Defining the "Business of Baseball": A Proposed Framework for Determining the Scope of Professional Baseball's Antitrust Exemption

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DEFINING THE “BUSINESS OF BASEBALL”: A PROPOSED FRAMEWORK FOR DETERMINING THE SCOPE OF PROFESSIONAL BASEBALL’S ANTITRUST EXEMPTION

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ABSTRACT

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

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INTRODUCTION

For nearly 90 years, professional baseball has had the unique distinction of being the only professional sport to enjoy a judicially created exemption from federal antitrust law. Under the exemption, the activities of both Major League Baseball (MLB) – professional baseball’s highest level of competition – as well as the lower ranked, so-called “minor leagues” are generally shielded from antitrust law. Originating from the United States Supreme Court’s 1922 opinion in Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, baseball’s antitrust exemption has been affirmed by the Court on two subsequent occasions,
first in the 1953 case of Toolson v. New York Yankees,\(^2\) and later in the 1972 case of Flood v. Kuhn.\(^3\) In these opinions, the Supreme Court affirmed baseball’s exemption on the basis of both *stare decisis* concerns and Congressional inaction,\(^4\) despite acknowledging that the exemption is an “aberration” and an “anomaly.”\(^5\)

No doubt due to the peculiarity of the exemption, as well as baseball’s standing as the “national pastime,” baseball’s antitrust exemption has generated substantial consideration over the years from both courts\(^7\) and commentators.\(^8\) Despite this voluminous analysis, surprisingly little

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\(^2\) 346 U.S. 356 (1953).
\(^3\) 407 U.S. 258 (1972).
\(^4\) See generally, Toolson, 346 U.S. 356; Flood, 407 U.S. 258.
\(^5\) Flood, 407 U.S. at 282.
attention has been devoted to determining the extent to which baseball’s operations are properly protected under the antitrust exemption.\footnote{See Guarisco, supra note 8 at 652 (“courts and commentators have ... devoted relatively little effort to delineating the limits, if any, of the exemption”).} The Supreme Court itself has never specifically addressed the scope of the baseball exemption,\footnote{Nathanson, supra note 8 at 5 (“Nowhere in [the Court’s] three decisions is there a discussion of the scope of the exemption”); see also Minnesota Twins P’ship v. Minnesota, 592 N.W.2d 847, 854 (Minn. 1999) (“the Flood opinion is not clear about the extent of the conduct that is exempt from antitrust laws”); McMahon and Rossi, supra note 8 at 243 (“Federal Baseball, Toolson and Flood do not provide any helpful guidance as to the bounds of the exemption”).} but instead has generally held only that the “business of baseball” is exempt from antitrust law.\footnote{See generally Parts I.A-I.E infra.} Based on this language, some
lower courts have broadly interpreted the Supreme Court’s precedent as providing an exemption for the entire business of baseball. 12 Meanwhile, other courts have concluded that the exemption is more limited, with some finding that it protects only the “unique characteristics and needs” of professional baseball, 13 while others have held that the exemption should be restricted solely to the facts of the Supreme Court’s most recent affirmation in Flood v. Kuhn. 14 In Flood, the Court reconsidered baseball’s antitrust exemption in the specific context of the so-called “reserve clause,” a provision included at the time in all baseball player contracts that precluded players from negotiating future contracts with anyone but their current employer. 15 Because MLB players subsequently rid themselves of the constraints of the reserve clause through arbitration, 16 the implication of this final subset of decisions is that baseball’s antitrust exemption is now largely a nullity.

Meanwhile, the few existing scholarly works devoting any significant


16 In 1975, at the guidance of the recently founded Major League Baseball Players Association, pitchers Andy Messersmith and Dave McNally elected not to sign contracts that included the reserve clause, and instead played out the season without a contract. Abrams, supra note 8 at 117-33; Charles C. Alexander, Our Game: An American Baseball History 296 (MJF Books 1991). At season’s end, Messersmith and McNally declared themselves to be “free agents” eligible to negotiate with any MLB team, arguing that the reserve clause only allowed their contracts to be renewed for a single season, and thus since the two pitchers were not under contract for the 1975 season, the reserve clause no longer applied. Jennifer Dyer, The Curt Flood Act of 1998: After 76 Years, Congress Lifts Baseball’s Antitrust Exemption on Labor Relations But Leaves Franchise Relocation Up to the Courts, 3 T.M. COOLEY J. PRAC. & CLINICAL L. 247, 259 (2000). Not surprisingly, the owners disagreed. Id. The dispute between the owners and two pitchers was ultimately heard by a panel of arbitrators—a right the players had earned as part of the 1970 collective bargaining agreement. Jones, supra note 15 at 659. The arbitration panel sided with Messersmith and McNally, finding that the reserve clause in a particular contract lapsed after one season. Id. at 660. Following the arbitration decision, the owners and the MLB players’ union eventually negotiated a new collective bargaining agreement in 1976, granting players with six years of service the right to negotiate with all MLB teams, thus beginning baseball’s free agency era. Alexander at 297.
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analysis to the scope of the baseball exemption are equally conflicted. The majority of commentators to consider the issue have concluded that the subset of judicial decisions limiting the exemption to the facts of Flood were correctly decided. However, one leading scholar has argued in favor of the standard adopted by other courts, finding that Flood maintains an exemption protecting only baseball’s “unique characteristics and needs.” Finally, another top commentator has concluded that the exemption generally extends to the “structuring of professional baseball and [the production of] baseball entertainment,” but not contracts between professional baseball entities and third parties. In view of this conflict of opinion among both courts and scholars, some commentators have gone so far as to conclude that “the scope of baseball’s antitrust exemption has become whatever the reviewing court says it is.”

This lack of consensus regarding the scope of the exemption is particularly problematic in light of the fact that MLB regularly finds itself embroiled in antitrust disputes. For example, in August 2009, trading card manufacturer Upper Deck threatened to file an antitrust suit against MLB, following MLB’s decision to grant rival card manufacturer Topps an exclusive trademark license. Similarly, in 2007, Pennsylvania Senator Arlen Specter alleged that a proposed deal between MLB and DirecTV, under which the satellite television company would have received the exclusive rights to air MLB’s “Extra Innings” broadcasting package, violated antitrust law. Meanwhile, MLB’s restrictive territory allocation

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

18 Ross, supra note 8 at 205 (finding that Flood held that “baseball’s ‘unique characteristics and needs’ are exempt from the antitrust laws”).

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

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


23 For more on the “Extra Innings” package see infra note 331 and accompanying text.

24 Sandomir, supra note 19. MLB ultimately elected not to grant DirecTV exclusive rights to the Extra Innings package. See MLB Strikes Deal to Keep Games on Cable,
policies – a regular source of antitrust complaints against the league—were again at issue in December 2009 when the city attorney for San Francisco threatened to sue MLB should the league permit the Oakland Athletics franchise to relocate to San Jose, a city allocated to the San Francisco Giants organization. Should these or any similar future disputes result in litigation, the applicability of the baseball antitrust exemption will be unclear under the existing judicial precedent and scholarly analysis.

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

This article rejects the existing precedent and scholarly analyses, and instead asserts that future courts considering the scope of the baseball exemption should hold that only those activities directly related to the business of providing baseball entertainment to the public are exempt from antitrust law. This uniform standard is drawn from the largely overlooked focus of the Supreme Court’s opinions in *Federal Baseball* and *Toolson*, which both explicitly exempted the business of supplying baseball exhibitions to the public. Under the proposed standard, exempt activities directly related to providing baseball entertainment would include the formulation of baseball’s official rules, decisions regarding the league structure, broadcasting agreements, minor league operations, and certain

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27 Roberts, supra note 19 at 331. See also ANDREW ZIMBALIST, MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND PUBLIC POLICY 138 (Brookings Institution Press 2003)(noting that this uncertainty prevents baseball owners from fully and confidently investing in their teams).


29 See generally Part I.F infra.
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labor disputes.\textsuperscript{30} Meanwhile, commercial activities not directly related to supplying baseball entertainment, such as merchandise licensing, concessions, and sponsorship agreements, would not be exempt.\textsuperscript{31}

Admittedly, this proposed standard is unlikely to satisfy those who advocate the severe restriction or outright revocation of the baseball exemption on policy grounds.\textsuperscript{32} While the policy arguments advanced by these commentators may ultimately convince the Supreme Court or Congress to restrict or revoke baseball’s antitrust immunity, until that time comes a uniform standard for the baseball exemption is necessary. Therefore, this article sets aside the general policy concerns advanced by both the opponents and proponents of baseball’s antitrust exemption, and instead attempts to provide a much needed, workable standard consistent with the Supreme Court’s existing precedent for use by future courts applying the exemption.

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

I. THE ESTABLISHMENT OF THE BASEBALL ANTITRUST EXEMPTION

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


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

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

First, Justice Holmes concluded that the business of professional baseball was not interstate in nature. Specifically, Justice Holmes honed in on the precise business activity at issue in the case as being “giving exhibitions of base ball,” events that he concluded were “purely state affairs.” In other words, Justice Holmes focused on the fact that at the time of Federal Baseball all baseball revenues were generated from activities occurring in a single state, i.e., the sale of tickets to baseball games. Justice Holmes acknowledged that the popularity of these exhibitions could be attributed to competition between teams from different cities and states, but found that the requirement that teams cross state lines was “not enough to change the character of the business,” which was wholly intrastate, rather than interstate, in nature.

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

Although Justice Holmes’ opinion in Federal Baseball has since been widely criticized, when viewed in light of the business of professional baseball at the time the case was decided, as well as the Supreme Court’s then-existing interstate commerce jurisprudence, the opinion becomes more reasonable. Today, professional baseball is unquestionably engaged in interstate commerce, with its extensive revenues from selling broadcast rights (local and national; television, radio, and Internet) and its licensing of

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41 Federal Baseball, 259 U.S. at 208. See also generally McDonald, supra note 8 at 95-96.
42 Federal Baseball, 259 U.S. at 208.
43 Id.
44 Id. at 209.
45 Id.
46 See, e.g., Salerno v. American League of Professional Baseball, 429 F.2d 1003, 1005 (2d Cir. 1970) (“We freely acknowledge our belief that Federal Baseball was not one of Mr. Justice Holmes' happiest days”); ABRAMS, supra note 8 at 58 (finding that the “opinion has since been criticized as ludicrous”); Classen, supra note 8 at 376 (reporting that Federal Baseball has been “widely criticized”); Robert M. Jarvis and Phyllis Coleman, Early Baseball History, 45 AM. J. LEGAL HIST. 117, 117, n.2 (2001) (finding the opinion has been “much-criticized”).
47 See Flood v. Kuhn, 407 U.S. 258, 282 (1972) (“Professional baseball is a business, and it is engaged in interstate commerce.”).
intellectual property rights for merchandise. At the time Federal Baseball was decided, however, such revenue streams did not exist, as ticket sales were the overwhelming source of revenue for MLB teams. Indeed, radio broadcasts of MLB games were only in the experimental stage in 1922, and would not become popular or profitable for a number of years. Meanwhile, although the play-by-play results of baseball games were transmitted throughout the nation via telegraph at the time Federal Baseball was decided, these transmissions did not generate any revenue for MLB. Therefore, while baseball fans certainly followed the results of out-of-state contests closely, baseball teams’ revenue was overwhelmingly generated through ticket sales to those actually attending the games in person at the stadium, an inherently local activity.

Thus, a specific focus on the business of providing baseball exhibitions to the public was central to Justice Holmes’ opinion in Federal Baseball. When so viewed, and in light of the realities of the professional baseball business in 1922, Justice Holmes’s conclusion that these games were “purely state affairs” under the Court’s then-limited conceptions of interstate commerce becomes easier to understand.

B. Toolson v. New York Yankees

The Supreme Court would not revisit its Federal Baseball decision for 31 years, until the 1953 case of Toolson v. New York Yankees. Toolson was one of three companion cases simultaneously considered by the Court, all of which alleged antitrust violations by professional baseball. In

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50 While baseball’s first experimental radio broadcasts occurred in August 1921, broadcasting games in earnest did not gain popularity until the 1930s and 1940s. See McDonald, supra note 8 at 113 (noting date of first experimental broadcasts); McMahon and Rossi, supra note 8 at 237 (“Radio coverage of professional baseball became popular following World War II.”); Tomlinson, supra note 8 at 262 (noting that radio broadcasts became popular after Federal Baseball).
51 National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc., 269 F. 681, 683 (C.C.D.C. 1920) (“each league had a contract with a telegraph company for service, and had an income sufficient only to meet necessary expenses”).
52 McDonald, supra note 8 at 114.
53 See id. at 114-15. See also Alito, supra note 6 at 193 (noting same).
55 In addition to Toolson, the Court also decided Kowalski v. Chandler and Corbett v.
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*Toolson*, a minor league player from the New York Yankees’ farm system filed suit after being blacklisted in 1950 for failing to report to the Yankees’ minor league affiliate in Binghamton as he had been assigned. Toolson refused to accept his assignment, having grown frustrated at toiling in the minor leagues under the Yankees’ control for a number of years without receiving a chance to play at the Major League level. All three consolidated suits alleged that the reserve clause constituted an illegal restraint of trade, in violation of the Sherman Act; meanwhile both *Toolson* and the *Corbett v. Chandler* companion case also alleged that MLB had conspired to monopolize the professional baseball industry.

By the time *Toolson* reached the Court, the nature of the baseball business had changed significantly since the days of *Federal Baseball*. Most notably, the broadcasting of baseball games across state lines via both radio and television was well established by the 1950s. Moreover, the Supreme Court’s interstate commerce jurisprudence had also been substantially expanded. Despite these changes, the *Toolson* Court nevertheless affirmed the earlier baseball opinion by a 7-to-2 vote in a one paragraph, *per curiam* decision. The *Toolson* majority began by summarizing *Federal Baseball* as holding that “the business of providing public baseball games for profit … was not within the scope of the federal antitrust laws.” The Court then went on to note that Congress had allowed more than thirty years to elapse since *Federal Baseball* without enacting legislation bringing MLB within the purview of federal antitrust law. The Court thus asserted that the duty to revoke baseball’s exemption belonged

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Id. at 396.


