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THE IRRELEVANCE OF BASEBALL'S ANTITRUST EXEMPTION: A HISTORICAL REVIEW

*Mitchell Nathanson**

This article examines Major League Baseball's (MLB) antitrust exemption from a practical, historical perspective and concludes that it is largely irrelevant to the actual (as opposed to theoretical) workings of the business of baseball. This article focuses first on the exemption's supposed protection of baseball's "reserve clause" and finds that it was irrelevant to its creation in 1879 as well as its demise in 1975. Despite the exemption, the reserve clause has always been subject to challenge under contract law and it was a simple argument based on contract law principles that led to its eventual dismantling. This article then focuses on the exemption's purported ability to allow team owners to prevent franchise relocation and unwanted expansion (unlike their brethren in the National Football League (NFL)) and concludes that the exemption is merely a mirage: while it appears to exist from afar, up close it disappears. As a result, MLB owners have historically acted no differently than their counterparts in the NFL and in accordance with the principles of the Sherman Act out of fear that if they did not, Congress would step in and formally remove the exemption. Thus, in an ironic effort to prevent the Sherman Act from applying to it, MLB has voluntarily abided by it.

INTRODUCTION

To state that Major League Baseball is unique among American professional sports is to state the obvious. No other major sport (football, basketball or hockey) is as intertwined with our nation's

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history, ingrained in our collective consciousness or played without the limitations imposed by a clock. Perhaps this is why the Supreme Court has chosen, in a succession of convoluted opinions, to add to the unique status of Major League Baseball by carving out for it a judicially created exemption to the Sherman Antitrust Act. As a result, baseball now stands on its own, relative to its sporting counterparts, not only culturally and sociologically but legally as well. It is a status that those who run Major League Baseball (dubbed the "Lords of Baseball" by New York Daily News columnist Dick Young many decades ago[1]) no doubt relish and cherish, and apparently will fight to protect at seemingly all costs.

However, because the exemption was judicially created (and created in an opinion, *Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs,*[2] that is generally considered to be one of Justice Holmes's weakest[3]), it has been unclear ever since the decision was handed down in 1922 exactly how Major League baseball's unique legal status manifests itself. The absence of specific legislation, and corresponding legislative history, renders the exemption hopelessly murky. What is covered, and what is outside of the scope of the exemption, has become fodder for commentators and litigators alike for much of the ensuing eighty plus years.

Not surprisingly, the Lords have seized upon the confusion and for years have declared that it is not confusing at all: quite simply, it covers every aspect of Organized Baseball and, without it, the game – our National Pastime – would cease to exist. Naturally, therefore, it must be protected, for in a sense, the soul of our country depends upon it. This mindset has caused the Lords to consider the potential impact on the status of their exemption whenever major decisions in the game or business of baseball need to be made.

My article first examines the antitrust exemption itself in order to clarify its scope. As I conclude in section I, while the exemption potentially touches many areas of the business of baseball, it is mainly thought to have its greatest impact in two distinct areas: preservation of baseball's "reserve clause," and the ability of Major League Baseball to control and limit franchise relocation and

1. *See* JOHN HELYAR, LORDS OF THE REALM: THE REAL HISTORY OF BASEBALL xiii (Villiard Books 1994). Helyar subsequently borrowed Young's term for the title of his book.

2. 259 U.S. 200 (1922).

3. *See, e.g., Salerno v. Am. League of Prof'l Baseball Clubs,* 429 F.2d 1003, 1005 (2d Cir. 1970) wherein the court "freely acknowledge[s] our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days . . . ." *See also* HELYAR, *supra* note 1, at 10 (noting that Holmes' decision "was a piece of fiction, one that would grow sillier with each passing year").

expansion. The remainder of my article takes an historical perspective and examines the actual (as opposed to theoretical) relationship between the antitrust exemption and these two areas in order to better understand its significance.

As I will show in section II, contrary to the protestations of the Lords, I conclude that history shows that the exemption was absolutely irrelevant to the preservation of the reserve clause from its creation in 1879 until its' dismantling in 1976. Rather, the reserve clause survived merely through misinformation provided to the players as well as ignorance on their own part. As I will discuss, the owners knew all too well, at least as far back as 1946, that the reserve clause was vulnerable to a challenge based on contract law and that the antitrust exemption would not save it from a lawsuit on these grounds. It was only through their own bluster and policy of misinformation that the Lords were able to preserve it for as long as they did, until it was finally defeated by Marvin Miller and his players' union through an argument premised on basic contract principles.

With regard to franchise relocation, I once again examine the issue from an historical perspective and conclude in section III that despite repeated official pronouncements to the contrary from the Supreme Court and Congress, Major League Baseball has been, de facto, subject to antitrust principles ever since the first modern day franchise shift (The Boston Braves to Milwaukee) in 1953. Acting out of fear over the potential stripping of their exempt status, the Lords have informally abided by the Sherman Antitrust Act even though they are officially exempt from it. As I will show through an historical review of the franchise relocation flurry of the early 1950s, expansion in 1961, and the expansion and relocation efforts in the 1990s, the Lords have repeatedly permitted franchises to relocate as well as given in to expansion upon pressure from Congress to strip them of their exempt status. Therefore, in acting preemptively to protect their exemption, they have ironically succeeded in making the antitrust laws applicable to them, albeit informally. While the official exemption may allow the Lords to dictate the nature of their compliance with the antitrust laws more so than if they were officially subject to them, the exemption amounts to, at most, an obstacle rather than a roadblock. At the end of the day, despite the exemption, the Lords have no choice but to abide by the Sherman Act just like any other sport or business. Thus, while Major League Baseball may be unique in many different ways, it is, at least in a legal sense, somewhat less unique than it seems.

I. THE ORIGIN AND SCOPE OF BASEBALL'S ANTITRUST EXEMPTION

Because exhaustive discussions of the trilogy of Supreme Court opinions creating and subsequently upholding Major League Baseball's antitrust exemption have been undertaken in numerous articles,[4] I will forego repetition of this familiar terrain here. Rather, by way of providing background and context for the discussions in section II and III, I will provide a brief synopsis of the opinions.

In *Federal Base Ball,* the Supreme Court, in an opinion authored by Oliver Wendell Holmes, created the exemption in 1922.[5] In all of one paragraph, Justice Holmes dismissed the business of Major League Baseball as "purely state affairs."[6] Although acknowledging that state lines are crossed in the giving of "exhibitions of base ball" and that money changes hands pursuant to these exhibitions, Justice Holmes nevertheless held that "transport is a mere incident, not the essential thing."[7] Thus, baseball could not be considered interstate commerce and, as a result, could not be subject to the Sherman Antitrust Act, which applies only to "commerce among the [several] states."[8]

In 1953, the Supreme Court would revisit its 1922 opinion in *Toolson v. New York Yankees, Inc.*.[9] That case, like *Federal Base*

4. *See, e.g.,* Andrew Zimbalist, *The Practical Significance of Baseball's Presumed Antitrust Exemption,* 22 ENT. & SPORTS LAW 1 (Spring 2004); Charles Matthew Burns, Note, *The Scope of Major League Baseball's Antitrust Exemption,* 24 STETSON L. REV. 495 (1995); Thomas R. Hurst & Jeffrey M. McFarland, *The Effect of Repeal of the Baseball Antitrust Exemption on Franchise Relocation,* 8 DEPAUL-LCA J. ART & ENT. L. & POL'Y 263 (1998); Jeffrey Gordon, Note, *Baseball's Antitrust Exemption and Franchise Relocation: Can a Team Move?,* 26 FORDHAM URB. L.J. 1201 (1999); Andrew Borteck, Note, *The Faux Fix: Why a Repeal of Major League Baseball's Antitrust Exemption Would Not Solve Its Severe Competitive Balance Problems,* 25 CARDOZO L. REV. 1069 (2004); Stanley M. Brand, *The Case for the Minor League Baseball Antitrust Exemption,* 14 ANTITRUST ABA 31 (2000); Jeff Friedman, *Antitrust Exemption Vital For Minor League Survival: MLB & Parent Clubs Must Put Money Behind 1991 Stadium Standards,* 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 118 (2003); Gilbert Stein, *Introduction,* 10 VILL. SPORTS & ENT. L.J. 1 (2003) (Symposium, *6-4-3(Double Play)! Two Teams Out: Contraction in Baseball*); John T. Wolohan, *Major League Baseball Contraction and Antitrust Law,* 10 VILL. SPORTS & ENT. L.J. 5 (2003); 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 (2000). This list represents a mere smattering of the articles devoted to this topic in whole or in part.

5. 259 U.S. 200 (1922).

6. *Id.* at 208.

7. *Id.* at 209.

8. *Id.*

9. 346 U.S. 356 (1953) (per curiam).

Ball,[10] involved a suit brought under §1 of the Sherman Act.[11] Once again, eschewing the opportunity to clarify the scope of the judicially-created exemption, the Supreme Court issued a one paragraph per curiam order holding that the Sherman Act did not apply to Major League Baseball.[12] The Court rested its holding on its 1922 decision and further stated that Congressional inaction during the previous 31 years served to cement the exemption and that it was up to Congress, not the Court, to destroy it.[13]

Finally, in 1972, the Supreme Court revisited the issue in *Flood v. Kuhn.*[14] This time, the court waxed nostalgic about the history of baseball and reviewed the relationship between the antitrust laws and other major sports before concluding that although baseball was in fact engaged in interstate commerce, its holdings in *Federal Base Ball* and *Toolson* were "aberration[s] confined to baseball."[15] In upholding the exemption once again, the Court one more time focused on Congress's "positive inaction" in justifying the continued existence of the exemption.[16]

Nowhere in these three decisions is there a discussion of the scope of the exemption. Rather, this issue is repeatedly brushed aside and the entire issue lain on the doorstep of Congress to either abolish it or further define it. With the exception of the Curt Flood Act of 1998[17] (which, as will be discussed herein, only further muddied the waters), Congress has chosen to remain silent, causing confusion as to what the exemption covers and what, if anything, is outside of its scope.

If the Supreme Court trilogy is used as a guide, the exemption appears to cover only matters involving baseball's "reserve clause." Each of the three cases involved challenges to Major League Baseball's system of retaining players in perpetuity, regardless of their contract status. In fact, the lower court opinion in *Federal Base Ball* focused specifically on this system and baseball's resultant monopoly on the talent pool, and its ability to quash rival leagues.[18] The lower court assumed consideration (although never explicitly stating what such consideration consisted of) in exchange for the players' acceptance of the clause in their contracts and held the issue

10. 259 U.S. at 200.
11. 346 U.S. at 356.
12. *Id. at 357.*
13. *Id.*
14. 407 U.S. 258 (1972).
15. *Id.* at 282.
16. *Id.* at 283-84.
17. 15 U.S.C. § 27a (Supp. IV 2000).
18. *Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Baltimore, Inc.,* 269 F. 681 (1920).

to be outside of the scope of the Sherman Act.[19] The plaintiffs in *Toolson* and *Flood* likewise focused singularly on the reserve clause as the basis for their antitrust challenges.[20]

Drawing on the trilogy, lower courts have taken differing views on the scope of the exemption. In 1993, the Eastern District of Pennsylvania in *Piazza v. Major League Baseball* held that, consistent with the trilogy, the exemption extends no further than the reserve clauses in players contracts.[21] Other lower courts have taken a broader view, holding that the exemption applies to the entire business of baseball. The Federal Western District of Washington in *McCoy v. Major League Baseball* in essence threw up its hands over the issue and held that, until Congress or the Supreme Court "see[s] fit to alter the rule," baseball in its entirety is blanketed by the exemption.[22]

Congress did, in fact, finally enter the fray in 1998. However, the passing of the 1998 Curt Flood Act resolved little. Although stating, on the one hand, that the purpose of the Act was "to state that major league baseball players are covered under the antitrust laws,"[23] it then proceeded to carve out, on the other, a myriad of exceptions to this statement. For example, the following list of "conduct, acts, practices or agreements" are not subject to review under the Sherman Act: any agreements "relating to the operation of employment in the minor leagues," any "agreement between organized professional major league baseball teams and the teams of the National Association of Professional Baseball Leagues," any agreements between "professional major league baseball" and minor league teams, along with "any other matter relating to organized professional baseball's minor leagues. . . ."[24] In addition, "franchise expansion, location or relocation, franchise ownership issues, including ownership transfers, the relationship between the Office of

19. *Id.* at 687. In fact, Major League Baseball took steps in 1914 specifically to create the illusion of consideration in the standard player contract that was subsequently reviewed in *Federal Base Ball.* The revised standard contract stipulated a specified sum to be given to the player in exchange for the club's retaining of an option to resign the player the following season. This specified sum was intended by the owners to appear to be additional consideration paid to the player in exchange for the player's acceptance of the reserve clause in his contract. In reality, this sum was merely a portion of his overall salary and was, in practice, paid to the player regardless of whether the owner exercised the option. *See* HAROLD SEYMOUR, BASEBALL: THE GOLDEN AGE 209 (Oxford Univ. Press 1989) (1971).

