

NOTES

IN NAME ONLY: HOW MAJOR LEAGUE BASEBALL'S RELIANCE ON ITS ANTITRUST EXEMPTION IS HURTING THE GAME

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INTRODUCTION

Major League Baseball (MLB) is exempt from federal antitrust regulation, an oddity that has earned it the title of a “true monopoly.”¹ Baseball’s status in the eyes of the law is puzzling in a number of ways. First, its exemption is a judicial creation that the Court has never extended to any other professional sport or industry.² Second, the Supreme Court, despite having created the exemption in 1922, has never ruled directly on its scope.³ Finally, lower courts have applied the exemption inconsistently, leaving many commentators to openly wonder whether the exemption even still exists, and if it does, in what form.⁴ Despite repeated attempts by the courts, the legislature, and the legal community to clarify the precise nature of baseball’s antitrust exemption, the interaction of baseball and antitrust law remains very unsettled.

Although there has been significant disagreement as to both the breadth and validity of MLB’s antitrust exemption, those debates are beyond the scope of this Note. The more interesting question, as yet unanswered, is what effect the exemption has had on MLB’s operations, and whether that effect is worth the costs of maintaining the exemption. This Note asserts that MLB’s exemption is counterproductive and bad for business, contrary to the belief of even those who run MLB. The exemption, as currently applied and utilized, exposes MLB to intervention from both Congress and the courts.⁵ MLB, in its zeal to protect its exemption, has unwittingly exposed itself to pressures that no other professional sports league faces.

1. George McGlynn, *Beyond the Dugout: Reassessing the Baseball Dream*, in *BASEBALL AND THE AMERICAN DREAM: RACE, CLASS, GENDER, AND THE NATIONAL PASTIME* 187, 189 (Robert Elias ed., 2001).

2. See *infra* note 43 and accompanying text.

3. 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 (2010).

4. See, e.g., Joseph A. Kohm, Jr., *Baseball’s Antitrust Exemption: It’s Going, Going ... Gone!*, 20 NOVA L. REV. 1231, 1241-44 (1996); Martin M. Tomlinson, *The Commissioner’s New Clothes: The Myth of Major League Baseball’s Antitrust Exemption*, 20 ST. THOMAS L. REV. 255, 256 (2008).

5. See *infra* Part III.B.

At the same time, the impact of a policy change, initiated by either Congress or the courts, is unlikely to have a material effect on MLB's structure or day-to-day business operations. Despite the argument that revoking MLB's exemption would leave it exposed to antitrust violations,⁶ a thorough analysis of antitrust law, combined with the standing precedent implicating professional sports, indicates that almost all of MLB's practices would survive such scrutiny.⁷ This Note concludes that the exemption is largely, if not completely, irrelevant to MLB's operations. Prior arguments that the exemption is irrelevant have based that conclusion on an overly narrow reading of the trilogy of Supreme Court baseball cases.⁸ Instead, it is not the origins of the exemption that render it irrelevant, but rather its application and practical consequences. Other scholarship has identified the implications of removing the exemption as to particular areas of MLB's operation, such as franchise relocation,⁹ but no commentator has examined how and why MLB derives no benefit from its exemption.

This Note briefly summarizes in Part I the history and development of MLB's exemption through an examination of the Supreme Court's trilogy of cases. Part II illustrates how the exemption is largely irrelevant, in that MLB operates in the same manner as other professional sports leagues by using collective bargaining to sanction anticompetitive restraints. Part III discusses how the exemption adversely affects MLB's operations as a result of the uncertainty and political pressures that accompany threats to revoke its exemption. Part IV explores the implications of a potential policy change by applying antitrust regulation to the business of baseball, specifically in terms of policies and structures most likely to be deemed anticompetitive. Although a proper application of antitrust regulation is unlikely to invalidate any of its operations,

6. See, e.g., Thomas J. Ostertag, *Baseball's Antitrust Exemption: Its History and Continuing Importance*, 4 VA. SPORTS & ENT. L.J. 54, 67 (2004).

7. See *infra* Part IV.B.

8. See Mitchell Nathanson, *The Irrelevance of Baseball's Antitrust Exemption: A Historical Review*, 58 RUTGERS L. REV. 1, 5 (2005).

9. E.g., Frank P. Scibilia, *Baseball Franchise Stability and Consumer Welfare: An Argument for Reaffirming Baseball's Antitrust Exemption with Regard to Its Franchise Relocation Rules*, 6 SETON HALL J. SPORT L. 409, 467-68 (1996).

this examination highlights the tenuous nature of antitrust scrutiny and the difficulties that MLB faces from a legal standpoint.

I. THE HISTORY AND EVOLUTION OF BASEBALL'S ANTITRUST EXEMPTION

Baseball's exemption from antitrust regulation is a judicially created rule that Congress has never expressly codified or rejected.¹⁰ For that reason, any discussion regarding the subject must begin with the three pivotal Supreme Court decisions that established and affirmed the exemption.

A. *Federal Baseball*

Professional baseball in the United States began in earnest in the nineteenth century. In the early years, there were a number of leagues and associations, but as the game evolved, the two most stable, dominant leagues were the National League and the American League.¹¹ Though they started as competitors, the leagues merged in 1903 in an agreement that created the World Series, as well as an array of other rules and regulations.¹² This merged entity, the precursor to MLB, agreed to insert a "reserve clause" into the contract of every player, effectively allowing the franchise that originally signed him to own that player's rights indefinitely.¹³

The Federal League, another fledgling baseball league, tired of competing with MLB and its reserve clause, suggested a merger.¹⁴ After seeing its merger attempt fail, the Federal League filed an antitrust suit alleging MLB was in violation of the Sherman Antitrust Act.¹⁵ The parties came to a settlement agreement, but the

10. See Nathanson, *supra* note 8, at 2. Congress's sole legislative action was the passage of the Curt Flood Act in 1998, which explicitly applied only to issues of major league employment. See *infra* note 69 and accompanying text.

11. See 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, 179 (2008).

12. See *id.*

13. See Nathanson, *supra* note 8, at 9-10.

14. See Grow, *supra* note 3, at 566.

15. See *id.*; see also 15 U.S.C. § 1 (2006). Section 1 of the Sherman Act prevents contracts or combinations in restraint of trade of commerce among the states. *Id.*

Baltimore franchise refused to sell and subsequently filed its own antitrust suit.¹⁶ The trial court awarded the Baltimore franchise \$80,000 plus treble damages in the trial court, but the D.C. Circuit reversed and the Supreme Court granted certiorari.¹⁷ In a brief opinion, Justice Holmes reasoned that offering baseball exhibitions was a purely state affair and thus exempt from antitrust regulation, as it was not commerce among the states.¹⁸

Although this decision is often criticized,¹⁹ it was actually a sound analysis based on that Court's understanding of the Commerce Clause.²⁰ Professional sports are undoubtedly interstate commerce by today's standards, and even by the standards set in the New Deal Era, but in 1922 hosting baseball games was understood to be a purely intrastate activity.²¹ It follows, then, that if this case were simply from a different era of Commerce Clause analysis, the Court would have changed course at its next opportunity. Perhaps surprisingly, that opportunity was not taken.²²

B. Toolson

The next baseball case to reach the Supreme Court involved a much more direct challenge to the reserve clause. *Toolson v. New York Yankees, Inc.* was one of three challenges heard by the Court, each made by minor league players asserting that the reserve clause was an antitrust violation.²³ In a per curiam, one paragraph opinion, the Court affirmed the judgment below on the basis of *Federal Baseball*, while also noting that "Congress had no intention of

16. Grow, *supra* note 3, at 566.

17. *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 207-08 (1922).

18. *Id.* at 208-09.

19. See, e.g., ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* 58 (1998).

20. See Snyder, *supra* note 11, at 185.

21. See *id.*

22. Some commentators believe the exemption was almost overturned in *Gardella v. Chandler*. 172 F.2d 402 (2d Cir. 1949). In *Gardella*, the Second Circuit found that the game had evolved to a point at which *Federal Baseball* could be reevaluated, but MLB responded by settling with Gardella before the case went to trial on remand, thereby ensuring that the exemption remained. See Snyder, *supra* note 11, at 189 ("The real significance of *Gardella* was that it suggested that antitrust might be applied to professional baseball if the issue made it back to the U.S. Supreme Court.").

23. 346 U.S. 356 (1953); see Grow, *supra* note 3, at 569.

including the business of baseball within the scope of the federal antitrust laws.”²⁴ Despite its brevity, in many ways, *Toolson* is the most significant baseball case for two reasons. First, it passed on the opportunity to reevaluate the Commerce Clause analysis of *Federal Baseball* for the sake of stare decisis.²⁵ More significantly, it explicitly stated that baseball was exempt from antitrust law on the basis of congressional intent.²⁶

Both justifications given by *Toolson* require further examination. As part of its reasoning for upholding *Federal Baseball*, the Court explained that MLB had relied on the exemption for over thirty years.²⁷ Yet that rationale is not very compelling when compared to other Commerce Clause jurisprudence, as nearly every ruling of the era overturned an earlier case on which the industry in question had relied.²⁸ The Court’s theory on the intent of Congress is similarly unconvincing. As Justice Burton stated in his dissent, neither the Sherman Act nor its legislative history illustrate any intention of Congress to exempt baseball or any similar activity.²⁹ Despite this flawed reasoning, *Toolson* retained, and probably strengthened, the exemption. Further, the Court’s opinion demonstrated that the exemption applied to the entire industry of professional baseball, not solely to the reserve clause.³⁰

C. Flood

The Court’s most recent treatment of MLB’s antitrust exemption, *Flood v. Kuhn*, followed *Toolson* by upholding MLB’s exemption on the strength of stare decisis and congressional inaction.³¹ Justice Blackmun’s opinion referred to the exemption as an established “aberration confined to baseball.”³² The opinion acknowledged the

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

25. *Id.*

26. *Id.*; see also Snyder, *supra* note 11, at 191.

