425 Roe v. Wade, 410 U.S. 113, 154 (1973).

426 BANNER, *supra* note 18, at 216.

427 *Id.* at 211.

428 Flood v. Kuhn, 407 U.S. 258, 286, 288 (1972) (Douglas, J., dissenting).

429 *Id.* at 292–93 (Marshall, J., dissenting).

430 BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 190 (1979).

431 *See* sources cited *supra* note 73

Hence, he engaged with his list of famous baseball players rather than responding to the dissents of other justices, who argued for its abolition.[432]

d. Doctrinal Changes

Justice Blackmun's personal interest in baseball and its influence on the majority opinion in *Flood* finds further evidence in a historical analysis of the Supreme Court's prospective doctrine. Until the 1960s, all court decisions had retroactive effect.[433] Consequently, the *Toolson* Court changed the character of *Federal Baseball* instead of overruling the precedent in 1953.[434] When, in 1965, the Court ruled on *Linkletter v. Walker*,[435] it created a balancing test that allowed judicial rulemaking with prospective effect in matters of criminal law.[436] In 1971, when ruling on *Chevron Oil Co. v. Huson*,[437] the Court created a similar test for civil law cases.[438] While the Court would reinstate full retroactivity in 1987 for decisions on criminal law,[439] it refuses to apply the same reasoning to civil law decisions.[440] Because the justices have failed to agree upon a rationale against prospective judicial lawmaking in civil law decisions,[441] state courts retain that power.[442] Nevertheless, at least since 1993, when the Supreme Court ruled on *Harper v. Virginia Department of Taxation*,[443] all federal rulings on civil cases have retrospective effect.[444] Thus, if the Supreme Court heard a case on the baseball antitrust exemption, it would face the same retrospectivity concerns that the

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[432] *See* BANNER, *supra* note 18, at 210–11.

[433] *See* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1059 (1997).

[434] *See supra* Section I.C.4. (analyzing the *Toolson* opinion).

[435] Linkletter v. Walker, 381 U.S. 618 (1965).

[436] *See id.* at 629.

[437] Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

[438] *See id.* at 106–07.

[439] *See* Griffith v. Kentucky, 479 U.S. 314 (1987).

[440] *See* Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 197 (1990) (plurality opinion) (finding "important distinctions between the retroactive application of civil and criminal decisions").

[441] Fisch, *supra* note 432, at 1062.

[442] *See* Richard S. Kay, *Retroactivity and Prospectivity of Judgements in American Law*, 62 AM. J. COMP. L. SUPP. 37, 41–45, 50 (2014).

[443] Harper v. Va. Dept. of Tax'n, 509 U.S. 86 (1993).

[444] *Id.* at 97; *see also* Landgraf v. USI Film Prods., 511 U.S. 244, 278–79 n.32 (1994) (finding that *Harper* "established a firm rule of retroactivity"); *see also* Kay, *supra* note 441, at 50 (highlighting that prospective judicial lawmaking was only permissible for "state courts applying state law"). *But see* Lee-Ford Tritt, *Moving Forward by Looking Back: The Retroactive Application of* Obergefell, 2016 WIS. L. REV. 873, 917 (finding the Supreme Court to have retroactively created federal rights in 2015).

Toolson Court had to face in 1953 without the option to find baseball's exemption obsolete.[445]

As an aspect of electronic commerce (e-commerce), the MLB's online services contribute to the significant societal and economic changes of the Internet era.[446] Yet, the business of baseball does not change when fans watch a game online or on television.[447] Therefore, the Internet era did not affect the character of the business of baseball and did not make the antitrust exemption obsolete. The Supreme Court could neither have prospectively revoked the exemption when it ruled on *Toolson* in 1953 nor would it have that power if it granted certiorari on a case pertaining to the matter under the currently prevailing doctrine.

However, when the Supreme Court ruled on *Flood* in 1972, it had the power, at least hypothetically, to abolish the exemption without retrospective effect. Under the test the Court had laid out in *Huson*, this would have required *Flood* to first "establish a new principle of law, either by overruling clear past precedent . . . or by deciding an issue of first impression."[448] Second, the Court would have had to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[449] Finally, if a Supreme Court decision "could produce substantial inequitable results if applied retroactively, there is ample basis . . . for avoiding the 'injustice or hardship' by a holding of nonretroactivity."[450] By abolishing the baseball antitrust exemption, the *Flood* Court would have overruled the clear precedent of *Federal Baseball* and *Toolson* pursuant to the first factor. The MLB and its teams had, since 1922, also been allowed "with full and continuing congressional awareness . . . to expand unhindered by federal legislative action."[451] Prior to *Flood,* since the MLB could at "most . . . rely on the law as it then was," subjecting its teams retroactively to the Sherman Act would have been "anomalous indeed."[452] "The purpose of [that] Act is not to protect businesses from the working of the market; it is to

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[445] *See supra* notes 304-08 and accompanying text (analyzing how a Court with only retrospective rulemaking power could decide on an existing baseball antitrust exemption).

[446] *See* Carlos A. Primo Braga, *E-Commerce Regulation: New Game, New Rules?*, 45 Q. REV. ECON. & FIN. 541, 542 (2005) (analyzing the impact of e-commerce on the effects of the "'networking revolution'").

[447] *Cf.* Klinker, *supra* note 42, at 901–05 (comparing the MLB's streaming service to its broadcasting policy).

[448] Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971) (citations omitted).

[449] *Id.* at 106–07 (quoting Linkletter v. Walker, 381 U.S. 618, 629 (1965)).

[450] *Id.* at 107 (quoting Cipriano v. City of Houma, 395 U.S. 701, 706 (1969)).

[451] Flood v. Kuhn, 407 U.S. 258, 283 (1972). *But see supra* Section I.C.4. (arguing that the MLB could rely on congressional inaction only since 1953).

[452] *Chevron*, 404 U.S. at 107.

protect the public from the failure of the market. . . . It does so not out of solicitude for private concerns but out of concern for the public interest."[453] Retroactive application of the Sherman Act to the MLB would have furthered the private interests of baseball players but may have potentially deprived the public of professional baseball games. Contrary to the Act's purpose, it would have caused the baseball market to fail.[454] The second factor would also argue in favor of abolishing the exemption prospectively. The retroactive effects would finally be "substantial[ly] inequitable"[455] by holding the MLB accountable for violating obligations "at a time when [it] could not have known . . . that the law imposed [them] upon [it]."[456] Hence, the 1972 legal doctrine would have allowed the Supreme Court to abolish the baseball antitrust exemption with prospective effect.

In his dissent, Justice Marshall advocated for this approach,[457] citing prior instances of the Court overruling its earlier statutory interpretation with prospective effect.[458] Justice Blackmun's reasons for avoiding the question of whether the *Flood* Court could prospectively revoke the exemption by referring to the Court's earlier retroactivity concerns,[459] namely, those in the pre-*Huson* decisions in *Toolson* and *Radovich*,[460] are lost to time. His obvious fondness for professional baseball and his interest in upholding baseball's exemption to preserve the game's unique status suggests he might have avoided the subject to prevent other justices from acknowledging what Justice Marshall propounded. From this viewpoint, Justice Blackmun's decision not to engage with any dissent directed his colleagues' focus away from that option. Even if other justices,

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[453] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993); *accord* Apex Hosiery Co. v. Leader, 310 U.S. 469, 491–93 (1940).

[454] *See supra* note 197-98 and accompanying text (analyzing retroactive application of the Sherman Act to Organized Baseball in 1953).

[455] *Huson*, 404 U.S. at 108 (quoting *Cipriano*, 395 U.S. at 706).

[456] *Id.*

[457] Flood v. Kuhn, 407 U.S. 258, 293 (1972) (Marshall, J., dissenting).

[458] *Id.* at 293, n.5 (quoting United States v. Estate of Donnelly, 397 U.S. 286, 295 (1970)) (citing Simpson v. Union Oil Co., 377 U.S. 13, 25 (1964)).

[459] *See id.* at 283.

[460] *Id.* at 273–74, 284 (citing Toolson v. New York Yankees, 346 U.S. 356, 357 (1953)); *id.* at 278–79 (quoting Radovich v. Nat'l Football League, 352 U.S. 445, 450–52 (1957)).

including Chief Justice Burger, considered the ode to baseball obtrusive,[461] it still attracts attention among.[462]

Then again, "in the good old days, when retroactivity was simple,"[463] Chief Justice Hughes had already considered it "among the most difficult [questions] of those which have engaged the attention of" the Court.[464] Consequently, not only had Justice Blackmun abstained from original retroactivity considerations in the majority opinion, but Chief Justice Burger and Justice Douglas ignored the issue entirely.[465] Since Justice Blackmun had joined the Court just recently,[466] he might not have recognized the doctrinal changes between *Toolson* and *Flood*. Writing the majority opinion might have simply allowed for intellectual recreation from the demands of *Roe* and an opportunity to "play[] with baseball cards."[467] From this viewpoint, Justice Blackmun simply overlooked Justice Marshall's single remark to prospective judicial rulemaking.

Both explanations—the young justice outwitting his colleagues to preserve his beloved game or that game granting him a break from a complex and controversial opinion—would explain why Justice Blackmun later said *Flood* was his favorite opinion to write.[468] The former would provide evidence for structure behind the baseball trilogy that actively preserves baseball's exemption. The latter would indicate the Court at least passively ignored any option that allowed its revocation of that exemption. In any case, Justice Blackmun's personal interest in baseball preserved the exemption at a time when the Court could not only have found it obsolete, but also abolished it without retroactive effect.

e. Systematic Interpretation

That personal interest finally explains Justice Blackmun's rejection of Justice Stewart's advice to follow the lead set by *Toolson* and write a per curiam decision.[469] A per curiam stressing that only Congress could abolish the exemption without retroactive effect "would have been a respectable argument that would not have been open to the same sort of ridicule as the opinion

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461 *See Flood*, 407 U.S. 258 (Burger, C.J. concurring in all but part I) (White, J., concurring in all but part I); BANNER, *supra* note 18, at 210 (showing that Justice Blackmun would later note that Chief Justice Burger and Justice White perhaps considered the ode to baseball "beneath the dignity of the Court"); *id.* at 209 (finding some justices "were appalled. . . with the paean to baseball").

