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THE COMMISSIONER'S NEW CLOTHES: THE MYTH OF MAJOR LEAGUE BASEBALL'S ANTITRUST EXEMPTION

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INTRODUCTION

Baseball's exemption from federal antitrust law is a unique and peculiar legal institution. No other sport has ever enjoyed such an exemption, and the legal development of baseball's exemption has been strange indeed, famously dubbed a "derelict in the stream of law."[1]

While the antitrust exemption is still often spoken of as being important to the continued success of baseball,[2] it has by and large been rendered irrelevant, at least in the context of labor relations between owners and players. This is because the primary effect of the antitrust exemption was to allow the owners to engage in practices with players, mostly those pertaining to the reserve system, which would have been in violation of federal antitrust law if not for the exemption. These practices have been progressively done away with by a series of collective bargaining agreements between the players and the owners and several important decisions in arbitration.

In 1974, reigning American League Cy Young Award winner (the award annually presented to the best pitcher in each league) and future Hall of Famer Jim "Catfish" Hunter was in a contract dispute with notoriously

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

2. *See, e.g.*, Andrew Zimbalist, *Baseball's Antitrust Exemption: Why it Still Matters*, NINE: A JOURNAL OF BASEBALL HISTORY AND CULTURE 13.1, 1–9 (2004), *available at* http://muse.jhu/edu/journals/nine/v013/13.1zimbalist.pdf.

thrifty Oakland Athletics owner Charles Finley.[3] Hunter's contract stipulated that he would receive a $50,000 insurance annuity from the team.[4] But when Finley found out that providing the annuity to Hunter would have more severe tax consequences than he had anticipated, he refused to honor this portion of the contract.[5] Later, at the urging of the Player Relations Committee, Finley provided Hunter with a cash payment of $50,000.[6] However, Hunter and the players union felt that the contract had been materially breached. They took the case before an arbitrator, who held that the contract had been breached and that Hunter was free to market his services to any team in baseball.[7] This made him the first marquee modern free agent, and he signed a landmark $3.5 million contract with the New York Yankees, whose new owner, George Steinbrenner, was looking to make a splash (how little has changed!).[8] This lucrative contract was eye-opening for both players and owners, as it gave some hint as to how much more players could make on the free market than they were making under the reserve system.

After the Hunter affair, unsurprisingly, players and the union began looking for ways to gain free agent status and market themselves to teams on a competitive basis. The technical basis for the reserve system at that time was paragraph 10(A) of the Uniform Player Contract, which stated that if the player and the team did not otherwise come to mutual terms, the team had the right to renew the player's contract for an additional year.[9] The traditional view of owners had been that 10(A) gave them the right to annually renew a player's contract and could be used every year to keep a player under contract into perpetuity. However, union head Marvin Miller and union lawyers took the stance that 10(A) was a one-shot deal, giving a team the ability to renew a player's contract for one year and one year only, so a 10(A) extension could not be built on top of a previous 10(A) extension.[10]

Their chance to test this theory came along in the person of Los Angeles Dodger pitcher Andy Messersmith. Messersmith had finished second in the 1974 National League Cy Young balloting and was viewed as

3. James B. Dworkin & Richard A. Posthuma, *A Tale of Two Negotiators: Bowie Kuhn Versus Marvin Miller*, DIAMOND MINES: BASEBALL & LABOR 21, 24 (Paul D. Staudohar, ed. 2000).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. Dworkin, *supra* note 3 at 25.
9. *Id.* at 26.
10. *Id.*

one of the top pitchers in baseball.[11] He could not come to terms with the Dodgers after the 1974 season, and they renewed his contract (with a small raise) under paragraph 10(A) for the 1975 season.[12] He was unhappy with this situation, and the union filed a grievance on his behalf (an identical grievance was also filed on behalf of retired Expos pitcher Dave McNally), claiming that the Dodgers should not be able to use 10(A) to further renew his contract. The case went before an arbitrator, who ruled for Messersmith, thus granting him free agency after the 1975 season.[13] This decision gutted the reserve system, basically holding that it only lasted for one year after the expiration of a contract, and gave players much more leverage at the negotiating table.[14] Ironically, the main source of contention between Messersmith and the Dodgers is that Messersmith did not want to play for anyone but the Dodgers for his entire career and, thus, was demanding a no-trade clause in the new contract, which the Dodgers were unwilling to insert.[15]

However, the antitrust exemption does still come up from time to time. Major League Baseball ("MLB") still claims the antitrust exemption with regard to its ability to inhibit the free sale and transfer of MLB teams, particularly when such a sale would involve the relocation of the team to another city.[16] Courts hearing these cases typically uphold MLB's exercise of control over its owners' ability to sell their team on the rationale that this behavior falls under the baseball antitrust exemption and, therefore, is not actionable under state or federal law.[17]

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11. ESPN.com, *Free Agency: How It Happened*, http://espn.go.com/mlb/s/2000/1120/891700.html (last visited Nov. 8, 2007).

12. Dworkin, *supra* note 3, at 26.

13. *Id.* *See also* Nat'l and Am. League Prof'l Baseball Clubs v. Major League Baseball Players Ass'n, 66 LAB. ARB. REP. (BNA) 101 (1976).

14. Dworkin, *supra* note 3, at 26–27.

15. *Id.*

16. *See, e.g.*, Major League Baseball v. Crist, 331 F.3d 1177 (2003); Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993); Butterworth v. Nat'l League, 644 So. 2d 1021 (Fla. 1994); McCoy v. Major League Baseball, 911 F. Supp. 454 (W.D. Wash. 1995); Minnesota Twins P'ship v. State, 592 N.W.2d 847 (Minn. 1999); Major League Baseball v. Butterworth, 181 F. Supp. 2d 1316 (N.D. Fla. 2001); Wisconsin v. Milwaukee Braves, Inc., 144 N.W.2d 1 (Wis. 1966).

17. Courts have repeatedly held that the antitrust exemption applies to federal as well as state law, on the assumption that baseball's antitrust exemption is a matter of federal policy that cannot be preempted by state laws. *See, e.g.*, *Crist*, 331 F.3d at 1182–83. This is a somewhat odd rationale since the original justification given for the antitrust exemption was that baseball did not involve interstate commerce and therefore Congress had no power to regulate baseball. Reading between the lines, this would actually seem to argue that this was a state matter and should best be left up to state antitrust laws.