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

28. See, e.g., Wickard v. Filburn, 317 U.S. 111, 118-20 (1942).

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

30. One theory of irrelevance posits that the trilogy decisions exempted only the reserve clause, not the business of baseball. See, e.g., Nathanson, *supra* note 8, at 5. The Court’s language in each of the three decisions suggests otherwise.

31. 407 U.S. 258, 283-84 (1972).

32. *Id.* at 282.

criticisms of the exemption—namely that MLB is clearly engaged in interstate commerce—but resolved to let Congress deal with the inconsistency, further citing failed legislation as justification for why the Court should not step in and overrule precedent.³³

Although Justice Blackmun's opinion seems clear on its face, the facts that gave rise to the dispute in *Flood* have caused difficulty for lower courts when asked to apply the exemption. *Flood*, like *Toolson*, dealt directly with MLB's reserve clause.³⁴ Curt Flood, an all-star outfielder, was traded from the St. Louis Cardinals to the Philadelphia Phillies.³⁵ Flood protested the trade and asked to be made a free agent; the request was denied.³⁶ He then instituted an antitrust suit, challenging the reserve clause and MLB's exclusive control over its players.³⁷ Based on these facts, commentators have commonly refrained that the Court's opinions on the exemption should be limited narrowly to include only the reserve clause.³⁸

D. *The Exemption Applied*

Baseball's favored legal status has faced nearly universal criticism, both for how it was created and for its treatment at the Supreme Court level.³⁹ This atypical evolution has a practical effect

33. *Id.* at 283 (“Remedial legislation has been introduced repeatedly in Congress but none has ever been enacted. 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.”).

34. *Id.* at 259.

35. *Id.* at 264-65.

36. *Id.* at 265.

37. *Id.*

38. See, e.g., Kohm, *supra* note 4, at 1244 (“[I]t appears that the last of the Supreme Court cases, *Flood*, held that baseball’s antitrust exemption was limited in its scope to the reserve clause.”); Latour Rey Lafferty, *The Tampa Bay Giants and the Continuing Vitality of Major League Baseball’s Antitrust Exemption: A Review of Piazza v. Major League Baseball*, 831 *F. Supp.* 420 (E.D. Pa. 1993), 21 FLA. ST. U. L. REV. 1271, 1278-79 (1994) (asserting the *Flood* decision was a “narrow application of the rule of *stare decisis*” limited to the reserve clause (quoting *Flood*, 407 U.S. at 276)). *But see* Grow, *supra* note 3, at 592-95 (arguing that *Flood* exempted the business of providing baseball exhibitions, not solely the reserve clause).

39. See, e.g., ABRAMS, *supra* note 19, at 67 (“Marshall’s dissent [in *Flood*] skillfully dissected the majority opinion—admittedly, not a very difficult task.”); Nathanson, *supra* note 8, at 2 (discussing how the exemption has become “fodder for commentators” and was “created in an opinion, [*Federal Baseball*], that is generally considered to be one of Justice Holmes’s

as well; lower courts have interpreted and applied the exemption inconsistently.⁴⁰ A handful of lower courts have held MLB's exemption to be limited to the reserve clause, whereas other courts have exempted the business of baseball in its entirety.⁴¹ This lack of a consistent standard makes it difficult for MLB and its business partners to rely on, or otherwise utilize, the supposed benefits of the exemption.⁴²

Perhaps the most telling indictment of the exemption is how the Supreme Court has treated its trilogy in cases that do not implicate the business of baseball. In the interim between *Toolson* and *Flood*, the Court refused to extend professional baseball's exemption to other professional sports in spite of ample opportunity.⁴³ Despite sometimes creative legal theories,⁴⁴ recent federal courts have likewise been unwilling to grant a similar exemption to any other professional sport. An informative example is the recent case of *American Needle, Inc. v. NFL*.⁴⁵

In *American Needle*, the National Football League (NFL) attempted to use the "single entity defense" to escape antitrust regulation on an exclusive licensing contract.⁴⁶ The Court found that because each of the thirty-two NFL franchises are independently

weakest" (footnote omitted).

40. Michael J. Mozes & Ben Glicksman, *Adjusting the Stream? Analyzing Major League Baseball's Antitrust Exemption After American Needle*, 2 HARV. J. SPORTS & ENT. L. 265, 274 (2011).

41. *Compare* *Piazza v. MLB*, 831 F. Supp. 420, 440 (E.D. Pa. 1993) (holding that baseball's exemption was not applicable to franchise relocation), *with* *MLB v. Butterworth*, 181 F. Supp. 2d 1316, 1322 (N.D. Fla. 2001) (specifically refuting the argument that the exemption is limited to the reserve clause and instead finding that the exemption applied to the business of baseball, including franchise issues).

42. *See infra* Part III.A.

43. *See* *Haywood v. NBA*, 401 U.S. 1204, 1205 (1971); *Radovich v. NFL*, 352 U.S. 445, 447-48 (1957); *United States v. Int'l Boxing Club*, 348 U.S. 236, 241-42 (1955).

44. *See, e.g., Radovich*, 352 U.S. at 450 (arguing that "football has embraced the same techniques which existed in baseball[.]" that the two sports "have no counterpart in other businesses and that, therefore, they alone are outside the ambit of the Sherman Act"); *see also infra* note 46 and accompanying text.

45. 130 S. Ct. 2201 (2010).

46. *Id.* at 2207. The single entity defense stands for the proposition that economic actors with a "shared corporate consciousness" are to be treated as one entity, and thus cannot conspire to engage in anticompetitive conduct, rendering the entities exempt from section 1 of the Sherman Antitrust Act. *See* Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726, 742 (2010).

owned, the league and its teams could not be treated as a single entity.⁴⁷ While this case has no direct effect on MLB and its operations, it is generally considered a signal of the Supreme Court's willingness to tackle antitrust issues in professional sports, and possibly expand antitrust regulation beyond its current scope.⁴⁸ On the basis of that decision, it is reasonable to think that courts may reconsider the propriety of MLB's exemption.

II. THE FUNDAMENTAL IRRELEVANCE OF THE EXEMPTION

It is clear that MLB's leaders relish their position as the only professional sports league with an antitrust exemption and that they will take whatever steps necessary to protect the exemption.⁴⁹ The question that inevitably arises, though, is why MLB's management views maintaining the exemption as necessary to its continued prosperity. There seems to be no evidence indicating that an antitrust exemption is necessary to build a successful professional sports league. Neither the NFL nor the National Basketball Association (NBA) have ever received antitrust protection, and both leagues are flourishing.⁵⁰ The NFL is the most popular and profitable professional sport in the United States, and some have argued that baseball has fallen behind other professional sports in importance.⁵¹ With the success that other sports leagues have enjoyed, one could easily wonder why MLB would even need an antitrust exemption to operate successfully; the simple answer is that an exemption is unnecessary.

47. *Am. Needle*, 130 S. Ct. at 2215-17.

48. See Mozes & Glicksman, *supra* note 40, at 290.

49. See Allan Selig, *Major League Baseball and Its Antitrust Exemption*, 4 SETON HALL J. SPORT L. 277, 280-81, 285-86 (1994) (arguing that removal of baseball's antitrust exemption would not "better serve the public interest").

50. See Mozes & Glicksman, *supra* note 40, at 277 (quoting Tomlinson, *supra* note 4, at 297).

51. See Matthew Futterman, *Has Baseball's Moment Passed?*, WALL ST. J., Mar. 31, 2011, at D11 (noting that the declining number of adolescents playing baseball has also negatively impacted the MLB talent pool and fan base).

A. *The Impact of Labor Law*

The biggest factor that has contributed to the declining importance and impact of MLB's exemption is the increased role of labor law within professional sports. Labor law plays a significant role in all sports because of the unique balance between player and owner interests.⁵² In this arena, baseball's antitrust exemption is not significant.⁵³ When the National Labor Relations Board asserted jurisdiction over baseball in 1973, the MLB's antitrust exemption faded in importance.⁵⁴ The reason is that nearly all of MLB's rules and policies are collectively bargained for with the Major League Baseball Players' Association (MLBPA).⁵⁵

An essential aspect of federal labor law is the nonstatutory labor exemption, which allows the league and its union to agree on governing rules in collective bargaining agreements.⁵⁶ The Supreme Court has recognized that the nonstatutory labor exemption is necessary to give effect to the policies of federal labor law, namely incentivizing meaningful collective bargaining.⁵⁷ In the labor context, Congress has determined that collectively bargained-for practices are generally beyond the scope of judicial antitrust review.⁵⁸ This policy decision is consistent with the purpose of antitrust regulation: to prohibit only unreasonable restraints of trade.⁵⁹

52. See William B. Gould IV, *Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law*, 15 STAN. L. & POL'Y REV. 61, 61-62 (2004).

53. Cf. *id.* at 80-82 (discussing how labor law supersedes antitrust law for sports with or without an exemption).

54. *Id.* at 66.

55. See *id.* at 66-67 ("[T]he labor law framework was suited to the relationship between players and owners[,] ... that baseball might seek antitrust immunity via the labor exemption even if the broad antitrust exemption from *Federal Baseball* no longer applied.").

56. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996) ("As a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves *any* of the competition-restricting agreements potentially necessary to make the process work.").

57. See *id.* at 248-50 (confirming the applicability of the nonstatutory labor exemption to professional sports leagues); see also Ostertag, *supra* note 6, at 65 (explaining how the nonstatutory labor exemption is necessary because without it, all union negotiations could be considered collusive).

58. *Brown*, 518 U.S. at 236-37.