462 *Cf.* Roger I. Abrams, *Blackmun's List*, 6 VA. SPORTS & ENT. L.J. 181 (2007) (writing an entire article on the list of baseball players in the "ode" as late as 2007).

463 John B. Corr, *Retroactivity: A Study in Supreme Court Doctrine as Applied*, 61 N.C. L. Rev. 745, 745 (1983).

464 Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940).

465 *See Flood*, 407 U.S. at 285–86 (Burger, C.J., concurring in all but Part I); *see also id.* at 286–88 (Douglas, J., dissenting).

466 BANNER, *supra* note 18, at 206, 215.

467 WOODWARD & ARMSTRONG, *supra* note 429, at 190.

468 BANNER, *supra* note 18, at 211.

469 *See* BANNER, *supra* note 18, at 207.

Blackmun actually wrote."[470] This kind of opinion would have left Congress with a clear mandate to revoke the exemption, which *Flood* did as well,[471] and a per curiam would have provided no better reason for Congress to act than did *Flood*. However, if the exemption was to survive post-*Flood*, Justice Blackmun's approach provided the better long-term solution because of a simple, mostly overlooked advantage: the opinion was comprehensive.

Chief Justice Burger and Justice White might have scorned the ode to baseball in Part I.[472] Yet, the same panache that had Justice Blackmun compiling a list of players also led him to extensively lay out all legal aspects and characteristics of the antitrust exemption.[473] In *Federal Baseball*, the Supreme Court had not created any exemption.[474] In *Toolson*, the Court had created baseball's antitrust exemption through a complex system of interdependent implications.[475] While these implications did exempt baseball from federal antitrust scrutiny, they did not require the lower courts to exempt *only* baseball from the Sherman Act. Thus, the Supreme Court clarified via a series of rulings starting with *Shubert* and culminating in *Radovich* and *Haywood* that no other kind of entertainment, not even other professional team sports, would be exempt from the antitrust laws.[476]

In *Flood*, the Court expressively laid out what *Toolson* had only implied. Moreover, *Flood* consolidated all rulings on the baseball antitrust exemption. Thus, even if the *Flood* Court made no law, it provided the lower courts with a single opinion that provided reliable guidelines for applying the exemption. Because the *Toolson* Court never intended to create a permanent exemption for professional baseball, *Flood* also stressed that "[a]s long as the Congress continues to acquiesce [the justices] should adhere to— but not extend— the" baseball antitrust exemption.[477] *Flood* logically concludes the baseball trilogy by expressing the general guidelines for the exemption's scope and stressing the Court's desire for Congress to revoke the exemption prospectively.

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[470] *Id.* at 215.

[471] Flood v. Kuhn, 407 U.S. 258, 285 (1972); *id.* at 286 (Burger, C.J., concurring in all but Part I).

[472] *Cf. id.* at 258, 285–86 (Burger, C.J., concurring in all but Part I and White, J., concurring in all but Part I).

[473] *See id.* at 269–85.

[474] *Supra* Section I.A.4.

[475] *See supra* Section I.A.4.d. (analyzing these implications).

[476] *See supra* notes 323-28 and accompanying text.

[477] Flood v. Kuhn, 407 U.S. 258, 279 (1972).

III. APPROACHES BY THE LOWER COURTS

Since *Flood*, the Supreme Court has adhered to its position of leaving any future modifications to the baseball antitrust exemption to Congress and has denied any plea for certiorari on cases involving the relationship between professional baseball and the Sherman Act.[478] The ball is now, so to speak, in the legislative court.

The only definite congressional action on the issue of the exemption was the Curt Flood Act.[479] This Act was not a result of independent congressional deliberations but of collective lobbying by the MLB and the MLBPA.[480] Consequently, the Curt Flood Act only affects MLB players,[481] granting them "the same rights under the antitrust laws as. . .other professional athletes, e.g., football and basketball players" possess.[482] The nonstatutory labor exemption restricts these rights, however, by preventing unionized professional sports players from bringing antitrust suits over mandatory collective bargaining matters against their respective leagues.[483] While a list of particular subjects left unaffected by the Curt Flood Act initially created some confusion among legal scholars,[484] the Act must "be read neutrally with regard to baseball's historic antitrust exemption in all other respects" than MLB player employment terms.[485] Because even these players would have to "decertify," that is, dissolve, the MLBPA to gain standing in antitrust cases, the Act's legal impact is limited.[486] "[T]he ultimate fate of baseball's antitrust exemption remains in the hands of the judiciary, just as Congress intended."[487]

Hence, with the Supreme Court and Congress unwilling to act further upon the exemption, the inferior courts had to develop benchmarks to delimit their scope. To this end, the courts have employed three distinct approaches, relieving

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[478] *E.g.*, Right Field Rooftops, LLC v. Chicago Cubs Baseball Club, LLC, 870 F.3d 682 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 2621 (2018); City of San Jose v. Office of the Com'r of Baseball, 776 F.3d 686 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 36 (2015).

[479] Curt Flood Act of 1998, 15 U.S.C. § 27a (1998) (current version at 15 U.S.C. § 26b (2012)).

[480] Nathaniel Grow, *The Curiously Confounding Curt Flood Act*, 90 TUL. L. REV. 859, 879–88 (2016).

[481] 15 U.S.C. § 26(a).

[482] 15 U.S.C. § 26b(d), Pub. L. No. 105–297, 82, 112 Stat. 2824 (1998).

[483] *E.g.*, Brown v. Pro Football, Inc., 518 U.S. 231 (1996).

[484] 15 U.S.C. §§ 12-27 (2006); *see* Nathaniel Grow, *Reevaluating the Curt Flood Act of 1998*, 87 NEB. L. REV. 747, 752–58 (2008) (analyzing the legal effects of the Act and evaluating different assessments of its scope).

[485] Grow, *Curiously Confounding*, *supra* note 479, at 900; *accord* Selig & Mitten, *supra* note 46, at 1185–86.

[486] Grow, *Curiously Confounding*, *supra* note 479, at 878–79.

[487] *Id.* at 901.

the reserve system,[488] the entire business of baseball,[489] or baseball's unique characteristics and needs from federal antitrust scrutiny.[490]

A. RESERVE SYSTEM

The most restrictive interpretation of the baseball antitrust exemption limits its scope to baseball's reserve system. Because the MLB and MLBPA have negotiated away the reserve system for major league players, the restrictive approach limits the exemption to the MiLB reserve system. If the MLB and MLBPA would ever reinstate the reserve system, the scope of the baseball exemption under the restrictive interpretation would not change because the Curt Flood Act grants MLB players antitrust protection.

1. Cases

The restrictive interpretation was first applied by the court in *Piazza v. Major League Baseball*,[491] a case that arose when an investment group led by Pennsylvanian businessmen Vincent Piazza and Vincent Tirendi tried to buy the San Francisco Giants for $115 million, intending to move them to Tampa Bay.[492] After the background check on Piazza and Tirendi, the MLB rejected the proposal, selling the Giants to a different investment group for $100 million.[493] Piazza and Tirendi sued the MLB, claiming, *inter alia*, violations of 15 U.S.C §§ 1–2.[494] The MLB moved to dismiss this suit by partially asserting that the baseball trilogy exempted them from antitrust scrutiny.[495]

The *Piazza* court held that this exemption only applies to the reserve system,[496] thereby dismissing the Seventh Circuit's ruling from *Charles O. Finley & Co. v. Kuhn*,[497] considering it "bad law and therefore of no precedential value."[498] It stressed that "[n]either *Finley* nor any other case cited by [Organized Baseball]. . . has undertaken such an analysis of the Supreme Court's baseball

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[488] *See infra* Section II.A.

[489] *See infra* Section II.B.

[490] *See infra* Section II.C.

[491] Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993).

[492] *Id.* at 422.

[493] *Id.* at 422–23.

[494] *Id.* at 423–24.

[495] *Id.* at 421.

[496] *Id.*

[497] Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir. 1978), *cert. denied*, 439 U.S. 876 (1978); *see infra* Section II.B.1. (analyzing *Finley*).

[498] Deborah L. Spander, *The Impact of* Piazza *on the Baseball Antitrust Exemption*, 2 UCLA ENT. L. REV. 113, 122 (1995).

trilogy" as the *Piazza* court had.[499] Because the *Piazza* court found that the Supreme Court only exempted the reserve system from antitrust scrutiny, it held the exemption inapplicable to the current case[500] and consequently dismissed the MLB's motion.[501]

At least two courts followed the *Piazza* court's narrow application. The failed relocation of the Giants to Tampa Bay that sparked *Piazza* also resulted in the case of *Butterworth v. National League of Professional Baseball Clubs* (*Butterworth I*),[502] in which the Florida Supreme Court considered whether Florida's Attorney General could investigate the MLB for antitrust violations and issue civil investigative demands in this regard.[503] The court in *Butterworth I* followed *Piazza* against the "great weight of federal cases regarding the scope of the exemption" because "none of the other cases [had] engaged in such a comprehensive analysis of *Flood* and its implications."[504] Other failed attempts to bring an MLB team to Tampa Bay resulted in *Morsani v. Major League Baseball*,[505] also ruling that baseball's exemption was limited to its reserve system, citing the Florida Supreme Court's binding authority in *Butterworth I*.[506]

2. Analysis

Morsani relied on *Butterworth I*'s binding authority, which in turn followed the reasoning in *Piazza*.[507] Therefore, the validity of all three rulings and the restrictive approach depends on the quality of *Piazza*'s rationale. *Butterworth I* might correctly find *Piazza* to be the first comprehensive judicial analysis of *Flood*. *Piazza* might even correctly find that none of the "case[s] cited by [Organized] Baseball . . . ha[d] undertaken such an analysis of the Supreme Court's baseball trilogy."[508] A close examination of the *Piazza* reasoning however, demonstrates why no other court has undertaken such an analysis. *Piazza*'s comprehensiveness allowed the court to thoroughly misunderstand the baseball trilogy.