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

See McDonald, supra note 8 at 112-13.

*See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942).

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

Id.

The historical record somewhat undermines the *Toolson* Court’s reliance on the apparent Congressional silence following *Federal Baseball*. In fact, a House subcommittee considering MLB’s antitrust exemption deferred its consideration of the exemption at the urging of MLB’s legal counsel, who had assured the subcommittee that the Supreme Court would decide the issue in *Toolson* the following term. ABRAMS, supra note 8 at 310. Appearing before the Supreme Court in *Toolson*, however, MLB argued that the Court should affirm *Federal Baseball* specifically because Congress had elected not to disturb the precedent during its 1952 investigation. *Id.*
to Congress, and not the Court, as otherwise, baseball would face retroactive liability resulting from its reliance on Federal Baseball. The Toolson majority opinion then closed by affirming the lower court opinions on the authority of Federal Baseball, “so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.”

This closing statement by the Toolson Court is particularly noteworthy, effectively changing the rationale underlying baseball’s antitrust exemption. Rather than affirming Federal Baseball on the basis of Justice Holmes’ explicitly reasoning – i.e., that exhibitions of baseball were neither interstate in nature, nor commerce, and thus was not within the scope of federal antitrust law – the Toolson Court instead reinterpreted Federal Baseball to stand for the proposition that Congress had never intended for baseball to fall within the purview of the Sherman Act in the first place.

One commentator has gone so far as to call the Toolson Court’s reformulation of Federal Baseball “the greatest bait-and-switch scheme in the history of the Supreme Court.” Indeed, Congressional intent was never mentioned in the Federal Baseball opinion. However, intellectually honest or not, Toolson represented a significant shift in the Supreme Court’s baseball antitrust jurisprudence. Whereas Federal Baseball had concluded that baseball was not interstate commerce under the prevailing jurisprudence at the time – a rule subject to change pending future developments in the law or the business of baseball – Toolson transformed this precedent into a permanent exemption grounded in Congress’ purported original intent when passing the Sherman Act. Thus, although many commentators have overlooked the significance of the opinion’s closing

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65 Toolson, 346 U.S. at 357.
66 See Lafferty, supra note 8 at 1277 (concluding that the Toolson opinion was based upon “two concerns: first, Congress’s refusal to act, and second, the retroactive effect of its decision”).
68 See Hylton, supra note 56 at 397.
70 McDonald, supra note 8 at 100.
72 McDonald, supra note 8 at 107 (noting that Federal Baseball’s “conclusion that the interstate aspects of the business were merely ‘incidental’ to the game … [was not] immutable; it can change when the facts do”).
73 Id. at 119 (arguing that Toolson really first created baseball’s lasting antitrust exemption).
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sentence, Toolson was not simply a summary affirmance of Federal Baseball, but instead represented a revision of the fundamental basis for the baseball exemption.

C. Intervening Supreme Court Decisions

Although the Supreme Court would not specifically reconsider baseball’s antitrust status for nearly two decades after Toolson, the Court did address its Federal Baseball and Toolson precedents in several intervening decisions. Through these decisions, the Court limited the application of Federal Baseball and Toolson to only the business of baseball, refusing to extend the exemption to any other industries or sports. For instance, in the 1955 case of United States v. Shubert,75 the court discussed baseball’s exemption in the context of an antitrust action brought against a theater company.76 In considering the baseball exemption, the Shubert Court stated that Federal Baseball dealt “with the business of baseball and nothing else.”77 With respect to Toolson, the Shubert Court construed the opinion to be “a narrow application of the rule of stare decisis,” insofar “‘as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.’”78

Similarly, in United States v. International Boxing Club79 – a companion case to Shubert80 – the Supreme Court refused to extend the baseball exemption to professional boxing. There, the Court noted that


75 348 U.S. 222 (1955).
76 Id. at 223.
77 Id. at 228.
78 Id. at 230. As discussed infra, Shubert thus considered Toolson to be an application of stare decisis only insofar as it reinterpreted Federal Baseball into a statement of Congressional intent. See infra notes 257-258 and accompanying text.
80 Tomlinson, supra note 8 at 266.
“Toolson neither overruled Federal Baseball nor necessarily reaffirmed all
that was said in Federal Baseball,” before holding that the baseball
exemption was inapplicable to other types of local performance
exhibitions. 81

The Court again refused to extend baseball’s exemption two years later
in Radovich v. National Football League. 82 Radovich, an antitrust action
brought by a former professional football player against the National
Football League (“NFL”), reached the Supreme Court following dismissals
by the trial court and Ninth Circuit Court of Appeals on the basis of the
Federal Baseball and Toolson precedents. 83 The Supreme Court reversed,
extensively discussing Federal Baseball and Toolson in the process, and
repeatedly interpreting the decisions as exempting the “business of
baseball.” 84 Although the Court acknowledged that Federal Baseball “was
of dubious validity,” 85 and admitted that it would decide the case differently
if being raised “for the first time upon a clean slate,” 86 the Radovich Court
nevertheless refused to limit its prior baseball precedent beyond “the facts
there involved, i.e., the business of organized professional baseball.” 87 The
Court similarly declined to extend baseball’s antitrust exemption to the
National Basketball Association a few years later in Haywood v. National
Basketball Association. 88

Therefore, on four separate occasions following Toolson, the Supreme
Court considered Federal Baseball and Toolson, and in each case concluded
that its prior precedent exempted the business of baseball from antitrust law.
At no point did the Court ever find that its prior decisions exempted only a

81 International Boxing Club, 348 U.S. at 242.
82 Id.
84 Id. at 447.
85 See id. at 452 (“Federal Base Ball held the business of baseball outside the scope of
the [Sherman] Act.”); id. at 450 (“Federal Base Ball and Toolson … both involving the
business of professional baseball”); id. (“In Toolson we continued to hold the umbrella
over baseball”); id. at 451 (“The Court was careful to restrict Toolson’s coverage to
baseball”).
86 Id. at 450.
87 Id. at 452.
88 Id. at 451.
89 401 U.S. 1204, 1205-06 (1971) (finding that the suit implicated an issue “similar to
the one on baseball’s reserve clause which our decisions exempting baseball from
the antitrust laws have foreclosed”).

Lower courts have subsequently refused to extend baseball’s antitrust exemption to
professional hockey, Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club,
Golf Ass’n, 359 F.Supp. 1260 (N.D.Ga. 1973), and professional tennis, Gunter Harz
Sports, Inc. v. United States Tennis Ass’n, 665 F.2d 222 (8th Cir. 1981). See also Picher,
supra note 8 at 14 n.53 (identifying cases).
single facet of the baseball business, such as the reserve clause.

D. Flood v. Kuhn

Having decisively contained the Federal Baseball and Toolson precedents to the business of baseball in Shubert, International Boxing Club, Radovich, and Haywood, the Supreme Court directly confronted baseball’s antitrust status for the third – and, to date, final – time in the 1972 case of Flood v. Kuhn. The suit was brought by Curt Flood, a former star outfielder for the St. Louis Cardinals who was traded against his will to the Philadelphia Phillies in 1969. Upset over the trade, and citing his long-standing business interests in St. Louis, Flood refused to play for the Phillies, instead requesting that baseball’s commissioner Bowie Kuhn declare him a free agent, allowing him to sign with the team of his choice. Kuhn declined, citing the reserve clause in Flood’s contract. Flood filed suit against Kuhn and MLB shortly thereafter, alleging violations of federal and state antitrust law, as well as the Thirteenth Amendment’s prohibition against slavery.

After a bench trial, the Southern District of New York entered a judgment for the defendants pursuant to Federal Baseball and Toolson, and Second Circuit Court of Appeals affirmed. The Supreme Court affirmed as well, maintaining baseball’s exemption by a 5-to-3 vote. Justice Blackmun wrote the Court’s majority opinion, beginning with what he would later describe as a “sentimental journey” through baseball history, in which he named over 80 former baseball players while praising baseball’s place as the “national pastime” enjoyed by millions of fans. Justice Blackmun then provided a thorough review of the

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91 Id. at 264-65.
92 Id. at 265.
93 SNYDER, supra note 71 at 101-02.
99 Flood, 407 U.S. at 262-64. The players identified in Justice Blackmun’s list ranged from luminaries such as Ty Cobb and Babe Ruth to the largely forgotten Germany Schaefer and Bobby Veach. Id. at 262-63.
Court’s prior precedent considering baseball’s antitrust status,\textsuperscript{100} before turning to the merits of the case.

In considering the merits, Justice Blackmun’s opinion made several observations regarding the baseball exemption. First, Justice Blackmun acknowledged that “baseball is a business and it is engaged in interstate commerce,”\textsuperscript{101} thus repudiating the primary holding in \textit{Federal Baseball}. Second, Justice Blackmun admitted that the baseball exemption was “an exception and an anomaly,”\textsuperscript{102} but stressed that it was an established aberration that had been recognized by the Court on five separate occasions over the course of more than a half a century, and one which rested “on a recognition and acceptance of baseball’s unique characteristics and needs.”\textsuperscript{103} The opinion went on to emphasize that baseball had developed and expanded in reliance on the assumption that it was exempt from antitrust law, and feared that reversing the Court’s prior decisions would lead to retroactivity problems.\textsuperscript{104} In light of the foregoing, the Court was “loath … to overturn \textit{Federal Baseball} and \textit{Toolson} judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and … has clearly evinced a desire not to disapprove them legislatively.”\textsuperscript{105}

Accordingly, the \textit{Flood} majority adhered to \textit{Federal Baseball} and \textit{Toolson} and affirmed baseball’s antitrust exemption, with Justice Blackmun’s opinion closing by quoting \textit{Toolson}’s affirmance of \textit{Federal Baseball} “so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.”\textsuperscript{106}

\textbf{E. The Curt Flood Act of 1998}

After decades spent sitting on the sidelines, Congress finally addressed baseball’s antitrust status in 1998 by passing the Curt Flood Act (“CFA”).\textsuperscript{107} The CFA repealed baseball’s antitrust exemption in a single, limited respect, namely by allowing current major league players to file antitrust suits against MLB.\textsuperscript{108} Specifically, Section A of the CFA permits players to file antitrust suits “to the same extent such conduct, acts,

\textsuperscript{100} Id. at 269-81.
\textsuperscript{101} Id. at 282.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 283.
\textsuperscript{105} Id. at 283-84.
\textsuperscript{106} Id. at 285.
\textsuperscript{108} Id.
practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business,” but only so long as the lawsuits related to or affected “employment of major league baseball players.”\textsuperscript{109} Meanwhile, Section B expressly limits the Act, providing that “[n]o court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to” (i) litigation initiated by amateur or minor league players, (ii) “any other matter relating to organized professional baseball’s minor leagues,” (iii) lawsuits concerning “franchise expansion, location or relocation, [or] franchise ownership issues, including ownership transfers,” (iv) the employment of umpires, or (v) the acts of any “persons not in the business of organized professional major league baseball.”\textsuperscript{110}

While some might read Section B of the CFA as Congressional endorsement of a broad antitrust exemption (aside from labor disputes involving current MLB players), in reality the statute remains agnostic regarding the remaining scope of the exemption. Section B specifically states that future courts shall not rely on the CFA “as a basis for changing the application of the antitrust laws,”\textsuperscript{111} meaning that any then-existing precedent was unaffected by the statute. Because most of the conflicting precedents regarding the scope of the exemption had already been issued by 1998, as discussed \textit{infra},\textsuperscript{112} the CFA thus leaves the various judicial interpretations of the exemption untouched.

Indeed, the CFA’s legislative history reveals that the statute was not intended to adopt or reject any of the conflicting interpretations of the exemption’s scope reached by courts post-\textit{Flood}. Specifically, during the Senate’s deliberation of the bill, Senator Paul Wellstone noted that some courts had recently narrowed the scope of the baseball exemption, and asked for confirmation that the CFA would not affect these precedents.\textsuperscript{113} In response, the bill’s co-sponsors, Senators Orrin Hatch and Patrick Leahy, confirmed that the Act was “intended to have no effect other than to clarify the status of major league players under the antitrust laws. With regard to all other context or other persons or entities, the law will be the same after passage of the Act as it is today.”\textsuperscript{114} Accordingly, the CFA does not

\begin{itemize}
\item\textsuperscript{109} Id.
\item\textsuperscript{110} Id.
\item\textsuperscript{111} Id.
\item\textsuperscript{112} See Part II \textit{infra}.
\item\textsuperscript{114} Id. \textit{See also} Tomlinson, \textit{supra} note 8 at 286-87 (quoting comments made on the floor of the Senate by Senators Wellstone, Hatch, and Leahy); J. Philip Calabrese, \textit{Antitrust and Baseball}, 36 HARV. J. ON LEGIS. 531, 537 n.46 (1999)(summarizing same); Stephen F. Ross, \textit{Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices}
Implicate the scope of baseball’s antitrust exemption as considered in this article, aside from permitting antitrust suits by current major league players.115

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

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

First, as noted above, the central focus of Justice Holmes’ opinion in *Federal Baseball* was on the business of providing baseball exhibitions to the public.116 In his opinion, Justice Holmes provided a “summary statement of the nature of the business involved,” emphasizing the fact that baseball teams “play against one another in public exhibitions for money.”117 Justice Holmes repeated this focus in the next paragraph, stating that “[t]he business is giving exhibitions of base ball.”118 Therefore, a focus upon the specific business of providing exhibitions of baseball was central to Justice Holmes’ reasoning in *Federal Baseball*, and was in fact the basis for his conclusion that the games themselves were “purely state affairs,” and thus not of the requisite interstate nature for regulation under the Sherman Act.119 Because each baseball game was located in only a single state, and because the only way to follow the actual play-by-play results of each game in real time was by being in attendance at the stadium,120 Justice Holmes thus reasoned that the business was intrastate, rather than interstate, in nature.