59. See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 98 (1984).

The reality is that every sport engages in certain anticompetitive restraints, because it is the only way to make the league structure work.⁶⁰ Each of the major professional sports engage in conduct that, apart from this labor exemption, would clearly be considered anticompetitive. The simplest example would be the drafting of amateur players. The MLB, NFL, and NBA each hold a draft in the offseason in which teams select eligible players and retain their rights for a certain period, ensuring that the player can negotiate with only one team.⁶¹ The draft system is clearly a restraint on trade,⁶² but because the players' unions agree to these rules, they are not susceptible to antitrust regulation.⁶³ In addition to the draft, there are many other league rules covered by the nonstatutory labor exemption that would be unaffected by baseball losing its antitrust exemption.⁶⁴

MLB's antitrust exemption is not particularly useful in labor relations either. One might think that the strength of its antitrust exemption would give owners superior leverage, as the lack of decertification as an option would weaken the union's position;⁶⁵ but in practice MLB's labor situation has been chaotic.⁶⁶ Though the NFL and NBA have both recently gone through long labor disputes, historically, MLB has the worst record on labor relations of any professional sport. For example, prior to 2002, every collective bargaining agreement resulted in either a strike or a lockout.⁶⁷ Federal

60. *See id.* at 101.

61. *See* Jeffrey A. Rosenthal, *The Amateur Sports Draft: The Best Means to the End?*, 6 MARQ. SPORTS L.J. 1, 1 (1995).

62. *See id.* To be eligible for free agency, and negotiate compensation on the open market, players must incur a certain number of years of service time. In baseball, it is six years. *See* Gould, *supra* note 52, at 69.

63. *See* Rosenthal, *supra* note 61, at 16, 18.

64. Among the simplest examples are league rules as to on-field competition: the number of games played in a season, divisional assignments, and rules regarding equipment. *See, e.g.*, Walter Champion, Clarett v. NFL and the Reincarnation of the Nonstatutory Labor Exemption in Professional Sports, 47 S. TEX. L. REV. 587, 590-91 (2006) (quoting WALTER T. CHAMPION, JR., SPORTS LAW IN A NUTSHELL 58 (3d ed. 2005)).

65. As a result of the nonstatutory labor exemption, professional athletes, as union members, could file an antitrust suit on an issue implicated in collective bargaining only if they decertified their union or another event triggered the elimination of the negotiation process. *See* Gould, *supra* note 52, at 80-81.

66. *See generally id.* at 65-78 (discussing labor relations in baseball from the formation of the Players Association in 1954 to the 2002 collective bargaining negotiations).

67. *Id.* at 62.

labor law supersedes antitrust regulation where collective bargaining is involved,⁶⁸ so in regard to many of MLB's anticompetitive restraints, this exemption is meaningless. The passage of the Curt Flood Act in 1998 confirmed this development by guaranteeing major league players the right to file an antitrust action on matters regarding employment.⁶⁹

B. Nature of Professional Sports

Courts have generally acknowledged that professional sports are different than other industries because of their unique structure. In *Flood*, the Court labored to recognize the "unique characteristics and needs" of baseball.⁷⁰ This recognition is not limited to baseball; it applies to all sports organizations because without it, no sports league could function.⁷¹ Courts will tolerate restrictions on competition when they benefit the consumer, and this view has been consistently applied to cases involving professional sports.⁷² This means that the courts would treat baseball, without an exemption, in much the same manner as other sports. Its practices would be subject to antitrust regulation, but they would be analyzed according to the "rule of reason," under which some restraints are tolerated.⁷³ As noted, other sports are flourishing without an exemption, so there is no reason to believe baseball could not do the same.⁷⁴

Upon review, it becomes clear that tolerating some restraints in professional sports is justified.⁷⁵ The leagues are economic outliers

68. *See* *Brown v. Pro Football, Inc.*, 518 U.S. 231, 242 (1996).

69. 15 U.S.C. § 26b (2006). The Curt Flood Act is the only legislation directly implicating MLB's exemption. The Act, however, is very limited, explicitly stating that it does not change the application of antitrust law to any other facet of baseball, including franchise issues and the minor league system. *Id.*

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

71. *See* *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 (1984) ("[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal." (alteration in original) (quoting ROBERT BORK, *THE ANTITRUST PARADOX* 278 (1978)) (internal quotation mark omitted)).

72. *Cf.* *Scibilia*, *supra* note 9, at 435-36 (stating that courts, when applying antitrust law, have stressed the market impact of the challenged practice).

73. *See infra* Part IV.A.

74. *See supra* notes 50-51 and accompanying text.

75. *See infra* Part IV.B.

in that promoting unregulated competition would damage the product and adversely affect the consumer.⁷⁶ For those reasons, the choices professional sports leagues and their franchises make are treated differently under antitrust law.⁷⁷ This is one of the many reasons why the revocation of its exemption would not necessarily have an impact on MLB's practices.

C. MLB Does Not Assert or Take Advantage of Its Exemption

The clearest indication that MLB's antitrust exemption is irrelevant is the fact that MLB often chooses not to assert it. As sports law professor Mitchell Nathanson has noted, "in an ironic effort to prevent the Sherman Act from applying to it, MLB has voluntarily abided by it."⁷⁸ This reluctance to assert the exemption can be explained in one of two ways: either MLB does not want to overuse the exemption in a way that might attract congressional review, or MLB has concluded that its exemption does not actually produce any material benefit. Neither explanation is helpful to MLB when making operational decisions.

Several examples illustrate this point. Many commentators look at franchise relocation and expansion as the principle area in which MLB could use the exemption to its own benefit,⁷⁹ yet since 1958, MLB has expanded or relocated a team once every eight years.⁸⁰ Commissioner Allan "Bud" Selig himself has argued that the exemption allows MLB to avoid the "chaos and inefficiency" caused by franchise relocation,⁸¹ but MLB has seen more movement of its franchises than the NFL since 1950.⁸² MLB, presumably, could use its exemption to prevent relocation, yet it has generally chosen not to do so.

76. See *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2216-17 (2010).

77. See *id.*

78. Nathanson, *supra* note 8, at 1.

79. See, e.g., Scibilia, *supra* note 9, at 443-44 (arguing that baseball's exemption covers franchise issues).

80. See Mozes & Glicksman, *supra* note 40, at 282-83.

81. Selig, *supra* note 49, at 281. *But see* Nathanson, *supra* note 8, at 23-24 (finding that Selig's assertions proved incorrect).

82. See Nathanson, *supra* note 8, at 23-24.

Even if MLB chose not to use the exemption in regard to franchise issues, despite Selig's stated policy to the contrary, one would think MLB would use the exemption when other practices were challenged in court. Yet in a recent case involving its exclusive licensing provider, MLB chose not to assert the exemption, instead moving for summary judgment on the merits.⁸³ The Second Circuit applied the rule of reason analysis under the Sherman Act and found that the petitioner had failed to show any evidence that MLB's conduct adversely affected competition.⁸⁴ This outcome is important for two reasons. First, it is an implicit acknowledgement by MLB that its exemption is tenuous at best. Second, this decision is compelling evidence that many of baseball's practices would survive rule of reason scrutiny.⁸⁵

The obvious counterargument would be that MLB chose not to assert its exemption because it was confident it could win on the merits. A closer look at the case, however, reveals this to be unlikely. The dispute in *MLB Properties, Inc. v. Salvino, Inc.* implicated MLB's licensing agent, Major League Baseball Properties (MLBP), and an agreement among the thirty MLB teams to allow MLBP to exclusively market and promote the logo of MLB and its teams.⁸⁶ The agreement gave MLBP the authority to choose the prices for licenses attached to its merchandise.⁸⁷ Although the court found that this agreement did not constitute price fixing,⁸⁸ it is hard to find a compelling explanation for why MLB would take the chance of arguing this point on the merits if it believed it could successfully assert its exemption. The more reasoned conclusion is that MLB feared asserting the exemption to no avail. Losing the exemption was much more of a risk to MLB than losing the case.

MLB's resistance to asserting its exemption demonstrates that the exemption is primarily symbolic in nature. It allows MLB to say it is the only professional sport to possess favored legal status but brings little benefit in practical application. In other words, base-

83. *MLB Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 294 (2d Cir. 2008).

84. *Id.* at 334.

85. See *infra* notes 130-52 and accompanying text.

86. 542 F.3d at 295, 297.

87. See *id.* at 334-35 (Sotomayor, J., concurring).

88. *Id.* at 320 (majority opinion) (“[T]he so-called ‘price’ restriction is not in fact an agreement on ‘price’ but rather an agreement for the sharing of profits.”).

ball's "antitrust exemption represents merely a difference without a distinction."⁸⁹

III. HOW THE EXEMPTION HURTS BASEBALL

The benefits of MLB's antitrust exemption do not outweigh the costs of protecting it. As a result of its unique creation, the exemption is both cumbersome and uncertain. Not only has MLB's exemption been rendered largely irrelevant, the exemption, ironically, leaves MLB open to increased judicial and congressional scrutiny.

A. Cumbersome and Uncertain Nature of the Exemption

District courts asked to apply MLB's antitrust exemption have done so very inconsistently.⁹⁰ These lower court decisions generally fall into one of three categories: a narrow approach holding that the exemption applies only to the reserve clause; a broad view that the exemption covers nearly all aspects of the business of baseball; or a middle ground approach based on Holmes's view of the "unique characteristics and needs" of baseball.⁹¹ What is important is not which of these competing interpretations is most appropriate, but rather that no consistent standard exists.

This lack of consistency injects a great deal of uncertainty into MLB's business dealings. When MLB acts or engages in a business transaction, neither it nor its business partner knows to what extent the exemption applies. MLB's proposed deal with DirecTV in 2007 is a prime example of how the exemption can materially hurt MLB's bottom line.

MLB offers a service through cable and satellite providers in which subscribing consumers can view out-of-market contests that they ordinarily would not be able to see.⁹² Beginning in 2001, the service was offered through both DirecTV and local cable providers, but in January of 2007, MLB entered into a seven-year exclusive

89. Nathanson, *supra* note 8, at 21.

90. *See* Grow, *supra* note 3, at 580 ("[S]ubsequent lower courts nevertheless have failed to develop a uniform framework consistent with the Court's precedent.").

91. *Id.* at 580-81.