The *Piazza* court correctly finds that "[i]n each of the three cases [in the baseball trilogy,] the factual context involved the reserve clause."[509] Beyond that, it errs in its assessment of each baseball trilogy case and the interrelationships

499 *Piazza*, 831 F. Supp. at 438.

500 *Id.*

501 *Id.* at 441.

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

503 *Id.* at 1022.

504 *Id.* at 1025.

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

506 *Id.* at 657.

507 Grow, *Business of Baseball*, *supra* note 16, at 592.

508 Piazza v. Major League Baseball, 831 F. Supp. 420, 438 (E.D. Pa. 1993).

509 *Id.* at 435–36.

therein.[510] Therefore, in *McCoy v. Major League Baseball*,[511] a federal court ruled against restricting the exemption to the reserve system. In 2003, when the Eleventh Circuit upheld a broader scope of the exemption in *Major League Baseball v. Crist*,[512] the restrictive interpretation became obsolete.[513] The reserve system was held to be the relevant activity in *Flood* and part of baseball's antitrust exemption; it does not define that exemption's scope.

B. THE BUSINESS OF BASEBALL

Opposite to the restrictive view of *Piazza* is the opinion that the baseball antitrust exemption covers the entire business of baseball. Since *Flood*, a majority of lower courts have followed this approach.[514] Notably, all federal appellate courts have defined the exemption's scope to include the whole business of baseball.[515] Yet, if the business of baseball determines the scope of the baseball antitrust exemption, the courts must outline this business. While some courts only hold the business of baseball exempt from antitrust laws,[516] others have defined the scope of that business regarding single issues.[517]

1. Cases

In *Portland Baseball Club, Inc. v. Kuhn*,[518] the Ninth Circuit simply cited *Flood* to find that "the plaintiff's claim for relief under the antitrust laws was properly dismissed."[519] The Seventh Circuit defined the exemption's scope in *Charles O. Finley & Co. v. Kuhn*[520] as "the business of baseball, not any particular facet of

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[510] *See supra* Section I.D.4.a. (refuting the *Piazza* court's interpretation of *Flood*).

[511] McCoy v. Major League Baseball, 911 F.Supp. 454 (W.D. Wash. 1995); *see also infra* Section II.B.1. (analyzing the *McCoy* case).

[512] Major League Baseball v. Crist, 331 F.3d 1177 (11th Cir. 2003).

[513] *See* CARFAGNA, *supra* note 7, at 92; *see also infra* notes 543-545 and accompanying text (analyzing *Crist*).

[514] Grow, *Business of Baseball*, *supra* note 16, at 581.

[515] Selig & Mitten, *supra* note 46, at 1184 (citing a series of cases at 1184–85 n.72).

[516] *See e.g.* Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 541 (7th Cir. 1978), *cert. denied*, 439 U.S. 876 (1978) (defining the scope of the exemption as "the business of baseball").

[517] *See e.g.* Minn. Twins P'ship v. State, 592 N.W.2d 847, 856 (Minn. 1999) (holding franchise sales and relocations to be part of the business of baseball and therefore exempt from antitrust scrutiny); *see generally infra* Section II.B.1 (analyzing cases that were decided according to the business-of-baseball approach).

[518] Portland Baseball Club, Inc. v. Kuhn, 491 F.2d 1101 (9th Cir. 1974) (per curiam).

[519] *Id.* at 1103 (citing Flood v. Kuhn, 407 U.S. 258 (1972)).

[520] *Finley*, 569 F.2d at 527.

that business."[521] The *Finley* case arose when Charles O. Finley alleged, *inter alia*, violations of federal antitrust law after Commissioner Bowie Kuhn had rejected a mid-season sale of several players from the Oakland Athletics, the Boston Red Sox, and New York Yankees.[522] Finley tried to avoid dismissal by arguing that *Flood* restricted the baseball antitrust exemption to the reserve system.[523] The court remarked in a footnote that "this exemption does not apply wholesale to all cases which may have some attenuated relation to the business of baseball."[524] However, the court rejected Finley's argument that the exemption only applied to the reserve system, finding that "it appears clear from the entire opinions in the three baseball cases, as well as from *Radovich*, that the Supreme Court intended to exempt the [entire] business of baseball . . . from the antitrust laws."[525] In *McCoy v. Major League Baseball*,[526] a class action antitrust lawsuit fans and owners of businesses near MLB stadia filed after the 1994 players strike,[527] another federal court ruled in favor of this broad interpretation of the baseball antitrust exemption.[528]

League structure is the single most common issue in antitrust claims against professional baseball.[529] The MLB controls not just franchise expansion but also the sale, relocation, and merger of existing teams.[530] After the National Association of Professional Baseball Leagues (NAPBL) retracted its conditional approval of a purchase and relocation of the minor league Charlotte Knights, the Eastern District of Louisiana ruled in *New Orleans Pelicans Baseball, Inc. v. National Association of Professional Baseball Leagues, Inc.*[531] that the Supreme Court had exempted the business of baseball from federal antitrust scrutiny and that franchise relocation was part of this business.[532] In *Minnesota Twins Partnership v. State*,[533] another case involving franchise sales and relocations, the Minnesota Supreme Court acknowledged that "the *Flood* opinion is not clear about the

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[521] *Id.* at 541.

[522] *Id.* at 531.

[523] *Id.* at 540.

[524] *Id.* at 541 n.51.

[525] *Id.* at 541.

[526] McCoy v. Major League Baseball, 911 F.Supp. 454 (W.D. Wash. 1995).

[527] *Id.* at 455–56.

[528] *Id.* at 457 (quoting Flood v. Kuhn, 407 U.S. 258 (1972)).

[529] Grow, *Business of Baseball*, *supra* note 16, at 606–07; *see also* Mark Nagel et. al., *Major League Baseball Anti-Trust Immunity: Examining the Legal and Financial Implications of Relocation Rules*, 11–15 (Munich Pers. RePEc Archive, Paper No. 25799, 2010), https://mpra.ub.uni-muenchen.de/25799/1/MPRA_paper_25799.pdf (analyzing "league relocation cases")(last visited Oct. 12, 2019).

[530] *See generally* CARFAGNA, *supra* note 7, at 90–94 (examining the league structure); *see also generally* Nagel et. al, *supra* note 528, at 15–21 (analyzing the "history of MLB territorial rules").

[531] New Orleans Pelicans Baseball, Inc. v. Nat'l Ass'n of Prof'l Baseball Leagues, Inc., No. 93-253, 1994 WL 631144 (E.D. La. Mar. 1, 1994).

[532] *Id.* at *8–9.

[533] Minn. Twins P'ship v. State, 592 N.W.2d 847 (Minn. 1999).

extent of the conduct that is exempt from antitrust laws."[534] Nevertheless, it found franchise sales and relocations unquestionably part of the business of baseball and dismissed the case with the interpretation that the entire business is exempt from antitrust scrutiny.[535]

Beyond these aspects unquestionably in the business of baseball, the courts also had to engage with third-party contracts and the exemption's relation to state antitrust laws. In *State v. Milwaukee Braves, Inc.*,[536] the Wisconsin Supreme Court held that the league's structure was not subject to those laws.[537] Because of the Supremacy Clause,[538] the baseball antitrust exemption precludes the states from subjecting professional baseball to their respective antitrust laws.[539] When the Florida Attorney General issued Civil Investigative Demands due to potential violations of antitrust law by the MLB's contraction of two franchises, the case of *Major League Baseball v. Butterworth* (*Butterworth II*) began.[540] The court comprehensively analyzed the baseball trilogy and Supreme Court rulings that prevented other sports leagues from invoking the baseball antitrust exemption, concluding that this exemption relieved the business of baseball from federal and state antitrust laws.[541] Then, the court found the number of clubs in the league "integral to the business of major league baseball" and thus exempt from antitrust scrutiny.[542] This decision was upheld by the Eleventh Circuit in *Major League Baseball v. Crist*.[543] While the Circuit commented, as an aside, that relations between professional baseball clubs and the third parties in *Crist* were outside the exemption,[544] it ruled that the exemption *did* encompass the entire business of baseball, namely, the number of MLB clubs.[545] More recently, the exemption of franchise relocations from antitrust scrutiny was confirmed in *City of San Jose v. Office of the Commissioner of Baseball*.[546] The case arose after the MLB established a

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[534] *Id.* at 854; *see also* McMahon & Rossi, *supra* note 15, at 243 (stating the baseball trilogy does "not provide any helpful guidance as to the bounds of the exemption").

[535] *Minn. Twins*, 592 N.W.2d at 856.

[536] State v. Milwaukee Braves, Inc., 144 N.W.2d 1 (Wis. 1966).

[537] *Id.* at 18.

[538] U.S. CONST. art. VI, cl. 2.

[539] *Milwaukee Braves*, 144 N.W.2d at 18.

[540] Major League Baseball v. Butterworth (Butterworth II), 181 F. Supp. 2d 1316 (N.D. Fla. 2001).

[541] *Id.* at 1322–31.

[542] *Id.* at 1332.

[543] Major League Baseball v. Crist, 331 F.3d 1177 (11th Cir. 2003).