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116 See generally Part I.A supra.
118 *Id.*
119 See generally Part I.A supra.
120 See supra notes 46-52 and accompanying text.
Federal Baseball’s focus on supplying baseball entertainment was affirmed in Toolson. In the very first sentence of its opinion, the Toolson Court noted that Federal Baseball had “held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws.”\footnote{121} The Toolson majority then went on to affirm the judgments below “[w]ithout reexamination of the underlying issues … on the authority of Federal Baseball … .”\footnote{122} While the Toolson opinion ultimately reinterpreted Federal Baseball as holding that Congress had never intended for baseball to be regulated under the Sherman Act,\footnote{123} the decision nevertheless confirms the original scope of the Federal Baseball decision as being focused on the business of supplying baseball exhibitions to the public.

Admittedly, none of the Supreme Court’s intervening decisions considering the baseball exemption between Toolson and Flood emphasized the business of providing baseball entertainment.\footnote{124} Instead, these opinions simply stated that the exemption protected only the “business of baseball” from antitrust law. However, because none of these cases raised an issue of the exemption’s applicability to baseball’s commercial activities, there was no need for the Court to address the specific bounds of the exemption. Therefore, aside from indicating that the exemption generally shields the baseball business, and not any one single facet of that business, these intervening opinions are not particularly relevant when ascertaining the proper scope of the baseball exemption.

Finally, although the Flood Court did not explicitly focus its analysis on the business of providing baseball entertainment to the public, as had the Federal Baseball and Toolson Courts, the Flood Court nevertheless emphasized on several occasions that the exemption generally covers the “business of baseball.”\footnote{125} However, the Flood opinion does reveal an appreciation of the focus in Federal Baseball and Toolson on providing baseball entertainment. For example, when discussing Federal Baseball, the Flood Court quoted Justice Holmes’ statement that “[t]he business is giving exhibitions of base ball.”\footnote{126} The Court also clearly stated that it would “adhere once again to Federal Baseball and Toolson and to their application to professional baseball.”\footnote{127}

\footnote{122} Id.
\footnote{123} See supra notes 67-73 and accompanying text.
\footnote{124} See generally Part I.C supra.
\footnote{125} See infra notes 233-235 and accompanying text.
\footnote{127} Id. at 284.
emphasis on *stare decisis* reveals that the Court did not intend to alter the underlying focus of the exemption created in *Federal Baseball* and *Toolson.*

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

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128 McMahon and Rossi, supra note 8 at 253 (arguing that because *Flood* was “decided as a matter of law on *stare decisis* grounds, [the opinion] add[s] little (if anything) to understanding the antitrust contours of the exemption”).


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

131 *Flood*, 407 U.S. at 264.

132 Id. at 263 n.4.

133 See supra notes 98-99 and accompanying text.

134 *Flood*, 407 U.S. at 263.

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

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

Baseball’s status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody’s business. To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings succor from daily toil and an escape from the ordinary to most inhabitants of this land, were to suffer in the least because of
Therefore, while *Flood* does not explicitly limit the baseball exemption to only those activities related to supplying baseball entertainment to the public, based on its sentimental discussion of baseball’s impact on the United States along with its adherence to *stare decisis*, the opinion nevertheless evidences an appreciation of the exemption’s historical focus on shielding the business of providing baseball exhibitions from antitrust law. Future courts interpreting the scope of the baseball antitrust exemption should thus ignore the divergent, conflicting standards developed by lower courts post-*Flood*, discussed *infra*, and instead hold that those business activities directly related to providing baseball exhibitions to the public are exempt from antitrust law.

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

Although the Supreme Court’s opinions in *Federal Baseball*, *Toolson*, and *Flood* collectively establish that the baseball antitrust exemption extends to the “business of baseball” – and in particular, the business of providing baseball exhibitions to the public – subsequent lower courts have nevertheless failed to develop a uniform framework consistent with the Court’s precedent. Instead, lower courts applying baseball’s antitrust exemption have developed their own muddled, conflicting standards, resulting in three general categories of divergent precedent. First, some courts have simply held that the “business of baseball” is exempt from antitrust law, while providing few, if any, limitations to the exemption. In contrast, a second category of courts have taken a much more restrictive view of the baseball exemption, arguing that the Supreme Court has limited the exemption to protect only the reserve clause. Finally, two courts have rejected both the extremely broad and narrow views of the exemption, and instead held that the exemption applies to more than just the reserve clause, but something less than the entire business of baseball.

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

undue concentration by any one or any group on commercial and profit considerations. The game is on higher ground; it behooves everyone to keep it there.

*Id.*

136 See generally McMahon and Rossi, *supra* note 8 at 243-248.
A majority of lower courts considering the scope of the baseball antitrust exemption post-*Flood* have determined that the exemption generally protects the “business of baseball.” While two of these courts have suggested that the exemption would not protect activities attenuated to the baseball business,\(^{137}\) or agreements with non-baseball entities,\(^{138}\) most courts have simply held that the business of baseball is exempt from antitrust law, without attempting to derive any limiting parameters for the exemption.

The first court to construe the scope of the baseball exemption, post-*Flood*, was the Seventh Circuit Court of Appeals in *Charles O. Finley & Co. v. Kuhn*.\(^{139}\) In *Finley*, the owner of the American League’s Oakland Athletics sued then-MLB Commissioner Bowie Kuhn, alleging, *inter alia*, that Kuhn had violated federal antitrust law by disapproving Oakland’s proposed sales of Athletics pitchers Joe Rudi and Rollie Fingers to the Boston Red Sox and Athletics pitcher Vida Blue to the New York Yankees during the middle of the 1976 season for several million dollars in cash.\(^{140}\) Finley attempted to avoid dismissal of his antitrust claims pursuant to the baseball exemption by arguing that *Flood* had limited the exemption to protect only baseball’s reserve system.\(^{141}\) The Seventh Circuit rejected this argument concluding:

> Despite the two references in the *Flood* case to the reserve system, it appears clear from the entire opinions in the [Supreme Court’s] three baseball cases, as well as from *Radovich*, that the Supreme Court intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws.\(^{142}\)

However, the *Finley* court tempered its conclusion by noting in a footnote that “[w]e recognize that this exemption does not apply wholesale to all cases which may have some attenuated relation to the business of baseball.”\(^{143}\) The *Finley* court failed to elaborate on what might constitute such attenuated circumstances, instead simply citing the 1972 district court opinion in *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*,\(^{144}\) a case in which a concessions company was accused of antitrust violations by an

\(^{137}\) Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 541 n.51 (7th Cir. 1978).

\(^{138}\) Major League Baseball v. Crist, 331 F.3d 1177, 1183 (11th Cir. 2003).

\(^{139}\) 569 F.2d 527 (7th Cir. 1978).

\(^{140}\) *Id.* at 531.

\(^{141}\) *Id.* at 540.

\(^{142}\) *Id.* at 541 (emphasis added).

\(^{143}\) *Id.* at 541 n.51.

MLB team, but in which the antitrust exemption had not been asserted.\textsuperscript{145}

Four years later, the Eleventh Circuit Court of Appeals similarly construed the exemption in \textit{Professional Baseball Schools and Clubs, Inc. v. Kuhn}.\textsuperscript{146} Specifically, the plaintiff – owner of a minor league franchise in the Carolina League – alleged violations of federal antitrust law arising from (i) baseball’s player assignment and franchise location systems, (ii) monopolization of the business of professional baseball, and (iii) league rules forbidding member teams from staging exhibitions against teams outside of the National Association.\textsuperscript{147} In affirming the district court’s dismissal, the Eleventh Circuit noted “the exclusion of the business of baseball from the antitrust laws is well established.”\textsuperscript{148} Without specifically considering the bounds of the exemption, the court then concluded that each of the alleged activities were exempt because they “plainly concern[ed] matters that are an integral part of the business of baseball.”\textsuperscript{149}

The Eastern District of Louisiana reached the same conclusion twelve years later in \textit{New Orleans Pelicans Baseball, Inc. v. National Association of Professional Baseball Leagues, Inc.}\textsuperscript{150} That case arose out of plaintiff’s unsuccessful attempt to purchase the minor league Charlotte Knights franchise in order to move it to New Orleans.\textsuperscript{151} Specifically, after giving the plaintiff conditional approval to purchase and move the franchise, the National Association subsequently retracted that approval, giving priority to a later-filed, competing claim for the New Orleans market by the Denver Zephyrs minor league franchise.\textsuperscript{152} The district court dismissed the plaintiff’s claims under state and federal antitrust law, finding that the Supreme Court had exempted the “business of baseball” from antitrust law.\textsuperscript{153} The \textit{New Orleans Pelicans} court did not attempt to ascertain the specific limits of the exemption.\textsuperscript{154}

The same approach was taken the next year in \textit{McCoy v. Major League Baseball,}\textsuperscript{155} a class action antitrust lawsuit filed in the aftermath of the 1994

\textsuperscript{145} See generally id.

\textsuperscript{146} 693 F.2d 1085 (11th Cir. 1982).

\textsuperscript{147} Id. The National Association of Professional Baseball Leagues, or National Association for short, is the organization that governs minor league baseball. See Patrick S. Baldwin, \textit{Note: Keeping Them Down on the Farm: The Possibility of a Class Action by Former Minor League Baseball Players Against Major League Baseball for Allowing Steroid Abuse}, 43 GA. L. REV. 1195, 1227 n.180 (2009).

\textsuperscript{148} \textit{Professional Baseball Schools}, 693 F.2d 1085-86.

\textsuperscript{149} Id. at 1086.

\textsuperscript{150} Case No. 93-253, 1994 WL 631144 (E.D.La. March 1, 1994).

\textsuperscript{151} Id. at *1.

\textsuperscript{152} Id. at *1-2.

\textsuperscript{153} Id. at *8.

\textsuperscript{154} Id. at *8-9.

\textsuperscript{155} 911 F.Supp. 454 (W.D. Wash. 1995).
players strike by baseball fans and owners of businesses in close proximity to MLB stadia.\footnote{Id. at 455-56.} Like the court in \textit{New Orleans Pelicans}, the McCoy court read the \textit{Federal Baseball, Toolson}, and \textit{Flood} trilogy as establishing that the “business of baseball” was exempt from federal antitrust law, without defining any precise boundaries for the exemption.\footnote{Id. at 457.}

The next court to adopt a broad interpretation of the baseball exemption was the Supreme Court of Minnesota in \textit{Minnesota Twins Partnership v. Minnesota}.\footnote{592 N.W.2d 847 (Minn. 1999).} The suit arose out of civil investigative demands issued by the Minnesota Attorney General investigating the proposed sale and relocation of the American League’s Minnesota Twins franchise to North Carolina for possible violations of state antitrust law.\footnote{Id. at 849.} Finding that Minnesota antitrust law was interpreted consistently with federal antitrust law,\footnote{Id. at 851.} the \textit{Minnesota Twins} court examined the Supreme Court’s baseball trilogy, determining that “the \textit{Flood} opinion is not clear about the extent of the conduct that is exempt from antitrust laws.”\footnote{Id. at 854.} Despite this lack of clarity, the court elected to side with the “great weight of federal cases” and hold that “the entire business of baseball” was exempt from antitrust law.\footnote{Id.} Because “the sale and relocation of a baseball franchise … is an integral part of the business of professional baseball” the court determined the subject of the Attorney General’s investigation was foreclosed by the baseball exemption.\footnote{Id. at 856.} Specifically, the \textit{Minnesota Twins} court concluded that the civil investigative demands were outside the Attorney General’s authority, insofar as the investigation could never result in an enforcement action. \textit{Id.}

Finally, the most recent examination of the scope of the baseball antitrust exemption came in \textit{Major League Baseball v. Butterworth (Butterworth II)}.\footnote{181 F.Supp.2d 1316 (N.D.Fla. 2001).} \textit{Butterworth II} involved civil investigative demands issued by the Florida Attorney General relating to potential antitrust violations arising from MLB’s proposed contraction of two of its thirty franchises.\footnote{Butterworth II, 181 F.Supp.2d at 1318-19.} The district court undertook a comprehensive review of the antitrust law and concluded that the baseball exemption was limited to only the reserve clause, as discussed \textit{infra}. \textit{See infra} notes 197-202 and accompanying text.
Defining the “Business of Baseball”

relevant Supreme Court precedent, concluding that the “business of baseball” was exempt from federal and state antitrust law. The court then construed the proposed contraction to be within the “business of baseball,” stating that “[i]t is difficult to conceive of a decision more integral to the business of major league baseball than the number of clubs that will be allowed to compete.”

Butterworth II was appealed to the Eleventh Circuit, where it took the caption Major League Baseball v. Crist. Noting that the scope of the baseball exemption had been “the subject of extensive litigation over the years,” the Crist court ultimately adopted the district court’s interpretation of the relevant authority, finding that the exemption broadly protected the “business of baseball.” Although the court held that the exemption was not unlimited – in particular stating that the “exemption has not been held to immunize the dealings between professional baseball clubs and third parties” – the court nevertheless believed it clear that the proposed contraction fell within the scope of the exemption, concluding that “the number of clubs, and their organization into leagues for the purpose of playing scheduled games, are basic elements of the production of major league baseball games.”

Therefore, seven different courts post-Flood have generally construed baseball’s antitrust exemption to protect the “business of baseball” from federal antitrust law. While two of these courts did acknowledge potential limitations on the scope of baseball’s immunity, neither of them devoted much effort to delineating the boundaries of the exemption, and thus give future courts wrestling with the proper scope of the exemption little guidance upon which to rely.