20. *See generally Toolson*, 346 U.S. at 356; *Flood,* 407 U.S. at 258.

21. 831 F. Supp. 420 (E.D. Pa. 1993).

22. 911 F. Supp. 454, 458 (W.D. Wash. 1995).

23. Curt Flood Act of 1998 §2, 15 U.S.C. §27a note (Supp. IV 2000) (Purpose).

24. *See* Bautista, *supra* note 4, at 473-74 (discussing the limitations of and exceptions to the Curt Flood Act).

the Commissioner and franchise owners," is outside of the Act.[25] "'[C]onduct, acts, practices, or agreements' protected by the Sports Broadcasting Act of 1961" are likewise outside of the Act as are agreements between organized professional baseball and umpires.[26] Finally, and most importantly, the Act does not apply to any issue "covered under the current collective bargaining agreement" between the Major League Baseball Players Association and the owners.[27]

In short, despite its stated purpose, the Curt Flood Act, for the most part, maintained the murky status quo as the two main issues purportedly most affected by the exemption were carved out of the Flood Act. In fact, if anything, the Flood Act ironically reaffirms the exemption rather than abolishes it.[28] Issues relevant to the reserve clause, either as it pertains to the minor leagues or as it pertains to Major League Baseball, either historically (through the unilaterally imposed reserve clause that was standard in all player contracts prior to 1976) or as it currently pertains to Major League Baseball (through the collectively bargained reserve clause which prohibits free agency prior to six years of Major League service) remained exempt from the Act and therefore, the antitrust laws. Franchise relocation and expansion issues are likewise exempt from the Act. Whether franchise relocation and expansion is exempt from the antitrust laws, pursuant to *McCoy* or subject to them, pursuant to *Piazza*, remains unclear. In fact, the Judiciary Committee noted that "[b]oth the parties [major league baseball and the MLBPA] and the Committee agree that Congress is taking no position on the current state of the law one way or the other" with regard to this issue.[29] Discussing the impact of the Flood Act on areas other than the employment between major league owners and players, Senator Orrin Hatch added: "whatever the law was before the enactment of this legislation, it is unchanged by the passage of the legislation."[30]

Given that the mandatorily imposed reserve clause was abolished in 1976, it is unclear what remains of the exemption if one takes the more narrow, *Piazza* viewpoint. If one adopts the broader, *McCoy* reading, then franchise relocation remains the single most important issue still subject to the antitrust exemption. One commentator noted that decisions relating to franchise relocation and expansion stand as the single difference between what the Lords are

25. *Id.* at 474.

26. *Id.*

27. *Id.* at 475.

28. *See* Wolohan, *supra* note 4, at 26. In his conclusion, Wolohan states that the Flood Act stands "for the proposition that the entire business of baseball," with limited exception, "is exempt from [the] antitrust law[s]." *Id.*

29. 144 Cong. Rec. S9496 (daily ed. July 30, 1998) (statement of Sen. Hatch).

30. *Id.* at S9497.

permitted to do under the protection of the exemption that team owners in other professional sports leagues cannot.[31] Another noted that the exemption has enabled the Lords to control the movement of franchises to a degree which would be impossible in any other sport.[32]

Regardless of the impact of the Flood Act, few would disagree that ever since *Federal Base Ball* was handed down in 1922, Major League Baseball's antitrust exemption has had its most profound impact in the protection of the reserve clause (at least until its abolition in 1976), and the Lords ability to control franchise relocation and expansion. Sections II and III of my article challenge these assumptions. First, I will show that the exemption was absolutely irrelevant to the maintenance of the reserve clause for the subsequent fifty-four years. Next, I will show that the Lords are subject to the principles of antitrust laws with regard to franchise relocation and expansion even though they are technically exempt from them.

II. THE IRRELEVANCE OF BASEBALL'S ANTITRUST EXEMPTION IN THE CONTINUATION AND ULTIMATE ABOLISHMENT OF THE RESERVE CLAUSE

There are perhaps as many assumptions concerning the theoretical nexus between the reserve clause and the exemption as there are stitches on a baseball. Some commentators have gone so far as to conclude that the reserve clause actually is a *product* of the exemption.[33] However, Major League Baseball's "reserve system" (which resulted in the "reserve clause" incorporated into every professional baseball player's contract soon thereafter) predates *Federal Base Ball* and the granting of baseball's antitrust exemption by almost half a century and, instead, has its roots in the creation of the National League. As such, its origins are wholly separate from that of the exemption and, as this section will show, its workings were always irrelevant to it.

A. The Historical Development of the Reserve Clause

By the mid 1870s, the Boston Red Stockings (forerunners of the Boston/Milwaukee/Atlanta Braves) were the perennial champs of the National Association, having won four consecutive championships

31. *See* Borteck, *supra* note 4, at 1072.

32. *See* Hurst & McFarland, *supra* note 4, at 263.

33. Bautista, *supra* note 4, at 452 ("The reserve system is a direct result of baseball's antitrust exemption, and, arising from the baseball trilogy, it is the most significant method by which the owners were able to restrain player movement in professional baseball.").

from 1872-75.[34] In 1876 however, four of Boston's greatest stars jumped to the Chicago ball club – a move that ultimately resulted in the dissolution of the National Association and creation of the National League that season.[35] Thereafter, player jumping between competing National League clubs became commonplace – so commonplace that soon, team owners decided that something had to be done about it.[36]

The "reserve system" was the brainchild of Red Stocking's owner Arthur H. Soden in 1879 after three more of his stars jumped to rival Providence who then promptly defeated Boston and won the pennant.[37] Seeking to put a permanent end to player "revolving" between clubs at the end of each season, Soden's reserve system granted each team's owner an option on a player at the expiration of that player's contract.[38] As a result, this system allowed owners to effectively own their players in perpetuity, in disregard of their contracts which expired at the end of each season (and which made no mention of this reserve system).[39] Each of the eight league owners signed on to this compact, which initially applied to only five players per team.[40] The players were not informed of this compact but instead, simply found no market for their services at season's end, without further explanation, regardless of their accomplishments the previous season.[41] Left with no alternatives, the players had no choice but to return to their old team and at the mercy of their owner.

In the early 1880s a rival league, the American Association, was formed and in an effort to further protect against players not only jumping teams but leagues, the reserve list was expanded to 11 players in the early 1880s.[42] The American Association signed on to this compact and formed, with the National League, what was soon known as "the Baseball Trust."[43] Over time, the reserve list expanded

34. *See* HAROLD KAESE, THE BOSTON BRAVES, 1871-1953, at 10 (Northeastern Univ. Press 2004).

35. *See id.* at 15.

36. *See id.* at 29-30.

37. *See id.*

38. *See id.*

39. *See* HEYLAR, *supra* note 1, at 4 ("By 1879, its eight teams had developed a compact. At season's end, each would "reserve" five players, making them off-limits to any other team. The players were not told about this agreement. They'd simply discover that they couldn't catch on with any but their own team.").

40. *See id.*

41. *See id.*

42. *See id.*

43. *See* GOLENBOCK, THE SPIRIT OF ST. LOUIS, 30 (2000).

until finally it covered every player on every team.[44] The reserve system eventually shed its cloistered status in 1887 when a "reserve clause" was added to every player's contract, setting forth the reserve rule.[45]

As this brief history shows, the reserve system represented nothing more than an agreement among team owners not to raid the rosters of their rivals. At no time were the players ever consulted and at no time did they ever assent to it. The fact that the resultant "reserve clause" was soon included in players' contracts is little more than a red herring: the clause was not a bargained term, it lacked mutuality and, as such, violated the most basic of contract principles. This would leave the clause and the reserve system vulnerable to attack on this ground from its inception, regardless of any protection seemingly afforded it later on in *Federal Base Ball* and the antitrust exemption.

In fact, the reserve clause was struck down soon thereafter. Upon the formation of the rival American League in 1901, National League owners found themselves and their reserve clause exposed for the first time. Because the American League was formed as an outlaw league, it was not a signatory of the reserve system compact as was the American Association. Accordingly, its owners believed that they were free to sign players from the National League at the expiration of their contracts at the end of each season, irrespective of the reserve clause language. When the upstart St. Louis Browns did just that in 1902, signing three stars away from their intra-city rivals, the National League Cardinals, for the 1902 season, the Cardinals sued, alleging that its contracts with the players, including the reserve clause language, bound the players to the Cardinals.[46] The trial court judge disagreed and ruled that because the contracts bound the players "with bands of steel"[47] for the entire contractual period (which, pursuant to the reserve clause, stretched into infinity) but allowed the Cardinals to cancel the contract at its will simply upon ten days notice, the contract, and consequently the reserve

44. *See* HELYAR, *supra* note 1, at 4.

45. *See* HAROLD SEYMOUR, BASEBALL: THE EARLY YEARS 109 (Oxford Univ. Press 1989) (1960).

46. *See* GOLENBOCK, *supra* note 43, at 58. *See also League Contract Unfair,* WASH. POST, May 7, 1902, at 9 (discussing the trial court's ruling in favor of former Cardinal players Jack Harper, Bobby Wallace and J.E. Hedrick and against the St. Louis Cardinals, who sought to enforce the two-year contract of Harper that he sought to breach, as well as the reserve clause against Wallace and Hedrick whose contracts expired at the conclusion of the 1901 season but who were nevertheless, at least according to the Cardinals, reserved to them for all eternity.)

47. *See League Contract Unfair, supra* note 46 (quoting the oral opinion issued by Judge Talty of the trial court). The unpublished opinion of the court is on file with the author of this article.

clause, lacked mutuality.[48] In doing so, the court recognized that the reserve clause was merely a creature of contract law, and a poorly constructed one at that.

The National League owners knew when they were in trouble and took this ruling, as well as the turbulence and contradictory court rulings caused by other player defections to the American League (including most notably the turmoil and legal wrangling caused by the defection of Napolean Lajoie from the National League Phillies to the American League Philadelphia Athletics)[49] as a sign that it was necessary to make peace with their rivals.[50] On September 11, 1903, the "National Agreement for the Government of Professional Base Ball Clubs" ("National Agreement") was signed by the National and American major leagues, as well as the recognized minor leagues (organized under the collective heading of the "National Association of Professional Base Ball Leagues")[51]. Article VI of the National Agreement required all signatories "to recognize

48. *Id.*

49. *See* DAVID M. JORDAN, THE ATHLETICS OF PHILADELPHIA 21-24 (1999). The melodrama surrounding the Lajoie sigining by the Athletics went a long way towards the ultimate peace accord signed between the American and National Leagues. Lajoie, a star second baseman for the National League's Phillies, signed with the American League's newly formed Athletics prior to the start of the American League's inaugural season in 1901. The Phillies sued and the trial court ruled that Lajoie's contract with the Phillies lacked "mutuality," thereby freeing him to sign with the Athletics. On April 21, 1902, the Pennsylvania Supreme Court reversed this decision, holding that because Lajoie was a unique talent and impossible to replace, the Phillies had the right to restrain him from playing for any other club. After a series of legal wranglings, the Athletics nevertheless took the field for their opening game two days later with Lajoie at second base. A temporary injunction was issued during the course of the game, banning Lajoie from playing with the Athletics, causing Athletics manager Connie Mack to pull Lajoie off the field in the ninth inning. Issues arose as to whether the ruling of the Pennsylvania Supreme Court applied to games played outside of the state of Pennsylvania, as well as to whether it applied across the board to other players who jumped leagues or merely to Lajoie, due to his unique talent, thereby causing much confusion as to the reach of the Pennsylvania Supreme Court's decision. In order to circumvent the court's ruling, Lajoie eventually signed with the Cleveland ballclub of the American League, with the consent of Mack, and did not travel with the club when it played its games in Philadelphia. After the Phillies unsuccessfully attempted to have their injunction enforced by an Ohio court, the litigation over Lajoie came to a murky end.