[544] *Id.* at 1183.

[545] *Id.*

[546] City of San Jose v. Off. of the Comm'r of Baseball, 776 F.3d 686 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 36 (2015).

"special Relocation Committee" to evaluate the impact of a planned relocation of the Oakland Athletics to San José. The Athletics had entered an agreement with San José that gave them the option to buy parcels for a stadium from the city. "[F]our years later the committee was 'still at work,' with no resolution in sight."[547] The city considered "the delay . . . MLB's attempt to stymie the relocation" and filed suit, alleging, *inter alia*, violations of state and federal antitrust laws.[548] The Ninth Circuit found "that the Supreme Court intended to exempt the business of baseball" from antitrust scrutiny.[549] The Circuit dismissed the federal antitrust claims, holding that "*Flood* plainly extends to questions of franchise relocation."[550] "[B]ecause 'state antitrust regulation would conflict with federal policy and because national uniformity is required in any regulation of baseball,'" the Circuit also dismissed the state antitrust claims.[551] In *Right Field Rooftops, LLC v. Chicago Cubs Baseball Club, LLC*,[552] the Seventh Circuit opposed the Eleventh Circuit's opinion in *Crist* and applied the exemption to the relation between the Chicago Cubs and owners of the "Wrigley rooftops."[553] The business of baseball includes contracts with non-baseball entities and the exemption extends to state laws.

If contracts with third parties are part of the business of baseball then, *a fortiori*, so too are player contracts. In *Miranda v. Selig*,[554] the Ninth Circuit held MiLB players' contracts exempt from antitrust scrutiny.[555] Similarly, in *Professional Baseball Schools and Clubs, Inc. v. Kuhn*,[556] the Eleventh Circuit found baseball's antitrust exemption "anomalous" but "well established" and found MiLB players' employment terms outside the scope of the antitrust laws.[557] In *Salerno*, the Second Circuit held even major league umpires exempt from antitrust scrutiny.[558] In *Wyckoff v. Office of the Commissioner of Baseball*, two former MLB

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547 *Id.* at 688.

548 *Id.*

549 *Id.* at 690 (quoting Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 541 (7th Cir. 1978).

550 *Id.* at 692.

551 *Id.* at 691 (quoting Flood v. Kuhn, 407 U.S. 258, 284 (1972)).

552 Right Field Rooftops, LLC v. Chi. Cubs Baseball Club, LLC, 870 F.3d 682 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 2621 (2018).

553 The design of Wrigley Field allows viewing the outfield from the surrounding rooftops. In addition to the antitrust issues at question in *Right Field Rooftops*, this particular location has repeatedly led to claims of copyright infringement and unfair competition claims by the Cubs. *See generally* Charley Shifley & Patrick Shifley, *Who Owns the View? Chicago Cubs v. Rooftop Owners, Or* Chicago National League Ball Club, Inc. v. Sky Box on Waveland, L.L.C, 1 NW. J. TECH. & INTELL. PROP. 70 (2003).

554 Miranda v. Selig, 860 F.3d 1237 (9th Cir. 2017), *cert. denied*, No. 17-453, 138 S. Ct. 507 (2017).

555 *Id.* at 1238.

556 Prof'l Baseball Sch. and Clubs, Inc. v. Kuhn, 693 F.2d 1085 (11th Cir. 1982).

557 *Id.* at 1085–86.

558 Salerno v. Am. League of Prof'l Baseball Clubs, 429 F.2d 1003 (2d Cir. 1970).

scouts claimed that MLB teams colluded to suppress scouts' salaries.[559] The Circuit found itself bound not only by the Supreme Court's precedent in the baseball trilogy but also by its own precedent from *Salerno*, highlighting that *Flood* had not restricted the baseball exemption.[560]

As highlighted by the *Finley* court, even the business of baseball does not encompass every activity remotely related to professional baseball. In the *Laumann/Garber* action, Judge Scheindlin of the Southern District of New York addressed the relationship between broadcasting rights, the baseball antitrust exemption, and the Curt Flood Act.[561] He found that Congress "includ[ing] [these rights] in a long list of topics that would remain unchanged by the Act" did not necessarily mean they could be considered part of the "business of baseball."[562] Because broadcasting rights are "not central to the business of baseball," they are subject to antitrust scrutiny.[563]

2. Analysis

The primary argument against the business-of-baseball approach is that it "fail[s] to provide any reasonable limiting factors for future courts to apply" or "a workable standard . . . when deciding whether allegedly anticompetitive conduct falls within the bounds of baseball's antitrust exemption."[564] None of these rulings provide guidelines for determining the exact scope of the business of baseball beyond their respective cases,[565] and this argument confuses the functions of rulings by the Supreme Court when compared to those of the lower courts. While Supreme Court rulings should provide general guidelines, the lower courts are expected to narrowly resolve the issue before them,[566] possessing neither the mandate nor the power to provide a workable standard for all other subsequent cases on the issue.

Another point of criticism raised against the business-of-baseball approach is that it would "lead to absurd results."[567] A literal interpretation might allow any activity conducted by a professional baseball team to be included in the exemption, the results of which would indeed be irrational. For instance, if the

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559 Wyckoff v. Office of the Comm'r of Baseball, 705 Fed. Appx. 26 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 2621 (2018).

560 *Id.* at 28–29.

561 Laumann v. Nat'l Hockey League, 56 F. Supp. 3d 280, 280 (S.D.N.Y. 2014), *motion to certify appeal denied sub nom.* Garber v. Office of the Comm'r of Baseball, 120 F. Supp. 3d 334 (S.D.N.Y. 2014).

562 *Laumann*, 56 F. Supp. 3d at 297.

563 *Id.*

564 Grow, *Business of Baseball*, *supra* note 16, at 601–02.

565 *See id.* at 583.

566 *See* Stinson, *supra* note 416, at 221.

567 Grow, *Business of Baseball*, *supra* note 16, at 602.

MLB decided to purchase all gas stations in the United States, some of the MLB gasoline would be used by fans driving to baseball games, but the antitrust exemption would not relieve the MLB from antitrust scrutiny regarding the monopoly interest.[568] If the MLB acquired all steel mills in the United States, its involvement in the steel industry would be subject to antitrust law, even if some of the steel were used to build and maintain baseball stadiums. The owners could not exempt their other businesses from federal antitrust scrutiny by attaching pictures of baseballs or the MLB logo to their business cards and stationery, even if they supported their teams with those businesses' profits. Extending the baseball antitrust exemption to any of those activities would be ludicrous. In any event, the argument that courts defining the scope of the exemption as the business of baseball would exempt such conduct from antitrust scrutiny is a straw man by proponents of the more restrictive approaches. Since *Finley*, the courts have held that an "attenuated relation to the business of baseball" does not provide relief from antitrust laws.[569]

C. BASEBALL'S UNIQUE CHARACTERISTICS AND NEEDS

The final approach relies on *Flood* holding that the baseball antitrust exemption "rests on a recognition and an acceptance of *baseball's unique characteristics and needs*."[570] Two courts have taken this intermediate position. Similar to the business-of-baseball approach, the unique-characteristics-and-needs approach misinterprets the baseball trilogy.

1. Cases

The first ruling following this approach originated in the sale of baseball broadcasting rights. The leagues are entitled to sell these rights on the national level, while the teams retain the rights to negotiate regional broadcasting agreements.[571] The individual teams' negotiation rights for in-market games led to *Henderson Broadcasting Corp. v. Houston Sports Association*.[572] Henderson, a radio broadcaster, alleged that the Houston Astros violated federal and state antitrust laws by canceling their contract with its station, KYST-AM, to grant another station exclusive broadcasting rights in Houston.[573] The Astros argued that these "actions fall within the baseball exemption from the antitrust laws."[574] The court disagreed, holding that "broadcasting is not central enough to the 'unique

[568] *See id.* (finding this example not "reasonabl[e]" but "absurd").

[569] Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 541 n.51 (7th Cir. 1978).

[570] Flood v. Kuhn, 407 U.S. 258, 282 (1972) (emphasis added).

[571] CARFAGNA, *supra* note 7, at 98–99; *see also* 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, 916–20 (2008) (analyzing the allocation of broadcasting revenues in professional sports leagues).

[572] Henderson Broad. Corp. v. Houston Sports Ass'n, 541 F. Supp. 263 (S.D. Tex. 1982).

[573] *Id.* at 264.

[574] *Id.*

characteristics and needs' of baseball which the exemption was created to protect."[575] The baseball trilogy exempts from antitrust scrutiny "only those aspects of baseball, such as leagues, clubs and players which are integral to the sport and not related activities which merely enhance its commercial success."[576] Furthermore, the baseball trilogy also noted that "[r]adio broadcasting is not a part of the sport in the way . . . players, umpires, the league structure and the reserve system are."[577] The court adopted Henderson's "argument that an exempt baseball team, like a labor union or agricultural cooperative, which is exempted from the Sherman Act by statute, loses its exemption when it combines with a non-exempt radio station."[578]

In *Postema v. National League of Professional Baseball Clubs*,[579] an umpire asserted that the wrongful termination of her contract by the National League constituted not only employment discrimination but also a violation of state antitrust law.[580] When the court assessed whether the federal baseball antitrust exemption preempted state antitrust laws, it found that Congress had not expressively indicated its intention to preempt state law.[581] Hence, "Congress intended the federal anti-trust laws to supplement, not displace, state anti-trust remedies."[582] The *Postema* court went on to highlight that the baseball trilogy only considered the exemption in the context of the reserve system and therefore provides little guidance for determining its scope.[583] The court cited *Flood* to show that the exemption "rests on a recognition and acceptance of baseball's unique characteristics and needs" and argued that the exemption's scope would be limited accordingly.[584] The *Postema* court found its opinion was supported by the ruling in *Milwaukee Braves*, noting that the exemption was limited to those matters "incidental to the maintenance of the league structure."[585] The *Postema* court also cited *Henderson*, finding the baseball exemption was restricted to "the reserve

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[575] *Id.* at 268–69.