92. *See* Tomlinson, *supra* note 4, at 307.

agreement with DirecTV reportedly worth \$700 million.⁹³ After the deal was announced, baseball fans reacted negatively to the proposed agreement—so negatively that the United States Senate became involved.⁹⁴ Senator John Kerry immediately cast doubt on the deal, asking the Federal Communications Commission to investigate.⁹⁵ Senator Kerry then called committee hearings to examine the deal, during which he strongly urged MLB to resume negotiations with its cable partners.⁹⁶

MLB, presumably fearful of how Congress would respond, gave in to the pressure and entered into an agreement with the cable providers,⁹⁷ while at the same time renegotiating its DirecTV deal for substantially less money.⁹⁸ Had MLB decided to stand by its original arrangement, Congress could have chosen to statutorily remove MLB's antitrust exemption or strip the protection afforded by the Sports Broadcasting Act.⁹⁹ MLB was apparently not willing to risk its exemption for a favorable television contract, raising the question as to when MLB is actually willing to assert its exemption.

B. Fear of Congressional and Judicial Intervention

The DirecTV episode was certainly not the first instance in which Congress played a role in MLB's operations. In fact, many of the significant actions MLB has taken over its history have been accompanied by the threat of congressional intervention or the threat of an antitrust lawsuit. Whereas other professional sports must be cognizant of the courts but have little exposure to congressional intervention, MLB consistently faces pressure from both the

93. *See id.*

94. *See id.* at 308.

95. *Id.*; *MLB Has Deal to Keep "Extra Innings" on Cable TV*, ESPN.COM (Apr. 4, 2007, 10:16 PM), <http://sports.espn.go.com/mlb/news/story?id=2826280> [hereinafter *MLB Has Deal*].

96. *See MLB Has Deal*, *supra* note 95.

97. *See Tomlinson*, *supra* note 4, at 308 (referring to the DirecTV deal as evidence that baseball "realizes that its antitrust exemption does not offer strong protection").

98. *See MLB Has Deal*, *supra* note 95. The actual value of the DirecTV deal was not released publicly, though DirecTV's President said that the "economics [were] better" under the reworked deal. *See id.*

99. *See Tomlinson*, *supra* note 4, at 308. There are significant questions as to whether the Sports Broadcasting Act, 15 U.S.C. § 26b (2006), would have applied, but any resulting lawsuit is likely to have hinged on the antitrust exemption either way. *See Tomlinson*, *supra* note 4, at 308.

legislative and judicial branches. There are several examples of this throughout baseball history; this Note will focus solely on franchise relocation and expansion.

The moves of the Dodgers to Los Angeles and the Giants to San Francisco are thought to be great accomplishments for MLB's leaders,¹⁰⁰ yet the moves were just as much a result of congressional intervention as they were the genius of ownership. In 1951, the House Monopoly Subcommittee held hearings on MLB's rejection of a proposed merger with the Pacific Coast League (PCL).¹⁰¹ Despite threats from multiple congresspeople, MLB did not budge and continued to stonewall the PCL and the western United States.¹⁰² The Committee responded by issuing a report in May of 1952 suggesting revocation of the exemption as a way to force MLB to expand its territorial footprint to the West.¹⁰³ The report further went on to question the structure of MLB, namely that several cities had multiple teams, one much less successful than the other, including Boston, Philadelphia, and St. Louis.¹⁰⁴ Within two years, the Boston Braves moved to Milwaukee, the St. Louis Browns moved to Baltimore, and the Philadelphia Athletics moved to Kansas City.¹⁰⁵ None of the relocations could be considered voluntary,¹⁰⁶ but for many in Congress westward expansion remained a priority.¹⁰⁷ Not coincidentally, in 1958, the Dodgers and Giants both left New York for California.¹⁰⁸

100. *E.g.*, Lewis Abraham Leader, *50 Years Ago Today, Westward Expansion*, S.F. CHRON. (Apr. 15, 2008, 4:00 AM), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/04/15/SP3E1046NH.DTL>.

101. *See* Nathanson, *supra* note 8, at 27-28.

102. *Id.* at 29.

103. H.R. REP. NO. 82-2002, at 230 (1952).

104. *Id.* at 84-85.

105. *See* Nathanson, *supra* note 8, at 31-33 (discussing the pressures and disputes that surrounded these three relocations).

106. *See id.*

107. *See id.* at 36 (noting that it was the moves to California that placated Congress, as the Athletics' move to Kansas City did not exactly make MLB bicoastal).

108. *See* Scibilia, *supra* note 9, at 456 n.222. These two moves are more likely to have been voluntary because of Los Angeles and San Francisco's market potential. *See id.* at 455-57. However, expanding baseball to California was a subject for the House Monopoly Subcommittee as early as 1951, and even those two cities encountered resistance from the baseball establishment prior to 1958. *See* Nathanson, *supra* note 8, at 27-28.

Before the dust could settle from the wave of relocations mentioned above, MLB had to deal with the issue of expansion. Prior to 1960, MLB had never expanded despite the efforts of many upstart leagues, independent franchises, ambitious municipalities, and Congress.¹⁰⁹ Yet that would soon change as a result of both congressional and legal threats. In response to yet another failed merger attempt, this one by the Continental League, Senator Estes Kefauver proposed legislation and convened hearings on the legality of MLB's "special" exemption.¹¹⁰ At the same time, William Shea, head of a committee formed to bring a second team to New York, was ambitiously signing away players from MLB in an effort to force MLB to sue over the reserve clause.¹¹¹ MLB, realizing it was being attacked on multiple fronts, relented and allowed four new franchises to join the league.¹¹²

The events surrounding MLB's most recent expansion in 1995 illustrate the same convergence of outside forces. In 1992, Bob Lurie, owner of the San Francisco Giants, entered into an agreement with a group of investors intending to move the Giants to St. Petersburg, Florida.¹¹³ The city of St. Petersburg had made several attempts to persuade an MLB team to relocate and thought it had succeeded with the Giants.¹¹⁴ However, MLB rejected the proposed agreement, purportedly because of concerns raised in the background checks of the investment group's leaders, Vincent Piazza and Vincent Tirendi.¹¹⁵ A group based in San Francisco promised to keep the team there and subsequently purchased the Giants for less, with

109. See Nathanson, *supra* note 8, at 39.

110. *Id.* at 37-38.

111. *Id.* at 38-39.

112. *Id.* at 39-40 ("With the two headed dragon of the judicial and legislative branches looming over them, the Lords knew that they would have to give ground. Their reserve clause was going to be challenged, either through antitrust or contract law, and likely defeated if they continued to resist pressure to expand.").

113. See Scibilia, *supra* note 9, at 414-15.

114. See JONAH KERI, *THE EXTRA 2%: HOW WALL STREET STRATEGIES TOOK A MAJOR LEAGUE BASEBALL TEAM FROM WORST TO FIRST* 25-26 (2011).

115. See Grow, *supra* note 3, at 586.

MLB's explicit approval.¹¹⁶ The disgruntled investment group then filed suit, alleging defamation and violation of antitrust law.¹¹⁷

MLB filed a motion to dismiss under *Federal Baseball*, but the court denied the motion, holding that MLB's exemption applied only to the reserve clause.¹¹⁸ The court undertook a thorough analysis of the trilogy of Supreme Court cases and found that *Flood* had stripped *Federal Baseball* of all its precedential value outside of the reserve clause.¹¹⁹ Meanwhile, Congress became involved again, as the Senate Judiciary Committee scheduled hearings for its Anti-trust Subcommittee to consider overturning the exemption.¹²⁰ As a result, the parties settled the case before the lower court's decision was reviewed on appeal.¹²¹ Less than two years later, MLB announced a new round of expansion and unanimously voted for a franchise in the Tampa/St. Petersburg area.¹²²

If MLB continually reacts to outside pressures, solely out of fear for the future of its antitrust exemption, then the exemption is likely not improving the league's outlook. The preceding examples illustrate that many of MLB's operations over the past several decades were at least partially motivated by pressure from Congress and the courts. It is clear from the record surrounding each of these events that outside forces compelled MLB to take actions that it originally opposed. This is not to argue that expansion or relocation is always negative, but from this framework it would be easy to imagine a scenario in which external pressure forced MLB into a decision it viewed as decidedly negative.

116. *Id.* This is probably the best example of MLB actually asserting its exemption, but even this shows MLB's fear of intervention. The reason given for rejecting the St. Petersburg's group's bid was not the interests of baseball or its fans, but rather problems with background checks of the acquiring ownership group. The exemption, as MLB often portrays it, is supposed to serve the public interest and protect baseball's special covenant with its fans, see *infra* note 220 and accompanying text, yet those were not among the reasons given here.

117. *Piazza v. MLB*, 831 F. Supp. 420, 423-24 (E.D. Pa. 1993).

118. *Id.* at 421.

119. See *id.* at 434-38 ("In *Flood*, the Supreme Court exercised its discretion to invalidate the rule of *Federal Baseball* and *Toolson*. Thus no rule from those cases binds the lower courts as a matter of *stare decisis*.").

120. See Selig, *supra* note 49, at 277-78.

121. Ostertag, *supra* note 6, at 63.

122. The terms of the settlement were never made public, but Piazza told a member of the media shortly after the settlement that he was certain the St. Petersburg area would be getting an MLB franchise soon. Nathanson, *supra* note 8, at 42.

Assuming that the exemption is as powerful as MLB publicly portrays it to be, MLB would likely use the exemption to sanction practices that would otherwise be violations. Yet a cursory look at MLB operations points to no such practice, or even attempted practice.¹²³ As Professor Nathanson wrote, “in its zeal to protect its exemption and reserve clause, [MLB] bargained away much of the power these tools supposedly gave it.”¹²⁴

IV. THE IMPLICATIONS OF A POTENTIAL POLICY CHANGE

In order to determine precisely how important—or unimportant—the antitrust exemption actually is to MLB and its essential operations, it is necessary to examine how MLB would fare if exposed to antitrust scrutiny. This analysis reveals two things: first, that courts would be unlikely to treat challenges to MLB’s structure any differently than they currently do; and second, proper application of antitrust law would not negatively impact MLB’s structure and operations. These conclusions further reinforce the notion that MLB’s exemption has an extremely limited practical application.