But is MLB actually exempt? In this paper, I will argue that MLB's antitrust exemption has been widely misinterpreted as being much more broadly applicable than the Supreme Court's decision in *Flood v. Kuhn* actually mandates. Based on the language and the underlying reasoning in the case, *Flood* should in fact be narrowly interpreted as only exempting MLB's reserve system, not any and all actions undertaken by MLB pertaining to the business of baseball. As mentioned before, the reserve system is no longer in effect due to the collective action taken by players over the years, which has brought about its dismantling.

However, even if the most important components of the reserve system had not been lost, the owners would no longer be immune from antitrust lawsuits from players on these grounds. In 1998, Congress passed The Curt Flood Act, which explicitly applied federal antitrust law to the baseball reserve system, but was intentionally ambiguous regarding the application of antitrust law to any other aspects of MLB.[18] If coupled with a narrow interpretation of *Flood*, the Curt Flood Act entirely takes away MLB's antitrust exemption. I will also discuss several legal doctrines that have evolved significantly since the *Flood* decision was issued and that should be taken into account when evaluating the current status of MLB's antitrust exemption.

There is no evidence that MLB actually needs an exemption from federal antitrust law, or that such an exemption would actually benefit the game. This can be seen most clearly by viewing other similarly situated sports like basketball and football, which have grown enormously in recent decades, while baseball no longer enjoys the place in the national spotlight that it once did. These sports have thrived despite never having been exempt from federal antitrust law.

Finally, I will conclude by examining how realistic it is that a general antitrust exemption will ever be absolutely removed by the Supreme Court or Congress. There are several legal doctrines and rationales that would support such an action. There are also several situations in which antitrust litigation could arise, and I will detail what these situations are and how

18. Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824. The Curt Flood Act was not ambiguous, however, regarding the application of federal antitrust law to minor league baseball. The Act explicitly held that it only applied at the major league level, and since it is beyond dispute that minor league baseball's labor relations with players had been exempt from federal antitrust law, the reserve system could still theoretically exist at the minor league level. *Id.* For more detail on the Curt Flood Act's impact on minor league baseball, see Gary Roberts, *The Curt Flood Act: A Brief Appraisal of the Curt Flood Act of 1998 from the Minor League Perspective*, 9 MARQ. SPORTS L.J. 413 (1999).

they may force a court or Congress to make a final decision on MLB's antitrust exemption.

I. THE SUPREME COURT'S DEVELOPMENT OF THE BASEBALL ANTITRUST EXEMPTION

A. FEDERAL BASEBALL

The baseball antitrust exemption is now eighty-five years old. It does not arise from any policy decision made by the legislative or executive branches that baseball should be treated differently from any other industry; rather, it started with a Supreme Court decision that is now universally acknowledged as having been wrongly decided.

The case was *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.[19] The plaintiff was a professional team in the defunct Federal League,[20] which was suing the National and American Leagues, competing professional leagues, because both of those leagues employed the reserve system.[21]

The Baltimore club sought to use the legal system to force its way into the National or American League, and filed a suit against both leagues alleging an antitrust violation.[22] The team objected to the situation it had been put in because the teams of the National and American Leagues signed the vast majority of players; thus, Baltimore was not able to

19. 259 U.S. 200 (1922).

20. All Federal League history comes from MARC OKKONEN, THE FEDERAL LEAGUE OF 1914-1915: BASEBALL'S THIRD MAJOR LEAGUE (1989). The Federal League was an eight-team professional baseball league which had started in 1914 as a direct competitor with the National and American Leagues. *Id.* at 3. After its second season concluded in 1915, the Federal League disbanded. *Id.* The owners of the American and National Leagues bought out four of the eight teams (Brooklyn, Buffalo, Newark, and Pittsburgh). *Id.* The owners of the Chicago and St. Louis Federal League franchises were permitted to purchase the Chicago Cubs (National League) and the St. Louis Browns (American League), respectively, and merge their new teams with their old Federal League teams. *Id.* The Kansas City Federal League franchise went bankrupt. *Id.* The Baltimore franchise refused any overtures from the National and American League franchises to purchase the team. *Id.* This meant that the franchise was a team without a league and was forced to cease operations. *Id.* at 24.

21. For discussion and critique of the reserve system in baseball, see Dworkin, *supra* note 3 and Belth, *infra* note 59. The reserve system was an agreement between all teams in the league that once a team signed a player, that team had the exclusive rights to negotiate with the player for the duration of the player's career. This meant that a player had very little control over his own career—he could never freely market his services among different employers and accept the highest bidder. He simply had to try to use whatever good will and leverage he had to convince the employer to marginally increase his salary. Players could also be traded and/or sold at the whim of their current employer without any input into the matter.

22. *Federal Baseball*, 259 U.S. at 207.

compete for top-level baseball talent.[23] The Baltimore team sued the National and American Leagues, claiming that the reserve system was an unreasonable restraint on trade.[24]

The Supreme Court upheld the Court of Appeals, which had ruled for the defendants.[25] The Court's opinion, penned by Justice Holmes, held that baseball exhibitions were "purely state affairs,"[26] and that the interstate nature of baseball games was "mere incident, not the essential thing."[27] The Court also rejected the notion that baseball was, in fact, a business, ruling that "[t]hat to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of these words."[28] Therefore, the Court ruled that because it was not interstate commerce, federal antitrust law did not apply to exhibitions of professional baseball.[29]

This was, simply put, an odd rationale for the decision. The three leagues in question had dubbed themselves the American, Federal, and National Leagues, respectively, clearly marketing themselves as national products with the best players in the nation playing for various franchises located across the country. While it had not yet become as popular or as profitable as it has become today, professional baseball was already clearly established as a truly national endeavor. In 1919, the fact that several members of the Chicago Black Sox took money from gamblers to intentionally play poorly and "throw" the World Series had become a national scandal and made front pages across the nation.[30] Baseball players were already starting to be used by companies as national endorsers and