[576] *Id.* at 265.

[577] *Id.* at 269.

[578] *Id.* at 271 n.9.

[579] Postema v. Nat'l League of Prof'l Baseball Clubs, 799 F. Supp. 1475 (S.D.N.Y. 1992), *rev'd on other grounds*, 998 F.2d 60 (1993).

[580] *Id.* at 1477.

[581] *Id.* at 1488 (citing Flood v. Kuhn, 407 U.S. 258, 283–84 (1972)).

[582] *Id.* (citing California v. ARC America Corp., 490 U.S. 93, 102, 109 (1989).

[583] *Id.*

[584] *Id.* (citing *Flood*, 407 U.S. at 282).

[585] *Id.* (citing State v. Milwaukee Braves, Inc., 144 N.W.2d 1 (Wis. 1966), *cert. denied*, 87 S. Ct. 598 (1966)); *see also supra* notes 535–38 and accompanying text (analyzing *Milwaukee Braves*).

system or to league structure."[586] The court concluded that only baseball's unique characteristics and needs, namely, the reserve system and the league structure, are within the scope of the exemption.[587] It found that because "[a]nti-competitive conduct toward umpires is not an essential part of baseball . . . the baseball exemption does not encompass umpire employment relations."[588] Thus, even the first two courts that followed the unique-characteristics-and-needs approach differed in their assessment of those characteristics and needs.

2. Analysis

By taking the intermediate position, the unique-characteristics-and-needs approach counterintuitively combines the disadvantages of both alternatives. The restrictive approach violates the Supreme Court's precedent in the baseball trilogy because it interprets the *Flood* Court's four mentions of the reserve system to mean that the antitrust exemption pertains to the reserve system alone.[589] The intermediate view draws a similar conclusion from a single mention of baseball's unique characteristics and needs. Yet, in that very paragraph, the Supreme Court twice calls the exemption an "aberration" that it concedes to have created and upheld in "five consecutive cases" over the course of "half a century."[590] The *Flood* Court's intention was thus not to restrict but to justify the exemption.[591]

If the *Flood* Court had limited baseball's exemption to its unique characteristics and needs, it would have had to evaluate the reserve system according to these criteria. Instead, the Court based its decision on Organized Baseball's longstanding reliance upon the exemption and congressional inaction.[592] Additionally, *Flood* quoted *Radovich*: "[s]ince *Toolson* and *Federal Baseball* are still cited as controlling authority . . . we now specifically limit the rule there established to the facts there involved, *i.e.*, the business of organized professional baseball."[593] If the Court had intended to limit the exemption further, for instance, to baseball's unique characteristics and needs, it would have done so expressly. The baseball antitrust exemption is not limited to those characteristics and needs, but "rests on [their] recognition and acceptance."[594] The reserve system was the factual starting point in *Flood*, but the majority opinion ruled on other fact, as well.[595] Likewise, the majority opinion was not limited to baseball's unique characteristics and needs as its legal starting point.

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586 *Postema*, 799 F. Supp. at 1488–89 (citing Henderson Broad. Corp. v. Houston Sports Ass'n, 541 F. Supp. 263 (S.D. Tex. 1982)).

587 *See id.* at 1489.

588 *Id.*

589 *See supra* Section II.A.2.

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

591 *See* Grow, *Business of Baseball*, *supra* note 16, at 600–01.

592 *See Flood*, 407 U.S. at 283–84.

593 *Id.* at 279 (quoting Radovich v. Nat'l Football League, 352 U.S. 445, 450–52 (1957)).

594 *Id.* at 282.

595 *See supra* Section II.A.2.

The legal analysis culminated in a quotation of *Toolson*: "the *business of baseball*" was outside "the scope of the federal antitrust laws."[596]

The primary objection to the business-of-baseball approach is that it fails to establish general guidelines.[597] While that argument confuses the roles of the Supreme Court and the lower courts,[598] the unique-characteristics-and-needs approach provides little improvement. The intermediate approach substitutes the need to define the business of baseball with the need to define baseball's unique characteristics and needs. In fact, even the first two courts that employed the unique-characteristics-and-needs approach disagree on what these characteristics and needs entail. The dictum in *Henderson* matter-of-factly presented umpires as an example covered by the baseball exemption, whereas the *Postema* court held their employment terms subject to antitrust scrutiny.[599]

In summary, the business-of-baseball approach complies with the Supreme Court precedent in the baseball trilogy but fails to provide a clear benchmark for future courts. The restriction to the reserve system provides a clear benchmark but violates the Supreme Court precedent. The unique-characteristics-and-needs approach is less vague than the business-of-baseball approach but still fails to provide definite guidelines for future courts; it violates the Supreme Court precedent less obviously and extensively than the restrictive approach but violates it nevertheless.

IV. THE BASEBALL ANTITRUST EXEMPTION

A 1995 article by John J. McMahon and John P. Rossi states that "the scope of baseball's antitrust exemption has become whatever the reviewing court says it is."[600] While McMahon and Rossi intended the above statement to show their disdain for arbitrary decisions by the lower courts, these decisions are how law is made. The courts have developed antitrust law as a new "'common law' in the same way that a new jurisdiction customarily does – that is, by using certain customary techniques of judicial reasoning, considering the reasoning and results of other common law courts, and developing, refining, and innovating in the dynamic common law tradition."[601] The lower courts have developed the

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

597 Grow, *Business of Baseball*, *supra* note 16, at 601.

598 *See supra* note 563 and accompanying text (refuting this argument in the context of the business-of-baseball approach).

599 *Supra* note 576.

600 McMahon & Rossi, *supra* note 15, at 243.

601 AREEDA & HOVENKAMP, *supra* note 86, at ¶ 1501.

baseball antitrust exemption the same way. For instance, the *Piazza* court used customary techniques of judicial reasoning in an attempt to innovate the scope of the exemption because it considered the reasoning of other lower courts insufficient.[602]

A. DEFINING THE SCOPE

This article proposes a two-stage test derived from Supreme Court precedent in light of the existing lower court decisions and reflecting the tests the courts apply to regular antitrust cases.[603] The baseball trilogy exempts the *entire* business of baseball from antitrust scrutiny.[604] The reserve system is but one of baseball's unique characteristics and needs, which are only one aspect of the business of baseball.[605] However, the ongoing discussion in the courts and the academic literature, over forty years after the final baseball trilogy ruling, attests to the difficulty of delimitating that business.[606] Despite their inability to determine the entire scope of the antitrust exemption, the more limited approaches provide courts with more workable standards.[607] Hence, while the Supreme Court precedent defines the scope of the exemption as the business of baseball, an efficient judiciary must acknowledge its more clearly defined aspects. Future courts should administer a two-stage test and delimit the scope of the baseball antitrust exemption based upon whether the conduct in question is exempt per se and, if not, whether it is part of the business of baseball.

1. Exempt Per Se

Just as "plainly anticompetitive" activities require "no elaborate study of the industry" to be found violative of antitrust laws,[608] conduct that corresponds to baseball's unique characteristics requires no elaborate interpretation of the baseball trilogy to come within the baseball exemption. Conduct that

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602 *See supra* Section II.A.1. (analyzing *Piazza*).

603 *See supra* notes 80–86 and accompanying text (analyzing the illegal-per-se rule and the rule of reason test in antitrust jurisdiction).

604 *See* Flood v. Kuhn, 407 U.S. 258, 279 (1972); Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953); Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208–09 (1922).

605 *See supra* Section II.C.2.

606 *See supra* Section II.B. (analyzing court rulings that employ the business-of-baseball approach); *see also supra* notes 15–27 and accompanying text (scrutinizing the prevailing opinion on the baseball trilogy among the courts and scholarly commentators).

607 *See supra* Section II.C.2. (finding the unique-characteristics-and-needs approach slightly more workable than the business-of-baseball approach); *cf. supra* notes 61-77 and accompanying text (defining the reserve system, the only part of baseball exempted by the restrictive approach); *compare* Grow, *Business of Baseball*, *supra* note 16, at 591 (finding the restrictive approach "fundamentally flawed"), *and id.* at 600 (finding the intermediate approach "[a]lso [f]lawed"), *with id.* at 601 (finding that the business-of-baseball approach "fail[s] to provide any reasonable limiting factors").

608 Texaco, Inc. v. Dagher, 547 U.S. 1, 5 (2006) (quoting Nat'l Soc. of Prof'l Eng. v. United States, 435 U.S. 679, 692 (1978)).

corresponds to those characteristics and needs is per se protected by the exemption. The reserve system is unequivocally such conduct and therefore part of the baseball antitrust exemption. Moreover, unlike other criteria of the baseball exemption's scope, this system is clearly defined. Thus, the courts should first scrutinize whether disputed conduct is part of that system.

Since, at present, the reserve system exists only in the minor leagues, passing the first test shows that the conduct in question is exempt from antitrust scrutiny. If the MLB reinstated a reserve system, a positive result would still provide a definite answer: the MiLB reserve system would remain exempt from antitrust scrutiny, while pursuant to the Curt Flood Act, the MLB reserve system would not.

If the disputed conduct is not part of the reserve system, the court determines whether it corresponds to one of baseball's unique characteristics and needs according to *Henderson's e*xtensive approach. New issues fall within the scope of the antitrust exemption if they are uniquely crucial to or characteristic of professional baseball. For instance, rubbing mud is uniquely necessary to play baseball and a unique characteristic of the game.[609] Hence, antitrust laws would not prevent baseball teams from uniting to lower the price of that mud.