A. Application of Antitrust Law

Section 1 of the Sherman Act states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... is declared to be illegal.”¹²⁵ The Supreme Court has not interpreted the statutory language strictly, holding that not all restraints of trade are unlawful as section 1 only prohibits restraints that unreasonably restrain trade, not those that promote competition.¹²⁶ The Court further noted that, “[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.”¹²⁷ As a result, the Court’s

123. *See supra* Part II.C.

124. Nathanson, *supra* note 8, at 40.

125. 15 U.S.C. § 1 (2006).

126. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

127. *Id.*

antitrust jurisprudence has created two tests to determine whether a practice is in violation of the Sherman Act.¹²⁸

1. *Per Se vs. Rule of Reason*

When reviewing a practice under section 1 of the Sherman Act, the Supreme Court will apply either the “per se illegality” test or the “rule of reason” test. The per se illegality test is “invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.”¹²⁹ The rule of reason test is applicable when “restraints on competition are essential if the product is to be available at all.”¹³⁰ In applying rule of reason analysis, the Court is to compare the anticompetitive effects of a practice with its “pro-competitive impact and business justifications.”¹³¹ In other words, the validity of the challenged restraint is judged on how it impacts competition.¹³²

The Supreme Court has consistently chosen the rule of reason standard over the per se illegality test in cases involving sports.¹³³ In an action challenging MLB, a court is almost certain to follow suit and perform its analysis under the rule of reason; in fact, the Second Circuit did so in *Salvino*.¹³⁴ Because there is no compelling reason to depart from previous precedent, it is safe to assume that another court would apply the rule of reason test to a case challenging MLB.

128. It is worth noting that the Supreme Court has recognized the “single entity” defense when entities, usually a corporation and its wholly owned subsidiary, are deemed incapable of conspiring with one another as a result of a complete unity of interest. *See* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-72, 777 (1984). Several sports leagues have attempted to assert the single entity defense, but the Supreme Court explicitly rejected it in 2010. *See* *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2215 (2010). There is no reason to believe that MLB would be treated as a single entity.

129. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 103-04 (1984).

130. *Id.* at 101.

131. *Scibilia*, *supra* note 9, at 434.

132. *NCAA*, 468 U.S. at 104.

133. *See* *Mozes & Glicksman*, *supra* note 40, at 294 (“[A] plaintiff would have to prove an anti-competitive effect under a rule of reason analysis, which is generally the standard used to judge sports leagues’ conduct.”); *Scibilia*, *supra* note 9, at 435 (“[T]he Supreme Court has expressed an unwillingness to apply the per se test to cases involving sports leagues.”).

134. *MLB Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 309 (2d Cir. 2008).

B. Analysis Under Rule of Reason

In such an analysis, it is important to remember that the purpose of antitrust regulation is to promote consumer welfare.¹³⁵ The Supreme Court has defined consumer welfare in terms of unrestricted output, nonmonopolistic pricing, and responsiveness to consumer preference.¹³⁶ This notion, combined with the Supreme Court's stated mandate to invalidate only actions that are unreasonable restraints,¹³⁷ will serve as the framework for examining how MLB's organizational structure and practices would survive a rule of reason analysis in the courts.

1. Factors Suggesting MLB's Practices Might Pass Rule of Reason Analysis

Before applying antitrust scrutiny to specific policies, it is useful to refer back to Holmes's recognition of MLB's unique characteristics and needs.¹³⁸ Arguably, the most important need is competitive balance among the teams in the league. MLB's system and structure are unlike those of any other American professional sports league, as it is the only league without a salary cap.¹³⁹ Economic inequality and competitive balance problems are major concerns, spawning the development of revenue sharing and a luxury tax for the franchises with the highest payrolls.¹⁴⁰ Yet those measures are only part of the system that guarantees competitive balance, and competitive balance is necessary to protect the interests of the consumer.¹⁴¹ For

135. See Scibilia, *supra* note 9, at 440 ("The Supreme Court, in light of its shift toward neoclassical economic theory, has in recent years focused on 'consumer welfare' as the major goal of antitrust policy." (footnotes omitted)).

136. *NCAA*, 468 U.S. at 107-08 (stating that Congress designed the Sherman Act to protect consumer welfare and that restraints on price and output are "paradigmatic examples" of the conduct that Congress intended the Act to remedy).

137. *Id.* at 98 ("[A]s we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.").

138. See *supra* notes 70, 91 and accompanying text.

139. See Gould, *supra* note 52, at 62. A salary cap is a completely artificial restriction on compensation that baseball has never instituted, much to its owners' chagrin. *Id.* at 73-74.

140. See Ostertag, *supra* note 6, at 67.

141. See Mozes & Glicksman, *supra* note 40, at 293 (noting that a system providing opportunities for small and midmarket teams is necessary to the health of the sport).

that reason, when examining MLB's practices, one must be keenly aware of their effects on competition within the league, as well as competition in the traditional sense of antitrust regulation.

The two best examples, though certainly not the only ones, are the draft and the player control system. When players are initially drafted or signed by an MLB franchise, that franchise owns their rights unconditionally while the players are in the minor leagues and in their first three years of service time.¹⁴² During that period, the franchise unilaterally determines the salaries for those players in accordance with league rules.¹⁴³ After three years of service time, or under special circumstances between two and three years, individual players become eligible for arbitration.¹⁴⁴ The independent arbiter, absent an agreement between the parties, determines the player's compensation by selecting either the proposed salary figure submitted by the team or the figure proposed by the player.¹⁴⁵ The arbiter is permitted to review salaries of other players not exceeding one year of service above the player's level of service time for comparative purposes.¹⁴⁶ A player only reaches free agency after six years of service time.¹⁴⁷

The player control and arbitration system described above artificially restricts player compensation, as players are not paid in accordance with performance for at least three years of MLB service time,¹⁴⁸ and even in their arbitration years generally make less than

142. See Tomlinson, *supra* note 4, at 290-91. Players, when drafted or signed, can negotiate signing bonuses and certain contract provisions, but their salaries in the minor leagues are not negotiable because they can only negotiate with one team. See Rick J. Lopez, *Signing Bonus Skimming and a Premature Call for a Global Draft in Major League Baseball*, 41 ARIZ. ST. L.J. 349, 353 (2009). Once they make it to the major league level, players make close to the league minimum, as determined by the franchise, for their first three years unless the two parties work out a long-term contract. Tomlinson, *supra* note 4, at 290-91. Players' bargaining power is further restricted under the most recent collective bargaining agreement, wherein each franchise is limited by a spending cap for its draft picks. See Keith Law, *New CBA a Net Loss for Baseball*, ESPN.COM (Nov. 22, 2011, 4:09 PM), http://insider.espn.go.com/mlb/blog/_name/law_keith/id/7270031/mlb-new-collective-bargaining-agreement-does-more-harm-good. Teams that exceed the cap are subject to penalties, including the loss of future draft picks. *Id.*

143. See Tomlinson, *supra* note 4, at 291.

144. See Gould, *supra* note 52, at 71-72.

145. *Id.* at 67.

146. *Id.* at 71-72.

147. *Id.* at 69.

148. The classic example is San Francisco Giants pitcher Tim Lincecum, who won the Cy Young Award—the award for the most outstanding pitcher—in his first two full seasons while

they could on the open market.¹⁴⁹ Yet this is nearly unanimously considered good for the game because allowing individual teams to draft and develop their own affordable talent gives small and midmarket teams the opportunity to compete with high revenue producing franchises.¹⁵⁰ Without this player control system, big market teams like the New York Yankees or Boston Red Sox would be able to buy all the young talent away from small market teams, making it much more difficult for those clubs to compete.¹⁵¹ Though a free labor market would increase competition on the micro level for individual players, it would destroy competitive balance on the macro level, as the overall success of the league depends on each team having at least some ability to compete financially.¹⁵²

As the above example illustrates, any antitrust analysis must consider a practice's procompetitive effects as well as its restraints on competition. In order to promote consumer welfare—in terms of the factors cited by the Supreme Court—MLB must set up a system with significant constraints, as all professional sports leagues require competitive balance to be successful; otherwise the demand for the product would rapidly decrease.¹⁵³

2. Franchise Relocation

The aspect of MLB's current policies most susceptible to antitrust regulation is almost assuredly franchise issues, specifically fran-

making only \$405,000 and \$650,000 respectively. *Tim Lincecum: Player*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/l/linceti01.shtml> (last visited Oct. 15, 2012).

149. See Tomlinson, *supra* note 4, at 291.

150. See, e.g., Mozes & Glicksman, *supra* note 40, at 293. There is controversy, especially in light of the most recent collective bargaining agreement, about whether MLB's player control system is the best way to improve competitiveness, which is far beyond the scope of this Note. See *generally* Law, *supra* note 142. The important consideration, however, is that all agree that there must be some system that restricts the free movement of players, because otherwise competitive balance would be destroyed.

151. Tomlinson, *supra* note 4, at 292-93.

152. *Id.* (“[M]aking sure that every team has the ability to be competitive is necessary for the overall success of the league.”).