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

plans, and remains an association of 30 franchises today. See Marc Edelman, Can Antitrust Law Save the Minnesota Twins? Why Commissioner Selig’s Contraction Plan was Never a Sure Deal, 10 SPORTS LAW. J. 45, 46 (2003) (noting that MLB owners agreed to table their contraction plans for four years as part of the 2002 collective bargaining agreement).

167 Id. at 1322.
168 Id.
169 331 F.3d 1177 (11th Cir. 2003).
170 Id. at 1179.
171 Id. at 1183.
172 Id.
173 See supra notes 143-145 and 172 and accompanying text.
In contrast to those decisions holding that baseball’s exemption broadly protects the “business of baseball” from antitrust law, three courts have taken an extremely restrictive view of the exemption, finding that it shields only baseball’s reserve clause. As previously discussed, the reserve clause was a provision that, until the mid-1970s, was included in the contracts of all players within organized baseball, restricting players from negotiating with anyone but their current teams. Because major league players ultimately freed themselves of the constraints of the reserve clause through arbitration following the 1975 season, the implication of these decisions is that baseball’s antitrust exemption is now effectively obsolete.

The first court to limit the scope of baseball’s antitrust exemption to the reserve clause was the Eastern District of Pennsylvania in the 1993 case of *Piazza v. Major League Baseball*. *Piazza* arose after the aborted sale of the San Francisco Giants to an investment group led by Pennsylvania businessmen Vincent Piazza and Vincent Tirendi for $115 million. Piazza and Tirendi intended to move the Giants from San Francisco to Tampa Bay, Florida. MLB rejected the proposed sale, citing concerns arising from its background check of Piazza and Tirendi. As a result, the Giants were instead sold for only $100 million to another investor group that kept the team in San Francisco. Piazza and Tirendi sued MLB alleging a variety of federal and state claims, including violations of Sections One and Two of the Sherman Antitrust Act. MLB promptly moved to dismiss the lawsuit, asserting in part that it was exempt from antitrust liability by virtue of the Supreme Court’s decisions in *Federal Baseball, Toolson*, and *Flood*. The *Piazza* court denied MLB’s motion to dismiss with respect to the antitrust claims, finding that the baseball antitrust exemption did not apply to the facts before it. Rather, the court determined that baseball’s exemption was limited solely to the reserve clause. The court reached this conclusion after reexamining the Supreme Court’s three baseball-related cases, determining that each involved only the reserve clause. For example, in considering the Supreme Court’s decision in *Federal Baseball*,

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175 *See supra* note 15 and accompanying text.
176 *See supra* note 16 and accompanying text.
178 *Id.* at 422.
179 *Id.* at 421.
180 *Id.* at 422-23.
181 *Id.* at 423.
182 *Id.* at 421.
183 *Id.*
184 *Id.*
along with the underlying decision from the D.C. Circuit, the Piazza court found that the “gravamen of [the complainant’s] case was the alleged anticompetitive impact of what is known as the ‘reserve clause’ in the yearly contracts of players” in the AL and NL. Similarly, the Piazza court briefly considered Toolson, finding that that case also involved alleged harms from the reserve clause. Finally, the Piazza court determined that the reserve clause was again challenged in Flood. Accordingly, the court concluded that “[i]n each of the three cases in which the Supreme Court directly addressed the exemption, the factual context involved the reserve clause.”

From there, the Piazza court went on to argue that Flood had undermined the Federal Baseball and Toolson precedents. Specifically, Piazza emphasized the statement in Flood that “[p]rofessional baseball is a business … engaged in interstate commerce,” finding that this passage directly repudiated Federal Baseball insofar as that case held that exhibitions of baseball were not subject to antitrust law because they were neither interstate in nature, nor commerce. Therefore, the Piazza court determined that Federal Baseball had been stripped of “any precedential value … beyond the particular facts there involved, i.e., the reserve clause.” The Piazza court reached the same conclusion regarding Toolson, which it viewed as little more than a narrow application of the Federal Baseball precedent. With Federal Baseball and Toolson having been limited to their perceived facts (i.e., an exemption covering only the reserve clause), the Piazza court next turned to the Supreme Court’s decision in Flood in order to determine the remaining scope of baseball’s exemption. The Piazza court focused its analysis on the fact that the majority opinion in Flood had specifically referenced MLB’s reserve system four times, finding it “clear” that the Flood Court had intended to limit the exemption to the

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186 Piazza, 831 F.Supp. at 434.
187 Id.
188 Id. at 435.
189 Id.
191 See supra notes 41-45 and accompanying text.
192 Piazza, 831 F.Supp. at 436.
193 Id. The Piazza court’s holding was based on a distinction between rule-based and result-based stare decisis, a distinction which the court believed led to the conclusion that Federal Baseball and Toolson had been restricted to their facts. Id. at 437-38.
194 Id. at 437.
reserve clause. Accordingly, having concluded that Federal Baseball, Toolson, and Flood collectively established a continuing exemption protecting only baseball’s reserve clause, the Piazza court held that the antitrust exemption was inapplicable to the facts before it, as the reserve clause was not at issue.

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

A year after Butterworth I, the Second District Court of Appeal of Florida heard Morsani v. Major League Baseball, an antitrust lawsuit arising out of other failed attempts to bring an MLB team to Tampa Bay. In particular, the Morsani plaintiffs alleged, inter alia, that MLB had violated federal and state antitrust laws by blocking their attempted purchase and relocation of the Minnesota Twins in 1984 and the Texas Rangers in 1988, as well as by foiling an attempt to obtain an expansion franchise for Tampa Bay in 1993. In ruling that baseball’s antitrust exemption extended to only the reserve system, the Morsani court did not undertake an analysis of

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195 Id. at 436.
196 Id. at 438.
197 644 So.2d 1021 (Fla. 1994).
198 Id. at 1022.
199 Id. at 1025.
200 Id. at 1024.
201 Id. at 1025.
202 Id. (“Based upon the language and the findings in Flood, we come to the same conclusion as the Piazza court: baseball’s antitrust exemption extends only to the reserve system.”).
204 Id. at 655-56.
the Supreme Court’s trilogy of cases, nor the Piazza decision, but instead simply deferred to the Florida Supreme Court’s binding authority in *Butterworth I*. 205

Therefore, those courts limiting the baseball exemption to only the reserve clause have generally based their opinions on a narrow interpretation of the Supreme Court’s baseball trilogy. Given that it was the first time that a court had specifically held that the Supreme Court’s baseball trilogy was limited to an exemption covering only the reserve clause, the Piazza opinion in particular has been quite controversial. The decision has generated a split of opinion among scholars, with some commentators concluding that the case was properly decided, 206 while others have suggested that the opinion may be “intellectually infirm” 207 or “flawed.” 208 This article asserts that the critics of the Piazza opinion have the better argument, for the reasons discussed in Part III.A below.

C. Decisions Taking a Middle Ground Approach to the Exemption

Finally, two courts have rejected both the extremely broad and overly restrictive views of baseball’s antitrust exemption adopted by the lower courts discussed above. These courts have determined that while the exemption shields more than simply the reserve clause from antitrust law, it is not so expansive as to protect all aspects of the business of baseball. However, these courts have not agreed upon a uniform standard for the exemption themselves, but have instead each created their own conflicting standards.

The first court to adopt such a middle ground approach was the United States District Court for the Southern District of Texas in the 1982 case of *Henderson Broadcasting Corp. v. Houston Sports Assoc., Inc.* 209 In *Henderson*, a Houston radio station alleged that the Houston Astros had violated both federal and state antitrust law by canceling the station’s contract to broadcast Astros games, in order to give a different radio station exclusive broadcast rights in Houston. 210 In its defense, the Astros argued that its actions were exempted under *Federal Baseball, Toolson*, and *Flood*.

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205 Id. at 657.
206 See, e.g., Burns, supra note 8 at 532-34; Lafferty, supra note 8 at 1288; Nathanson, supra note 8 at 5-6; Tomlinson, supra note 8 at 309. See also Mack and Blau, supra note 8 at 212 (reaching the same conclusion several months prior to the Piazza decision).
208 Scibilia, supra note 8 at 416-17. See also Guarisco, supra note 8 at 661-62; McMahon and Rossi, supra note 8 at 255-56; Weinberger, supra note 8 at 88.
210 Id. at 264.
The *Henderson* court disagreed, finding that the three Supreme Court opinions shielded “only those aspects of baseball, such as leagues, clubs and players which are integral to the sport and not related activities which merely enhance its commercial success.”

Therefore, because “[r]adio broadcasting is not a part of the sport in the way in which players, umpires, the league structure and the reserve system are,” the court concluded that the baseball exemption did not shield the Astros from antitrust liability.

Meanwhile, ten years later in *Postema v. National League of Professional Baseball Clubs*, the Southern District of New York itself adopted a limited view of baseball’s antitrust exemption. In *Postema*, a former female minor league umpire filed suit asserting both employment discrimination and state law antitrust claims arising from her allegedly wrongful termination.

In analyzing the claim under state antitrust law, the *Postema* court considered whether the baseball antitrust exemption had preempted state antitrust regulation of professional baseball, concluding that preemption would only arise if the state law conflicted with the federal exemption. The court considered the Supreme Court’s decisions in *Federal Baseball*, *Toolson*, and *Flood*, and determined that the exemption only immunized baseball “from antitrust challenges to its league structure and its reserve system … [not] anti-competitive behavior in every context in which it operates.” Thus, because “[a]nti-competitive conduct toward umpires is not an essential part of baseball” the court concluded that “the baseball exemption does not encompass umpire employment relations,” enabling Postema to proceed with her state antitrust allegation.

Therefore, although the Houston Broadcasting and Postema courts both adopted a middle ground approach to the scope of baseball’s antitrust exemption, they did not agree upon a consistent, uniform standard to apply. Specifically, even though the court in Henderson Broadcasting suggested that matters involving umpires would fall within the scope of the exemption, the Postema court nevertheless held that MLB’s relations with its umpires are not exempt from federal antitrust law.

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211 *Id.* at 265.
212 *Id.* at 269.
214 *Id.* at 1477.
215 *Id.* at 1488.
216 *Id.* at 1489.
217 *Id.*
III. THE EXISTING LOWER COURT PRECEDENT IS FLAWED AND SHOULD BE REJECTED BY FUTURE COURTS

Despite the varied approaches to construing baseball’s antitrust exemption utilized by lower courts, none of these approaches has established a satisfactory standard for future courts to apply when determining the scope of the exemption. With respect to those opinions taking an extremely narrow or middle ground approach to the exemption, these courts have generally misconstrued the Supreme Court’s relevant precedent, resulting in an overly narrow interpretation of the exemption. Meanwhile, while the majority of opinions finding that the “business of baseball” is exempt from antitrust law are generally consistent with the Supreme Court’s precedent, these opinions nevertheless fail to provide any standard for determining whether a particular business practice falls within the scope of the exemption. Notably, these courts have failed to appreciate the Supreme Court’s specific focus upon the business of providing baseball exhibitions to the public, a focus that was the basis for the Federal Baseball decision and then explicitly affirmed in Toolson. Therefore, future courts analyzing the scope of the exemption should reject each of the approaches taken by prior lower courts, and instead hold that only those activities directly related to the business of providing baseball entertainment to the public are exempt from antitrust law.

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

As an initial matter, those opinions limiting baseball’s antitrust exemption to the reserve clause are fundamentally flawed. The court in Piazza v. Major League Baseball220 – the first court to so limit the exemption – erred in several respects. First, the Piazza court misread Flood, wrongly interpreting the opinion as holding that only the reserve clause was exempt, when in reality the decision provides no such limitation. Second, Piazza failed to appreciate the significance of the Toolson opinion, a decision which provided a new, broader justification for baseball’s antitrust exemption untouched by Flood, and which therefore cannot simply be dispatched as merely a routine application of the Federal Baseball precedent. Finally, Piazza incorrectly concluded that Federal Baseball and Toolson each involved only the reserve clause, when in reality both cases included other allegations of anticompetitive conduct.

Both Butterworth I\textsuperscript{221} and Morsani\textsuperscript{222} suffer from the same flaws as Piazza. As in Piazza, the Butterworth I court misread Flood, overemphasizing the opinion’s few passing references to the reserve clause.\textsuperscript{223} Likewise, Butterworth I also failed to appreciate that Toolson had reformulated Federal Baseball and thus was not controverted by Flood.\textsuperscript{224} Meanwhile, because the Morsani court simply deferred to Butterworth I, it is by implication flawed for the same reasons as the other two cases. Therefore, although the discussion below specifically considers the analysis in Piazza, it applies with equal force to both Butterworth I and Morsani as well.