23. *See id.*
24. *See generally id.*
25. *See id.* at 208–09.
26. *Id.* at 207–08.
27. *Id.* at 209.
28. *Federal Baseball*, 259 U.S. at 209.
29. *See id.*
30. For a great account of the Black Sox scandal, see ELIOT ASINOF, EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES (1963). Ironically enough, the common perception (shared and fostered by Asinof) of the Black Sox scandal is that it was brought about indirectly by the reserve system. Black Sox owner Charles Comiskey was notoriously cheap: players could barely scrape by on what he paid them, and he refused to give them raises. But under the reserve system, they were powerless to do much of anything about this situation, since they could not market their own services to anyone and could not demand trades, etc. All the players could really do was essentially beg for more money, which was rarely effective when negotiating with the hard-hearted Comiskey, or they could simply quit playing the game they loved. Asinof and others have suggested that one of the main reasons, if not the main reason, that the Black Sox involved in the scandal took money from the gamblers to throw the World Series was because they were making so little money, a situation that would not have existed were it not for the reserve system.

spokesmen.[31] All in all, it seemed antiquated, even by 1922 standards, to rule that any of the national professional baseball leagues were purely state affairs that did not sufficiently constitute interstate commerce to an extent that would subject them to federal law under the Commerce Clause.

B. INTERIM DEVELOPMENTS

Much happened, both factually and legally, between 1922 and the next time the Supreme Court would revisit the issue of the exemption in 1953.

For starters, the atmosphere surrounding professional baseball had clearly changed. There could no longer be any doubt that professional baseball was a national business that constituted interstate commerce on a large scale. Radio had become widely available to people in the intervening years, and radio broadcasts of baseball games had become extremely popular in local media markets, and in many markets, the radio broadcasts actually crossed state lines.[32]

But much had changed legally as well. First and foremost, the generally accepted understanding and interpretation of the Commerce Clause had changed. Since its inception, the Court had generally taken a narrow view of the Commerce Clause,[33] which was certainly reflected in Justice Holmes's opinion in *Federal Baseball*. However, in the 1930s, key components of much of President Roosevelt's "New Deal," particularly the National Industrial Recovery Act, were struck down by courts on the grounds that the law exceeded the constitutional powers of the federal government as limited by the commerce clause.[34] Roosevelt was incensed at this roadblock to his national recovery plan, and soon thereafter introduced his plan to appoint additional justices to the Court, who would presumably have a view of the Commerce Clause much more favorable to

31. *See, e.g.*, Roberta Newman, *It Pays to Be Personal: Baseball and Product Endorsements*, NINE: A JOURNAL OF BASEBALL HISTORY AND CULTURE, 12.1 (2003) 1, 4–6 (detailing Ty Cobb's 1915 endorsement of patent medicine "Nuxated Iron" in a nationwide advertising campaign, his late 1910s endorsement of Coca-Cola, and his twin endorsements in the early 1920s of General Motors for $25,000 per year and competing automaker Hupmobiles for $15,000 per year) *available at* http://muse.jhu.edu/journals/nine/v012/12.1newman.pdf.

32. Gardella v. Chandler, 172 F.2d 402, 404 (2d Cir. 1949).

33. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918) (holding that a federal law restricting the interstate shipping of goods manufactured using child labor was unconstitutional because it was actually targeting child labor itself, which did not have a direct impact on interstate commerce).

34. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

the type of expansive legislation favored by Roosevelt.[35] Before he could do this, however, one of the Justices who held a narrow view of the Commerce Clause retired, and another, Justice Owen Roberts, suddenly became much more sympathetic to Roosevelt's views on national power.[36] What had once been a 6-3 minority was now a 5-4 majority, and with the Court on his side regarding the limits the Commerce Clause imposed upon the government, Roosevelt's hand was freed to pass expansive legislation designed to help the nation recover from the Great Depression. With this, Roosevelt abandoned his plan to appoint more justices.[37]

The new Court all but did away with Commerce Clause limits on federal power. This new jurisprudence culminated in *Wickard v. Filburn*, in which the Court held that Congress could regulate a farmer who was growing crops for personal consumption because, if he did not consume those crops, he would have had to purchase them from somewhere else, and this hypothetical purchase was enough to satisfy the Commerce Clause requirement.[38]

In light of both the factual and legal developments that took place between 1922 and 1953, it is obvious that (a) the nature of how baseball was conducted no longer left any doubt that it was in fact interstate commerce; and (b) the legal definition of interstate commerce had broadened to the point that it seemed plain that Congress did have the power to regulate baseball.[39]

There was one important case in the interim that considered the baseball antitrust exemption. It was the Second Circuit case of *Gardella v. Chandler*, and it involved a player challenging the reserve system.[40] The Court ultimately ruled that it was bound by *Federal Baseball* to rule that the antitrust exemption precluded any finding of liability, but the judges were very critical of the rationale behind the exemption.[41] Judge Learned Hand, writing for the majority, openly questioned *Federal Baseball*'s holding that interstate commerce was not an integral aspect of professional baseball, pointing out that the existence of interstate radio broadcasts of games made interstate commerce an essential part of professional baseball:

35. William G. Ross, *When Did the "Switch in Time" Actually Occur?: Re-discovering the Supreme Court's "Forgotten" Decisions of 1936-1937*, ARIZ. ST. L.J. 1153, 1153–54 (2005).

36. *Id.* at n.2.

37. Because this shift seemingly preserved the number of Supreme Court justices at nine, it has come to be known as the "switch in time that saved nine." *Id.*

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

39. *Id.* at 120.

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

41. *Id.* at 407–08.