2. The Business of Baseball

If the conduct in question is neither part of the reserve system nor another of baseball's unique characteristics and needs, the court analyzes whether it is part of the general business of baseball. An affirmative answer shows that the matter is exempt from antitrust scrutiny, while a negative answer subjects the issue to the antitrust laws. Because of the complex nature and undetermined scope of the business of baseball, this step requires case-by-case review.

Some commentators add a qualifier to the business of baseball. For instance, based on the language in *Federal Baseball* and *Toolson*, Nathaniel Grow argues the exemption should denote the "business of supplying baseball entertainment to the public."[610] A student comment by Ari Khuner Haber rests on the language in *Toolson* and *Flood*, advocating the following interpretation: "the business of providing baseball games to the public for profit."[611]

Grow highlights that "Justice Holmes provided a 'summary statement of the nature of the business involved,' emphasizing the fact that baseball teams 'play against one another in public exhibitions for money'" and stated that "'[t]he

[609] *See supra* notes 1–6 and accompanying text (presenting the practice of applying that mud to all baseballs used in professional games).

[610] Grow, *Business of Baseball*, *supra* note 16, at 577; *see generally id.* at 577–80 (proposing this benchmark).

[611] Haber, *supra* note 15, at 43; *see generally id.* at 43 (proposing this benchmark).

business is giving exhibitions of baseball.'"[612] The *Federal Baseball* Court found the business of baseball to be intrastate because that business consisted of baseball games, which, for lack of live broadcasting, were purely intrastate at the time.[613] However, Grow also provides a sound argument to refute his own proposal. When discussing *Piazza*, he demonstrates that the "court read too much into *Flood*'s few passing references to baseball's reserve system. Because the reserve clause was the sole anticompetitive restraint at issue in the case, it was only natural that the *Flood* majority would reference the clause in its opinion."[614] Similarly, because at the time of *Federal Baseball* the game of baseball was the only significant aspect of the business of baseball,[615] it was only natural that Justice Holmes would significantly reference it when describing that business. Grow implicitly agrees with Haber's claim that the relevant "business. . . should be construed in its modern incarnation"[616] when he shows that the evolution of that business extended to broadcasting agreements.[617] *Federal Baseball* provides little reason to assume that the entire business of baseball has expanded but that the Supreme Court nonetheless exempts only those parts concerning the exhibition of the game.

Both articles quote *Toolson* as finding that *Federal Baseball* exempted "the business of providing public baseball games for profit" from antitrust scrutiny.[618] Though Grow concedes that "the *Toolson* opinion ultimately reinterpreted *Federal Baseball*" with regard to the earlier opinion's statement about congressional intent, he claims that "the decision nevertheless confirms the [exemption's] scope . . . as being focused on the business of supplying baseball exhibitions to the public."[619] Grow also admits that "the *Flood* Court did not explicitly focus its analysis on supplying baseball exhibitions to the public,"[620] whereas Haber claims *Flood* supports his argument by citing the case *en large* as affirming *Toolson*.[621] Even if Grow and Haber's interpretation of *Federal Baseball* and the opening statement in *Toolson* were correct, *Toolson* would have stripped the business of baseball of

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[612] Grow, *Business of Baseball*, *supra* note 16, at 577 (alteration in original) (quoting Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208 (1922)).

[613] *Id.*

[614] *Id.* at 593; *see supra* notes 400–411 (citing, *inter alia*, Grow to reject the claim that references to the reserve system in *Flood* restricted the opinion to the reserve clause).

[615] *See Fed. Baseball*, 259 U.S. at 208–09 (holding other aspects of the business of baseball incident to the exhibitions); *see also* Grow, *Business of Baseball*, *supra* note 16, at 567 (analyzing those incidental interstate aspects).

[616] Haber, *supra* note 15, at 43.

[617] *See* Grow, *Business of Baseball*, *supra* note 16, at 567–69 (analyzing the evolving character of the business of baseball); *id.* at 617–18 (finding that the baseball exemption should include broadcasting agreements).

[618] *Id.* at 577–78 (quoting Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953) (per curiam)); Haber, *supra* note 15, at 43 n.248 (quoting *Toolson*, 356 U.S. at 357).

[619] Grow, *Business of Baseball*, *supra* note 16, at 578.

[620] *Id.*

[621] *See* Haber, *supra* note 15, at 43 n.248.

its qualifier. The *Toolson* opinion upheld *Federal Baseball* only "so far as that decision" found "the business of baseball [outside] the scope of the federal antitrust laws."[622] *Toolson* changed every aspect of *Federal Baseball* except those that had exempted the business of baseball from antitrust scrutiny.[623] The *Toolson* exemption covered the business of baseball without any of the restrictions of the *Federal Baseball* exception.[624]

Finally, Grow claims that *Flood* supports his view because the Court's emphasis on stare decisis showed adherence to the earlier cases' points of focus.[625] Even Justice Blackmun's ode to baseball highlights the importance of the game for the exemption.[626] Yet, because *Toolson* had exempted the entire business of baseball, the *Flood* Court's reliance on stare decisis argues against a qualified business of baseball. Since *Flood* brings no legal changes, but is the only case in the trilogy that clearly lays out the different aspects of the exemption,[627] Justice Blackmun would have emphasized any intention he had to restrict *Toolson*.

Similar to the lower courts' attempts to create an antitrust exemption narrower than the business of baseball, narrowing the scope of that business through qualifiers violates the Supreme Court's precedent. Nevertheless, just as the reserve system is a salient part of baseball's unique characteristics and needs that are part of the business of baseball, providing public baseball games for profit is a substantial part of that business. Therefore, any conduct directly related to presenting games to the public is part of the business of baseball.

B. LABOR RELATIONS

The most clearly defined aspect of the business of baseball and the exemption is baseball's reserve system and thereby the employment terms of baseball players.[628] Then again, the Curt Flood Act grants MLB players the same antitrust protection that players in other professional sports leagues enjoy,[629] and their contracts are hence outside the scope of the exemption. MiLB players, however,

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[622] *Toolson*, 346 U.S. at 357.

[623] *See supra* Section I.C.4. (analyzing *Toolson*).

[624] *See supra* Section I.C.4.d. (scrutinizing the legal effects of *Toolson*).

[625] Grow, *Business of Baseball*, *supra* note 16, at 578.

[626] *Id.* at 579–80.

[627] *See supra* Section I.D.4.e. (conducting a systematic analysis of the legal effects of *Flood*).

[628] *See supra* Section II.A. (analyzing an attempt by lower courts to restrict the exemption to the reserve system).

[629] 15 U.S.C. § 26b; *see supra* notes 478-89 and accompanying text (analyzing the legal impact of the Act on MLB player contracts).

are explicitly excluded from the Curt Flood Act,[630] and their employment terms thus remain within the scope of the antitrust exemption.

While the courts are divided on antitrust protection for baseball umpires,[631] the only court ruling in their favor was *Postema*, which followed the unique-characteristics-and-needs approach.[632] *Henderson*, the first court that applied this approach, had already shown that it allows exempting umpire contracts from the Sherman Act.[633] *Postema* ignored not just *Henderson* but, more importantly, the precedent from *Salerno* that the Supreme Court had implicitly approved in *Flood*.[634] "Anti-competitive conduct toward umpires" might not be "an essential part of baseball"[635] per se, but that argument rests on false criteria for determining the scope of the exemption. Umpires are an essential part of baseball's unique characteristics and needs and therefore of the business of baseball. They provide the "neutral rule-enforcement" characteristic of any "fair and orderly" game.[636] Their knowledge of baseball's rules is needed by professional baseball. Thus, umpires are part of the business of baseball and their employment terms are exempt from antitrust scrutiny.

Wyckoff held that *Salerno* applies to baseball scouts.[637] Similarly, without "professional baseball, the market for the services of . . . managers, or coaches would be substantially smaller, if not altogether non-existent."[638] Baseball coaches and team managers are part of the unique needs of professional baseball. The labor relations of baseball umpires, scouts, coaches, managers, and MiLB players thus fall within the scope of the antitrust exemption.

C. LEAGUE STRUCTURE AND BASEBALL RULES

While the courts that applied the restrictive interpretation ruled on labor relations, "[i]t is difficult to conceive of a decision more integral to the business of major league baseball than the number of clubs that will be allowed to compete."[639] These characteristics and needs indisputably include any questions pertaining to the league structure. In fact, the general league structure, not the

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630 15 U.S.C. § 26b(b)(2).

631 *Compare* Salerno v. Am. League of Prof'l Baseball, 429 F.2d 1003, 1004–05 (2d Cir. 1970) (exempting umpires from antitrust scrutiny) *with* Postema v. Nat'l League of Prof'l Baseball Clubs, 799 F. Supp. 1475 (S.D.N.Y. 1992) (granting umpires antitrust protection).

632 *See supra* notes 587 and accompanying text (showing the reasoning behind the *Postema* court's extension of antitrust protection to umpires).

633 *See supra* notes 574-76 and accompanying text (analyzing the reasoning in *Henderson*).

634 Grow, *Business of Baseball*, *supra* note 16, at 619.

635 *Postema*, 799 F. Supp. at 1489.

636 Grow, *Business of Baseball*, *supra* note 16, at 618.

637 *Id.* at 29.

638 Grow, *Business of Baseball*, *supra* note 16, at 618.

639 Major League Baseball v. Butterworth (*Butterworth II*), 181 F. Supp. 2d 1316, 1332 (N.D. Fla. 2001).

reserve system, provided the facts in question in *Federal Baseball*.[640] As the core of baseball's unique characteristics and needs, that entire structure is exempt from antitrust scrutiny.[641]

Moreover, a sports league must establish the rules of its game. If one team considered its players "out" after three strikes and the other team after four, the two could not play each other.[642] If the teams could not agree on the parameters that decide the winner of a match, none of them could effectively win, rendering the game, at best, soccer. Other professional sports leagues' rulemaking does not violate antitrust laws.[643] Therefore, rulemaking by the MLB, the National League, and the American League is part of baseball's unique characteristics and needs and falls under the baseball antitrust exemption.