1. Piazza Misinterpreted Flood

First, the Piazza court’s conclusion that baseball’s antitrust exemption protects only the reserve clause is flawed insofar as the Piazza court misconstrued the intent and holding of the Supreme Court’s majority opinion in Flood v. Kuhn. In particular, the Piazza court concluded that Flood “made clear” that the baseball exemption was “limited to the reserve clause.”\textsuperscript{225} The Piazza court premised this finding on the fact that the Flood majority opinion specifically mentions the “reserve clause at least four times.”\textsuperscript{226} For example, Piazza emphasized the Flood Court’s reference to the reserve clause in the opening sentence of its opinion,\textsuperscript{227} and quoted three other references to the reserve system in Flood.\textsuperscript{228} Based on these references, Piazza held that Flood had limited the antitrust exemption to protect only the reserve clause.\textsuperscript{229}

The Piazza court read too much into Flood’s few passing references to

\begin{itemize}
\item \textsuperscript{221} 644 So.2d 1021 (Fla. 1994).
\item \textsuperscript{222} 663 So.2d 653 (Fla. Dist. Ct. App. 1995).
\item \textsuperscript{223} See supra notes 197-202 and accompanying text.
\item \textsuperscript{224} Id.
\item \textsuperscript{225} Piazza, 831 F.Supp. at 436 (“Thus in 1972, the Supreme Court made clear that the Federal Baseball exemption is limited to the reserve clause.”).
\item \textsuperscript{226} Id. at 437 (emphasis in original).
\item \textsuperscript{227} Flood begins by stating, “[f]or the third time in 50 years the Court is asked specifically to rule that professional baseball’s reserve system is within the reach of the antitrust laws.” Flood v. Kuhn, 407 U.S. 258, 259 (1972).
\item \textsuperscript{228} Piazza quoted the following passages from Flood: “baseball was left alone to develop for [three decades] upon the understanding that the reserve system was not subject to existing antitrust laws”; “Congress as yet has had no intention to subject baseball’s reserve system to the reach of the antitrust statutes”; and “With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and anomaly.” Piazza, 831 F.Supp. at 436 (quoting Flood, 407 U.S. at 273-74, 282, 283).
\item \textsuperscript{229} See id. at 438 (“For these reasons, I conclude that the antitrust exemption created by Federal Baseball is limited to baseball’s reserve system”).
\end{itemize}
baseball’s reserve system. Because the reserve clause was the sole anticompetitive restraint at issue in the case,\footnote{See generally Flood, 407 U.S. 258.} it was only natural that the \textit{Flood} majority would reference the clause in its opinion. As one subsequent court has noted, “[t]he reserve clause was merely the incident-driven catalyst for the Court’s inquiry.”\footnote{New Orleans Pelicans Baseball, Inc. v. National Association of Professional Baseball Leagues, Inc., Case No. 93-253, 1994 WL 631144 *9 n.4 (E.D.La. March 1, 1994).} Such references do not mean that the Court intended to limit the scope of the baseball exemption to only the reserve clause. Indeed, nowhere in \textit{Flood} did the Court specifically express an intent to limit the baseball exemption to the reserve clause.\footnote{See \textit{Flood}, 407 U.S. 258. See also Major League Baseball v. Butterworth (Butterworth II), 181 F.Supp.3d 1316, 1327 (N.D.Fla. 2001) (“Not once did the \textit{[Flood]} Court intimate in any way that it was only the reserve clause that was exempt.”).}

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

\begin{quote}
We repeat for this case what was said in Toolson: “Without re-examination of the underlying issues, the (judgment) below (is) affirmed on the authority of \textit{Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs}, supra, so far as that decision determines that Congress had no intention of including the \textit{business of baseball} within the scope of the federal antitrust laws.”\footnote{\textit{Flood}, 407 U.S. at 285 (emphasis added).} Similarly, the \textit{Flood} majority opinion stated “since 1922 baseball … has been allowed to develop and to expand unhindered by federal legislative action,”\footnote{Id. at 283 (emphasis added).} and noted that it would “adhere once again to \textit{Federal Baseball} and \textit{Toolson} and to their application to \textit{professional baseball.”}\footnote{Id. at 284 (emphasis added).} Also instructive in this regard is the \textit{Flood} majority opinion’s review of the Supreme Court’s prior precedent considering baseball’s antitrust status.\footnote{Id. at 269-82.} Nowhere in this summary does \textit{Flood} specifically construe an earlier opinion as exempting only the reserve clause.\footnote{See generally, id. At one point in the \textit{Flood} majority opinion, Justice Blackmun did identify four primary factors supporting the Court’s opinion in \textit{Toolson}, including “(b) The fact that baseball was left alone to develop for [three decades] upon the understanding that the reserve system was not subject to existing federal antitrust laws,” \textit{Id.} at 274. However, this conclusion was not the majority’s.\footnote{\textit{Id.} at 285.} Indeed, the opinion

\begin{quote}
without re-examination of the underlying issues, the (judgment) below (is) affirmed on the authority of \textit{Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs}, supra, so far as that decision determines that Congress had no intention of including the \textit{business of baseball} within the scope of the federal antitrust laws.”\footnote{\textit{Flood}, 407 U.S. at 285 (emphasis added).}
\end{quote}
quotes several prior opinions construing the exemption as generally covering the business of baseball. For example, Flood noted that in Toolson the Court had held that “Congress had no intention to include baseball within the reach of the federal antitrust laws.” While reviewing Shubert, Flood praised the Court’s “meticulous[]” analysis before quoting it for the proposition that Federal Baseball dealt “with the business of baseball and nothing else.” Finally, the Flood Court quoted the passage in Radovich “specifically limit[ing] the rule … established [in Federal Baseball and Toolson] to the facts there involved, i.e., the business of organized professional baseball.”

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

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238 Flood, 407 U.S. at 274 (emphasis added).
240 Flood, 407 U.S. at 275 (emphasis added).
242 Flood, 407 U.S. at 279 (emphasis added).
243 429 F.2d 1003 (2d Cir. 1970).
244 See generally id.
245 144 N.W.2d 1 (Wisc. 1966).
246 Id. at 2.
Therefore, the Piazza court’s conclusion that Flood “clearly” limited baseball’s antitrust exemption to the reserve clause is simply not supported by the entirety of the Flood majority opinion. Despite the few passing references to baseball’s reserve system in Flood, a review of the majority opinion in its entirety does not evidence an intent by the Court to limit baseball’s exemption to the reserve clause, but rather reveals that the Court intended to maintain a broader exemption for the baseball business.

2. Piazza Failed to Appreciate the Significance of Toolson

In addition to misinterpreting Flood, the Piazza court also failed to appreciate the significance of Toolson. Far from simply being “a narrow application of the doctrine of stare decisis,”248 as suggested in Piazza, Toolson in fact reinterpreted Federal Baseball, providing a new basis for the baseball exemption.249 Toolson thus cannot simply be dispatched along with Federal Baseball on the basis of Flood, as the Piazza court believed. To the contrary, Flood in fact explicitly affirmed Toolson’s reinterpretation and expansion of Federal Baseball. Therefore, Toolson remains fully binding authority, undermining Piazza’s attempt to limit the exemption.

While the Piazza court may be correct that Flood’s acknowledgement that “[p]rofessional baseball is a business … engaged in interstate commerce”250 undermined the reasoning of Federal Baseball,251 this acknowledgement did not disturb the fundamental holding of Toolson. Although Toolson affirmed baseball’s antitrust exemption on the authority of Federal Baseball,252 it did not rely on the explicit reasoning of Federal Baseball, which had held that exhibitions of baseball were not interstate commerce.253 Indeed, the majority in Toolson never opined on baseball’s

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249 See supra notes 67-73 and accompanying text.
250 Flood, 407 U.S. at 282.
251 Piazza, 831 F.Supp. at 436. However, as noted by the district court in Major League Baseball v. Butterworth (Butterworth II), 181 F.Supp.2d 1316 (N.D.Fla. 2001), the Flood Court itself had stated that the baseball aberration, presumably including Federal Baseball, was “fully entitled to the benefit of stare decisis.” Id. at 1329 (quoting Flood, 407 U.S. at 282) (emphasis in original). See also Flood, 407 U.S. at 283-84 (“We continue to be loath, 50 years after Federal Baseball … to overturn [that decision] judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long”).
253 See supra notes 41-45 and accompanying text. See also Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970) (“But the ground upon which Toolson rested was that Congress had no intention to bring baseball within the antitrust laws, not that baseball’s activities did not sufficiently affect interstate commerce.”).
status as interstate commerce at all. Rather, the one-paragraph majority opinion in Toolson reformulated the Federal Baseball holding, concluding:

Without reexamination of the underlying issues, the judgments below are affirmed on the authority of [Federal Baseball] so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.

Thus, the Toolson decision was premised on a new interpretation of Federal Baseball, construing the case as having held that Congress never intended to regulate baseball under the Sherman Act.

Failing to appreciate that Toolson had fundamentally altered the basis for baseball’s antitrust exemption, Piazza instead minimized the case by quoting Flood for the proposition that Toolson was simply “a narrow application of the doctrine of stare decisis.” While it is true that the Supreme Court had described Toolson in this manner – in both Flood and Shubert – the Piazza court failed to place this quotation in the proper context. Read in its entirety, the passage from which the quotation originates discussed the fact that Toolson had:

[A]dhered to Federal Base Ball “so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.” In short, Toolson was a narrow application of the rule of stare decisis.

In other words, the Shubert and Flood Courts did not interpret Toolson as a simple application of the Federal Baseball holding that baseball was not interstate commerce. Instead, both courts considered Toolson to be an application of stare decisis only insofar as it reinterpreted Federal Baseball into a statement of Congressional intent.

Indeed, Piazza neglected to acknowledge the concluding passage of the Flood majority opinion, which explicitly affirmed Toolson’s reinterpretation of Federal Baseball. Specifically, the Flood Court

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254 See generally Toolson, 346 U.S. at 356-57. See also Sica, supra note 8 at 386 n.701 (noting that Toolson failed “to discuss the rationale of Federal Baseball”).

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


concluded its opinion in part by stating:

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

Moreover, the Flood Court also noted that it was “loath … almost two decades after Toolson, to overturn [that decision] judicially when Congress, by its positive inaction, has allowed [the] decision[] to stand for so long and … has clearly evinced a desire not to disapprove [it] legislatively.”

Therefore, far from overruling Toolson, or limiting the opinion to a narrow application of the Federal Baseball precedent, the Flood Court unambiguously endorsed Toolson’s reinterpretation of Federal Baseball. Accordingly, the Piazza court incorrectly concluded that Flood had vitiated the precedential effect of Toolson. Instead, Toolson remains binding authority, providing a broad exemption for the business of baseball.

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

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

First, a close reading of the Supreme Court’s Federal Baseball opinion

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260 Flood, 407 U.S. at 283-84.

261 See Guarisco, supra note 8 at 661-62.

262 Piazza, 831 F.Supp. at 436.

263 See id. at 435 ("In each of the three cases in which the Supreme Court directly addressed the exemption, the factual context involved the reserve clause.").
shows that Piazza’s interpretation of the case is simply incorrect. In Federal Baseball, the Court specifically noted that the plaintiff had alleged that the defendants violated antitrust law by destroying “the Federal League by buying up some of the constituent clubs and in one way or another inducing all those clubs except the plaintiff to leave their League …” This allegation clearly extends beyond just the reserve clause, instead implicating organized baseball’s settlement with seven of the eight Federal League franchises. The Court went on to state that it was “unnecessary to repeat” each of the means by which the AL and NL were alleged to have conspired to monopolize the business of baseball, a statement which evidences not only that there were multiple theories of anticompetitive conduct before the Court, but also that the Court did not intend to limit its holding solely to a particular, identified allegation.

Moreover, nowhere in the Supreme Court’s Federal Baseball opinion is the phrase “reserve clause” ever used. Presumably the Court would have mentioned the reserve clause at least once in its opinion had the clause in fact been the sole – or even primary – focus of the Court’s decision. While it is true that the D.C. Circuit’s earlier opinion in Federal Baseball extensively discussed the clause, a fact relied on heavily in Piazza, that court’s description of the case does not trump the Supreme Court’s own recitation. Therefore, a close reading of the Supreme Court’s decision in

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264 See Major League Baseball v. Butterworth (Butterworth II), 181 F.Supp.2d 1316, 1324 (N.D.Fla. 2001) (“The assertion that [Federal Baseball] was solely a reserve clause case is simply not true.”).

265 Id. See also Picher, supra note 8 at 14 (noting same); Tomlinson, supra note 8 at 282 (same).

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

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


269 Major League Baseball v. Butterworth (Butterworth II), 181 F.Supp.2d 1316, 1324 n.9 (N.D.Fla. 2001) (“It is an odd approach to interpreting Supreme Court cases to
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Federal Baseball shows that the Court clearly understood the plaintiff to be alleging anticompetitive conduct beyond just the reserve clause.

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

Accordingly, even if the Piazza court were correct that Flood had limited both Federal Baseball and Toolson to their facts, it nevertheless was incorrect in concluding that those cases dealt simply with the reserve clause. In actuality, both cases involved more extensive allegations of anticompetitive conduct, meaning that neither case can properly be limited to cover only the reserve clause. Thus, for all of the foregoing reasons, the Piazza, Butterworth, and Morsani opinions are contrary to the Supreme Court’s existing precedent, and should not be followed by future courts.

B. The Standards Adopted by Courts Taking a Middle Ground Approach Are Also Flawed

Similarly, those courts holding that the exemption shields more than just the reserve clause from antitrust law, but less than the entire business of baseball, have also misconstrued the Supreme Court’s precedent. For example, the court in Henderson Broadcasting Corp. v. Houston Sports Association, Inc., held that the baseball exemption covered “only those aspects of baseball, such as leagues, clubs and players which are integral to the sport and not related activities which merely enhance its commercial success.” The court adopted this standard in light of a passage in Flood in which the Supreme Court stated that the baseball exemption “rests on a disregard that Court’s own description of a case in favor of a lower court’s description.”

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271 Toolson, 346 U.S. at 364 n.10 (Burton, J., dissenting).
272 345 U.S. 963 (1953).
273 Toolson, 346 U.S. at 364 (Burton, J., dissenting).
274 Flood v. Kuhn, 407 U.S. 258, 273 (1972) (noting that the Toolson opinion “affirmed the judgments of the respective courts of appeals in” Toolson, Kowalski, and Corbett). See also Sullivan, supra note 8 at 1296 (stating that it appeared the Toolson Court “understood the exemption to extend beyond the reserve clause”).
276 Id. at 265.
recognition and an acceptance of baseball’s unique characteristics and needs.”277 The Henderson court believed that this language in Flood limited the scope of the exemption, and therefore held that because radio broadcasting did not implicate one of baseball’s “unique characteristics and needs,” the exemption was not applicable.278

The court in Postema v. National League of Professional Baseball Clubs279 emphasized the same passage from Flood when concluding that baseball’s umpire relations were outside the scope of its antitrust exemption. Specifically, the Postema court found that the Flood Court’s reference to “baseball’s unique characteristics and needs” suggested that “baseball might not be exempt from liability for conduct not touching on those characteristics or needs.”280 Applying this standard to the facts before it, the Postema court found that “baseball’s relations with non-players are not a unique characteristic or need of the game,” and that “[a]nti-competitive conduct toward umpires is not an essential part of baseball.”281 Accordingly, the court held that the exemption did not apply to antitrust claims brought against baseball by a former umpire.