> [T]he situation appears to me the same as that which would exist at a 'ball-park' where a state line ran between the diamond and the grandstand. Nor can the arrangements between the companies be set down as merely incidents of the business, as were the interstate features in *Federal Baseball Club v. National League*. On the contrary, they are 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 audiences; together they form as indivisible a unit as do actors and spectators in a theatre.[42]

Judge Frank also wrote a scathing dissent in the case in which he argued that federal antitrust law should apply to the reserve system.[43] Frank reasoned that the advent of radio and television had so fundamentally altered the business of baseball that *Federal Baseball* no longer controlled. He wrote:

> I think the foregoing will serve alone to distinguish the incidental-means rationale of the Federal Baseball case: There the traveling was but a means to the end of playing games which themselves took place intra-state; here the games themselves, because of the radio and television, are, so to speak, played interstate as well as intra-state.[44]

Judge Frank went on to conclude, "here there is substantial interstate commerce of a sort not considered by the Court in the Federal Baseball case."[45]

So at the end of the 1940s, *Federal Baseball* was unquestionably the controlling precedent on the matter of baseball's antitrust exemption. But given how much the landscape of professional baseball had changed since 1922 and how many prominent jurists (such as Hand and Frank) had openly questioned the continuing vitality of the "incidental-means rationale," the situation seemed ripe for the Supreme Court to overturn *Federal Baseball* when the issue was next granted certiorari.

C. TOOLSON

In 1953, the Supreme Court again heard a case dealing with whether federal antitrust law applied to the reserve clause. The Supreme Court upheld *Federal Baseball* in a cursory, one-paragraph per curiam opinion:

> In Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, this Court held that the business of providing public baseball games for profit between clubs of

42. *Id.*
43. *Id.* at 408–09.
44. *Id.* at 411 (Frank, J., dissenting).
45. *Id.* at 412.

> professional baseball players was not within the scope of the federal antitrust laws. Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without re-examination of the underlying issues, the judgments below are 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.[46]

The Court made it clear that it had very little interest in dealing with the underlying issues in the case, and decided the case purely on *stare decisis* grounds.[47] However, the case is more interesting for the dissent issued by Justices Reed and Burton, which supported the application of federal antitrust law to the reserve clause.[48]

The dissent pointed out that even if Justice Holmes' rationale for the *Federal Baseball* had been correct in 1922, it undoubtedly no longer made any sort of sense in 1953:

> In the light of organized baseball's well-known and widely distributed capital investments used in conducting competitions between teams constantly traveling between states, its receipts and expenditures of large sums transmitted between states, its numerous purchases of materials in interstate commerce, the attendance at its local exhibitions of large audiences often traveling across state lines, its radio and television activities which expand its audiences beyond state lines, its sponsorship of interstate advertising, and its highly organized 'farm system' of minor league baseball clubs, coupled with restrictive contracts and understandings between individuals and among clubs or leagues playing for profit throughout the United States, and even in Canada, Mexico and Cuba, it is a contradiction in terms to say that the defendants in the cases before us are not now engaged in interstate trade or commerce as those terms are used in the Constitution of the United States and in the Sherman Act.[49]

46. Toolson v. New York Yankees, 346 U.S. 356, 356–57 (1953) (per curiam) (internal citations omitted).

47. *Federal Baseball*, 259 U.S. at 208–09.

48. *See Toolson*, 346 U.S. at 362–65 (Burton, J., dissenting).

49. *Id.* at 357–58.

The dissent went on to argue that applying the Sherman Act to baseball's reserve system did NOT require overturning *Federal Baseball*; rather, it only required the court to rule that the factual circumstances had changed to the point where interstate commerce was no longer simply "incidental" to professional baseball, but was now an important part of the industry.[50]

In the two decades between the Court's decision in *Toolson* and the final time it would consider baseball's antitrust exemption, the Court issued a series of decisions in which it seemed to acknowledge the faulty reasoning behind the *Federal Baseball* case. In *United States v. Shubert*, the Court declined to extend the *Federal Baseball* rationale to a company that toured around the country and set up theatrical exhibitions.[51] In *United States v. International Boxing Club*, a companion case to *Shubert*, the Court also declined to extend baseball's antitrust exemption to boxing matches.[52] In *Radovich v. National Football League*,[53] the Court ruled that the baseball antitrust exemption did not apply to football, only baseball, and explicitly said that "were we considering the question of baseball for the first time upon a clean slate we would have no doubts."[54] The Court also ruled that the exemption did not apply to professional basketball in *Haywood v. National Basketball Association*, echoing the rationale of *Radovich*.[55]

D. FLOOD

Nineteen years later, the Supreme Court was for the third and final time asked to decide the issue of the application of federal antitrust law to baseball in the context of the reserve system. The case was *Flood v. Kuhn*, and it involved an effort by star St. Louis centerfielder Curt Flood to become a free agent.[56]

Flood was a three-time All-Star and winner of seven consecutive Gold Glove awards.[57] He was a key member of the Cardinals' World Championship teams in 1964 and 1967, as well as the team that lost in

50. *Id.* at 360–61.
51. United States v. Shubert, 348 U.S. 222, 227–28 (1955).
52. United States v. Int'l Boxing Club of New York, 348 U.S. 236, 242–43 (1955).
53. Radovich v. Nat'l Football League, 352 U.S. 445, 451 (1957).
54. *Id.* at 452.
55. *See* Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1205 (1971).
56. Flood v. Kuhn, 407 U.S. 258 (1972).
57. Statistical Data of Curt Flood, http://www.baseball-reference.com/f/floodcu01.shtml.

Game 7 of the 1968 World Series.[58] Flood grew up in Oakland, California, near the University of California at Berkeley, and was exposed to radical politics and activism at an early age.[59] Partly as a result of this,[60] he had long expressed admiration for athletes who had spoken out against things they believed to be unfair, like Muhammad Ali and Olympic track stars John Carlos and Tommie Smith.[61] When Flood was traded by St. Louis to Philadelphia against his wishes and without his consent, he refused to play for his new team.[62] Flood had gotten very involved in the St. Louis community and also had many business interests in the city.[63] Philadelphia fans also had a reputation for being among the most racist in the league, and Flood, a black man, did not want to play half his games in front of such a crowd.[64] Motivated partially by self-interest but in no small part by a desire to change what he regarded as the fundamental unfairness of the reserve system,[65] Flood consulted with the head of the players' union head, Marvin Miller, and decided to petition the commissioner's office for the ability to market his services among the major league teams.[66] Flood wrote to Commissioner Bowie Kuhn:

> After twelve years in the major leagues, I do not feel I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic rights as a citizen and is inconsistent with the laws of the United States and of the several States.
>
> It is my desire to play baseball in 1970, and I am capable of playing. I have received a contract offer from the Philadelphia club, but I believe I have the right to consider offers from other clubs before making any decision. I, therefore, request that you make known to all Major League clubs my feelings in this matter, and advise them of my availability for the 1970 season.[67]

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58. Richard Lederer, Curt Flood: Between the Lines, http://www.alexbelth.com/article_lederer.php.