153. James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims After American Needle*, 21 MARQ. SPORTS L. REV. 517, 521-22 (2011) (noting that competitive balance, and thus the uncertainty of a particular outcome, is a principle factor in driving the appeal of a sporting event to consumers).

chise relocation.¹⁵⁴ MLB, like all professional sports leagues, has promulgated a series of rules governing the relocation of a franchise. No league approval is needed for a franchise to move into an unoccupied city with a population of over 2.4 million.¹⁵⁵ For a team to move into an unoccupied territory of less than 2.4 million people, three-fourths of the league must approve.¹⁵⁶ To move into a city that is already home to another franchise, the moving franchise must be a member of the other league—National League or American League—and obtain the three-fourths approval.¹⁵⁷ The phrase “home territory,” or occupied territory, denotes a designated geographical area in which each franchise has exclusive rights.¹⁵⁸ It is unclear whether these rules would sustain a rule of reason analysis. The conventional wisdom seems to be that the franchise rules would be invalidated,¹⁵⁹ but a more reasoned analysis would suggest that MLB should prevail in a rule of reason challenge.

a. L.A. Coliseum and Other Non-Baseball Cases

The most important franchise relocation case is *Los Angeles Memorial Coliseum Commission v. NFL*, decided in 1984.¹⁶⁰ The Ninth Circuit invalidated the NFL’s franchise relocation rule,¹⁶¹ which was remarkably similar to MLB’s current rule for occupied territory.¹⁶² Some commentators have suggested that because of this decision, MLB’s rule would ultimately fail if reviewed by the courts.¹⁶³ That assertion, however, misinterprets the holding of *L.A.*

154. This is apparent because it is also the subject that has drawn the most attention in legal scholarship. See, e.g., Thomas R. Hurst & Jeffrey M. McFarland, *The Effect of Repeal of the Baseball Antitrust Exemption on Franchise Relocations*, 8 DEPAUL-LCA J. ART & ENT. L. 263, 264-65 (1998); Matthew J. Mitten & Bruce W. Burton, *Professional Sports Franchise Relocations from Private Law and Public Law Perspectives: Balancing Marketplace Competition, League Autonomy, and the Need for a Level Playing Field*, 56 MD. L. REV. 57, 60-63 (1997).

155. See Nathanson, *supra* note 8, at 22.

156. *Id.* at 22.

157. *Id.* at 22-23.

158. See Hurst & McFarland, *supra* note 154, at 274.

159. See Nathanson, *supra* note 8, at 43.

160. *L.A. Mem’l Coliseum Comm’n v. NFL (L.A. Coliseum I)*, 726 F.2d 1381 (9th Cir. 1984).

161. *Id.* at 1398, 1401.

162. See Nathanson, *supra* note 8, at 22.

163. See, e.g., *id.* at 23.

Coliseum, ignores the court's analysis in the subsequent damages case, and fails to properly consider the effects of market definition and competitive balance on consumer welfare.

The dispute in *L.A. Coliseum* arose after the Los Angeles Rams moved to Anaheim and left the city of Los Angeles without a team to play in its premier venue, the Coliseum; the Oakland Raiders desired to fill the void.¹⁶⁴ Standing in their way was NFL Rule 4.3, which required three-fourths approval of the other franchises in order for a team to move into the home territory of another NFL franchise.¹⁶⁵ The NFL subsequently voted unanimously against the move, motivating the Raiders and the Coliseum owners to institute an antitrust action.¹⁶⁶ The Ninth Circuit used the rule of reason and engaged in a "thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition."¹⁶⁷ Using this analysis, the court held that the NFL could not prevent the Raiders from moving to Los Angeles.¹⁶⁸

Although the decision seems to completely invalidate the NFL's restrictions on relocation, the court's holding is not as expansive as it appears. The court acknowledged that there were potential procompetitive effects but that the NFL had not instituted any requirements that those factors be considerations in its vote on the Raiders.¹⁶⁹ This recognition suggested that if the rule had contained some procedural safeguards, it might have survived under rule of reason.¹⁷⁰ This implication was confirmed in the subsequent damages case, as the Ninth Circuit revisited its prior opinion and made it clear that the rule was only invalidated as applied, not on its face.¹⁷¹

164. *L.A. Coliseum I*, 726 F.2d at 1384-85.

165. *Id.* at 1385.

166. *Id.*

167. *Id.* at 1391 (quoting *Cascade Cabinet Co. v. W. Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1373 (9th Cir. 1983)).

168. *Id.* at 1401.

169. *Id.* at 1397 (mentioning population, economic projections, facilities, and regional balance as potential factors for consideration).

170. *Id.* ("Some sort of procedural mechanism to ensure consideration of all the above factors may also be necessary.")

171. *L.A. Mem'l Coliseum Comm'n v. NFL (L.A. Coliseum II)*, 791 F.2d 1356, 1368-69, 1375 (9th Cir. 1986).

Despite stating that “the relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue,”¹⁷² the court never precisely defined that market.¹⁷³ As a result, *L.A. Coliseum* is of questionable precedential value to MLB. Even though MLB’s relocation rules look similar to the NFL’s, baseball has been much more willing to entertain multiple franchises in one city than the NFL.¹⁷⁴ Additionally, the Ninth Circuit itself has indicated that the rule in *L.A. Coliseum* is limited in that some restrictions on franchise relocation would survive rule of reason scrutiny.¹⁷⁵ In a subsequent NBA case, the court reversed an order for summary judgment on the basis of *L.A. Coliseum*, confirming its position that the restraints in *L.A. Coliseum* were only invalid as applied.¹⁷⁶

b. Defining the Applicable Market

In order to weigh the procompetitive effects of a restraint against its anticompetitive effects, a court applying the rule of reason must define the relevant market and consider how that market operates.¹⁷⁷ The relevant market includes both a product market and a geographic market.¹⁷⁸ Even though it did not offer a precise definition, it is clear in *L.A. Coliseum* that the court adopted a narrow market definition.¹⁷⁹ Yet, the nature of rule of reason analysis guarantees that there are no “hard and fast rules” for determining the applicable market.¹⁸⁰ A thorough analysis of the market for major league-caliber baseball indicates that the narrow market interpretation of *L.A. Coliseum* would be improper, at least as it relates to the product market.

172. *L.A. Coliseum I*, 726 F.2d at 1392.

173. *Id.* at 1394 (“Here the exceptional nature of the industry makes precise market definition especially difficult.”).

174. Hurst & McFarland, *supra* note 154, at 297. Baseball currently has three such markets: New York, Chicago, and Los Angeles, though the Angels play in Anaheim. *Id.* at 297 n.220.

175. *NBA v. SDC Basketball Club, Inc.*, 815 F.2d 562, 567 (9th Cir. 1987).

176. *Id.* at 567-68.

177. *L.A. Coliseum I*, 726 F.2d at 1392.

178. *Id.* at 1392-93.

179. See Scibilia, *supra* note 9, at 438.

180. Hurst & McFarland, *supra* note 154, at 274.

The product market is defined by the reasonable interchangeability of the product and the cross-elasticity of demand among related products.¹⁸¹ Economic research has shown that MLB franchises are not competing as much among themselves as they are competing with alternative uses for people's leisure time and entertainment dollars.¹⁸² Another test for determining the relevant product market is the sensitivity of the product to price changes.¹⁸³ If a small increase in price would drive consumers to substitutes, then that substitute should be included in the properly defined market.¹⁸⁴ If MLB's prices were to rise above the current market level, a compelling argument could be made that its consumer base would migrate to other entertainment options.¹⁸⁵

Obviously, teams compete with one another in some sense, but the true competition in the economic market is between baseball, as a whole, and other entertainment choices.¹⁸⁶ This makes sense when one considers the draw of professional sports to its consumers. Generally, fans choose their favorite teams and develop a strong loyalty and identity tied to a specific team.¹⁸⁷ Therefore, the market to consider is not among individual franchises, because, generally speaking, the consumers are going to support one specific team even if there are others in the area.

An individual team's commercial strategy is extremely unlikely to affect the economic performance of any other team, even if the

181. *L.A. Coliseum I*, 726 F.2d at 1393.

182. See McKeown, *supra* note 153, at 521; Scibilia, *supra* note 9, at 441.

183. See, e.g., *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1038 (D.C. Cir. 2008). The technique for this analysis is known as the "small but significant non-transitory increase in price" test (SSNIP), and is used extensively by the FTC and Department of Justice in reviewing transactions for antitrust implications. *Id.*

184. *Id.*

185. See *infra* note 186 and accompanying text.

186. Donald L. Alexander, *Major League Baseball: Monopoly Pricing and Profit-Maximizing Behavior*, 2 J. SPORTS ECON. 341, 347 (2001) ("[C]onsumers view baseball as one form of entertainment among many, and although team owners have a monopoly position in MLB in a particular city, they are nevertheless competing for the consumer's dollar in a broader entertainment market.").

187. See Scibilia, *supra* note 9, at 442 ("[M]ost fans of one Chicago or New York club, for example, would not be caught dead in the ballpark of the other club, even if the other club was charging \$1 for seats behind the dugout.").

franchises are located in close proximity to one another.¹⁸⁸ MLB, then, must act in the best interest of all its teams when creating and enforcing its rules, recognizing that the health of the sport is dependent on attracting and maintaining consumers of MLB teams collectively.¹⁸⁹ Structuring its relocation rules based on competition among franchises would be shortsighted. Accordingly, the procompetitive aspects of MLB's rules are designed to improve its position versus other entertainment options.¹⁹⁰

The applicable market should not be defined as professional baseball within a certain geographical region, but rather all entertainment options in that area. At the very least, the market should encompass other professional and college sports because a narrower market definition ignores the economic realities described above.

c. Procompetitive Aspects

MLB has a strong financial interest in maintaining franchise stability; it benefits the league, the individual franchises, and the consumers.¹⁹¹ Franchise relocation restrictions help achieve financial stability for its franchises, geographic diversity, traditional rivalries, and fan loyalty, each of which is essential to the health of a professional sports league.¹⁹² Stability also increases MLB's attractiveness to potential television partners, as networks are less likely to commit billions of dollars if they are uncertain as to the geographical makeup of the league.¹⁹³ For the same reason, geographical diversity is important for national advertising and other media contracts.¹⁹⁴ Competitive balance is also at stake, particularly in MLB,¹⁹⁵ because there is a strong causal link between revenue/

188. See Alexander, *supra* note 186, at 348; see also Scibilia, *supra* note 9, at 441-42 & n.175 (reporting research on the cross-elasticity of demand among games played in different ballparks).