Both the Henderson and Postema courts overemphasized this single passage in Flood, and in the process misinterpreted the Supreme Court’s opinion. Read in its entirety, the passage in question discusses the fact that the baseball exemption is an established aberration that has been recognized by the Supreme Court five times over the course of a half-century.282 Only after noting this history did Flood state that the exemption “rests on a recognition and an acceptance of baseball’s unique characteristics and needs.”283 Thus, this passage does not appear to have been intended to place a new limitation upon the exemption – one which was not recognized in any of the five Supreme Court precedents considered by Flood – but rather was simply intended to provide an explanation of the basis for the baseball exemption.

That the Flood Court did not intend to limit the exemption to only baseball’s “unique characteristics and needs” is also evidenced by the fact that the Court never specifically considered the necessity of the anticompetitive conduct there at issue – i.e., the reserve clause – under the standard proposed in Henderson and Postema. Rather than consider whether the reserve clause was a unique characteristic or need of MLB, the

277 Flood, 407 U.S. at 282.
278 Henderson, 541 F.Supp. at 271.
280 Id. at 1488.
281 Id. at 1489.
283 Id.
Flood Court instead rejected petitioner’s antitrust claims by emphasizing MLB’s reliance on the long-standing exemption, along with Congress’ failure to overturn the exemption through legislation.\(^{284}\) Indeed, as noted above, the Court concluded its opinion by quoting Toolson for the proposition that “Congress had no intention of including the business of baseball within the scope of the federal antitrust laws,”\(^{285}\) without any indication that the exemption was limited to baseball’s unique characteristics and needs. Presumably the Flood Court would have either applied the “unique characteristics and needs” standard itself, or expressly restricted the exemption to that benchmark, had it intended to so limit the baseball exemption.

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

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

Although the majority of lower court precedents, post-Flood, holding that the “business of baseball” is exempt from federal antitrust law do not conflict with the existing Supreme Court precedent,\(^{286}\) they fail to provide any reasonable limiting factors for future courts to apply when considering the bounds of the exemption. Thus, because these opinions do not provide a reliable framework, additional guidance regarding the scope of the exemption is necessary.

Indeed, while a literal interpretation of the Supreme Court’s precedent might exempt the entire “business of baseball”\(^{287}\) – i.e., all business activities by professional baseball teams – it stands to reason that the

\(^{284}\) Id. at 283-84.

\(^{285}\) Id. at 285 (emphasis added).

\(^{286}\) See generally Part II.A supra.

\(^{287}\) As discussed supra, the majority opinions in Toolson and Flood both concluded by affirming Federal Baseball “so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.” Toolson v. New York Yankees, 346 U.S. 356, 357 (1953); Flood, 407 U.S. at 285. Similarly, in United States v. Shubert the Court construed Federal Baseball as providing an exemption for “the business of baseball and nothing else,” 348 U.S. 222, 228 (1955), while in Radovich v. National Football League the Court specifically limited Federal Baseball and Toolson “to the facts there involved, i.e., the business of organized professional baseball.” 352 U.S. 445, 451 (1957).
exemption does not universally protect all such conduct. For instance, the court in *Charles O. Finley & Co. v. Kuhn*\(^{288}\) stated that the exemption should not be applied to those activities having only an “attenuated relation to the business of baseball.”\(^{289}\) Surely this is correct, as extending the exemption to every potential facet of a baseball team’s business could lead to absurd results. For instance, if MLB decided to purchase every gas station operating within each market hosting an MLB team, that monopoly interest in gasoline distribution could not reasonably be said to be part of the business of baseball, even though most baseball fans use gasoline in order to attend games. Thus, just because a professional baseball team engages in a business activity alone should not be enough to hold that activity exempt from antitrust law.

Those opinions holding simply that the “business of baseball” is exempt from antitrust law – while not in direct conflict with the Supreme Court’s precedent – fail to provide future courts with a workable standard to apply when deciding whether allegedly anticompetitive conduct falls within the bounds of baseball’s antitrust exemption. These lower courts have failed to appreciate that the Supreme Court has itself provided such a limiting factor in *Federal Baseball* and *Toolson*, focusing the exemption specifically on the business of providing baseball exhibitions to the public.\(^{290}\) Therefore, future courts considering the scope of the baseball exemption should adopt the approach advocated in this article, and hold that only those activities directly related to supplying baseball entertainment to the public are exempt from antitrust law.

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

An additional limitation to baseball’s antitrust exemption proposed by two of the courts discussed above also warrants consideration. Specifically, both the *Henderson*\(^{291}\) and *Crist*\(^{292}\) courts have suggested that baseball entities lose their exemption when contracting with non-baseball entities, a limitation also recognized by some scholars.\(^{293}\) For example, in the

\(^{288}\) 569 F.2d 527 (7th Cir. 1978).
\(^{289}\) Id. at 541 n.51.
\(^{290}\) See generally Part I.F supra.
\(^{292}\) 331 F.3d 1177 (11th Cir. 2003).
\(^{293}\) See Roberts, supra note 19 at 325 (“The lower courts have narrowed the scope of the antitrust exclusion by holding in several cases that contracts between baseball entities such as teams, leagues, or players associations and third parties, will not be protected under Section One of the Sherman Act.”).
conclusion to its opinion, the court in *Henderson* noted that it was persuaded by the argument that “an exempt baseball team, like a labor union or agricultural cooperative which is exempted from the Sherman Act by statute, loses its exemption when it combines with a non-exempt radio station.”

Similarly, the Eleventh Circuit in *Crist* stated twenty-one years later that “[i]t is true that the antitrust exemption has not been held to immunize the dealings between professional baseball clubs and third parties.” However, such a limitation is unwarranted, as the Supreme Court has never suggested that baseball’s exemption is lost when contracting with a non-exempt entity. In fact, the Court has ruled in an analogous context that an antitrust exemption may apply in cases involving allegedly anticompetitive agreements between exempt and non-exempt entities.

Specifically, in *Union Labor Life Insurance Co. v. Pireno*, the Court considered the McCarran-Ferguson Act and the scope of its exemption for the “business of insurance” from federal antitrust law. The Court considered its earlier jurisprudence on the issue, and derived a three-factor test for future courts to apply when determining whether a challenged activity constituted the “business of insurance.” The final factor of the test was “whether the practice is limited to entities within the insurance industry.” However, in its very next sentence, the *Pireno* majority specifically stated that none of the three factors “is necessarily determinative in itself.” Therefore, while the fact that the challenged agreement was formed between an insurance company and a non-insurance company may certainly indicate that the agreement falls outside the “business of insurance,” contracting with a non-exempt entity is not itself

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294 *Henderson*, 541 F.Supp. at 271 n.9 (“The Court is also persuaded by plaintiff’s argument that an exempt baseball team, like a labor union or agricultural cooperative which is exempted from the Sherman Act by statute, loses its exemption when it combines with a non-exempt radio station ….”).

295 *Crist*, 331 F.3d at 1183.


299 Specifically, the McCarran-Ferguson Act limits the application of federal antitrust law to “the business of insurance to the extent that such business is not regulated by State Law.” 15 U.S.C. § 1012(b).

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

301 *Id.*
enough to displace an insurance company’s exemption under the McCarran-
Ferguson Act.

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

Moreover, with joint and several liability well established in antitrust
cases, traditionally non-exempt entity are likely to be cautious when
entering potentially anticompetitive agreements with baseball entities.
Because the non-exempt entities would not be protected under the baseball
exemption, these entities would potentially be liable for an entire judgment
(including treble damages) themselves, should a court determine that the
agreement at issue violated antitrust law. This threat is likely to provide
some deterrence for non-baseball entities considering whether to enter
potentially anticompetitive agreements with organized baseball, meaning
that the practical impact of extending the scope of the baseball exemption to
contracts with non-exempt entities will be relatively insignificant.

Thus, the Henderson and Crist courts erred by suggesting that baseball’s
antitrust exemption did not apply to agreements between baseball and non-
baseball entities. Instead, while future courts should consider this factor,
they should not find it dispositive as to whether the baseball exemption
applies in a given case.

302 For instance, as discussed below, intellectual property licensing and concessions
agreements would be examples of agreements with non-baseball entities falling outside the
scope of baseball’s antitrust exemption. See generally Part IV.F infra.
303 See generally Part IV.C infra.
304 See Burlington Industries, Inc. v Milliken & Co., 690 F.2d 380, 394 (4th Cir. 1982)
(noting that “joint and several liability […] has been the established doctrine of antitrust law
for the better part of a century and which Congress has not seen fit to disapprove”). See also
Stephen Calkins, An Enforcement Official’s Reflections on Antitrust Class Actions, 39
ARIZ. L. REV. 413, 413-14 (1997) (“The availability of class actions, along with treble
damages and joint and several liability, in turn has helped shape antitrust law.”).
305 See James R. Eiszner, Antitrust Civil Damages Remedies: The Consumer Welfare
Perspective, 75 UMKC L. REV. 375, 375 (2006) (noting that “joint and several liability …
serves somewhat to amplify the deterrent effect of the damages remedy in all cases without
any adverse impact on consumer welfare”).
IV. APPLYING BASEBALL’S ANTITRUST EXEMPTION TO ONLY THOSE ACTIVITIES DIRECTLY RELATED TO PROVIDING BASEBALL EXHIBITIONS TO THE PUBLIC PROVIDES A CONSISTENT, PREDICTABLE STANDARD

In view of the divergent opinions and general uncertainty surrounding the scope of baseball’s antitrust exemption, a uniform, predictable standard for the exemption is sorely needed. This article has asserted that the boundaries of the exemption should be drawn from the specific focus of the Supreme Court’s baseball opinions, namely the business of providing exhibitions of baseball to the public. Indeed, although a focus on supplying baseball entertainment to the public was central to Federal Baseball, reaffirmed in Toolson, and inferred in Flood, subsequent lower courts applying the exemption have nevertheless failed to recognize this particular element of the Court’s opinions. Instead, these lower courts have attempted to create their own inconsistent and muddled standards for the exemption on an ad hoc basis, resulting in the conflicting precedent discussed in Parts II and III.

Future courts should reject these existing lower court precedents, and instead hold that baseball’s antitrust exemption extends to those activities directly related to the business of providing baseball entertainment to the public. Not only is this standard consistent with the focus of the Supreme Court’s decisions in Federal Baseball and Toolson, but it also provides a workable, predictable standard, allowing future parties to reliably gauge whether a particular activity is likely to be held exempt. Moreover, while the proposed standard is generally consistent with the outcomes of the majority of existing precedents, it offers a more consistent framework than the divergent reasoning utilized by courts to date when applying the baseball exemption.

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

A. Rule Making

306 See McMahon and Rossi, supra note 8 at 243 (“the scope of baseball’s antitrust exemption has become whatever the reviewing court says it is.”).
307 See generally Part I.F supra.
One activity falling within the scope of the proposed standard for baseball’s antitrust exemption is league rule making. Specifically, MLB has established a thorough set of formal rules that govern the playing of professional baseball games. For example, the official MLB rules define everything from the game’s basic principles of runs and outs, to the more arcane infield fly rule. League rules also regulate the equipment used during games – bats, balls, gloves, uniforms, helmets, protective padding, etc. – in order to not only provide an equal playing field, but also to protect the safety of both players and fans. These rules apply to not only all games played at the major league level, but also most minor league games as well.

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

309 Id. at Rule 2.0.
311 See Matzura, supra note 8 at 1029 (noting that “MLB’s motivation for implementing a bat restriction is for fan and player safety”).
312 See id. (noting that the rules govern baseball games played by minor “leagues that are members of the National Association of Professional Baseball Leagues”).
313 See McCann, supra note 28 at 730 (noting same re NFL football).
Defining the “Business of Baseball”

B. Decisions Regarding the League Structure

Disputes regarding the league structure have been the single most common source of antitrust litigation involving professional baseball. These cases have involved decisions regarding how many teams will be allowed to compete in the league, who those teams will be owned by, and where those teams will be located. In deciding these cases, a majority of courts have correctly concluded that decisions regarding baseball’s league structure are integral to the business of baseball, and thus protected by baseball’s antitrust exemption.

Indeed, the baseball antitrust exemption itself originates from a case involving issues regarding the league structure. In Federal Baseball, the owner of the Federal League’s Baltimore franchise, desiring to maintain Baltimore’s status as a major league city, filed suit individually after an initial, league-wide litigation was settled on terms that would not have


317 See, e.g., Butterworth II, 181 F.Supp.2d at 1332 (“It is difficult to conceive of a decision more integral to the business of major league baseball than the number of clubs that will be allowed to compete.”); Minnesota Twins, 592 N.W.2d at 856 (“the sale and relocation of a baseball franchise, like the reserve clause discussed in Flood, is an integral part of the business of professional baseball and falls within the exemption”); New Orleans Pelicans Baseball, Case No. 93-253, 1994 WL 631144 at *9 (“One of the central features of [the business of baseball] is the power to decide who can play where.”). See also Postema v. Nat’l League of Professional Baseball Clubs, 799 F.Supp. 1475, 1489 (S.D.N.Y. 1992) (“the baseball exemption does immunize baseball from antitrust challenges to its league structure and its reserve system”). While these courts did not specifically construe the Supreme Court’s precedent in the manner advocated in this article—and thus did not consider whether disputes involving the league structure fell within the scope of the exemption covering the business of providing baseball exhibitions—this consensus of opinion is nevertheless instructive.
provided Baltimore with a major league team.\textsuperscript{318} The prior settlement agreement, under which the AL and NL agreed to buy out some Federal League owners while allowing others to purchase interests in existing major league franchise,\textsuperscript{319} was directly challenged by the plaintiff in \textit{Federal Baseball}. Thus, decisions regarding the number of teams allowed to compete in the major leagues, as well as issues of franchise location and ownership, were central to \textit{Federal Baseball}.