59. ALEX BELTH, STEPPING UP: THE STORY OF CURT FLOOD AND HIS FIGHT FOR BASEBALL PLAYERS' RIGHTS, 4 (Persea 2006).

60. *Id.* at 151 (describing himself as a "child of the sixties").

61. *Id.* at 4.

62. *Flood*, 407 U.S. at 265. For two excellent recent accounts of the events that led to this suit and their future implications, see BELTH, *supra* note 59 and BRAD SNYDER, A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS (Viking Adult 2006).

63. BELTH, *supra* note 59, at 145.

64. *Id.* at 143.

65. Tim McCarver, *Foreword* to BELTH, *supra* note 59, at xi.

66. BELTH, *supra* note 59, at 146–55.

67. *Id.* at 156.

Commissioner Kuhn denied his request for free agency, and Flood decided to file a suit, alleging that the reserve system was an unreasonable restraint of trade in violation of the Sherman Act.[68]

Flood's lawsuit became a national story.[69] It quickly became involved with issues of race, in no small part due to Flood's remark that the reserve system had rendered him a "well-paid slave."[70] Owners unanimously condemned Flood's actions, while contemporary and former players were split over whether they supported him or not.[71] The case went to trial, where legends Hank Greenberg, Jackie Robinson, and Bill Veeck testified on Flood's behalf against the reserve clause.[72] However, eventually both the trial court and the appellate court ruled that *Federal Baseball* and *Toolson* were controlling precedent, and upheld the reserve clause.[73] It would be up to the Supreme Court to ultimately decide the case.

The case is interesting in no small part because the Court explicitly disagreed with and undercut the rationale for the original *Federal Baseball* decision but went on to deny the application of antitrust law to the reserve system on *stare decisis* grounds.[74] For this reason, the case is often taught in law school Legislation classes as the paradigmatic case of *stare decisis*, in which the Court upheld a previous decision that it strongly disagreed with.[75]

Justice Blackmun's majority decision starts off with an overly saccharine overture to the glory days of baseball that includes a list of 88 of baseball's greatest players as well as invocations of "Casey at the Bat" and "Tinker to Evers to Chance."[76]

However, in the substantive part of the decision, the Court, unlike their *Toolson* counterparts, re-examined the underlying reasoning of the

68. *Id.* at 157–60.
69. *Id.* at 157–58.
70. *Id.* at 160–62.
71. BELTH, *supra* note 59, at 169–70.
72. *Id.* at 169–70.
73. Flood v. Kuhn, 407 U.S. 258, 267–68 (1972).
74. *Id.* at 282–83.
75. *See, e.g.*, WILLIAN N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION STATUTES AND THE CREATION OF PUBLIC POLICY 600–12 (3d ed. 2001).
76. *Flood*, 407 U.S. at 260–64. This section was viewed as so irrelevant and excessive that two Justices, White and Burger, joined the majority opinion *except* for Section I. *Id.* at 285–86. When coupled with the facts that two Justices dissented from the majority and Justice Powell did not take part in the case, this means that Section I was not supported by a majority of the Court, even though it was essentially a " statement of facts" section of the opinion. *See Flood*, 407 U.S. 258. This is surely one of the few, if not the only, decisions the Court has issued where it could not muster a majority for the initial factual portion of the opinion.

Federal Baseball decision in substantial detail. The Court detailed the development of baseball's antitrust exemption and the lack of any sort of similar exemption to other similarly situated industries, such as motion pictures and other sports.[77]

The Court also rebutted once and for all any notion that interstate commerce was only incidental to professional baseball, asserting, "[p]rofessional baseball is a business and it is engaged in interstate commerce."[78] The Court was explicitly refuting the reasoning behind *Federal Baseball* or, at the very least, saying that were it a matter of first impression it would be decided differently.[79] The majority also stated that "*Federal Baseball* and *Toolson* have become an aberration confined to baseball."[80]

However, despite this, the Court would not overrule its two previous rulings, writing that:

> [T]he aberration is an established one . . . that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of stare decisis, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs.[81]

It is somewhat unclear and never enunciated in the opinion what baseball's "unique characteristics and needs" actually consisted of that separates the sport from other sports like football and boxing, which were not exempt from federal antitrust law.

The Court also placed great emphasis on the fact that the exemption had existed for 50 years, and that Congress had done nothing to overturn *Federal Baseball*. The Court wrote that:

> We continue to be loath, 50 years after Federal Baseball and almost two decades after Toolson, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere

77. *Id.* at 274–80.
78. *Id.* at 282.
79. *Id.* at 282–84.
80. *Id.* at 282.
81. *Id.* It seems somewhat odd that the Court views as significant that the baseball antitrust exemption "has survived the Court's expanding concept of interstate commerce" when earlier in the opinion the Court explicitly stated that professional baseball was engaged in interstate commerce. *Id. See Gardella*, 172 F.2d at 412 (showing that it clearly no longer made sense in the Court's conception of the Commerce Clause).

> inference and implication, has clearly evinced a desire not to disapprove them legislatively.[82]

It is somewhat surprising that the Court used this rationale as the primary basis for the decision, as it seems to be at odds with some previous Court rulings, which were very dubious about the Court interpreting Congressional silence as approval and using such as grounds for not correcting the Court's own mistakes.[83]

The case was not unanimously decided, however, and there were several strong voices of dissent.[84] Justice Douglas (joined by Justice Brennan) issued a blunt dissent that disagreed with the methodology undertaken by the majority.[85] He wrote that the antitrust exemption was "a derelict in the stream of law that we, its creator, should remove."[86] He also wrote that "[w]hile I joined the Court's opinion in [*Toolson*], I have lived to regret it; and I would now correct what I believe to be its fundamental error."[87] He noted the fact that baseball today was a vastly different business model than its predecessor in 1922, and there could be no doubt that it was engaged in interstate commerce.[88] He also noted how much Commerce Clause jurisprudence had changed since the *Federal Baseball* decision was issued.[89] He concluded by saying, "[t]here can be no doubt 'that were we considering the question of baseball for the first time upon a clean slate,' we would hold it to be subject to federal antitrust regulation.