50. Interestingly, the court in the Cardinals litigation refused to follow the reasoning by the *Lajoie* court in Pennsylvania in reaching its decision. Thus, the National League was faced with conflicting decisions and the prospect of ever more conflicts in the future. In order to prevent such chaos, the National League decided to make peace with the American League. *See League Contract Unfair*, *supra* note 46 (quoting Judge Talty's decision finding the *Lajoie* ruling unpersuasive).

51. NATIONAL AGREEMENT FOR THE GOVERNMENT OF PROFESSIONAL BASEBALL CLUBS (1903) [hereinafter NATIONAL AGREEMENT], *available at* http://www.businessofbaseball.com/1903nlagreement.htm.

the right of reservation and respect contracts between players and clubs under its protection."[52] While this agreement may have settled things between the American and National leagues, the issue of lack of mutuality with regard to the players, as highlighted by the court in the Cardinals litigation, remained. As such, the National Agreement was wholly irrelevant as to them.

As was the Supreme Court's *Federal Base Ball* ruling in 1922. Although the Supreme Court's opinion was brief, the D.C. Circuit Court's lower opinion spent considerable time focusing on the reserve clause as the centerpiece of the litigation.[53] In its ruling, as affirmed by the Supreme Court,[54] the Circuit Court appeared to insulate, through its judicially fashioned exemption, Major League Baseball clubs from legal challenges to the reserve clause.[55] However, as *Federal Base Ball* involved a challenge to the clause from a rival league (the Federal League), it only extended that far. Although after *Federal Base Ball*, future rival leagues would be unable to challenge the reserve clause on antitrust grounds, there was nothing in either the Circuit Court or Supreme Court opinions that extended this protection any further.[56] After *Federal Base Ball*, just like the forty-three years before it, players were free to challenge the clause on other grounds. It would be up to the Lords to see to it that the players never realized that they had this opportunity. For over half a century thereafter, their policy of repeated misinformation concerning the reserve clause would serve to protect them in a way that they knew that the law would not.

Perhaps some of the Lords initially found support for the legality of the clause in the language of the Circuit Court's opinion that assumed consideration for the reserve clause.[57] Indeed, in its discussion of the clause the Court concluded that "[f]or his services each player was given a certain consideration, and for consenting to the reserve clause another consideration, both of which were set forth in his contract."[58] However, the Court never identified this consideration[59] (for how could it? How could there be consideration for a system that was secretly implemented and thereafter unilaterally inserted into every Major League player's contract?) and,

52. *Id.*

53. Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Balt., 269 F. 681, 687-88 (D.C. Cir. 1920).

54. *Fed. Base Ball*, 259 U.S. at 209.

55. *Id.*

56. *See generally Fed. Base Ball*, 259 U.S. 200; *Nat'l League of Prof'l Baseball Clubs,* 269 F. 681.

57. *See generally Nat'l League of Prof'l Baseball Clubs*, 269 F. at 687-88.

58. *Id.* at 687.

59. *See id.*

by 1946 at the latest, even the Lords were in agreement that the Court's analysis on this point was fundamentally incorrect from a legal standpoint and that their judicially created exemption would not protect them from a challenge to the reserve clause on contract principles. Although they took action to prevent such a challenge from ever occurring, they could not prevent the inevitable and, in 1975, their worst fears came true.

B. The Lords' Policy of Misinformation

Whatever the Lords thought of the *Federal Base Ball* decision and the sanctity of their reserve clause initially, the events of 1946 would bring the tenuous status of the clause into sharp focus for each of them. That year, a lawyer named Robert Murphy attempted to unionize the players into what he called "The American Baseball Guild."[60] His plan was to start with the Pittsburgh Pirates players and then move on to other teams.[61] Although he found much support among the Pittsburgh players, his Guild fell just four votes shy of the two-third majority needed for it to be certified as the Pirates players' bargaining agent.[62] A bullet was diverted, although the Lords recognized that this was merely temporary unless something was done.

In order to prevent future forays into player unionization, as well as fears over a potential player war with the rival Mexican League, the Lords created a Major League Steering Committee which issued its report at the owners meeting in Chicago on August 27, 1946.[63] (Of course, the report was not made public or available to the players or anyone other than the Lords and baseball commissioner Happy Chandler). Part of its mission was to examine the reserve clause and its ability to withstand legal scrutiny.[64] Its conclusions were clear and dire:

> In the well-considered opinion of counsel for both Major Leagues, the present reserve clause could not be enforced in an equity court in a suit for specific performance, nor as the basis for a restraining order to prevent a player from playing elsewhere, or to prevent outsiders from inducing a player to breach his contract.[65]

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60. *See* HELYAR, *supra* note 1, at 10-11.

61. *Id.* at 10.

62. *Id.* at 11.

63. *See* JOINT MAJOR LEAGUE COMMITTEE, REPORT OF MAJOR LEAGUE STEERING COMMITTEE FOR SUBMISSION TO THE NATIONAL AND AMERICAN LEAGUES AT THEIR MEETINGS IN CHICAGO (1946) [hereinafter JOINT MAJOR LEAGUE COMMITTEE], *available at* http://www.businessofbaseball.com/docs.thm#steering committee.

64. *Id.* at 3.

65. *Id.* at 10.

The report supported its conclusions by focusing on the failings of the reserve clause under contract law: its terms of renewal were indefinite, it lacked consideration, it was not freely bargained for, its insertion into player contracts was the result of an inequality of bargaining power.[66] In short, it failed to meet several of the requirements outlined in any first year course in contract law. More importantly, the Committee realized that the antitrust exemption could not save it from these failings.[67]

In order to remedy these contractual ills, the Committee proposed (and the Lords eventually adopted) a revised reserve clause.[68] The revised clause would solve the indefiniteness problem by expressly limiting the owners' renewal option to one year and by placing a floor of 25% (or $5000, whichever was greater) on the amount that a player's contract could be unilaterally reduced through the reserve clause.[69] The Committee concluded that these contractual modifications would increase the likelihood of the reserve clause withstanding judicial scrutiny because they rendered the clause "less harsh" than its predecessor.[70]

The potentially fatal problems of inequality of bargaining power and lack of consideration remained, however. These problems could not be cured as easily because they could not be unilaterally solved. The cooperation of the players was required. It was at this point where the Lords' policy of misinformation was born.

As the Committee concluded in its report:

> It is extremely desirable that the players' representatives recognize that the reserve rules are for the benefit of players, as well as Club owners. Consequently the Committee, in its meeting with the representatives of the players, took the initiative to secure such a statement.
>
> If a uniform contract can be adopted which is in general satisfactory to both parties to the contract, and if the players' representatives agree that the reserve clause is necessary for the protection of the industry and benefits the player – your counsel and your Committee believe that the Courts will be inclined to recognize this fact and uphold the validity of the option clause.[71]

Upon review of this report, each of the Lords understood that a vigorous campaign was required to create the *illusion* of

66. *See id.* at 10-11.
67. *See id.* at 3.
68. *Id.* at 11.
69. *See id.*
70. *Id.*
71. *Id.* at 11-12.

consideration in order to save their reserve clause from extinction in the courts. Interestingly, nowhere in its analysis of the validity of the reserve clause does the Steering Committee (or its counsel) refer to the antitrust exemption as offering any protection whatsoever.[72] Despite *Federal Base Ball* and the D.C. Circuit Court's opinion focusing on the reserve clause and its impenetrability due to the antitrust exemption, the Committee realized that ultimately, the exemption was irrelevant to its protection. It was incumbent upon the Lords to shore up the reserve clause to protect it against a challenge based on contract law that was inevitable.

To their credit, the Lords worked hard to convince the players that a system that artificially suppressed their salaries and restricted their movement actually worked to their benefit, and for many years were successful. Before the Steering Committee's report was even issued, the committee's members (consisting of executives of Major League Baseball as well as selected owners of various National and American League teams) sought out the players' representatives and cajoled them into cooperating with them in defending the reserve clause against attack.[73] Within a few years, their efforts paid off handsomely during the House of Representatives' Judiciary Committee's hearings before the Subcommittee on Monopoly Power during the summer of 1951.[74] During these hearings, several of the games top players, past and present, including the all-important player representatives singled out by the Major League Steering Committee back in 1946, took the stand and one after another extolled the virtues of the reserve clause.[75] Ty Cobb stated that the reserve clause protected competition between the richer and poorer clubs; Ned Garver, a pitcher with the St. Louis Browns, testified that he did not believe that baseball could exist without it; Pee Wee Reese concurred and bolstered the Lords' consideration illusion by adding that without it, he did not believe that "[he] would have been able to play baseball"; Lou Boudreau called it a "must" in organized baseball.[76] Most importantly, Fred Hutchinson, a pitcher for the Detroit Tigers and the American League's player representative's testimony went as follows:

> Hutchinson: I would like to say first that in my opinion the reserve clause is a necessary and reasonable provision for the

72. *See id.* at 10-12.

73. *Id.*

74. *Celler Hearings (1951): Hearing Before the Subcomm. on Monopoly Power and the Comm. on the Judiciary,* 82nd Cong. (1951) [hereinafter *Celler Hearings (1951)*], *available at* www.businessofbaseball.com/cellerhearings1.htm.

75. See *id.*

76. *Id.*

> preservation of organized baseball. . . In my opinion the players as a rule have been treated fairly by the clubs and have generally been paid in accordance with their value to the clubs.
>
> [Subcommittee member:] As the players' representative, in handling all their grievances and complaints and being in constant touch with them day in and day out, do you feel, in your own mind, that the players wish to retain the reserve clause, as a whole.
>
> Mr. Hutchinson: Yes, sir.[77]

Later, in August, 1957, additional players were called to testify in hearings before the Antitrust Subcommittee.[78] When asked about their feelings concerning the reserve clause, player after player said the same thing: that it was not only necessary for the preservation of the game, but that it benefited everyone – players and owners alike.[79] Ted Williams, Stan Musial, National League player representative Robin Roberts, American League player representative Ed Yost all extolled the virtues of the clause.[80] Yost even went so far as to clarify his earlier testimony that appeared to favor imposing a 10-year limit on the reserve clause.[81] This time he made it clear that he absolutely did not favor any limits on the reserve clause.[82] Only Jackie Robinson (proving himself a courageous pioneer once again) spoke out against it.[83]

At the conclusion of these hearings, the thorny problems of bargaining power and consideration seemed to have been addressed and resolved, much to the Lords' satisfaction, for they surely must have felt more secure now than they did when they first read their Steering Committee's report back in 1946. Under the radar, however, they had inadvertently allowed a mechanism to be put in place that would ultimately undue all of their hard work of misinformation. And this mechanism would succeed by focusing solely on contract law.

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77. *Id.*

78. *Celler Hearings (1957-58): Hearing Before the Antitrust Subcomm. and the Comm. on the Judiciary*, 85th Cong. (1957-58) [hereinafter *Celler Hearings (1957-58)*], *available at* http:// www.businessofbaseball.com/cellerhearings2.htm.

79. *See id.*

80. *See id.*

81. *Id.*

82. *Id.*

83. *Id.* Robinson stated that although stars such as Ted Williams, Mickey Mantle and Stan Musial had testified that the reserve clause had been beneficial to them, it must be remembered that they received large salaries as superstars on their clubs. *Celler Hearings (1957-58), supra* note 78. Robinson questioned whether players of lesser stature would feel the same way about the reserve clause due to their smaller salaries. *Id.*

C. *The Creation of The MLBPA and the Dismantling of the Reserve Clause By Way of Contract Law.*

In retrospect, the Lords may have been misguided in many ways when it came to their approach to player relations, but one thing they cannot be accused of is being stupid. They understood the failings of the reserve clause and recognized its Achilles Heel. By 1946, they knew that above all else, it must not be permitted to be adjudicated.[84] While the exemption would bar rival leagues from mounting challenges to the clause, it would not prevent the players themselves from doing so. And once they had taken this step, the reserve clause was as good as dead. For this reason, the 1946 Steering Committee flatly rejected the notion of inserting an arbitration clause in players' contracts:

> Your committee considered, and discarded as impracticable, suggestions that salary disputes be arbitrated . . . . In lieu of arbitration we requested counsel to revise the option clause so as to remove the grounds on which the option could be attacked successfully.[85]

In addition, once again recognizing the vital importance of cooperation of the players in preventing litigation of the reserve clause, the owners threw what they believed at the time to be a harmless bone to the players: the creation of a Major-Minor League Executive Council.[86] Among its roles, the council would allow for the airing of grievances by player representatives on contract matters as well as other aspects of player-team relations.[87] Little did they know it at the time, but this would eventually result in the arbitration clause and litigation they had worked so hard to avoid.