Moreover, issues regarding how many teams will be allowed to compete in the league, who those teams will be owned by, and where those teams will be located, are all central to the business of providing baseball exhibitions to the public. First, the number of teams admitted into the league has a direct impact on the distribution and quality of the product produced by MLB. At the most basic level, the number of teams in a league determines how much baseball will be produced, and how many cities will host teams. Moreover, because there are a finite number of major league caliber baseball players,\textsuperscript{320} MLB must guard against over-expansion so that the end product does not become too diluted.\textsuperscript{321} Otherwise, the level of play on the field may slip below that to which fans have become accustomed to seeing at a professional game. Indeed, as noted by the court in \textit{Butterworth II}, “[i]t is difficult to conceive of a decision more integral to the business of major league baseball than the number of clubs that will be allowed to compete.”\textsuperscript{322}

\textsuperscript{318}Mack and Blau, supra note 8 at 210 n.76 (“The Baltimore owners were so intent on keeping professional baseball, however, that they rejected the settlement and proceeded to court by initiating their own litigation.”).
\textsuperscript{319}\textit{Abrams}, supra note 8 at 55-56; Bortek, supra note 8 at 1076 n.30; \textit{Andrew Zimbalist, Baseball and Billions} 9 (2d. Ed. Basic Books 1994).
\textsuperscript{322}Major League Baseball v. Butterworth (Butterworth II), 181 F.Supp.2d 1316, 1332
With respect to decisions regarding who may own an MLB team, ownership restrictions are also vital providing baseball exhibitions, helping provide the necessary element of franchise stability. Unless a league takes steps to ensure that all of its franchise owners have the requisite financial backing to run a team, the league risks having poorly financed or managed franchises disband, perhaps even in mid-season. Even if teams did not disband, the league would still risk suffering from having to support undercapitalized franchises that are unable to make the requisite investments to successfully compete. As a result, competitive balance would suffer, reducing the quality and attractiveness of the product as a whole.

Similarly, franchise location decisions also directly impact the business of providing baseball exhibitions. Most significantly, these decisions enable MLB to allocate teams throughout the nation, and thus ensure that its product is reasonably distributed. Moreover, franchise location can also have an impact on competitive balance, as there are a limited number of cities boasting media markets large enough to support one or more major league franchises. Thus, maintaining control over franchise location decisions not only allows MLB to ensure that franchises are placed only in cities large enough to financially support a team, but also that those cities

(N.D.Fla. 2001).

323 Grow, supra note 320 at 198.

324 Id. at 198-99.

325 See, e.g., James L. Brock, Jr., A Substantive Test For Sherman Act Plurality: Applications for Professional Sports Leagues, 52 U. CHI. L. REV. 999, 1014 (1985) (“Competitive balance on the playing field also increases overall revenues for the clubs in the league by making contests less predictable and more interesting to fans.”); Michael A. Carrier, The Real Rule of Reason: Bridging the Disconnect, 1999 B.Y.U. L. REV. 1265, 1355 (“no team has an economic interest in vanquishing all the other teams … teams benefit when the league has competitive balance and the sporting contests are close, thereby maximizing fan interest”); Jacob F. Lamme, The Twelve Year Rain Delay: Why a Change in Leadership Will Benefit the Game of Baseball, 68 ALB. L. REV. 155, 168 (2004) (“If there is competitive balance in the game, not only will fan interest rise, but so will the generated revenue. When the game lacks competitive balance, however, fans become disinterested and take their money to other forms of entertainment”); Thomas M. Schiera, Balancing Act: Will The European Commission Allow European Football to Reestablish the Competitive Balance that it Helped Destroy?, 32 BROOKLYN J. INT’L L. 709, 710 (2007) (“Within the professional sporting world it is generally accepted that there must be a competitive balance among teams in order to preserve the integrity of sporting competition, the interest of fans, and in turn, commercial success.”).

are not overpopulated with too many teams.

Accordingly, because decisions relating to the league structure were the primary impetus leading to Federal Baseball, and because they directly affect the business of providing baseball exhibitions, they should be held to fall within the scope of the baseball exemption.

C. Broadcasting

One facet of the business of providing baseball entertainment to the public that has arisen since the time of Federal Baseball is the broadcasting of games over television, radio, and even the Internet. Indeed, broadcasting has fundamentally changed the way in which fans follow baseball. As one commentator has noted, “[i]t is difficult to overestimate the role of broadcasting in the rise of baseball … in the American cultural consciousness.”

Television broadcasting is now the primary means by which baseball entertainment is delivered to fans. During the 2009 MLB season, the average audience for a local television broadcast of a MLB game was an estimated 77,000 households, a total more than double the average in-stadium attendance of roughly 30,000 fans per game. Moreover, this estimate accounts for only local broadcasts of regular season MLB games, and does not include households watching games televised nationally on Fox, ESPN, TBS, or MLB’s own “MLB Network,” nor postseason games, broadcasts that can draw audiences of up to 3 million fans per game. The local broadcast estimate also fails to account for the more than one million fans that watch games via subscriptions to either MLB’s “Extra Innings” pay-per-view television package, or MLB’s “MLB.tv” Internet service.

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327 McDonald, supra note 8 at 112.
331 The Extra Innings package allows fans to watch games that would otherwise not be broadcast in their local market. For instance, by subscribing to Extra Innings a Detroit Tigers fan located in Connecticut can watch the vast majority of his team’s games, despite not being able to receive any Detroit-area television stations as part of his local cable package. See Tomlinson, supra note 8 at 307; see also IN Demand offers to match DirecTV’s MLB offer, March 21, 2007, http://sports.espn.go.com/mlb/news/story?id=2806948/ (reporting that more than 500,000 fans subscribed to the Extra Innings package for the 2006 MLB season).
332 MLB.tv is similar to the Extra Innings package, discussed in note 331 supra, but
In addition to television and Internet broadcasting, radio broadcasts of MLB games also routinely attract audiences larger than those attending games in-person at the stadium. Because broadcasting baseball games via the television, Internet, and radio is today the most significant means by which baseball entertainment is provided to fans, MLB’s broadcast agreements are thus an integral aspect of the business of providing baseball exhibitions to fans.

The rise in the importance of broadcasting is not a recent development for professional baseball. Although baseball radio broadcasting was only in its infancy at the time of Federal Baseball, the petitioner noted in its briefing that an analogous technology – the telegraph – was readily in use at the time to relay the results of professional baseball games across state lines. Moreover, the use of broadcasting as a means for delivering baseball entertainment had become well established by 1953 when the Supreme Court ruled in Toolson. Indeed, four years before Toolson, Judge Learned Hand considered the impact of broadcasting on the baseball exemption in the Second Circuit’s high profile decision in Gardella v. Chandler, stating that broadcasts of baseball games had become:

part of the business itself, for that consists in giving public entertainments; the players are the actors, the radio listeners and the television spectators are the audience; together they form as indivisible a unit as do actors and spectators in a

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

334 The first experimental radio broadcasts of baseball games occurred as early as 1921, although games were not routinely broadcast until the 1930s and 1940s. See supra note 50. These radio broadcasts became especially popular following World War II. McMahon and Rossi, supra note 8 at 237; see also McDonald, supra note 8 at 112 (noting that “[r]adio coverage began to define the game in the 1940s”). Television broadcasts of baseball games started shortly thereafter, beginning with the 1947 World Series. Id. at 113.


336 172 F.2d 402 (2d Cir. 1949).
theatre.\textsuperscript{337}

Meanwhile, the plaintiff in \textit{Toolson} emphasized such broadcasts in his brief to the Court,\textsuperscript{338} while the \textit{Toolson} dissent specifically noted that radio and television broadcasts were the “fastest-growing source of revenue for major league clubs.”\textsuperscript{339}

The use of telegraphing and broadcasting were thus well established at the time of \textit{Federal Baseball} and \textit{Toolson}, respectively, and in fact were emphasized by the petitioner in each case. Therefore, because neither Court specifically distinguished the telegraphing or broadcasting of baseball from the business of providing baseball exhibitions to the public,\textsuperscript{340} baseball’s broadcasting agreements are properly within the scope of its antitrust exemption, insofar as they are central to the business of providing baseball entertainment to the public.

This proposed rule is consistent with the outcome reached by the first court to consider the antitrust status of baseball’s broadcasting activities. In 1958, the district court for the Northern District of Texas considered an antitrust challenge to the broadcasting of baseball in \textit{Hale v. Brooklyn Baseball Club, Inc.},\textsuperscript{341} and held that broadcasts of baseball games were covered by the baseball exemption, reasoning:

The telecasting simply lifts the horizon, so to speak, and brings in another set of viewers of the same identical game that those present in the grandstand are seeing at the same time, ordinarily, and I believe it is straining reality to suggest that this television business has become a new facet of activity that you can look at apart from the ordinary business of baseball; and I can’t follow that because there couldn’t be such broadcasting except for the old-fashioned baseball game being played somewhere – the very gist and essence of the baseball business.\textsuperscript{342}

However, another court subsequently held that broadcasting is not

\begin{flushright}
\textsuperscript{337} Id. at 407-08.
\textsuperscript{341} Case No. 1294 (N.D.Tex. 1958).
\end{flushright}
within the scope of the exemption. Specifically, in *Henderson Broadcasting Corp. v. Houston Sports Association, Inc.*, the court ruled that baseball’s antitrust exemption did not shield a broadcast agreement between the owner of the Houston Astros franchise and a local radio station. In addition to applying an erroneous standard, as discussed above, the *Henderson* court also rested its holding on three faulty considerations.

First, the *Henderson* court believed that the Supreme Court had “implied that broadcasting is not central enough to baseball to be encompassed in the baseball exemption.” The *Henderson* court based this conclusion on two facts. First, the court emphasized that neither the *Toolson* nor *Flood* majority opinions cited the Second Circuit’s decision in *Gardella v. Chandler*. The *Henderson* court also found that broadcasting was not encompassed by the baseball exemption because the Supreme Court had subsequently refused “to extend the exemption to other professional sports, in part because of the interstate broadcasting of the sports.”

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

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344 *See* Part III.B *supra*.
345 *Henderson*, 541 F.Supp. at 265. The court reached this conclusion despite acknowledging that the Supreme Court had twice held that the “business [of] giving exhibitions of base ball,” or the “business of providing public baseball games for profit,” was exempt from antitrust law. *Id.* at 266.
346 172 F.2d 402 (2d Cir. 1949).
348 *See* *Gardella*, 172 F.2d at 407-08.
presumably would have done so explicitly. Therefore, the Henderson court erred by interpreting the Supreme Court’s failure to discuss Gardella in Toolson and Flood as implying that broadcasting agreements are outside the scope of the exemption.

Similarly, the Henderson court also erred by interpreting the Supreme Court’s opinions in International Boxing and Radovich as implying the same. While it is true that the Supreme Court considered interstate broadcasting when refusing to extend the baseball exemption to boxing and football, that does not mean that broadcasting is outside the scope of the baseball antitrust exemption. In International Boxing, the court specifically distinguished between its consideration of boxing and the existence of the baseball exemption, noting “[t]he issue confronting us is, therefore, not whether a previously granted exemption should continue, but whether an exemption should be granted in the first instance.” Meanwhile, in Radovich, the Court expressly limited Federal Baseball and Toolson “to the facts there involved, i.e., the business of organized baseball.” Thus, both International Boxing and Radovich establish that the baseball exemption is simply different from the rules applying to other sports. Accordingly, it does not reason that because interstate broadcasting rendered boxing and football susceptible to antitrust regulation, that baseball’s broadcast agreements are outside the scope of the baseball exemption. Rather, at most these cases simply illustrate once again that baseball is an anomaly.

In addition to misinterpreting the Supreme Court’s precedent, the Henderson court also found that “Congressional action does not support an extension of the exemption to radio broadcasting.” The court reached this conclusion in view of the Sports Broadcasting Act of 1961 (SBA). In the SBA, Congress provided an express exemption for professional sports leagues when collectively negotiating network television broadcast agreements. The Henderson court focused on the fact that Congress treated baseball no differently than football, basketball, or hockey in the SBA, and also emphasized its belief that Congress’ primary concern in passing the SBA was preserving the league structure, based on a portion of

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353 Henderson, 541 F.Supp. at 265.
the legislative history.\(^{356}\) Because local radio agreements were not covered by the SBA, and because the league structure was not directly implicated by the Astros’ radio broadcast agreement, the court determined Congress’ enactment of the SBA did not support the defendant’s position.\(^{357}\)

The *Henderson* court’s analysis with regard to the SBA was lacking in at least one significant respect. While it is true that Congress did not explicitly exempt all baseball broadcasting in the SBA, the *Henderson* court failed to recognize that the SBA contains a provision expressly stating that the Act does not “change, determine, or otherwise affect the applicability or nonapplicability of the antitrust laws” with respect to anything other than jointly negotiated television contracts by professional sports leagues.\(^{358}\) Therefore, reliance on the SBA as evidence of the scope of baseball’s antitrust exemption is misplaced. The SBA expressly does not alter MLB’s antitrust status in any way, aside from providing an express exemption to the league when it negotiates league-wide television broadcast agreements.