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82. *Flood*, 407 U.S. at 283–84. *See also id.* at 283 ("Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes").

83. *See* Helvering v. Hallock, holding:

> It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities . . . . Congress may not have had its attention so directed for any number of reasons . . . . But certainly such inaction . . . can hardly operate as a controlling administrative practice, through acquiescence, tantamount to an estoppel barring re examination by this Court of distinctions which it had drawn. Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction . . . , but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.

309 U.S. 106, 120–21 (1940) (internal citations omitted). *See also* United States v. Wise, 370 U.S. 405, 411 (1962) (holding that the failure of Congress to overrule a statutory interpretation does not have "persuasive significance" due to the fact that a court can draw "several equally tenable inferences" from this information).

84. *Flood*, 407 U.S. at 286–96.

85. *Id.* at 286–88 (Douglas, J., dissenting).

86. *Id.* at 286.

87. *Id.* at n.1.

88. *Id.* at 286–87.

89. *Id.*

The unbroken silence of Congress should not prevent us from correcting our own mistakes."[90]

In a separate dissent, Justice Marshall (also joined by Justice Brennan) agreed:

> Has Congress acquiesced in our decisions in *Federal Baseball Club* and *Toolson*? I think not. Had the Court been consistent and treated all sports in the same way baseball was treated, Congress might have become concerned enough to take action. But, the Court was inconsistent, and baseball was isolated and distinguished from other sports. In *Toolson* the Court refused to act because Congress had been silent. But the Court may have read too much into this legislative inaction.[91]

Marshall also noted that even were the Court to overrule that MLB was no longer exempt from federal antitrust regulation, that did not necessarily mean that Flood had a remedy, because labor issues between players and management may be governed by the nonstatutory labor exemption, in which case players would be barred from seeking relief under federal antitrust law.[92]

However, the arguments of Douglas and Marshall did not win the day, and it was clear that professional baseball was still at least partially exempt from federal antitrust regulation. Even so, a crucial issue that has come up in numerous courts that have ruled on the antitrust exemption since 1972, and an issue central to the thesis of this paper, is how broadly the exemption should apply.

II. HOW BROADLY SHOULD THE ANTITRUST EXEMPTION BE APPLIED?

A. A NARROW VIEW OF THE ANTITRUST EXEMPTION

This paper will side with the many courts (although admittedly a minority of courts who have been called upon to interpret this aspect of *Flood*) which have held that the antitrust exemption applies only to the reserve system in professional baseball and nothing else.

90. *Flood*, 407 U.S. at 288 (quoting Radovich v. National Football League, 352 U.S. 445, 452 (1957)).

91. *Id.* at 292 (Marshall, J., dissenting).

92. *Id.* at 293–94. For more detail on the nonstatutory labor exemption, see *infra* Part IV.A.

1. Evidence for a Narrow Application of the Antitrust Exemption Within the *Flood* Decision

There is ample support for this view in the text of the *Flood* opinion itself. All of the *original* (i.e., not quoted from other cases, mainly *Federal Baseball* and *Toolson*) language within *Flood* supports the view that the Court only recognized the reserve system, not the entirety of professional baseball operations, as enjoying an exemption from federal antitrust law.[93]

First and foremost, the opening line of the *Flood* decision reads, "For 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 federal antitrust laws."[94] If, as the majority of courts have held, the *Flood* Court fully intended professional baseball, as a whole, to enjoy the antitrust exemption, this would seem to be a puzzling way to open the opinion.[95] The use of word "specifically" especially seems to indicate that the Court views the question before it (and, just as importantly, the question that had been before the *Federal Baseball* and *Toolson* Courts) as a very narrow one—whether to uphold the *reserve system*'s antitrust exemption.[96]

Later in the opinion, the Court provides a list of four separate reasons it identifies as persuasive rationales for upholding *Federal Baseball* and *Toolson*.[97] The second item (item "b" in the bullet-pointed list) is "[t]he fact that baseball was left alone to develop for that period upon the understanding that *the reserve system* was not subject to existing federal antitrust laws."[98] Again, this would seem to be an odd statement if the Court's understanding of the antitrust exemption was that it applied broadly to the business of baseball. Perhaps it could be argued that the Court was merely making mention of the very specific practice at issue in this case, and that this should not be read as a refutation of a broader exemption. But given that the Supreme Court's primary purpose is to formulate the law at the broadest possible level, and that this particular passage was expounding the broad underlying reasons for upholding the exemption, it simply does not seem logical for the Supreme Court to use the specific reference to the reserve system if, indeed, it did view the exemption as applying to all aspects of professional baseball operations.

93. *Id.* at 282–84.
94. *Id.* at 259 (emphasis added).
95. *See infra* Part II.B.
96. *Flood*, 407 U.S. at 259.
97. *Id.* at 273–74.
98. *Id.* at 274 (emphasis added).

At the beginning of Section V, after the Court had discussed the *Federal Baseball* and *Toolson* opinions and discussed the nature of baseball in the present day, it said, "1. Professional baseball is a business and it is engaged in interstate commerce. 2. With its *reserve system* enjoying exemption from federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball."[99] Further down this numbered list, the court wrote, "[t]he Court, accordingly, has concluded that Congress, as yet, has had no intention to subject baseball's *reserve system* to the reach of the antitrust statutes."[100]

The Court's continued specific references to the reserve system in these statements of the legal issue of the case support the notion that the *Flood* Court viewed *Federal Baseball* and *Toolson* as only applying an exemption to baseball's reserve system, and thus although the Court was grudgingly upholding those cases on *stare decisis* grounds, it was implicitly making the holding as narrow as possible.[101] The *Flood* Court also discussed and cited approvingly the district court and the circuit court decisions, which had both specifically discussed the exemption as applying to the reserve system.[102]