At first the system worked just as intended from the Lords' perspective. Council hearings were one-sided affairs that merely offered the players an opportunity to air their gripes to management.[88] The Lords would listen to the grievances and either take action or not, for they were not required to do anything in response (they were *Lords*, after all).[89] The players were satisfied that they now had a mechanism in place to vent and did not appear

84. *See infra* note 73 and accompanying text. *See also,* HELYAR, *supra* note 1, at 36. Years later, in the 1960s, National League counsel Lou Carroll of Wilkie, Farr and Gallagher was asked by the Owners' chief negotiator and labor expert, John Gaherin, what he thought of the legality of baseball's reserve clause. Carroll's response: "Don't ever let them try [it]." *Id.*

85. JOINT MAJOR LEAGUE COMMITTEE, *supra* note 63, at 10.

86. *See id.* at 15-16.

87. *Id.*; *see also* Bautista, *supra* note 4, at 455.

88. *See* Bautista, *supra* note 4, at 455.

89. *See id.*

to be too concerned with the fact that the mechanism did not increase their bargaining leverage one iota.[90] The illusion of communication was in place and, from both sides, this appeared to be the most important thing.

In 1954, the players created the Major League Baseball Players Association (MLBPA) in an effort to streamline the system and to create a conduit of information to the council.[91] The dynamics of the system, however, remained unchanged. What *had* changed was that now, with the creation of both the council and the MLBPA, all of the tools were in place for the systematic dismantling of the reserve clause through contract law. All that was need was someone on the players' side to see through the rhetoric of the Lords and recognize how easily penetrable the clause was. That person would be Marvin Miller.[92]

Miller was hired as Director of the MLBPA in 1966 and by 1969, had dealt the first major blow to the reserve clause by obtaining a ruling from the National Labor Relations Board that professional baseball was, contrary to the Supreme Court's ruling in *Federal Base Ball,* indeed part of interstate commerce and as such, subject to the provisions of the National Labor Relations Act (NLRA).[93] Thus, the first fiction embodied by *Federal Base Ball* was exposed (although the exemption itself remained fully intact). With the MLBPA now protected under the NLRA, it was entitled to basic labor relations rights, including the right to bargain collectively.[94] The MLBPA would, in the next 6 years, use these rights to expose the reserve clause's weaknesses under contract law.

Ironically, the recognition of the MLBPA as a legitimate bargaining unit under the NLRA most likely shored up many of the reserve clause's contractual weaknesses identified by the Steering Committee back in 1946 and, as such, bolstered the legality of the clause, at least temporarily. For now, it could no longer be said that any future incarnation of the reserve clause was the product of inequality at the bargaining table. Consideration would also be more likely to be found, given the equality of bargaining power between the Lords and the MLBPA. However, the NLRB's 1969 decision opened the door to additional attacks on the reserve clause based on contract law – attacks that focused not on relative bargaining power but the specific language of the clause. As an additional ironic twist, the specific language that would ultimately doom the reserve clause

90. *See id.*
91. *Id.*
92. *See id.*
93. *See Id.* at 455-56.
94. *Bautista*, *supra* note 4, at 455-56.

would be the "one year renewal option" language – the very language inserted into the clause by the Lords back in 1946 in an effort to solve the indefiniteness problem. Little did they know at the time that they had merely replaced one contractual failing with another.

Before that could be accomplished, however, the MLBPA needed a mechanism by which to test this language. It got it in their 1970 collective bargaining agreement when the Lords agreed to the arbitration provision they so desperately wanted to avoid in 1946.[95] In the Fall of 1975, the arbitration hearing of Dodgers pitcher Andy Messersmith and Expos pitcher Dave McNally commenced.[96] At issue was paragraph 10A of the Uniform Players Contract, which had remained effectively unchanged since the 1946 modifications.[97] In relevant part, the paragraph read: "The Club shall have the right to renew this contract for the period of one year on the same terms."[98] Messersmith and McNally failed to sign contracts for the 1975 season.[99] Pursuant to this reserve clause, their teams renewed their contracts unilaterally.[100] At the end of the 1975 season, because neither agreed to terms during the 1975 season, Messersmith and McNally declared themselves free agents, arguing that the phrase meant that their team may renew their contract for one season but no more.[101] The Lords, on the other hand, argued that the clause protected their right to renew their contract indefinitely.[102] In short, the issue before arbitrator Peter Seitz was one of basic contract interpretation – the Achilles Heel of the reserve clause.

During the arbitration, the Lords battled with the one weapon that had protected the reserve clause for nearly a century: their policy of deception and misinformation. They argued that it wasn't really paragraph 10A that was at issue. Instead, it was the entire foundation of Major League Baseball.[103] It was an intricate maze of interwoven rules and regulations that together formed the backbone of our National Pastime.[104] It reached back to the 19th century and had served baseball – players, owners and fans – well.[105] A ruling

95. *See id.* at 456 n.74.
96. *See* HEYLAR, *supra* note 1, at 160-61.
97. *Id.*
98. *Id.*
99. Joseph Durso, *Arbitrator Frees 2 Baseball Stars,* N.Y. TIMES, Dec. 24, 1975, at 1.
100. *See* HELYAR, *supra* note 1, at 157-59.
101. *See id.* at 157-61.
102. *See id.* at 161.
103. *Id.*
104. *See id.* at 161-62.
105. *Id.*

against them, they contended, could very well lead to the collapse of the entire industry.[106]

It was a valiant effort but this time, they weren't preaching to a collection of ballplayers with varying degrees of education and intellect and who depended on them for their livelihood. They were forced, as they were loath to do since 1946, to make their case before an experienced arbitrator; an attorney with a background in labor issues and conversant in the intricacies of contract law.[107] Despite the force of their argument, they knew that ultimately, Seitz would see the case as the MLBPA urged him to: as a simple case of contract interpretation.

As such, they were not surprised when, on December 24, 1975, Seitz issued his ruling. As expected, he ruled that paragraph 10A meant what it said: that the Lords' reserve rights extended no further than one year.[108] Upon completion of the delivery of his opinion, a representative of the Lords literally handed Seitz his already-prepared and fully executed walking papers; firing him on the spot as umpire of future grievance cases.[109] In a final, desperate attempt to perhaps salvage something by way of misinformation, they likewise "demand[ed] that Seitz release no copies of his 70-page opinion and [further] refrain from discussing it" with anyone.[110] No matter, the damage had already been done. The reserve clause was done in, much as the Lords had feared for decades, through a simple matter of contract interpretation. The antitrust exemption had proven as irrelevant to its demise as it was to its creation.

Technically, the reserve clause did not die that day. It survived, badly tattered and devoid of much of its power per Seitz's ruling, until it was written out of the 1976 collective bargaining agreement which granted all players free agent status after their sixth year of Major League service, subject of course to their right to contract out of this privilege.[111] That the antitrust exemption remained fully intact, the *Federal Base Ball, Toolson* and *Flood* rulings remaining untouched in any way despite the collapse of the system it was alleged to have protected for over half a century, is perhaps the most damning evidence that it never bore any relationship with the

106. *Id.* at 162.

107. *Id.* at 159-60.

108. *See* Durso, *supra* note 99, at 15.

109. *See id;* Red Smith, *Christmas Spirit,* N.Y. Times, Dec. 24, 1975, at 15.

110. Smith, *supra* note 109, at 15.

111. *See* Allen Lewis, *Ball Players, Owners, Reach Labor Accord,* PHILA. INQUIRER, July 13, 1976, at 1C. Under terms of the 1976 collective bargaining agreement, an agreed-upon reserve clause was implemented which tied players to their respective teams for their first 6 years of Major League service. Thereafter, they became free agents unless they agreed to terms with their present club.

reserve clause at all. In the end, as the Lords understood for decades, the exemption was irrelevant to the reserve clause and it would be the most fundamental principles of contract law that would doom it forever. If anything, the exemption proved to be little more than an obstacle to the means of attack rather then the roadblock many had assumed it to be.

III. THE IRRELEVANCE OF THE EXEMPTION WITH REGARD TO FRANCHISE RELOCATION AND EXPANSION

The abolition of the unilaterally-imposed reserve clause left the Lords' presumed ability to restrict and control franchise movement and expansion as the primary power exercised through baseball's antitrust exemption.[112] In fact, some commentators have concluded that this is the only thing they can do through their exemption that owners of teams in other leagues cannot.[113] However, as history shows, this theoretical power has had little practical effect. In the end, despite the exemption, the Lords have always been subject to the antitrust laws in practice.

A. Franchise Relocation Pursuant to the Sherman Act: The NFL and Raiders I.

In order to better understand this issue, a discussion of how the franchise relocation issue plays out when it is officially subject to the Sherman Act will be undertaken. Once this is compared to how this issue is resolved in Major League Baseball, it will be clear that when it comes to franchise relocation and expansion, Major League Baseball's antitrust exemption represents merely a difference without a distinction.

In the beginning of the 1980 NFL season, the Los Angeles Rams decided to play their home games in Anaheim, leaving their former home, the Los Angeles Coliseum, without a tenant for the season.[114] In order to fill the void, the Coliseum courted the Oakland Raiders until eventually, the Raiders decided to abandon Oakland for Los Angeles and the Coliseum, setting off a flurry of litigation.[115] At issue was NFL Rule 4.3 which initially provided that unanimous approval was needed for a franchise to relocate into the home territory of another NFL franchise.[116] After the suit was initially dismissed and the NFL revised Rule 4.3 to require merely three-fourths approval,

112. *See* Borteck, *supra* note 4, at 1072.
113. *Id.*
114. *See* Hurst & McFarland, *supra* note 4, at 281-82.
115. *Id.* at 282.
116. *Id.*

the Coliseum renewed its suit when the Raiders formally announced their intention to relocate and the NFL voted 22-0 to prevent them.[117]

Because the NFL is subject to the Sherman Act, the 9th Circuit analyzed Rule 4.3 under its "rule of reason" approach.[118] Under this approach, a balancing test is used where "the procompetitive effects of the restraint [are weighed] against the anticompetitive effects" with the goal of determining the reasonableness of the restraint.[119] Although various factors are analyzed (such as facts peculiar to the industry, the nature of the market, the reasons for the restraint etc.), the hallmark of the "rule of reason" approach "is that there are no hard and fast rules for determining a violation" of §1 of the Sherman Act.[120] This is in contrast to the "per se" approach which simply concludes that the restraint is violative of §1 on its face.[121] Not surprisingly, courts are hesitant to apply the "per se" approach because they at least are receptive of entertaining arguments regarding the procompetitive effects of most restraints.[122] Under its "rule of reason" approach the 9th Circuit upheld the jury verdict below that held that Rule 4.3 violated the Sherman Act.[123] As a result of this decision (commonly referred to as "*Raiders I*"), the NFL was powerless to prevent the Raiders from moving to Los Angeles and into the Coliseum.[124]

Raiders I provides a helpful baseline for analysis of Major League Baseball's ability to restrict franchise relocation pursuant to its antitrust exemption because Major League Baseball's rules for relocation are strikingly similar to the NFL's revised Rule 4.3 that was struck down by the 9th Circuit. For example, in order for an existing Major League franchise to move into an unoccupied territory with a population under 2.4 million, three-fourths approval of other teams is required.[125] While it appears that no approval is needed for movement to an unoccupied city with a population exceeding 2.4 million, it should be noted that currently, no such city exists in the United States.[126] Further, a franchise can move into a city occupied

117. *Id.* at 282-83.

118. *Id.* at 283-84; *see id.* at 273-74 (for an analysis of the rule of reason approach).

119. *Id.* at 273.

120. Hurst &McFarland, *supra* note 4, at 274.

121. *Id.*

122. *Id.*

123. *See* Gordon, *supra* note 4, at 1219-20.

124. *See generally id.* at 1218.