Finally, the *Henderson* court also relied on judicial interpretations of the baseball antitrust exemption from other jurisdictions. Here, the *Henderson* court particularly emphasized the fact that other courts did not apply the exemption in cases involving concession agreements,\(^{359}\) and licensing agreements for baseball cards,\(^{360}\) concluding that “the exemption is no more applicable to an antitrust suit on a broadcasting contract that it” was in those cases.\(^{361}\) The *Henderson* court’s reliance on these opinions was misplaced. As an initial matter, the antitrust exemption was not even asserted in either case.\(^{362}\)

More significantly, though, unlike a broadcasting agreement, neither a concession agreement nor a baseball card licensing agreement are directly related to the business of providing baseball entertainment to fans,

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\(^{356}\) *Henderson*, 541 F.Supp. at 269-70.

\(^{357}\) *Id.* at 270.

\(^{358}\) 15 U.S.C. § 1294. That provision states in its entirety:

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


\(^{361}\) *Henderson*, 541 F.Supp. at 271.

as will be discussed infra, and therefore both are fundamentally different than broadcasting agreements for purposes of applying the baseball exemption.

Thus, for all these reasons, future courts should not follow the Henderson precedent. Instead, because broadcasting has been central to the business of providing baseball exhibitions to the public for over 50 years, and today represents the single most significant means by which baseball entertainment is delivered to fans, baseball broadcasting agreements should be held to be within the scope of baseball’s antitrust exemption.

D. The Minor Leagues

The minor leagues are another significant aspect of the business of providing exhibitions of baseball. Whereas there are only 30 major league franchises, minor league baseball consists of more than 175 franchises. Although major league games typically outdraw the cumulative total attendance at minor league games in a given season, the minor leagues still generate significant attendance. In 2007 alone, minor league baseball attracted nearly 43 million fans. Moreover, these minor league teams are predominantly located in smaller communities, and thus provide live baseball entertainment to fans who would otherwise be forced to travel to major cities to see live professional baseball.

It is unclear whether the present minor league structure would survive absent the antitrust exemption. Presently, each MLB franchise maintains

363 See generally Part IV.F infra.
364 In the conclusion to its opinion, the Henderson court further noted that the exemption might be lost when a baseball team contracts with a non-exempt radio station. Henderson, 541 F.Supp. at 271 n.9. However, as noted above, the suggestion that that baseball’s exemption is lost when contracting with a non-exempt entity is inconsistent with the Supreme Court’s precedent. See Part III.D supra.  
367 Jones, supra note 15 at 641 (noting that minor league baseball is “a source of civic pride to small town America and an enduring part of the nation’s heritage”).  
close contractual relationships with five or six different minor league teams, collectively comprising the MLB franchise’s “farm system.”\textsuperscript{369} In addition to assigning players to each of their minor league teams,\textsuperscript{370} MLB franchises also typically provide substantial financial subsidies to their minor league affiliates.\textsuperscript{371} Recognizing that professional baseball’s vertically integrated structure could present antitrust issues, Congress – at the behest of lobbying efforts by minor league baseball – specifically drafted the Curt Flood Act of 1998 in order to avoid any chance that it might be read to revoke the baseball antitrust exemption with respect to the minor leagues.\textsuperscript{372} Therefore, because the Curt Flood Act expressly did not disrupt the antitrust exemption as it applies to the minor leagues,\textsuperscript{373} and because a considerable number of fans consume baseball entertainment by attending minor league games,\textsuperscript{374} courts should hold that lawsuits involving the minor leagues fall within the scope of the proposed standard for baseball’s antitrust exemption.

\textbf{E. Labor Disputes}

Aside from antitrust challenges to the league structure, no other area has generated more antitrust litigation for professional baseball than have labor

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\textsuperscript{369} See Gary, \textit{supra} note 34 at 296 n.25 (“A farm system is a collection of baseball clubs structured so that a ‘major league baseball club exercises control by means of either stock ownership or contract, over the activities of several minor league clubs ... .’”) (quoting LIONEL S. SOBEL, PROFESSIONAL SPORTS & THE LAW 21 (1977)). See also James R. Devine, \textit{The Racial Re-Integration of Major League Baseball: A Business Rather than Moral Decision; Why Motive Matters}, 11 SETON HALL J. SPORTS L. 1, 27-39 (2001) (discussing history of the farm system); Jones, \textit{supra} note 15 at 649-53 (same).


\textsuperscript{371} Friedman, \textit{supra} note 368 at 119.


\textsuperscript{373} Roberts, \textit{supra} note 372 at 419-21.

\textsuperscript{374} See Turland, \textit{supra} note 8 at 1377 (noting that “[m]inor [l]eague teams have become increasingly popular over the last decade”).
disputes. Both players and umpires have brought antitrust suits against MLB, generally alleging that MLB has unreasonably restrained trade in the market for their respective services. Following the Curt Flood Act of 1998, it is clear that antitrust suits brought by current MLB players are no longer shielded by the baseball exemption. However, because the CFA does not apply to suits brought by umpires, managers and coaches, or minor league players, the applicability of the antitrust exemption to those suits remains unsettled.

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

Not surprisingly then, most courts considering whether to apply the baseball exemption to antitrust suits brought by players or umpires have held that such suits fall within the bounds of the exemption. For example, the Supreme Court applied the exemption to a suit brought by minor league players in Toolson, and followed suit in Flood by rejecting a challenge.

377 See generally Part I.E supra.
378 See id. But see Edmunds, supra note 372 at 325 (“the drafters of the [CFA] are insisting that, notwithstanding the language of Postema, the relationship between Major League Baseball and its umpires should not be subjected to antitrust liability after the passage of act”).
379 Admittedly, some of these functions could be filled by a dual player-manager, as has occasionally been the case throughout baseball history. See Paul Weiler, Symposium: From Grand Slams to Grand Juries: Performance-Enhancing Drug Use in Sports, 40 New Eng. L. Rev. 809, 809 (2006) (noting that Cincinnati’s Pete Rose was “baseball’s first player-manager in decades”).
380 See supra note 56 and accompanying text.
brought by a major league player.\textsuperscript{381} Meanwhile, the Second Circuit applied the antitrust exemption to a suit brought by American League umpires in \textit{Salerno v. American League of Professional Baseball}.\textsuperscript{382}

In fact, the only case brought by a player or umpire post-\textit{Toolson} in which a court has refused to apply the antitrust exemption was \textit{Postema v. National League of Professional Baseball Clubs}, a suit brought by a former minor league umpire.\textsuperscript{383} As noted above, the \textit{Postema} court held that the baseball exemption did not apply because “baseball’s relations with non-players are not a unique characteristic or need of the game,”\textsuperscript{384} and thus applied an erroneous standard based on a misinterpretation of \textit{Flood}.\textsuperscript{385} The \textit{Postema} court further erred by disregarding the Second Circuit’s binding precedent in \textit{Salerno} regarding the applicability of the baseball exemption to suits brought by umpires, finding that “there is a substantial question whether \textit{Salerno} would be decided similarly” post-\textit{Flood}.\textsuperscript{386} However, the \textit{Postema} court overlooked the fact that \textit{Flood} cited the Second Circuit’s opinion in \textit{Salerno} without ever suggesting that the opinion was wrongly decided.\textsuperscript{387} Surely the \textit{Flood} Court would have noted any disagreement it may have had with the \textit{Salerno} ruling had it intended to exclude baseball’s umpire relations from the scope of its antitrust exemption. Thus, in addition to misinterpreting and misapplying \textit{Flood}, the \textit{Postema} court had no reasonable basis for departing from the \textit{Salerno} precedent, a case directly cited with approval by the Supreme Court in \textit{Flood}.

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

\textit{F. Non-Exempt Activities}

Although this article has asserted that a number of facets of the baseball business are directly related to supplying exhibitions of baseball to the public, and thus properly fall within the scope of baseball’s antitrust exemption, the proposed standard does not shield all of MLB’s commercial activity. Indeed, there are several facets of the “business of baseball” which do not directly concern providing baseball games to fans, and thus are not

\textsuperscript{381} See \textit{supra} note 89 and accompanying text.
\textsuperscript{382} 429 F.2d 1003 (2d Cir. 1970).
\textsuperscript{384} \textit{Id.} at 1489.
\textsuperscript{385} See generally Part III.B \textit{supra}.
\textsuperscript{386} \textit{Postema}, 799 F.Supp. at 1489.
\textsuperscript{387} \textit{Flood} v. \textit{Kuhn}, 407 U.S. 258, 268 n.9, 272 n.12 (1972). See also \textit{supra} notes 243-247 and accompanying text.
properly exempt from antitrust law.

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

Despite the significant profitability of MLB’s licensing and merchandising operations, these activities should not be held immune from antitrust law pursuant to the baseball exemption. Unlike broadcasting, labor disputes, the minor leagues, and decisions regarding the league structure and rules, MLB’s merchandising activities do not directly relate to the business of providing exhibitions of baseball. While the popularity of the baseball games themselves admittedly drives the sales of MLB-licensed merchandise, the licensing revenue is nevertheless generated separately from the actual exhibitions. Indeed, merchandise licensing does not affect the experience of a fan watching a baseball game.

Moreover, exempting MLB’s licensing activities from antitrust law would be inconsistent with MLB’s course of conduct in its own licensing-

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391 Weinberger, *supra* note 8 at 75.
393 Several justices noted this distinction during the United States Supreme Court’s recent oral argument in *American Needle, Inc. v. National Football League*. See generally Transcript of Oral Argument, *American Needle v. Nat’l Football League* (S. Ct. Case No. 08-661). *American Needle* involves an exclusive trademark license agreement between the NFL and Reebok, in which the NFL granted Reebok the sole right to manufacture NFL-logoed merchandise. See generally Feldman, *supra* note 314; McCann, *supra* note 28. American Needle has asserted that this exclusive license violates federal antitrust law, while the NFL has argued that it acted as a “single entity” outside the reach of Section One of the Sherman Act. *Id.* MLB’s antitrust exemption is not at issue in *American Needle*, making it unlikely that the Court’s ultimate decision will implicate the scope of the Federal Baseball, Toolson, and Flood decisions. However, depending on how broadly the *American Needle* Court rules, the case could nevertheless provide MLB with an additional basis for antitrust immunity aside from its historic antitrust exemption, and may shield some or all of MLB’s merchandising activities from antitrust law.
related antitrust suits. For example, in the 2008 case of *Major League Baseball Properties, Inc. v. Salvino*, 394 MLB Properties – MLB’s licensing entity – was sued by a merchandise manufacturer alleging that MLB’s licensing activities violated the Sherman Act. 395 Despite the existence of the long-standing baseball antitrust exemption, MLB Properties did not assert that it was exempt from antitrust law, instead successfully moving for summary judgment on the merits of the case. 396 Similarly, the antitrust exemption was also not asserted in *Fleer Corp. v. Topps Chewing Gum, Inc.*, 397 a case involving an antitrust challenge to a licensing agreement between the MLB Players’ Association and a baseball card manufacturer. 398

MLB’s licensing endeavors may continue to be the subject of antitrust litigation in the future. For example, as noted above, 399 in August 2009, MLB announced that it had granted an exclusive license for the production of baseball cards to the Topps company, a long-time trading card manufacturer. 400 In response, a different trading card manufacturer – and former MLB licensee – Upper Deck has threatened to file suit challenging the exclusive agreement. 401 Should Upper Deck file suit, or should MLB face a different antitrust challenge to its licensing activities, future courts should hold that such an action is not exempt from antitrust law under the baseball exemption, and consistent with MLB’s prior licensing-related antitrust litigation.

Similarly, other sources of MLB revenue such as concessions and sponsorships also do not fall within the scope of the exemption immunizing the business of providing baseball exhibitions. Baseball teams earn significant profits by selling concessions such as food and beverages to fans in attendance at the stadium, 402 and generate considerable revenue by selling sponsorship rights, including stadium-naming rights, to companies seeking to advertise their businesses to these fans. For example, the New York Mets recently entered a 20-year agreement with Citibank selling the bank the naming rights to the Mets’ new stadium for $20 million per

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394 542 F.3d 290 (2d Cir. 2008).
396 Id. at 218-21.
397 658 F.2d 139 (3d. Cir. 1981).
398 Id. at 140.
399 See supra notes 21-22 and accompanying text.
400 Sandomir, supra note 22.
401 Winn, supra note 21.
Like the merchandising revenues discussed above, both concessions and sponsorship revenues are driven by the popularity of the actual baseball exhibitions themselves. Indeed, greater attendance leads to increased sales of food and beverages, while sponsorship revenue also increases as in-stadium attendance grows, because companies are willing to pay more for sponsorships when their advertisements will reach a larger number of fans.

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

CONCLUSION

This article has highlighted the need for a single, uniform standard to be applied by courts when considering the applicability of baseball’s antitrust exemption. The existing lower court opinions are inconsistent and muddled, failing to recognize the true focus of the applicable Supreme Court precedent. Future courts should reject the divergent approaches utilized in the existing lower court decisions, and instead hold that the baseball exemption shields only those activities directly related to the business of providing baseball exhibitions to the public. Facets of the baseball business exempt under the proposed standard include baseball’s

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405 See Major League Baseball signs new sponsorship deals, REUTERS, April 14, 2009, http://www.reuters.com/article/companyNews/idUKN1444007720090414 (reporting that when consumers buy fewer tickets to sporting events, companies in turn spend less on sponsorships).
rule-making, league structure, broadcasting, minor league operations, and certain labor disputes. Meanwhile, baseball’s licensing, concessions, and sponsorship agreements do not directly impact the delivery of baseball entertainment, and thus should not be exempt from antitrust liability. Adoption of the proposed standard will enable future courts to provide clarity and predictability, while remaining consistent with the relevant Supreme Court precedent.