D. THIRD-PARTY AGREEMENTS

In contrast to baseball-related entities, including contracts with non-baseball entities into the baseball antitrust exemption remains contentious. Each type of contract, broadcasting agreement, licensing agreement, and sponsorship agreement provides specific challenges to the exemption. Yet, these challenges are moot if third-party agreements are per se outside the scope of baseball's antitrust exemption.

These agreements are not part of the reserve system and, because they involve entities beyond the realm of baseball, they are not among baseball's unique characteristics and needs. Thus, they are only exempt from antitrust scrutiny if they are part of the general business of baseball. In *Henderson*, the court subjected third-party contracts to antitrust scrutiny and held that "an exempt baseball team . . . loses its exemption when it combines with a non-exempt" entity.[644] However, in *Right Field Rooftops*, the Seventh Circuit held third-party agreements to be part

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[640] Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 207–08 (1922); *see also supra* Section I.A.1. (analyzing the facts behind *Federal Baseball*).

[641] *See* City of San Jose v. Office of the Comm'r of Baseball, 776 F.3d. 686 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 36 (2015); Postema v. Nat'l League of Prof'l Baseball Clubs, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992); Henderson Broad. Corp. v. Houston Sports Ass'n, 541 F. Supp. 263, 265, 269 (S.D. Tex. 1982) *see also supra* Section II.C. (analyzing *Postema* and *Henderson*); *see also supra* notes 528-45 (analyzing rulings that exempt decisions pertaining to the league structure as part of the business of baseball).

[642] *Cf.* Michael A. McCann, American Needle v. NFL*: An Opportunity to Reshape Sports Law*, 119 Yale L.J. 726, 730 (2010) (remarking that "if [football] teams disagreed as to whether a first down requires ten yards or fifteen yards of advancement, they could not play each other").

[643] *See, e.g.*, Sullivan v. Nat'l Football League, 34 F.3d 1091, 1097 (1st Cir. 1994) (finding that in a sports league, "member clubs must cooperate in a variety of ways, and may do so lawfully, in order to make the . . . league a success").

[644] *Henderson*, 541 F. Supp. at 271 n.9.

of the business of baseball and therefore included in the antitrust exemption; the Supreme Court denied certiorari.[645]

Similar to restricting the antitrust exemption to the reserve system or baseball's unique characteristics and needs,[646] excluding relations with non-baseball entities from its scope is not entirely illogical, but it finds no justification in Supreme Court precedent.[647] Rather, the Court's insurance jurisprudence shows that an antitrust exemption for a particular business includes third-party relations that are part of that business. Like baseball, insurance companies initially were held not to constitute interstate commerce, which would exempt them from federal antitrust scrutiny.[648] While the antitrust exemption preserved this status for baseball, the Supreme Court eventually held insurance companies subject to the Sherman Act.[649] Congress then created a statutory antitrust exemption for insurers by enacting the McCarran-Ferguson Act.[650] The "business of insurance" that this Act privileges is analogous to the "business of baseball."[651] In 1969, the Supreme Court generally restricted the business of insurance to relations with policyholders.[652] In 1982, however, the Court specified three criteria to define that business: It must (1) spread or transfer the policyholder's risk, (2) be integral to the insurer-policyholder relationship, and (3) be "limited to entities within the insurance industry."[653] Notably, the Court held that none of these criteria would be sufficient alone.[654] Moreover, the primary purpose of the McCarran-Ferguson Act is not to exempt the business of insurance from antitrust scrutiny but to leave it to the states.[655] While the business of baseball has a broad scope, "the narrowness of the [insurance]

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645 Right Field Rooftops, LLC v. Chi. Cubs Baseball Club, LLC, 870 F.3d 682, 688–89 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 2621 (2018).

646 *See supra* Section II.A.2. (finding that restricting the exemption to the reserve system violates Supreme Court precedent); *see supra* Section II.C.2. (finding the same for baseball's unique characteristics and needs).

647 *See* Flood v. Kuhn, 407 U.S. 258 (1972) (abstaining from any consideration of third-party relations); Toolson v. N.Y. Yankees, 346 U.S. 356(1953) (same); Fed. Base Ball Club of Balt., Inc. v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200 (1922) (same).

648 *See supra* notes 261-63 and accompanying text.

649 United States v. S.-E. Underwriters Ass'n, 322 U.S. 533, 552-53 (1944).

650 McCarran-Ferguson Act of 1945, 15 U.S.C. §§ 1011–15 (2012).

651 Grow, *Business of Baseball*, *supra* note 16, at 603–04.

652 *See* SEC v. Nat'l Sec., Inc., 393 U.S. 453 (1969) (implying this limitation in a decision on states preempting federal securities law); *see also* Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979) (finding an agreement between Blue Shield and participating pharmacies outside the business of insurance because it involves neither underwriting nor risk spreading).

653 Union Labor Life Ins. Co. v. Piero, 458 U.S. 119, 129 (1982).

654 *Id.*

655 Eric Peter Gillett, *The Business of Insurance: Exemption, Exemption, Who has the Antitrust Exemption.*, 17 PAC. L.J. 261, 265 (1985); *see infra* Section III.E. (showing baseball exempt from state antitrust laws).

exemption . . . undermine[s] the claimed benefit of an exemption."[656] If the intra-industry criterion is insufficient to delimitate the narrow business of insurance, it cannot define the scope of the business of baseball. Thus, third-party contracts can hypothetically be part of the business of baseball.

1. Broadcasting Agreements

Arguably, the most significant of these contracts are broadcasting agreements.[657] Consequently, *Hale v. Brooklyn Baseball Club, Inc.*,[658] the first decision on the relation between baseball's antitrust exemption and its broadcasting activities, held that "there couldn't be such broadcasting except for the old-fashioned baseball game being played somewhere – the very gist and essence of the baseball business."[659] When later courts subjected broadcasting agreements to antitrust scrutiny, they considered the issue with a misguided interpretation of the Sports Broadcasting Act (SBA).[660]

That Act exempts "any joint agreement . . . by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells . . . the rights of such league's member clubs in the sponsored telecasting of [their] games."[661] The *Henderson* court found broadcasting agreements not among baseball's unique characteristics and needs[662] because its erroneous assessment of the SBA led it to find "Congressional action does not support an extension of the exemption to radio broadcasting."[663] The *Henderson* court held that because the SBA does not differentiate between baseball and other major professional sports, the Act restricted the scope of the baseball antitrust exemption to its own scope.[664] However, the SBA expressly states that it does *not* "affect the applicability or nonapplicability of the antitrust laws to any . . . agreement . . . except the agreements to which section 1291 of this title shall apply."[665] Hence,

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[656] SECTION OF ANTITRUST L., AM. BAR ASS'N, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 149 (2007).

[657] *See* Grow, *Business of Baseball*, *supra* note 16, at 611–12 (showing that as early as 2009, more fans watched baseball games online or on television than at a stadium); McDonald, *supra* note 31, at 112 (finding it "difficult to overestimate the role of broadcasting in the rise of baseball").

[658] Hale v. Brooklyn Baseball Club, Inc., Civ. Action No. 1294 (N.D. Tex. 1958).

[659] Henderson Broad. Corp. v. Houston Sports Ass'n, 541 F. Supp. 263, 268 n.7 (S.D. Tex. 1982) (quoting *Hale*, Civ. Action No. 1294).

[660] Sports Broadcasting Act of 1961, 15 U.S.C. §§ 1291–95 (2012).

[661] 15 U.S.C. § 1291.

[662] *Henderson*, 541 F. Supp. at 263; *see supra* notes 571-77 and accompanying text (analyzing the reasoning behind *Henderson* that held broadcasting rights are not part of baseball's unique characteristics and needs).

[663] *Henderson*, 541 F. Supp. at 265.

[664] *See id.* at 269–70.

[665] 15 U.S.C. § 1294.

just as the Curt Flood Act had no impact on the status of any matter under the antitrust laws save MLB players,[666] the SBA had no effect on the baseball antitrust exemption beyond creating a limited statutory exemption.[667]

The *Henderson* court comes to this conclusion because it finds "broadcasting . . . not central enough to baseball to be encompassed in the baseball exemption."[668] The court provides two reasons for this assessment. First, neither *Toolson* nor *Flood* had cited *Gardella*.[669] By not engaging with *Gardella*, the Supreme Court implied its agreement and intention to have that ruling stand.[670] Second, in *International Boxing* and *Radovich*, the Court "refus[ed] to extend the exemption to other professional sports, in part because of the interstate broadcasting of the sports."[671] While the Supreme Court considered broadcasting in these cases, the question in *International Boxing* was "not whether a previously granted exemption should continue, but whether an exemption should be granted in the first instance."[672] The *Radovich* Court limited the exemption to "the business of . . . baseball,"[673] refusing to extend it to football. The reasoning in *Henderson* does not justify excluding broadcasting rights from the exemption *a priori*.

While the first experimental radio broadcasts of baseball games had occurred before *Federal Baseball*,[674] the advent of radio and television took place between *Federal Baseball* and *Toolson*.[675] At the time of *Federal Baseball*, "each league had a contract with a telegraph company for service" to transmit game results across the nation, but the leagues did not generate profits from those transmissions.[676] Similar to Justice Holmes's characterization of transporting players across state borders, the transmissions were "a mere incident" and "not enough to change the character of the business" of baseball.[677] When *Toolson* extended antitrust protection to the entire business of baseball, regardless of any restrictions in *Federal Baseball*, radio and television broadcasting had become an integral part of that business,[678] and broadcasting agreements are exempt from the antitrust laws.[679]

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666 *See supra* notes 478-86 and accompanying text (analyzing the Curt Flood Act).