125. *See* THE MAJOR LEAGUE CONSTITUTION, art. V § 2(b) (2005) ("The vote of three-fourths of the Major League Clubs shall be required for the approval of any of the following: . . .(3) The relocation of any Major League Club."); *see also* Hurst & McFarland, *supra* note 4, at 288.

126. Hurst & Mcfarland, *supra* note 4, at 288.

by a team in the other league (an American League team into a city currently occupied by a National League team, for example) only if its ballpark is at least five miles away from the preexisting team's ballpark and if three-fourths of the other teams approve.[127]

Thus, it appears as if without the exemption, Major League Baseball would be subject to the same "rule of reason" analysis that was applied by the 9th Circuit in *Raiders I*.[128] It would also appear that without the exemption, the Lords would likely be adjudicated powerless to stop franchise movement much as NFL owners have been subsequent to the 9th Circuit's decision (indeed, after *Raiders I*, the NFL's Colts (Baltimore to Indianapolis), Browns (Cleveland to Baltimore), Rams (Los Angeles to St. Louis), Cardinals (St. Louis to Phoenix), Oilers (Houston to Nashville) and Raiders again (Los Angeles back to Oakland) all shifted cities with the league unable to quell the turmoil). However, as the following sections will show, the Lords are, in practice, just as powerless to prevent franchise relocation despite the window dressing of the exemption. Accordingly, it is of little matter that Major League Baseball enjoys an exemption whereas other sports such as the NFL do not. In the end, when it comes to franchise relocation and expansion, everyone is, in fact, playing under the same rules.

B. MLB Franchise Relocation and Expansion under the Exemption: A Difference Without a Distinction.

Before delving into the specifics of various relocation attempts through baseball history, it is apparent that the exemption has had little or no practical effect simply due to the fact that baseball clearly has not benefited from its purported ability to prevent franchise relocation. In his testimony before the Antitrust Subcommittee of the Senate Judiciary Committee in 1992, then-interim commissioner Bud Selig testified that after the 9th Circuit's *Raiders I* decision, only Major League Baseball had the ability "to stop a franchise from abandoning its local community."[129] Further, he stated that it was the Sherman Act that "has been the cause of many problems, including franchise instability, that exist in the other professional sports today."[130] The "chaos and inefficiency" caused by the application of antitrust laws to the issue of franchise relocation had resulted, in Selig's opinion, in the inability of other leagues such as

127. *Id.*

128. *Id.* at 279-80.

129. Allan Selig, *Major League Baseball and its Antitrust Exemption,* 4 SETON HALL J. SPORT L. 277, 281.

130. *Id.* at 281-82.

the NFL to protect local communities against maverick team owners bolting for greener pastures in search of greater profits.[131]

If only this were true. In reality, the volume of franchise relocation of Major League Baseball franchises actually exceeds that of the NFL since 1950. Prior to the NFL's aforementioned wave of relocation after *Raiders I* in the 1980s and early 1990s, only the relocation of the Chicago Cardinals to St. Louis took place during this period, for a total of eight out-of-market franchise relocations during the past fifty-five years.[132] By contrast, Major League Baseball has seen eleven such relocations during this time: the Braves (Boston-Milwaukee in 1953 and then Milwaukee-Atlanta in 1966); The Browns (St. Louis-Baltimore in 1954); The Athletics (Philadelphia-Kansas City in 1955 and then Kansas City-Oakland in 1968); The Dodgers (Brooklyn-Los Angeles in 1958); the Giants (New York-San Francisco in 1958); the Senators (Washington-Minnesota in 1961); the expansion Senators (Washington-Texas in 1972); the Pilots (Seattle-Milwaukee in 1970) and the Expos (Montreal-Washington in 2005). If the antitrust exemption was designed to give Major League Baseball the ability to protect local communities against maverick owners, it certainly has not worked out that way. If anything, there has been more instability in Major League Baseball than the NFL given the fact that some MLB franchises have relocated multiple times and that cities such as Milwaukee, Seattle and Washington have seen teams arrive, leave and then arrive again during this time period. In the NFL, other than the renegade Raiders and hapless Cardinals, franchises have tended to stay put once they have relocated.

Beyond the simple number of moves, however, a closer analysis of the motivation behind the various relocations that have taken place in Major League Baseball since 1953 as well as the impetus behind expansion in the early 1960s shows that the antitrust exemption has had little or no practical effect. Although, in theory, the exemption allows the Lords to restrict relocation and expansion, in reality it has not worked out that way. Perhaps because of the questionable analysis supporting *Federal Base Ball* and its progeny, the Lords have always been cognizant of the possibility that their exemption could be snatched away from them at any moment. Because of this, they have taken it upon themselves to comply (albeit

131. *Id.* at 281.

132. Local relocations such as the NFL's Giants and Jets from New York to New Jersey, Lions from Detroit to Pontiac, MI and back to Detroit again, Redskins from Washington, D.C. to Landover, MD etc. have not been included because these relocations did not affect the fan bases of these teams and did not result in a franchise abandoning its local community. In addition, the relocation of the Rams from Cleveland to Los Angeles is not included as this occurred after the 1945 season.

begrudgingly and oftentimes not until given a significant push) with the spirit of the Sherman Act in an effort to prevent Congress from stepping in and removing their exemption once and for all. As a result, as the following sections will show, they have repeatedly allowed relocation and expansion to occur in an attempt to demonstrate to Congress that they are acting reasonably even though their exemption technically allows them to act unreasonably.

1. The First Wave of Relocation: The Braves, Browns and Athletics - 1953-55

Before the relocations of the Braves, Browns and Athletics prior to the 1953, '54 and '55 seasons respectively, Major League Baseball enjoyed half a century of rock-solid stability. After the relocation of the original Milwaukee Brewers to St. Louis in 1902, there was not a single franchise shift or addition for the next five decades.[133] Beginning in March of 1953, however, three teams would relocate within the next 19 months. Although each individual relocation can be explained away (and has been, historically) simply as instances where these particular franchises were struggling and losing the battle for supremacy in two team markets that could not support two teams[134] (indeed, the Red Sox, Cardinals and Phillies were all stronger franchises at the time of their cross-town rival's departure), this does not explain why all three franchises moved in brisk succession in the early 1950s. After all, Boston, St. Louis and Philadelphia had long since proven that they could not support two franchises and the Braves, Browns and Phillies spent the vast majority of Major League Baseball's half century of stability struggling mightily just to survive.[135] The possibility of relocation was occasionally discussed during this time but always dismissed as league stability always trumped individual profit.

133. *See* GOLENBOCK, *supra* note 43, at 353.

134. *See generally id.*; KAESE, *supra* note 34; JORDAN, *supra* note 49.

135. A comparison of the attendances of these intra-city rivals bears this out. During the 52 years the Braves and Red Sox competed in Boston, The Braves outdrew the Red Sox only 7 times, with all of these occurrences in the 1920s and 30s. In St. Louis, the Browns outdrew the Cardinals only 17 times in 52 years and only once since 1925. In Philadelphia, the Athletics outdrew the Phillies in 40 of the 54 years they competed in the Philadelphia market. 8 of the Phillies' 14 attendance victories occurred between 1943 and 1954, however. *See* http://www.baseball-reference.com (last visited Dec. 10, 2005); *see also* JORDAN, *supra* note 49, at 164-71 (noting that for the majority of the time both the Athletics and Phillies shared the same city, Philadelphia was clearly an "A's" town, with the Phillies struggling both financially and popularly. It was only in the late 1940s and early 1950s, with the combination of the Phillies' "Whiz Kids" and the deterioration of both Connie Mack's health and his Athletics, that the city's allegiances shifted towards the Phillies for the first sustained period ever).

Now, however, in the early 1950s, relocation was suddenly not merely acceptable to the Lords, it was in fact pushed on these franchises (in the case of the Athletics, against their will). Although this drastic change in mindset may seem odd at first glance, an analysis of the events that immediately preceded these relocations brings clarity. For it was the fear of Congressional intervention and the loss of their antitrust exemption that spurred the Lords to accept what had been unacceptable to them for the previous half century. And all of this had its origins in a place thousands of miles from the nearest Major League city – The Pacific Coast League.

a. Congressional Intervention through the House Monopoly Subcommittee and the Lingering effects of the PCL's Attempted Merger

Ever since its inception, the Pacific Coast League (PCL) toyed with the idea of competing with the American and National Leagues and becoming a third major league. In fact, the PCL has its roots as an outlaw league that refused to sign the National Agreement recognizing the reserve rights of the National League in 1899.[136] Eventually, in 1904, it joined the National Association and accepted its status as a minor league.[137] However, the outlaw spirit of the PCL was never far away and throughout the first half of the twentieth century, it contemplated a promotion to major league status on several occasions. After the end of World War II, it believed that it finally had its chance.

Spurred by the manufacturing boom created by the war, the west coast grew rapidly during the 1940s. Between 1940 and 1950, California saw a 53% increase in population and became the second largest state in the nation.[138] Still, it lacked major league baseball. Once the war ended, the PCL owners decided that they were going to do something about this. In March of 1946, the Lords entertained a request by the PCL owners to meet with them "to discuss the possibility of the P.C.L becoming a third major league."[139] Although Commissioner Happy Chandler gave appropriate lip service to the possibility, it was clear that this was the only service the Lords were prepared to provide to the PCL.[140] Indeed, the PCL's official request

136. *See* PAUL J. ZINGG & MARK D. MEDEIROS, RUNS, HITS, AND AND ERA: THE PACIFIC COAST LEAGUE, 1903-58, at 17 (1994).

137. *Id.* at 20.

138. *Id.* at 107-08.

139. *See Coast Major League Baseball Debated by Heads of Clubs,* L.A. TIMES, Mar. 19, 1946, at A7.

140. *See* Al Wolf, *Chandler Ducks Talk of Thierd Big League Here,* L.A. TIMES, July 21, 1946, at A5 (wherein Chandler is quoted as saying that, "the Pacific Coast League's desire to go major is entitled to every consideration; nobody recognizes the importance

to Major League Baseball for promotion to major league status in July of 1947 was met with deafening silence. The Lords never even prepared a response.

This kept the wolf at bay, but only for a while. In June of 1951, the PCL owners voted to give the Lords one more chance to consider their proposal.[141] This time, they came prepared with ammunition, publicly entertaining the possibility that the PCL would return to its roots, renounce the National Agreement and become an outlaw league once again, setting off a bidding war for players with Major League Baseball if MLB refused once again to even consider their request.[142] Although the PCL owners subsequently agreed to drop their threat to become an outlaw league,[143] it was clear that now, they meant business.The Lords would have to deal with them, regardless of how repugnant they found this possibility. And in order to ensure that they did, the PCL brought out an even more powerful weapon: the intervention of the House Monopoly Subcommittee.

Chaired by Emanuel Celler of New York, the Subcommittee initially took an interest in the PCL's charge that the Lords failed to respond to its 1947 request.[144] National League President Ford Frick incredibly testified in July of 1951 that in fact there never was a request made and that the PCL, after being given data on the costs and problems associated with major league status, changed its mind.[145] "It became obvious to us that the Pacific Coast League had no desire to become a major league," said Frick before the subcommittee.[146] Clearly, Frick's recounting of events did not sit well with the subcommittee's members as his testimony was met with a warning that MLB's antitrust exemption would be removed if it did not act to expand west of the Mississippi river.[147] Frick responded by stating that the PCL would join the majors "if and when" its (the PCL's) clubs feel they are "ready."[148] With this apparent concession, Congress then acted on Frick's words.

In order to set firm guidelines for determining if and when they were "ready," California Congressman Patrick Hillings challenged the Lords to come up with a comprehensive plan for the promotion of

of this part of the country more than I").

141. *See PCL To Give Majors One More Chance,* L.A. TIMES, June 23, 1951, at B2.

142. *Id.*

143. *See Coast League Outlaw Plan Fails to Carry,* L.A. TIMES, July 28, 1951, at B1.

144. *See Frick Says Major Status Up to Coast,* L.A. TIMES, Aug. 1, 1951, at C1.