189. See Ostertag, *supra* note 6, at 66-67.

190. See Scibilia, *supra* note 9, at 439 (“[The restraints] serve to make [b]aseball more competitive *vis a vis* other sports and forms of entertainment.”).

191. See Mitten & Burton, *supra* note 154, at 103.

192. See Scibilia, *supra* note 9, at 439.

193. See Mitten & Burton, *supra* note 154, at 103.

194. *Id.*

195. See Grow, *supra* note 3, at 609 (“Moreover, franchise location can also have an impact on competitive balance.... [M]aintaining control over franchise location decisions not only

payroll and on-field performance.¹⁹⁶ It should be apparent, then, that there are significant procompetitive aspects of MLB's restrictions on franchise relocation that would outweigh their anticompetitive effects if a court were to use the appropriate market definition.

d. Consumer Welfare

The final consideration is whether MLB's franchise restrictions satisfy the Supreme Court's notion of consumer welfare, defined as unrestricted output, nonmonopolistic pricing, and responsiveness to consumer preference.¹⁹⁷ Clearly, franchise relocation restrictions do not reduce output in the global sense, as the number of teams remains constant. The only potential argument would be that the rules restrict output for the city that wishes to attract a team. However, such a contention, if accepted, would lead to absurd results.¹⁹⁸ Under that reasoning, any city wishing to field a team could officially petition MLB and immediately file suit if MLB rejected its petition, with no consideration as to whether the city would be an appropriate host for a major league franchise.¹⁹⁹ Certainly that result is not consistent with the intent of the Sherman Act, as MLB would face an inordinate number of suits challenging every restriction on franchise movement, no matter how reasonable. This notion is also directly at odds with the Ninth Circuit's view in *L.A. Coliseum*.²⁰⁰

As a further consideration, all professional sports are national industries; technology allows consumers to gain access to games and exposure to teams across the country, regardless of where they are located. For example, MLB offers services that broadcast out-of-market games on television, computer, radio, and wireless devices

allows leagues to ensure that franchises are located only in cities large enough to support a team financially, but also that those cities are not over populated with too many teams.”).

196. Ostertag, *supra* note 6, at 67.

197. See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 107 (1984).

198. See Scibilia, *supra* note 9, at 444.

199. *Id.* This seems to further reinforce the notion that MLB's relevant market for antitrust purposes must be broader than simply professional baseball in the particular city.

200. See *supra* notes 174-76 and accompanying text (arguing that many of MLB's franchise restrictions would survive a rule of reason review).

like the smartphone and iPad.²⁰¹ Whether a team is able to relocate does not affect output in a meaningful way, because the consumers of the sport have nearly unlimited access to the product. No longer is being an engaged fan dependent on one's proximity to their favorite team.

Likewise, franchise relocation has a negligible effect on pricing.²⁰² Market studies show that ticket prices are determined almost entirely by factors such as team stature, a home team's place in the standings, a visiting team's place in the standings, and star power.²⁰³ Examining cities where there are multiple teams like New York and Chicago confirms this dynamic. If consumer prices were determined by the availability and competition of neighboring franchises, prices would be lower in these two cities. Instead, the opposite is true; prices in New York and Chicago are higher than in many cities with just one team.²⁰⁴ The Yankees and Cubs are two of the most valuable and popular franchises in MLB.²⁰⁵ Each has been in its current city for well over one hundred years and enjoys a strong tradition,²⁰⁶ creating a demand that is not affected by the existence of another franchise in the same geographic area. Consumer prices, then, are more about the franchise's stature and competitive prowess than they are about neighboring franchises.²⁰⁷

Finally, MLB's rules show that the league is responsive to the interests and desires of its consumers. All fans of a professional sports team wish for the team to remain, but franchise stability holds even greater importance in baseball.²⁰⁸ Baseball, more than

201. See, e.g., *MLB.com Media Center*, MLB.COM, <http://mlb.mlb.com/mediacenter/> (last visited Oct. 15, 2012).

202. Scibilia, *supra* note 9, at 441 (“[I]t does seem clear that [b]aseball’s franchise relocations have not led to the expansion of monopoly prices.”).

203. See *id.* at 443.

204. See Alexander, *supra* note 186, at 348 (“One hypothesis suggests that demand is more elastic given the presence of a second team. The regression results, however, indicate that the presence of a second team does not matter.”).

205. *Baseball’s Most Valuable Teams*, FORBES (Mar. 22, 2011), http://www.forbes.com/lists/2011/33/baseball-valuations-11_land.html.

206. See *Baseball Teams*, BASEBALL ALMANAC, <http://www.baseball-almanac.com/teammenu.shtml> (last visited Oct. 15, 2012).

207. See Alexander, *supra* note 186, at 348.

208. Scibilia, *supra* note 9, at 447, 450 (observing that baseball fans desire franchise stability and are “indoctrinated into the histories of their teams”).

any other sport, is inextricably tied to its history and tradition.²⁰⁹ Allowing for free movement of franchises would destroy a great deal of that history and tradition, harming the consumers who invest so heavily into it. Even discounting the damage that a lack of regional balance and geographic diversity might have on the league, pervasive relocation is an unsatisfying prospect in a sport in which brand loyalty and tradition are very powerful.

Antitrust law exists to protect the consumer welfare; striking down MLB's relocation rules does not serve that purpose. For the above reasons, it becomes clear that MLB's franchise relocation rules are not inconsistent with the purpose of federal antitrust regulations, and would be upheld under a rule of reason analysis.

3. Expansion

Franchise expansion is often linked to franchise relocation; however, it is a much simpler issue to resolve. It is easy to see that the number of teams within a league has a direct and substantial impact on the distribution and quality of the product.²¹⁰ MLB must be permitted to unilaterally restrict expansion, otherwise the product would be diluted and the structure of the league would be unmanageable.²¹¹ The courts have recognized this fundamental issue, best explained in *MLB v. Butterworth*: "It is difficult to conceive of a decision more integral to the business of major league baseball than the number of clubs that will be allowed to compete."²¹² The same, presumably, could be said about contracting teams, though MLB's financial situation makes contraction a remote possibility.²¹³ It thus seems safe to say that expansion would be beyond the reach of antitrust regulation.

209. *Id.* at 448.

210. See Grow, *supra* note 3, at 608.

211. See *id.*

212. 181 F. Supp. 2d 1316, 1332 (N.D. Fla. 2001), *aff'd sub. nom.* MLB v. Crist, 331 F.3d 1177 (11th Cir. 2003).

213. See generally Maury Brown, *Why Contraction in Major League Baseball Is a Pipe Dream*, BIZ OF BASEBALL (Apr. 5, 2011, 8:27 AM), http://bizofbaseball.com/index.php?option=com_content&view=article&id=5152:why-contraction-in-major-league-baseball-is-a-pipe-dream&catid=26:editorials&Itemid=39.

4. *The Minor League System*

Several commentators have asserted that, without an antitrust exemption, MLB's minor league structure, like franchise relocation, could be vulnerable to an antitrust challenge.²¹⁴ As alluded to above, however, MLB's player control system, to include minor league baseball, is necessary to promote competitive balance at the major league level and improve the product going to the consumer.²¹⁵ Eliminating or substantially altering the current minor league system would change the entire nature of professional baseball and the hundreds of small towns and cities across the country that currently serve as homes to minor league baseball clubs. Without the parent organizations, many minor league franchises would be unable to operate, as the current business model is possible only because the parent organization pays the salaries of all players, coaches, and trainers.²¹⁶ Without MLB subsidies, the prices for minor league games are likely to increase substantially.

This would undoubtedly adversely affect consumers, as minor league baseball offers cheaper, family-friendly entertainment in hundreds of small towns and cities that otherwise may not have exposure to professional sports.²¹⁷ The best young players in baseball are likely to play in as many as three or four different cities on their way to the major leagues,²¹⁸ offering countless opportunities for consumers that would not be possible without this structure. Minor league baseball is a restraint in that it restricts player movement and compensation, but it actually increases output and provides real benefits to MLB's consumers. A thorough analysis under the rule of reason is highly unlikely to declare the minor league system a restraint on trade in violation of section 1 of the

214. *E.g.*, Grow, *supra* note 3, at 610; Mozes & Glicksman, *supra* note 40, at 293.

215. *See supra* Part IV.B.1.

216. *See* Eric Scheible, Note, *No Runs. No Hits. One Error: Eliminating Major League Baseball's Antitrust Exemption Will Not Save the Game*, 73 U. DET. MERCY L. REV. 73, 91 n.151 (1995).

217. *See* Grow, *supra* note 3, at 610.

218. *Cf. id.* at 610-11 (discussing how MLB teams assign their players to each of their minor league teams).

Sherman Act, because without the restraint, the product would not be available at all.²¹⁹

C. Counterarguments as to How MLB Would Be Hurt by a Revocation Fail

Admittedly, the contention that an exemption from antitrust law adversely affects an entity is bound to provoke criticism. One would think an exemption should allow that particular entity to engage in behavior that would otherwise be illegal. A common argument, and the one advanced by MLB itself, is that the exemption confers a general ability for MLB to serve the “public interest” and protect its “special covenant” with its fans.²²⁰ What the facts show is that baseball has been unable and unwilling to take any actions that are fundamentally different than those of any other professional sports league.

Bud Selig, in his testimony to the Antitrust Subcommittee of the Senate Judiciary Committee, explained this theory in the following way: “The fact of the matter is that the threat of antitrust liability has caused nothing but confusion and instability in the other professional sports.”²²¹ Selig’s position, however, is far from unassailable. As demonstrated, other professional sports have flourished without an antitrust exemption, so it is difficult to maintain that an exemption from antitrust law is necessary for a professional sports league to succeed.²²²

Commissioner Selig’s main contention in support of his instability claim was that the application of antitrust laws prevents leagues from protecting franchise stability and leads to “inevitable chaos

219. See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 (1984).

220. See *Baseball’s Antitrust Immunity: Hearing on the Validity of Major League Baseball’s Exemption from the Antitrust Laws Before the Subcomm. on Antitrust, Monopolies and Bus. Rights of the S. Comm. on the Judiciary*, 102d Cong. 105-06 (1992) [hereinafter *Baseball’s Antitrust Immunity Hearing*] (statement of Allan H. Selig, President of the Milwaukee Brewers Baseball Club). Selig was elected as the ninth commissioner of MLB on July 9, 1998. *MLB Executives: Allan H. (Bud) Selig*, MLB.COM, http://mlb.com/mlb/official_info/about_mlb/executives.jsp?bio=selig_bud (last visited Oct. 15, 2012).