667 Grow, *Business of Baseball*, *supra* note 16, at 616–17.

668 *Henderson*, 541 F. Supp. at 265.

669 *Id.* at 267.

670 Grow, *Business of Baseball*, *supra* note 16, at 615.

671 *Henderson*, 541 F. Supp. at 267–68.

672 United States v. Int'l Boxing Club, 348 U.S. 236, 243 (1955).

673 Radovich v. Nat'l Football League, 352 U.S. 445, 451 (1957).

674 Grow, *Business of Baseball*, *supra* note 16, at 568 n.55.

675 *See* Flood v. Kuhn, 407 U.S. 258, 272 (1972).

676 Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Balt., Inc., 269 F. 681, 683 (D.C. Cir. 1920).

677 Fed. Base Ball Club of Balt., Inc. v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200, 209 (1922).

678 *See supra* Section I.C.2.

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

2. Licensing Agreements

Not even the MLB and MLBPA claim antitrust exemptions for their licensing agreements. In a suit over licensing agreements that allegedly violated the Sherman Act, Major League Baseball Properties moved for summary judgment instead of asserting its antitrust exemption.[680] Similarly, the MLBPA did not invoke the exemption when its contract with a baseball card manufacturer led to an antitrust suit over a licensing agreement.[681]Hypothetically, licensing agreements could be part of baseball's antitrust exemption regardless of Organized Baseball's view. For instance, despite the Commerce Clause barring the states from regulating professional baseball, Organized Baseball has not invoked the exemption in all cases concerning state laws.[682]

Just as the production and sale of movie merchandise is separate from the production of a movie, baseball licensing agreements are separate from the business of baseball. Licensing revenue might contribute to financing the second part of a multi-movie series, but the production company only receives income from merchandise after it has concluded production of the first film and distributed it to cinemas. Similarly, the sale of baseball merchandise results from past activities on the field. Even if licensing revenue contributes to future on-field activities, those agreements have no closer connection to the business of baseball than the owners' investments in their respective teams. Under the test proposed in the article,[683] licensing agreements are not part of the business of baseball and are hence subject to antitrust scrutiny.[684]

3. Sponsorship Agreements and Concessions

For similar reasons, Nathaniel Grow argues that sponsorship agreements and concessions "are only tangentially related to the baseball exhibitions themselves. Indeed, unlike other aspects of the baseball business . . . neither the existence nor quality of the actual on-field competition would necessarily change should concessions and sponsorship agreements cease to exist."[685] In 2018, total MLB sponsorship revenue exceeded $900 million,[686] while the average player salary

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680 *See* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 293–94 (2d Cir 2008).

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

682 *See infra* Section III.E.

683 *See supra* Section III.A.

684 *See* Grow, *Business of Baseball*, *supra* note 16, at 620-21 (reaching the same conclusion).

685 Grow, *Business of Baseball*, *supra* note 16, at 622.

686 Christina Gough, *Major League Baseball (League and Teams) Sponsorship Revenue from 2010 to 2018 (in Million U.S. Dollars)*, STATISTA, https://www.statista.com/statistics/380197/mlb-sponsorship-revenue/ (last visited August 2, 2019).

was $4.41 million.[687] Arguing that an average of $30 million per team, almost seven players' combined salaries, would not affect the quality of on-field competition requires a Blackmun-esque view of the game. Unlike licensing agreements, sponsoring "create[s] an association among the sponsor, sponsee, and sports fans" and it helps "achieve the marketing objectives of the sponsoring company."[688] Thus, sponsoring directly affects the spectacle presented to the public. An economic analysis of the relationship between professional sports, sponsors, and the media in the U.S. and Ireland even showed that sponsorship agreements have become arguably necessary for any professional sports exhibition.[689] As a requirement for the game of baseball itself, sponsorship agreements are part of the business of baseball and therefore fall within the scope of the antitrust exemption.

Additionally, only an overly detached view would find that concessions are irrelevant to the business of providing baseball entertainment for the public. In *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*,[690] a dispute over a concession franchise contract,[691] Finley claimed, *inter alia*, violations of antitrust laws.[692] The Ninth Circuit did not even consider the antitrust exemption.[693] The players' conduct during the game would likely not change if there were no peanuts, hot dogs, or Cracker Jacks. While the quality of entertainment provided for the public would decrease considerably, concessions are not part of the game of baseball, but rather the link between the game and the business of baseball; they are hence exempt from the antitrust laws.

E. STATE LAW

Generally, federal antitrust laws supplement state laws.[694] However, "[b]aseball is an exception to [this rule]."[695] The Supreme Court expressly held in *Flood* that the Commerce Clause prevents the states from regulating

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[687] *Id.*

[688] Sanghak Lee & Seung-Chang Lee, *The Influence of Sport Sponsorship Communication on Sport Fans' Rating of Retail Service Quality*, 6 INT'L J. SPORT COMM. 312, 313 (2013) (internal citation omitted).

[689] *Cf.* Rosita Wolfe, Tony Meenaghan & Paul O'Sullivan, *Sport, Media and Sponsor—The Shifting Balance of Power in the Sports Network*, 10, No. 2 IR. MARKETING REV., 53, 55 (1997/98).

[690] Twin City Sportserv., Inc. v. Charles O. Finley & Co., 512 F.2d 1264 (1975).

[691] *Id.* at 1268–69.

[692] *Id.* at 1268.

[693] *See id.* at 1269–76 (making no mention of the antitrust exemption); *see also* City of San Jose v. Office of the Comm'r of Baseball, 776 F.3d. 686, 690 (9th Cir. 2015) (finding the opinion in *Twin City* "without any reference to the baseball exemption"), *cert. denied*, 136 S. Ct. 36 (2015).

[694] California v. ARC Am. Corp., 490 U.S. 93, 102 (1989); Giboney v. Empire Storage Co., 336 U.S 490, 495 (1949).

[695] *San Jose*, 776 F.3d at 690 (second alteration in original) (quoting *ARC Am. Corp.*, 490 U.S. at 102).

professional baseball even if Organized Baseball has not always invoked its exemption in this regard, citing not just the earlier cases in the baseball trilogy but also *Shubert*, *International Boxing*, and *Radovich*.[696] Thus, the exemption prevents the states from subjecting baseball to their respective antitrust laws.

V. CONCLUSION

The antitrust exemption broadly addresses the business of baseball. Diverging approaches by the lower courts highlight certain aspects of that business, but any restriction beyond the limits of that business violates the Supreme Court precedent. Despite some muddled aspects of dubious intellectual honesty, the baseball trilogy has a logical inner structure that the Court is unlikely to overrule.

In order to elucidate this point, it is helpful to return to the concept of rubbing mud discussed earlier within this article. Even if Japanese manufacturers were to begin producing game-ready baseballs,[697] American baseball teams would be unlikely to give up on their rubbing mud. Abandoning the practice would not just end a long-standing tradition but would shift the balance of power between hitters and pitchers.[698] By way of analogy, *Federal Baseball* corresponds to the "clean" baseball within the baseball trilogy.[699]

Accordingly, reverting to *Federal Baseball* would significantly extend antitrust scrutiny over the business of baseball and shift the balance against Organized Baseball. In *Federal Baseball*, the Supreme Court did not just exempt baseball from the antitrust laws; rather, the Court held that professional baseball did not constitute interstate commerce in 1922 and therefore was not subject to the Sherman Act.[700] *Toolson* followed, creating the baseball antitrust exemption in a ruling that ostensibly only upheld, but effectively all but overruled, *Federal Baseball*.[701] While its intention might have been limited to creating a baseball antitrust exemption within congressional jurisdiction, the instrumentalist *Toolson* Court created the exemption in all its aspects through its logically inevitable implications. Finally, *Flood* expressively laid out those aspects and consolidated the trilogy with the Supreme Court decisions that held other professional teams

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696 Flood v. Kuhn, 407 U.S. 258, 284–85 (1972).

697 *See* Krest, *supra* note 2.

698 *Id.(noting that hitters prefer to hit whiter balls).*

699 *See supra* note 11 and accompanying text.

700 Fed. Base Ball Club of Balt., Inc. v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200 (1922).

701 Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953).

sports subject to antitrust scrutiny.[702] Whether Justice Blackmun favored the opinion simply for its subject matter, or whether his ode to baseball still diverts the attention from the Court's exceptional prospective lawmaking power, *Flood* made no law. Instead, it expressively defined baseball's antitrust exemption and included state antitrust laws into its scope, thus ensuring its survival and concluding the baseball trilogy. As one can see, throughout the baseball trilogy, the Supreme Court steadily strengthened the exemption and made clear that only Congress could restrict or abolish it.

That trilogy exempts the entire business of baseball from federal and state antitrust laws. Namely, the MiLB reserve system, employment terms of umpires, scouts, coaches, and managers, the league structures, the rules of the game, concessions, and broadcasting and sponsorship agreements are exempt from antitrust scrutiny. More restrictive approaches by the lower courts violate the Supreme Court's precedent. Nevertheless, by highlighting distinct aspects of the business of baseball, they provide an easier approach to some parts of its scope. Future courts can rely on the experience gained from those attempts, such as the attempts of courts to delimit the business of baseball. The baseball antitrust exemption might not be entirely logical, given that other professional team sports still face antitrust scrutiny. Yet, in the famous words of its later unintentional ex post creator, Justice Oliver Wendel Holmes, Jr.: "[t]he life of the law has not been logic: it has been experience."[703]

[702] Flood v. Kuhn, 407 U.S. 258 (1972).

[703] O.W. HOLMES, JR., THE COMMON LAW 1 (Am. Bar Ass'n 2009) (1881).