145. *Id.*

146. *Id.*

147. *Id.* Celler is quoted as saying, "If we exempt you, you'll have to reorient your thinking. You can't keep this complete hold on major league status. Stop saying there will be major leagues only east of the Mississippi." *Id.*

148. *Id.*

the PCL to major league level or risk being found in "bad faith" by Congress.[149] Hillings made this challenge on the eve of the resumption of the subcommittee's hearings in October, 1951 and put even more pressure on the Lords to act before the heavy hand of Congress came down and acted for them.[150] This motivation was echoed by a subcommittee member who stated it wasn't the preference of the subcommittee to act at all. Rather, it was their hope "that the owners will correct these evils and abuses and not force Congress to do it."[151] In order to get the Congressional monkey off their back, the Lords had to come up with something.

On November 14, 1951, the Lords responded.[152] In an effort to appease the PCL and, consequently, Congress, the Lords unveiled the first step of a two-step program that initially appeared to give the PCL everything it wanted. It was only after step two was unveiled two weeks later (conveniently after the PCL and Congress had the opportunity to publicly laud the Lords for their swift and decisive action and had turned down the heat) that it became clear that in fact, nothing had been accomplished and, if anything, the PCL now faced an even more daunting, all but impossible, task of achieving major league status.

First, the good news. Among other things, step one proposed an "open" classification (above the current highest AAA) for those qualified minor leagues wishing to become major leagues, a move that brought with it the ability of the qualifying league's players to opt out of the annual Major League draft, thereby allowing the league's teams to build up their rosters to major league quality "within a reasonable time."[153] Rejecting as "unsound," the possibility of individual teams or cities moving up to major league status, the Lords announced that only entire eight-team leagues could advance to major league status.[154] Happily for the PCL, it easily met all six conditions set forth by the Lords on November 14 for promotion to "open" classification.[155]

Not surprisingly, PCL officials were overwhelmed by step one. Stated PCL league president Clarence Rowland:

> Commissioner Frick's proposed legislation favoring the Coast League is most encouraging. While he has been in office less than a month, this is the first recognition by the majors that

149. *Major Coast Ball Asked by Hillings,* L.A. TIMES, Oct. 15, 1951, at C4.
150. *Id.*
151. *Wrigley Sees Pacific Coast Major League,* L.A. TIMES, Oct. 18. 1951, at C1.
152. *See Major League Plan Would Assist PCL,* L.A. TIMES, Nov. 15, 1951, at C1.
153. *Id.*
154. *Id.*
155. *Id.*

> the Coast League is faced by unusual and special problems. This gives us renewed confidence and shows that our requests were not out of line. Commissioner Frick is to be commended for his insight into our problems.[156]

The reaction to step two would be markedly different.

On November 28, the Lords announced the specific requirements for those "open" classification leagues seeking to make the final step up to major league status. Among the requirements were population and league attendance requirements that were impossible for the PCL, or any other minor league for that matter, to meet.[157] Moreover, the possibility of one or two strong cities, such as Los Angeles or San Francisco, applying for a promotion to major league status was forever quashed with the previously agreed-upon requirement that any expansion be done in eight-team units. In its enthusiastic acceptance of step one of the Lords "expansion" plan, the PCL had unwittingly slit its own throat. Now, not only was there no chance for the league as a whole to earn a promotion, it was also impossible for Los Angeles, the second largest city in the nation, to do so on its own. If there was ever any doubt as to the Lords' disgust for expansion, this underhanded two-step "plan" surely disavowed anyone of it.

Once again, however, the Lords had only managed to keep the wolf from their door temporarily. In May of 1952, the subcommittee issued its report and again suggested the possibility of removing MLB's antitrust exemption as a way to force the Lords to expand despite their demonstrated reluctance.[158] In its report, the subcommittee sympathized with the plight of Los Angeles and singled out Boston, St. Louis and Philadelphia as two-team cities that clearly could not support both teams.[159] It noted that St. Louis was smaller in size than either Los Angeles or San Francisco (cities without any Major League teams) but enjoyed two teams, one of which continually lagged in attendance (the Browns).[160] Philadelphia's attendance problems were also noted.[161] The report openly questioned the validity of such an arrangement and wondered aloud whether an antitrust exemption was warranted given these

156. *Coast League Nabobs Laud Recommendations,* L.A. TIMES, Nov. 15, 1951, at C33.

157. *See New Proposal Dims PCL's Major Hopes,* L.A. TIMES, Nov. 29, 1951, at C1.

158. *See* Warren B. Francis, *Congressmen Rap Majors' Monopoly,* L.A. TIMES, May 23, 1952, at C1.

159. *Id.* Noting that the report pointed out "that several clubs in the presently-operated circuits have been losing money in large amounts and over continued periods *and rais[ed] the question whether Boston, St. Louis and Philadelphia are two-team cities." Id.* (emphasis added).

160. *See id.*

161. *See id.* at C1, 27.

circumstances.[162] The continued presence of these weak two-team cities amid the Lords' reluctance to expand to the rapidly-growing west coast was becoming an increasingly large albatross around their necks.

Although successful in fending off the PCL threat, the Lords soon realized that Congressional pressure was not going to abate without expansion in some form. Thus, despite the exemption, which remained in full force and unaltered since *Federal Base Ball*, it was becoming increasingly apparent that it did not amount to much. In order to protect their ability to prevent franchise relocation and expansion, the Lords were being forced by Congress to act as if the exemption did not exist at all. After the House Monopoly Subcommittee hearings, the message to the Lords was clear: flaunt the illusion of the exemption at your own risk.

b. Appeasement of Congress through the Relocation of the Braves and Browns

With the House subcommittee's hearings as a backdrop, the Lords were powerless to prevent the succession of franchise relocations that took place shortly thereafter and, in fact, actively encouraged them in an effort to relieve some of the pressure being applied by Congress. Concurrent with these hearings were the rumblings of St. Louis Browns owner Bill Veeck. Not one to quarrel with the findings of the subcommittee's report, Veeck announced that his plight left him no alternative but to relocate to Milwaukee – a city that was presently building a stadium in the hopes of landing a Major League team.[163] In order to do so, however, Veeck needed to purchase the territorial rights to the city from Boston Braves owner Lou Perini.[164] When Perini refused to relinquish the rights,[165] a skirmish ensued that left the Lords in a bind.

For here was Milwaukee, yet another city without Major League baseball, with a brand new stadium larger than any in the PCL,[166] being denied a Major League franchise by a Lord (Perini) who sought to keep it as a minor league jewel and a safety net should *he* ever decide to move his Braves. With the subcommittee's hearings hanging over their heads, the Lords no doubt understood that to prevent Milwaukee from becoming a major league city would most

162. *See id.* at C1, 27.

163. *See* GOLENBOCK, *supra* note 43, at 353. *See also Braves Block Bid to Shift Browns,* N.Y. TIMES, May 4, 1953, at 32.

164. *Braves Block Bid*, *supra* note 163.

165. *Id.*

166. *See New Milwaukee Park is Really Big League,* CHIC. DAILY TRIB., Mar. 22, 1953. The new Milwaukee stadium was designed to Major League specifications and would initially seat 28,111 with plans for 12,000 additional seats.

likely result in the abolishment of their exemption.[167] This was particularly true after Perini had previously publicly stated that he never would stand in the way of Milwaukee obtaining a Major League team and then went out and did precisely that.[168] They knew all too well that they could not sit back, allow Perini to refuse Veeck's substantial offer for the Milwaukee territorial rights[169] to move a team identified by the subcommittee as a perennial weak-sister, and expect Congress to turn a blind eye.[170] Therefore, on March 18, 1953, after a series of maneuvers that compelled Perini to act on his refusal and move his Braves to Milwaukee immediately, the National League voted unanimously to allow the Braves (another two-city weak-sister as noted by the subcommittee's 1952 report) to relocate to Milwaukee.[171] The vote marked the first approved relocation in Major League Baseball in half a century.

Although eight days later, the American League owners voted down Veeck's fallback option – a move to Baltimore[172]—the Lords must have understood that their exemption would not protect them from the watchful eye of Congress. For Baltimore was also building a Major League caliber stadium[173] and, like Milwaukee, yearned for a team of its own. If it was refused one by the Lords, the specter of additional Congressional hearings and the ultimate stripping of the antitrust exemption was a very real possibility. Therefore, as much as many of Veeck's colleagues despised him and wished to punish him for what they perceived to be his clownish behavior, they surely realized that ultimately, they would have to eventually permit his Browns to relocate to a city where they stood a reasonable chance of prosperity. Despite threats such as the one made by Yankee owner Dan Topping to one of Veeck's stockholders in which he said, "we're going to keep you in St. Louis and bankrupt you,"[174] the Lords

167. Francis, *supra* note 158, at 27.

168. *Id.* (noting that Perini was on the "hot spot" for keeping Milwaukee out of the Major Leagues after stating that he would never stand in its way.) *See also* KAESE, *supra* note 34, at 282 (stating that after the completion of the 1952 season, Perini promised Milwaukee fans that he would help them obtain a Major League franchise).

169. *Id.* Accounts regarding the exact figure offered by Veeck to Perini vary, with the New York Times stating that it was $500,000 and Golenbock claiming that it was $750,000. *See* Golenbock, *supra* note 43, at 353.

170. Francis, *supra* note 158, at 27.

171. Louis Effrat, *Braves Move to Milwaukee; Majors' First Shift Since '03,* N.Y. TIMES, Mar. 19, 1953, at 1.

172. Shirley Povich, *Veeck Plans To Stay With Browns in St. Louis,* WASH. POST, Mar. 17, 1953, at 1.

173. *See* Golenbock, *supra* note 43, at 354 (noting that, at the time, Baltimore was the only other major American city without a Major League baseball team that was currently building a stadium).

174. *Id.* at 357. Topping reportedly followed this statement with: "Then we'll decide

realized that despite their exemption, which should have allowed them to do just that if they so pleased, Congress would never allow it. Therefore, they took the next best approach and extracted some revenge by forcing Veeck out as owner of the Browns.[175] Once that was accomplished, in September of 1953, the American League swiftly approved the new ownership's move to Baltimore.[176] Just like that, the second weak-sister franchise highlighted by the subcommittee had been relocated. All that remained were the Philadelphia Athletics.

Once the moves of the Braves and Browns were consummated, there was much speculation that the Athletics were next.[177] For many reasons this was only natural, for there could be no question that the Athletics were struggling mightily.[178] Attendance had plummeted significantly in the early 1950s and the team was so heavily in debt that it could not even afford to pay for the new uniforms it ordered for the 1954 season[179] (which was to be their last in Philadelphia). The Athletics, once the dominant team in Philadelphia, had ceded that position to the Phillies who won the pennant in 1950 and had captured the heart of the city.[180] Years of bad baseball and worse management had finally appeared to have done in Connie Mack's once-proud franchise.

However, while a change in ownership was inevitable (Connie Mack's health was failing and his sons appeared not to be up to the task of rebuilding the team and stabilizing the franchise), a move out of Philadelphia was not.[181] As the following section will show, the Athletics were not without options. Given Major League Baseball's stated preference to "to stop a franchise from abandoning its local community,"[182] and its purported ability to accomplish this through its antitrust exemption, it should have been able to keep the Athletics in Philadelphia if it was viable to do so. By the early 1950s however, its demonstrated preference was to not merely permit

where the franchise will go." Despite these strong words, the Lords understood that they would not be able to wait Veeck out like this and would have to force him out rather quickly instead.

175. *Id.* On September 29, 1953, Veeck announced at an owners meeting that he was selling the Browns against his wishes.

176. *Id.; see also* JEFFREY SAINT JOHN STUART, TWILIGHT TEAMS, 89 (2000).

177. *See, e.g.,* John Drebinger, *Philadelphia's Sad Story,* N.Y. TIMES, Aug. 15, 1954, at S2 (reporting that Athletics owner Connie Mack was conflicted by financial woes and loyal fans); Arthur Daley, *Day of Decision,* N.Y. TIMES, Oct. 12, 1954, at 32 (reporting that a move for the A's was inevitable).

178. *See id.*

179. *See* JORDAN, *supra* note 49, at 183.

180. *See* Daley, *supra* note 177, at 32.

181. *See* Drebinger, *supra* note 177, at 52.