2. Lower Courts Applying the Antitrust Exemption Narrowly

In contrast to the Supreme Court, which has only dealt with the antitrust exemption with regard to the reserve system, lower courts have dealt with the professional baseball antitrust exemption in a variety of different contexts, reached a wide variety of results, and shown a wide variety of interpretations of *Flood*.[103]

a. *Henderson Broadcasting Corp.*

One of the first post-*Flood* cases that was called upon to determine the scope of the baseball antitrust exemption was *Henderson Broadcasting Corp. v. Houston Sports Association, Inc.*[104] This case involved the radio broadcasting rights of the Houston Astros.[105] The plaintiff, a radio station, alleged that the Astros pulled out of a contract to have plaintiff broadcast

99. *Id.* at 282 (emphasis added).
100. *Id.* at 283 (emphasis added).
101. *Id.* at 282–84.
102. *Flood*, 407 U.S. at 284.
103. *See infra* Part II.A.2.a-d.
104. *See generally* 541 F. Supp. 263 (S.D. Tex. 1982).
105. *Id.* at 264.

their games and subsequently contracted with another local radio station for their broadcasting rights.[106] The plaintiff sued under the Sherman Act, and the defendant filed a motion to dismiss, claiming that they were protected by the professional baseball antitrust exemption.[107]

The court rejected the motion to dismiss, holding that the antitrust exemption did not cover broadcasting.[108] It did so for several reasons.

First, the court noted that there is a presumption against antitrust exemptions and broad readings of antitrust exemptions, and thus where there was any doubt about whether the antitrust exemption applied, the burden was on the defendant to show that the exemption should apply.[109] The court went on to note that, given that the Supreme Court's decisions in both *Toolson* and *Flood* rested solely on *stare decisis* grounds, the antitrust exemption upheld in those cases should be construed as narrowly as possible.[110] Viewed in this light, "[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."[111] Reading the Supreme Court's reasoning to only apply to those things integrally connected to baseball and necessary for the actual performance of games, the court ruled that the professional baseball antitrust exemption did not apply to broadcasting.[112]

b. *Postema*

The Southern District of New York also construed the antitrust exemption narrowly, in *Postema v. National League*.[113] That case involved a female minor league umpire who claimed that the various professional leagues unfairly conspired to keep her out of the major leagues, and later

106. *Id.*

107. *Id.*

108. *Id.* at 264–65.

109. *Id.* at 265 n.4; *see also* Carnation Co. v. Pac. Westbound Conference, et. al., 383 U.S. 213, 218 (1965) ("We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry."). Similarly, in the case of judicially-created exceptions, "[w]e do not start with a clean slate, neatly balancing whether there should or should not be antitrust jurisdiction . . . . The burden is on defendants to demonstrate that they or their practices were intended to be exempt or immune from the broad mandate of the Act." United States v. Am. Telephone and Telegraph Co., 461 F. Supp. 1314, 1324 (D.D.C. 1978).

110. Henderson Broad Corp. v. Houston Sports Ass'n, Inc., 541 F. Supp. 263, 267 (S.D. Tex. 1982).

111. *Id.* at 269.

112. *See generally id.*

113. Postema v. Nat'l League of Prof'l Baseball Clubs, 799 F. Supp. 1475 (S.D.N.Y. 1992).

terminated her contract when it became apparent that she would not make it to the major leagues.[114] She filed a state law restraint of trade claim against the defendants, and the defendants moved for summary judgment on the grounds that this claim was precluded by the antitrust exemption.[115]

The court ruled that this was not covered by the antitrust exemption.[116] Like the court in *Henderson Broadcasting*, the court in this case read *Flood* as approving a very narrow exemption from federal antitrust laws for professional baseball. The court placed emphasis on *Flood*'s language that baseball's exemption "rests upon a recognition and acceptance of baseball's unique characteristics and needs."[117] Therefore, the court analyzed whether the employment of professional umpires was a "unique characteristic or need" of baseball.[118] The court determined that unlike players, who could damage the game if they were allowed to switch teams with impunity, there was no such valid pro-competitive argument for applying the antitrust exemption to umpires.[119]

c. *Piazza* and *Butterworth I*

The single most extensive and thorough analysis of the reach of the baseball antitrust extension was provided by Judge John R. Padova of the Eastern District of Pennsylvania in *Piazza v. Major League Baseball.*[120] That case involved an attempt by a group of investors, led by two Philadelphia residents, to buy the San Francisco Giants franchise and move it to Tampa, Florida.[121] Major League Baseball took steps to prevent them from doing so, and the would-be owners of the franchise brought suit against MLB under the Sherman Act for unlawful restraint of trade.[122] MLB filed a motion to dismiss this claim on the grounds that the federal antitrust exemption prevented the plaintiffs from bringing such a claim.

114. *Id.* at 1479.
115. *Id.* at 1486.
116. *Id.* at 1489.
117. *Id.* at 1487 (quoting Flood v. Kuhn, 407 U.S. 258, 282 (1972)).
118. *Postema*, 799 F. Supp. at 1488.
119. *Id.* at 1489 ("The Court concludes that the Defendants have not shown any reason why the baseball exemption should apply to baseball's employment relations with its umpires. Unlike the league structure or the reserve system, baseball's relations with non-players are not a unique characteristic or need of the game. Anti-competitive conduct toward umpires is not an essential part of baseball and in no way enhances its vitality or viability.").
120. *See generally* Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993).
121. *Id.* at 422.
122. *Id.* at 423–24.