221. *Baseball’s Antitrust Immunity Hearing*, *supra* note 220, at 119.

222. See *supra* text accompanying notes 50-51.

and inefficiency.”²²³ In his testimony, Selig specifically referenced the Ninth Circuit’s decision in *L.A. Coliseum*.²²⁴ As this Note demonstrates, the reasoning of *L.A. Coliseum* would not guarantee a similar outcome in a case implicating baseball.²²⁵ Further, the NFL is not wrought with franchise chaos or inefficiency, nor has the outcome of that case had a devastating impact on communities with professional football.

Since the *L.A. Coliseum* decision in 1984, there have been five relocations of NFL franchises.²²⁶ One of these five involved the Raiders moving back to Oakland from Los Angeles.²²⁷ In three of the other four cases, the city from which the franchise relocated saw another franchise move into town within a decade.²²⁸ The lone exception is Los Angeles,²²⁹ the second largest media market in the country.²³⁰ If the “chaos” was really a matter of owners uprooting their organizations for “greener pastures” as Selig claims,²³¹ it is hard to imagine why there is no team in Los Angeles, or why there has not been more franchise movement in the NFL.

Another potentially compelling argument as to how baseball might be materially injured by a repeal of its antitrust exemption is that its financial information would no longer be private. Some within the baseball industry believe that keeping its financial books closed is one of MLB’s principle motivations for fighting to protect

223. *Baseball’s Antitrust Immunity Hearing*, *supra* note 220, at 112 (internal quotation marks omitted).

224. *Id.* at 111.

225. *See supra* Part IV.B.2.a. (discussing *L.A. Coliseum* and the subsequent cases applying it).

226. *See History of NFL Franchises, 1920-Present*, PRO FOOTBALL HALL OF FAME, <http://www.profootballhof.com/history/stats/franchises.aspx> (last visited Oct. 15, 2012).

227. *Id.* The Raiders moved from Oakland to Los Angeles in 1982 and then back to Oakland in 1995, where they remain.

228. *Id.* The three examples: Cleveland lost the Browns to Baltimore in 1996 (the franchise changed its name to the Ravens) and was compensated with an expansion team, also named the Browns, in 1999; St. Louis lost the Cardinals to Phoenix in 1988, but seven years later the Rams moved from Los Angeles; Houston lost the Oilers to Tennessee in 1996, but also got an expansion franchise, this one in 2002. *Id.*

229. *Id.*

230. *Top 100 Television Markets*, STATION INDEX, <http://www.stationindex.com/tv/tv-markets> (last visited Oct. 15, 2012).

231. Selig, *supra* note 49, at 281.

its exemption.²³² The utility of this argument is questionable at best; neither the NFL nor NBA seem to be materially injured by the lack of an antitrust exemption that assists in keeping their financial records private.²³³

The focus of this matter, however, is not whether baseball guards its financial information, but rather, why and how MLB would be affected if those books were available for antitrust investigations. A common theory is that it would weaken franchise bargaining power over stadium financing with their municipalities.²³⁴ The contention is that franchises attempt to hold localities hostage with the threat of relocation, claiming that they are losing money in that city and would need to move without a new, publicly funded stadium.²³⁵ This is true to some degree; it is probably why MLB has seen a significant number of new publicly funded stadiums in recent years.²³⁶ Since 2000, fourteen of thirty teams have built new stadiums; look back to 1997 and the number of new stadiums becomes eighteen.²³⁷

Yet this rapid increase in new, publicly funded stadiums is highly unlikely to continue. In the wake of the construction of these new ballparks, there has been increased research into the economic impact of new stadiums to the surrounding area. Economist Phillip Miller has written extensively on the subject and found that the construction of new sports stadiums is not a catalyst for either employment or economic output.²³⁸ Indeed, the consensus of independ-

232. See, e.g., KERI, *supra* note 114, at 29 (“If an antitrust case were ever to go to court, the league would be forced to open its books, something it desperately strives to avoid.”). MLB has also launched its own suits to prevent government officials from issuing civil investigative demands. See, e.g., *MLB v. Butterworth*, 181 F. Supp. 2d 1316, 1318 (N.D. Fla. 2001); *Butterworth v. Nat’l League of Prof’l Baseball Clubs*, 644 So. 2d 1021, 1022 (Fla. 1994). The two courts came to inconsistent decisions, with the Florida Supreme Court finding the exemption to be limited to the reserve clause, and the federal court finding that MLB’s exemption prevented investigation. See *Grow*, *supra* note 3, at 584-85, 588.

233. See *supra* notes 50-51 and accompanying text.

234. See KERI, *supra* note 114, at 29.

235. *Id.*

236. See Phillip Miller, *Private Financing and Sports Franchise Values: The Case of Major League Baseball*, 8 J. SPORTS ECON. 449, 452 (2007).

237. See *American League Ballparks*, BASEBALL ALMANAC, <http://www.baseball-almanac.com/stadium/stadium2.shtml> (last visited Oct. 15, 2012); *National League Ballparks*, BASEBALL ALMANAC, <http://www.baseball-almanac.com/stadium/stadiu2b.shtml> (last visited Oct. 15, 2012).

238. See Miller, *supra* note 236, at 450-51.

ent academic studies is that the existence of sports stadiums does not have a net positive economic impact on a municipality.²³⁹ These studies have particular importance in today's economy, as states and localities attempt to tighten their budgets.²⁴⁰ Thus, it could be said that the era of publicly funded stadiums is over.²⁴¹ In this context, the impact of disclosing financial information is likely to be minimal to the league and its member organizations.

The final consideration worthy of mention is the notion that even if none of baseball's policies were unlawful under the rule of reason, MLB would still be harmed by the mere possibility of antitrust litigation. This concern, presumably, flows from the idea that revocation of the exemption would encourage antitrust lawsuits, even ones likely to fail. This possibility, along with the high cost of antitrust litigation, could materially and negatively affect MLB even in the absence of an adverse judgment. This concern, however, is not a significant one. First, most of baseball's suspect policies are sanctioned by its union and covered from antitrust scrutiny by the nonstatutory labor exemption.²⁴² Second, other professional sports are subject to antitrust scrutiny and thus face the potential for litigation costs.²⁴³ Finally, as illustrated in *Salvino*, MLB is reluctant to assert its exemption when one of its policies is challenged.²⁴⁴ There is no evidence that this possibility affects the financial success of either the NFL or NBA. Although MLB may periodically face an antitrust challenge, this possibility does not pose a significant threat to the long-term success of MLB's business operations.

239. See Phillip Miller, *The Economic Impact of Sports Stadium Construction: The Case of Construction Industry in St. Louis, MO*, 24 J. URB. AFF. 159, 159-61 (2002) (recounting previous studies to illustrate the consensus on the impact of sports stadiums).

240. Logan E. Gans, *Take Me Out to the Ball Game, but Should the Crowd's Taxes Pay for It?*, 29 VA. TAX REV. 751, 753-54 (2010).

241. The two franchises that truly do need new stadiums are having significant difficulty obtaining them. Both Oakland and Tampa have resisted the demands of the Athletics and Rays, respectively. No doubt, this can be partially credited to the criticism that publicly funded stadium projects have received from both economists and the media. See Howard Bryant, *Problem for Rays and A's? MLB Greed*, ESPN.COM (June 23, 2011), <http://sports.espn.go.com/espn/commentary/news/story?page=bryant-110622>.

242. See *supra* Part II.A.

243. See *supra* notes 60-64 and accompanying text.

244. See *supra* text accompanying notes 82-89.

CONCLUSION

MLB's antitrust exemption, while important historically to protect the reserve system, has a net negative effect in today's professional sports landscape. Although it may be foolish to unilaterally renounce the exemption, as limiting antitrust exposure is very important to professional sports leagues,²⁴⁵ it brings no clear benefit to MLB or its business partners. MLB's exemption is only symbolic in nature.

In fact, the exemption actually adversely affects MLB, because it exposes MLB's operations to scrutiny from both Congress and the courts.²⁴⁶ The mere threat of revocation seems more powerful than the exemption itself, as MLB has chosen not to assert it for fear that either Congress or the courts might revoke it. Application of the exemption is also extremely unpredictable, as lower courts have adopted completely inconsistent standards for applying antitrust law to MLB.²⁴⁷ This uncertainty can and does negatively affect the business operations of MLB.

Still, all is not lost for professional baseball. It is clear that MLB is nervous about life without the exemption, presumably fearful of inconsistent treatment by the courts in cases involving baseball and antitrust law. Yet, as this Note posits, many if not all of MLB's practices would survive a proper rule of reason analysis, meaning that its major policies and operations likely would be unaffected by revocation of the antitrust exemption.²⁴⁸ In such an action, courts must apply a properly broad market definition, as baseball franchises compete economically with other entertainment options, not with each other. When such factors are properly accounted for, it is clear that the procompetitive aspects of most restraints, particularly those as to franchise issues and the minor league, outweigh their anticompetitive aspects. For these reasons, MLB's antitrust exemp-

245. See Timothy Davis, *What Is Sports Law?*, 11 MARQ. SPORTS. L. REV. 211, 227-29 (2001).

246. See *supra* Part III.B.

247. See *supra* Part III.A.

248. See *supra* Part IV.B.

tion is actually hurting the game, rather than conferring any tangible benefits.

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