182. Selig, *supra* note 129, at 281.

franchise relocation but to actively facilitate it if at all possible in order to demonstrate to Congress that it was not abusing its exemption. In short, its preference was to voluntarily abide by the Sherman Act so as to avoid being compelled to do so. It was in furtherance of this policy that the Athletics were uprooted and moved to Kansas City in spite of their preference to remain in Philadelphia.

c. The Relocation of the Athletics

In July of 1954, real estate magnate Arnold Johnson, a man with significant ties to the New York Yankees, made an offer to buy the team and relocate it to Kansas City.[183] At the time of the offer, Johnson was mired in real and potential conflicts of interest with the Yankees as he was not merely the owner of Yankee Stadium, he owned the Yankees' Kansas City farm team's stadium as well.[184] While an initial "Save the A's" campaign drew sporadic interest from Philadelphia's business leaders,[185] a late offer arrived in October of 1954 when a Philadelphia syndicate made up of eight prominent businessmen matched Johnson's offer and promised to keep the team in Philadelphia.[186] This offer was deemed acceptable to Connie Mack's son Roy, (who, like his father, preferred the team to remain in Philadelphia),[187] and he promptly accepted the offer.[188] This satisfied everyone except the other Lords, who continued their swift about-face when it came to matters of franchise stability and who preferred to see the Athletics relocate.

On October 28th, the American League owners convened and blocked the sale to the Philadelphia syndicate, leaving the Macks no choice but to sell to Johnson and see the team uprooted, significantly, west of the Mississippi river to Kansas City, Missouri.[189] Although Kansas City certainly was not Los Angeles or San Francisco, this relocation was particularly important because it technically responded to the stated criticism of the subcommittee who repeatedly chided the Lords for failing to advance west of the river. Perhaps this could be seen by Congress as a first step in the right direction.

Although the sale of the Athletics to Johnson was officially justified by the Lords on the ground that no sufficient offer was

183. *See* STUART, *supra* note 176, at 121.

184. *See Johnson To Compensate Yankees If Athletics Go To Kansas City,* N.Y. TIMES, Oct. 8, 1954, at 29.

185. *See* JORDAN, *supra* note 49, at 181.

186. *Id.* at 184.

187. *See* BRUCE KUKLICK, TO EVERY THING A SEASON: SHIBE PARK AND URBAN PHILADELPHIA 120 (1991). Although Roy wanted to remain as owner of the team and keep the team in Philadelphia, his brother Earle wanted out. *Id.*

188. *See* JORDAN, *supra* note 49, at 184.

189. *Id.*

received by anyone seeking to keep the team in Philadelphia, it is important to note that in fact there were three such offers: the one described above and two earlier ones, dismissed by American League Commissioner Will Harridge as being without "substance."[190] Only Johnson's offer was, according to Harridge, "really sound."[191] Apparently, the substance of Johnson's offer came from the notion that it was a cash offer whereas the others were not.[192] However, an analysis of the sale of the franchise to Johnson shows that the deal was a "cash" one in name only. While cash may have technically crossed the negotiating table, most, if not all of the money for the $3.5 million sale of the Athletics came from outside sources.[193] In fact, it is very likely that the sale went through without a single dollar of new money laid on the table by Johnson.[194] While the substance of the three Philadelphia offers are unknown in their entirety, it is safe to say that at least the Johnson offer was not nearly as sound as Harridge and the Lords led the public to believe.

The absence of cash, coupled with the potential conflicts of interest Johnson's presence in the American League presented (conflicts that bore themselves out after the sale when the Kansas City Athletics became a thinly-veiled farm club for the Yankees)[195] and, most importantly, the antitrust exemption should have caused the American League owners to hesitate before approving the sale to Johnson. That they not only did not, but in fact spurned all local

190. *See Shift of Athletics to Kansas City is Authorized by the American League,* N.Y. TIMES, Oct. 12, 1954, at 34. One of the offers came from Tommy Richardson, a director of the Athletics under Mack and president of the Eastern League while the other came from a group headed by Jack Rensel whose goal was to buy out the Macks and keep the team in Philadelphia.

191. *Id.*

192. *See* STUART, *supra* note 176, at 131.

193. *See* KUKLICK, *supra* note 187, at 124. *See also* Arthur Mann, *How to Buy a Ball Club for Peanuts,* SAT. EVENING POST, Apr. 9, 1955, at 25, 106-08. In order to finance his purchase of the Athletics (and Connie Mack Stadium, which was part of the deal), Johnson promptly sold the stadium to Phillies' owner Bob Carpenter for $1,675,000, sold his stadium in Kansas City to the city for $650,000, and got an extension for the roughly $800,000 he owed the Jacob Brothers concessionaires who agreed to take repayments out of future profits with the Athletics in Kansas City. This brought in roughly $3,125,000 of the $3.5 million purchase price. He then raised the remaining $400,000 through sales of minority stock. Roy Mack invested a large portion of the $450,000 he received through the sale back into the Athletics and there were additional investors from Chicago. *Id.*

194. *See* Mann, *supra* note 193, at 106-08.

195. *See* KUKLICK, *supra* note 187, at 126. *See also* HELYAR, *supra* note 1, at 73. From 1955-60, Johnson traded frequently with his former associates at the Yankees. In all, 29 players were exchanged between the two clubs with the Yankees receiving up and comers like Roger Maris and Ralph Terry in exchange for marginal talent. The Kansas City – Yankees connection fueled the Yankees' run of dominance in the early 1960s. *Id.*

offers and even blocked a completed sale to a local syndicate, is an indication that the sale of the Athletics involved more than the mere rescuing of a failing franchise. In all likelihood, they were, at least in part, sending a message to Congress, much as the National League owners did earlier when they approved the relocation of the Braves, that baseball was listening to the Congressional grumblings and working on its own to solve the problems of expansion. Official congressional intervention, through the removal of the antitrust exemption, was therefore unnecessary. It is unknown whether they recognized the irony of voluntarily submitting to the Sherman Act in an effort to prevent it from being applied to them formally.

2. Congressional Intervention and the First Wave of MLB Expansion – 1961-62.

The issue of expansion is somewhat different than the issue of relocation in that it involves a different aspect of Major League Baseball's antitrust exemption. Relocation focuses on the issues outlined in *Raiders I* where the exemption theoretically (although as shown above, not in practice) allows Major League Baseball, as opposed to its brethren in the NFL and other professional sports leagues, to collectively restrain trade in additional markets that otherwise could support a franchise. The exemption's purported effect on expansion is somewhat different in that it theoretically permits Major League Baseball to maintain a monopoly over qualified professional baseball players through its reserve clause such that rival leagues are unable to compete due to the lack of competent personnel. Thus, it harkens back to *Federal Base Ball* and its shield against rival leagues challenging the legality of the reserve clause through the Sherman Act. However, as shown in section II, the reserve clause is irrelevant to the exemption beyond this limited protection. As this section will show, because there were at least two ways to circumvent this limitation (through either Congressional repeal of *Federal Base Ball* or judicial review of the reserve clause based on contract law), the exemption provided no protection to the Lords when the issue of expansion through a proposed third major league reared its head once again in the late 1950s and early 1960s.

If the relocations of the Braves, Browns and Athletics indicated an awareness on behalf of Major League Baseball that its antitrust exemption was not as ironclad as the Supreme Court in *Federal Base Ball* had made it appear to be, the events leading up to the first-ever expansion in the history of the game demonstrate a complete capitulation by the Lords to the tenets of the Sherman Act in practice if not officially. As this section shows, the Lords were adamantly opposed to expansion and indeed fought it for as long as they could. However, in the end, they were pressured by Congress to act

reasonably in matters pertaining to expansion even though their exemption permitted them to act otherwise. As a result, along with even more franchise relocation, four new teams were added against their will in 1961 and 1962.

Prior to the 1958 season, the Lords appeared to have solved the problem of western expansion when the Brooklyn Dodgers and New York Giants relocated to Los Angeles and San Francisco respectively. This may have placated West Coast baseball fans and Congress temporarily but the moves created an entirely new web of legal problems for Major League Baseball and the questionable power of its antitrust exemption. As a result of these relocations, New York was left with only one team and with no presence in the National League whereas previously it comprised twenty-five percent of the senior circuit. Almost immediately after the departure of the Dodgers and Giants, a push was made to reestablish a National League presence in New York.

Initially, there was speculation that a current National League team such as the Philadelphia Phillies or Cincinnati Reds would simply continue the craze of relocation and move to New York but these possibilities were quickly quashed as it became apparent that, at least in the Phillies case, they were merely using the threat of relocation as a chip to squeeze a new stadium out of the city of Philadelphia.[196] With the possibility of relocation exhausted, the issue of expansion – dormant ever since the rebuking of the PCL back in 1951 – once again took center stage.

In an effort to bring another team to New York, Mayor Robert Wagner formed a Mayor's Baseball Committee and appointed William Shea to head it.[197] With the blueprints for expansion having already been drawn up by the Lords back in 1951, Shea organized a coalition of potential owners from cities large enough to overcome the population requirements that doomed the promotion of the PCL earlier. In keeping with Lords' expansion requirements, the coalition consisted of a unit of eight cities (New York, Atlanta, Dallas-Fort Worth, Houston, Denver, Minneapolis-St. Paul, Toronto and Buffalo) that would seek Major League status together as the Continental League – a third Major League.[198]

This attempt certainly must have surprised the Lords because by relocating the Braves, Browns and Athletics to Milwaukee, Baltimore and Kansas City respectively—some of the largest International League and American Association cities (either by coincidence or

196. *See* Roscoe McGowen, *Mayor Says His Baseball Aide Talked to Phils About Shift Here,* N.Y. TIMES, Apr. 16, 1959, at 41.

197. *See id.*

198. *See Continental Loop Threatens "War,"* L.A. TIMES, Apr. 15, 1960, at A1.

purposely), and consequently forcing these cities' current minor league teams to relocate to smaller cities such as Toledo[199]—they had effectively killed the ability of either of these two large AAA leagues to meet the population requirements that would enable them to make the jump, en masse as was required, to Major League status. Thus, with the most likely challengers – the three largest AAA leagues (the PCL, International League and American Association) – effectively stymied, there remained no league in current operation poised to force the expansion issue upon them. Shea's consortium presented a wholly different challenge: a rival league starting from scratch, with the ability to strategically pick and choose its locations so as to overcome the obstacles that doomed the PCL.[200] The Lords were clearly not prepared to deal with this.

Initially, Major League Baseball did as its exemption permitted it to do: simply ignore the upstart challenger. Shea and his Continental League cohorts, however, were well aware of the power of Congressional threats and actively played this card in their effort to force Major League Baseball to comply with the Sherman Act and permit expansion against their will. Fortunately for Shea, the head of House Judiciary Committee was Emanuel Celler of Brooklyn, whose district had recently lost its Dodgers and who pined for another team.[201] He, along with Estes Kefauver, his counterpart in the Senate,[202] quickly became willing allies in Shea's attempt to limit the effect of Major League Baseball's antitrust exemption.

In October of 1959, Celler publicly criticized the treatment of the Lords toward the Continental League and announced that he planned to take up the suggestion of the Supreme Court in *Toolson* and introduce legislation reversing *Federal Base Ball* in the upcoming legislative session.[203] Three months later, in January of 1960, Senator Kefauver, chair of the Senate's Antimonopoly Subcommittee, likewise expressed dismay over the treatment of the Continental League and announced that baseball would be put on their agenda in its next session as well.[204] Shea did his part to stoke

199. *See Milwaukee Has Veeck to Thank for Return to Majors as Bill Forces Perini's Hand,* CHI. DAILY TRIB., Mar. 21, 1953, at A2. Because the Braves relocated to Milwaukee, the home of their American Association farm team, it forced the Milwaukee minor league team to relocate to Toledo, which had previously been an "open" city ever since its minor league team relocated the previous summer. *Id.*

200. *See Continental Loop Threatens "War," supra* note 198.

201. *See Celler Blasts Owners, Frick for "Malarky,"* WASH. POST, Oct. 15, 1959, at A24.

202. *See Kefauver is Dissapointed,* N.Y. TIMES, Jan. 5, 1960, at 43. As noted in the article, Senator Kefauver chaired the Senate's Antimonopoly Subcommittee.

203. *See Celler Blasts Owners, supra* note 201. Celler announced that "he planned to push antitrust legislation in the next session of Congress." *Id.*

204. *See Kefauver is Dissapointed, supra* note 202.

the flames even further when he stated that he was keeping Congress informed of every step of the Continetnal League's progress and issued an ultimatum to the Lords: "[h]elp us or suffer the consequences."[205] If Major League Baseball was going to continue to lean on its exemption as a crutch to prevent the formation of the Continental League, Shea was going to see to it that Congress kicked this crutch out from under it.

In essence, Shea had two options available to him: he could either continue to press the issue with Congress and compel it to reverse *Federal Base Ball* (which would therefore permit rival leagues such as the Continental to then challenge the reserve clause as violative of the Sherman Act) or he could simply raid the rosters of major and minor league teams and force the Lords to initiate a suit that would eventually focus on the legality of their reserve clause.[206] By forcing Major League Baseball to file suit, rather than doing it himself, he would avoid the hurdle of arguing the merits of the reserve clause under antitrust law and compel Major League Baseball to instead argue that those players jumping to the Continental League were in breach of the reserve clause. This would necessitate an analysis of the reserve clause's legality under contract law rather than its relation with the antitrust laws. By so focusing the issue, Shea was confident of a ruling in his favor – a ruling that would, in effect, render practically every major and minor league player a free agent and permit the Continental League to thereafter legally raid the rosters of Organized Baseball despite the exemption.[207] This was precisely what the Lords had feared ever since 1946 and had thereafter worked furiously to prevent. Shea was well aware of the Lords' aversion to litigation over the issue and even said so publicly: "I don't believe they'd dare sue us if we raided them for players. They know they wouldn't have a leg to stand on."[208] By playing on these fears, Shea eventually was able to force Major League Baseball to do precisely what its exemption permitted it to avoid.

Shea and the Continental League continued to hammer away on both fronts. In May, 1960, hearings commenced over a bill introduced by Senator Kefauver that would limit the scope of Major League Baseball's control over players.[209] If it passed, the expanse of the

205. *See Continental Loop Threatens "War," supra* note 198, at A1.

206. *See id.; see also Advisor for Continental Doubts New Loop Will Become Outlaw,* N.Y. TIMES, May 20, 1960, at 17.

207. *Advisor for Continental Doubts New Loop Will Become Outlaw*, *supra* note 206.

208. *War or Quit, Shea Says, If Kefauver Bill Fails,* WASH. POST, May 12, 1960, at C11.

209. *See Major League "Summit Talks" Open Today,* L.A. TIMES, May 16, 1960, at C2.

reserve clause would be severely curtailed because the Lords would be limited to control over a total of just 100 players at the major and minor league level and of these, all but 40 would be subject to an annual unlimited draft by all interested clubs, including those in the Continental League.[210] The passage of this bill would render the Lords' 1951 expansion blueprints moot since player availability would no longer be an issue. Because Major League Baseball would lose control over the vast majority of potential players, its ability to prevent unwanted expansion through its exemption would be diminished.

Despite the Lords' worries over the hearings (indeed, all sixteen of them met in a special summit meeting just two days prior),[211] they concluded with the Lords dodging, at least on the surface, yet another bullet. The Kefauver bill was sent back to committee on June 28th, 1960, virtually killing the possibility that it could be passed in the immediate future.[212] It was subject to reconsideration, however, pending the veracity of Major League Baseball's pledge of cooperation with the Continental League.[213] Thus, in stalling the bill, Congress was able to extract a promise from the Lords that they would act in ways contrary to their rights under *Federal Base Ball*, thus calling into question the effectiveness of that ruling in the practical, day to day operations of Major League Baseball.

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 the pressure to expand. On July 18, 1960, less than three weeks after the pyrrhic victory that was the return of the Kefauver bill to committee, Major League Baseball announced that, for the first time in its history, it would indeed expand.[214] Initially, the National League announced its expansion plans, accepting a start-up team in New York and promising more teams to come.[215] A few weeks later, Major League Baseball struck a deal with the Continental League by announcing that in exchange for the extinction of the rival league, four of its proposed clubs would be admitted to the American and National leagues.[216] By October, the

210. *Id.*

211. *Id.*

212. *See Sports Bill Pigeonholed; Continental Dealt Jolt,* L.A. TIMES, June 28, 1960, at C1, 6.

213. *See* Zimbalist, *supra* note 4, at 23.

214. *See* Robert M. Lipsyte, *Loop Affiliation Remains in Doubt,* N.Y. TIMES, July 19, 1960, at 33.

215. *Id.*

216. *See* Joseph Sheenan, *Baseball to Add 4 Cities in Majors,* N.Y. TIMES, Aug. 3,

National League agreed to add Houston as an additional team and announced that the New York and Houston clubs would begin play in 1962.[217] Soon thereafter, the American League followed suit and announced that Minneapolis-St. Paul would receive the relocated Washington Senators franchise and that expansion franchises would be placed in Washington, D.C. and Los Angeles.[218] Although the American League backtracked from its earlier commitment to add teams from the Continental League ownership group, the Continental League reported "no hard feelings."[219]

By the end of this flurry of activity, Major League Baseball had expanded by twenty percent despite its vigilant opposition. Theoretically, it should have been able to rely on *Federal Base Ball* and its protection of the reserve clause to maintain its monopoly over qualified professional baseball players and prevent unwanted expansion of any sort. In reality, however, it was forced to admit that its antitrust exemption offered it no such power. Although it was technically able to fend off a rival league, it was only able to do so after agreeing to admit half of its teams into the Major Leagues. If this can be considered a victory for Major League Baseball and affirmation of its exemption, it should be noted that in its zeal to protect its exemption and reserve clause, it bargained away much of the power these tools supposedly gave it. Much as the Lords desired, their exemption survived this first wave of expansion technically "intact"—the Kefauver bill was defeated and they once again were able to fend off a judicial challenge to the reserve clause based on contract law. The ability of these tools to benefit them in any practical way was much less certain.

3. The Proposed Relocation of the Giants and Expansion into Tampa Bay – 1992-95

The sequence of events that ultimately led to the expansion of Major League Baseball into the Tampa-St. Petersburg market perhaps illustrates the major practical effect of baseball's antitrust exemption. To some degree, Major League Baseball *was* able to dictate the nature of expansion into Tampa Bay moreso than leagues not protected through an antitrust exemption. However, once again, and just like in those other leagues, it was not able to prevent unwanted expansion despite its unique legal protection. Whether the

1960, at 1.

217. *See* Louis Effrat, *National League Admits New York, Houston for 1962,* N.Y. TIMES, Oct. 18, 1960, at 1.

218. *See* John Drebinger, *American League, in '61, to Add Minneapolis and Los Angeles,* N.Y. TIMES, Oct. 27, 1960, at 1.

219. *Id.* at 46.

procedural advantages available to Major League Baseball through its exemption result in significant practical advantages relative to leagues not so protected is open to debate.

In August, 1992, San Francisco Giants owner Bob Lurie announced that he had sold his Giants to a group of investors known as the Tampa Bay Partnership for $115 million.[220] The Tampa Bay Partnership intended to move the Giants to Florida.[221] In its effort to keep the Giants in San Francisco, Major League Baseball then began to undercut the sale and seek an alternative buyer who would not relocate the team.[222] Eventually, Major League Baseball located a group of local San Francisco investors who offered to buy the team for $100 million.[223] In the meantime, it announced that two members of the Tampa Bay Partnership, Vincent Piazza and Vincent Tirendi, had failed its background check.[224] Piazza and Tirendi subsequently filed suit against Major League Baseball.[225] On November 10, 1992, the Lords rejected the offer of a revamped Tampa Bay Partnership (this one not including Piazza or Tirendi).[226] Eleven days later, Lurie sold the Giants to the group of San Francisco investors for $100 million and the team remained in San Francisco.[227]

If Major League Baseball's antitrust exemption was based on a solid foundation and had a substantial practical impact, this would mark the end of the story. However, because it does not, the Giants relocation story embarked on its second act. Once again, Major League Baseball's attempt to make practical use of its exemption caught the eye of Congress. The Antitrust Subcommittee of the Senate Judiciary Committee subsequently scheduled hearings to consider anew the possibility of overturning *Federal Base Ball* and revoking the exemption.[228] Among those called to testify was then-interim commissioner Bud Selig, who pleaded with the subcommittee not to do so on the grounds that the Giants situation "certainly cannot be said to be evidence that MLB has abused its antitrust exemption."[229]

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220. *See* Burns, *supra* note 4, *at* 502-04.

221. *Id.* at 502-03.

222. *Id. at* 503-04.

223. *Id. at* 504.

224. *Id.*

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

226. *See* Burns, *supra* note 4, at 504.

227. *Id.* at 504-05.

228. *See* Selig, *supra* note 129, at 278 (noting that the hearing before the Antitrust Subcommittee of the Senate Judiciary Committee was called for two reasons: 1) the National League's decision to not permit the relocation of the Giants to Tampa Bay; and 2) the recent resignation of baseball commissioner Francis "Fay" Vincent).

229. *Id.* at 283.

Selig's comment could not have been more illustrative of the practical impact of Major League Baseball's antitrust exemption, for what is the purpose of an exemption from a system of laws that compels those subject to them to act reasonably but a license to act *unreasonably?* Theoretically, because Major League Baseball is exempt from the antitrust laws, it should be able to abuse them. That it understands that it does not have license to do so throws grave doubt over the value of the exemption as a practical tool. Selig's statement revealed much about MLB's actual relationship with its exemption because what he was saying, in essence, was that the reason MLB was not abusing its exemption was because, in actuality, it was (and always had been) attempting de facto compliance with the Sherman Act in MLB's continuing effort to keep Congress from stepping in and compelling MLB to comply with the Sherman Act as a matter of law.

The flurry of activity that followed Selig's testimony is further validation of the veracity of this statement. Major League Baseball, although technically empowered to let the matter drop and leave the Tampa Bay Partnership group on the outside looking in, nevertheless took action to demonstrate its reasonableness to Congress in its effort to appease it and prevent it from stripping MLB of its exemption. In September of 1994, Major League Baseball settled its lawsuit with Piazza and Tirendi.[230] Although the terms of the settlement were confidential, Piazza shortly thereafter told a member of the St. Petersburg media that the Tampa-St. Petersburg area would be getting a Major League franchise soon.[231] Asked how he knew this, Piazza responded "[t]rust me."[232] Six months later, Piazza proved prescient as the Lords unanimously granted Tampa Bay an expansion franchise.[233]

In the end, the Lords understood that, ultimately, their exemption was meaningless when it came to issues of franchise relocation and expansion. Therefore, they had no choice but to see to it that Tampa Bay received either an expansion or relocated franchise. For nearly half a century, history had demonstrated that, despite their exemption, they are not free to deny legitimate cities, like Milwaukee and Baltimore in the early 1950s or Tampa Bay in the 1990s, with major league facilities already in place and with the population necessary to support a Major League baseball franchise. Rather than risk yet another round of Congressional hearings, the Lords acted swiftly to do what they knew Congress would ultimately

230. *See* Burns, *supra* note 4, at 536.
231. *Id.*
232. *Id.*
233. *Id.* at 537-38.

force them to do anyway—award Tampa Bay a Major League franchise.

After all, they would be in violation of the Sherman Act if they did not.

CONCLUSION

The Giants/St. Petersburg saga does indicate the practical effect of Major League Baseball's antitrust exemption relative to its brethren in other sports, however. Ultimately, the exemption allowed Major League Baseball to compel the Giants to remain in San Francisco against Bob Lurie's will and force him to sell his franchise for $15 million less than he otherwise could have sold it for. As a result, an established team remained in its hometown and an expansion franchise was awarded to the city that lured it. In the NFL, things would have worked out somewhat differently. After *Raiders I*, the NFL clearly does not have the power to compel teams to remain in cities they no longer wish to play in. However, as history has shown, the NFL has been quick to place expansion teams in cities that have lost established teams.[234] Thus, if the Giants played in the NFL, they would have relocated to St. Petersburg and San Francisco would have received the expansion franchise as a consolation prize.[235] Whether this difference has a profound practical effect is open to debate. However, there is no difference between Major League Baseball and the NFL when it comes to their respective abilities to prevent qualified markets from receiving Major League or NFL franchises. Neither league has much power to stop this, regardless of whether they are subject to the antitrust laws or operating under the illusion of an exemption.

234. For example, The Baltimore Ravens, Houston Texans and the reincarnated Cleveland Browns, replacing the Colts, Oilers and original Browns who relocated during the 1980s and 1990s.

235. As it was, Tampa Bay received the perpetually woeful and underfunded expansion Devil Rays—a dubious consolation prize at best.