The court denied the motion to dismiss on the grounds that the antitrust exemption applied only to the reserve system.[123]

The court started out by noting that all three of the Supreme Court cases involving the antitrust exemption had involved the reserve clause.[124] It also noted that the *Flood* decision contained numerous statements that indicate that the Supreme Court viewed the antitrust exemption as only applying to the reserve clause.[125]

The crux of the court's decision in *Piazza*, however, involved an in-depth discussion of the nature of stare decisis.[126] The *Flood* court explicitly repudiated the reasoning behind the antitrust exemption, calling it an "aberration"[127] and stating explicitly that "[p]rofessional baseball is a business and it is engaged in interstate commerce."[128] The *Piazza* court writes that there are two distinct elements to stare decisis.[129] There is rule stare decisis, where the court is bound by the underlying rule behind a previously decided case.[130] There is also result stare decisis, where a court is bound only by the result of the case.[131] Here, the court says that given that *Flood* explicitly overruled the reasoning underlying *Federal Baseball*, that rule stare decisis no longer applied in this context, and only result stare decisis remained.[132] Therefore, *Flood* (as interpreted by *Piazza*) demanded that lower courts follow only its result, which should be construed very narrowly—in this case, applying only to the reserve system.[133] Before the Third Circuit could hear the case and decide the issue on appeal, Major League Baseball reached a settlement with Piazza and the appeal was dropped.[134]

Meanwhile, in Florida, state Attorney General Robert Butterworth was also upset at MLB's actions, as it blocked Florida from gaining a Major League team.[135] He began serving parties with antitrust civil

123. *Id.* at 421.

124. *Id.* at 435.

125. *Piazza*, 831 F. Supp. at 435–36; *see also supra* Part I.D.

126. *Id.* at 437–38 ("Application of the doctrine of stare decisis simply permits no other way to read *Flood* than as confining the precedential value of *Federal Baseball* and *Toolson* to the precise facts there involved.").

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

128. *Id.*

129. *Piazza*, 831 F. Supp. at 437–38.

130. *Id.*

131. *Id.*

132. *Id.* at 438.

133. *Id.*

134. JEROLD J. DUQUETTE, REGULATING THE NATIONAL PASTIME: BASEBALL AND ANTITRUST 117 (1999).

135. Butterworth v. Nat'l League of Prof'l Baseball Clubs, 644 So. 2d 1021, 1022 (Fla. 1994).

investigative demands ("CIDs"), which could force them to produce documents or testimony.[136] The targets of the investigation brought an action in Florida state court to quash the CIDs on the grounds that they were immunized from an antitrust action by the antitrust exemption.[137] The lower court granted this motion, and Butterworth appealed to the Supreme Court of Florida, which decided this issue in *Butterworth v. National League*.[138]

The court overturned the lower court and allowed the CIDs to be issued.[139] The court cited *Piazza* extensively, and its analysis of the issue was virtually identical to that of the *Piazza* court.[140]

d. Others

There are several other cases that involve businesses that are somewhat attenuated from the actual business of baseball, but which may still be read as being supportive of the notion of a narrow reading of *Flood*. In *Fleer Corp. v. Topps Chewing Gum, Inc.*, the court held that the antitrust exemption did not cover an agreement between a trading card manufacturer and the players' association.[141] In *Nishimura v. Dolan*, the court did not apply the antitrust exemption to relations between a baseball team and a cable provider.[142] In *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, the Court did not apply the antitrust exemption to a dispute between a major league owner and a concessionaire.[143]

B. APPLYING THE ANTITRUST EXEMPTION BROADLY

As I stated above, the original language of *Flood* if taken by itself seems to strongly support the idea that the reach of the antitrust exemption applies only to the reserve system, and to no other actions taken by professional baseball.[144] The majority position on this issue, therefore, relies on the much broader language of *Federal Baseball* and *Toolson*,

136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 1023–25.
141. 658 F.2d 139 (3d Cir. 1981).
142. 599 F. Supp. 484 (E.D.N.Y. 1984).
143. 365 F. Supp. 235 (N.D. Cal. 1972).
144. *See generally Flood*, 407 U.S. at 258.

which were of course upheld and not explicitly narrowed in scope by *Flood*.[145]

1. Evidence for a Broad Application of the Antitrust Exemption Contained in Other Supreme Court Cases

Justice Holmes' majority opinion in *Federal Baseball* stated that that case involved "the business of giving exhibitions of baseball, which are purely state affairs."[146] In its terse opinion in *Toolson*, the Court summarized the holding of *Federal Baseball* as "that Congress had no intention of including *the business of baseball* within the scope of federal antitrust laws."[147]

In addition to *Federal Baseball* and *Toolson*, there were many other Supreme Court decisions regarding the application of federal antitrust law to other sports and industries that also generally characterized the holding of those two cases broadly. In *Shubert*, the Court denied a traveling theatrical exhibition company's claim of an antitrust exemption, writing that *Federal Baseball* "was dealing with *the business of baseball* and nothing else."[148] When the National Football League tried to claim an antitrust exemption similar to that granted to professional baseball, the *Radovich* Court wrote that "we now specifically limit the rule there established to the facts there involved, i.e., *the business of organized professional baseball*."[149]

2. Lower Courts Applying the Antitrust Exemption Broadly

a. *Finley*

The most in-depth appellate court decision dealing with this issue was the Seventh Circuit's decision in *Charles O. Finley, Inc. v. Bowie Kuhn*.[150] The case involved the controversial Oakland Athletics owner, Charlie Finley, who was attempting to sell his best players under the guise of trading them for cash.[151] Kuhn, the Commissioner, stepped in and blocked these "trades," invoking the power of the Commissioner to act "in the best

145. *Id.* at 267–68.
146. *Federal Baseball*, 259 U.S. at 208.
147. *Toolson*, 346 U.S. at 356–57 (emphasis added).
148. *Shubert*, 348 U.S. at 228 (emphasis added).
149. *Radovich*, 352 U.S. at 451 (emphasis added).
150. *See generally* 569 F.2d 527 (7th Cir. 1978).
151. The players in question were Vida Blue, Rollie Fingers, and Joe Rudi. *Id.* at 530–31.

interests of baseball."[152] This case is primarily known from a sports law perspective for its detailed, thoughtful discussion on the power of a sports commissioner, in particular, what actions the Major League Baseball Commissioner may take under the best interests clause.[153]

However, the case also involved a substantial discussion of the scope of the antitrust exemption, and whether Commissioner Kuhn, as the chief executive of Major League Baseball, was exempt from federal antitrust law when taking action regarding an owner's right to trade his own players.[154] The court concluded that he was, in fact, exempt in this regard.[155] The court relied upon the broad language of *Federal Baseball* and *Toolson*,[156] and ultimately concluded that "[d]espite the two references[157] in the *Flood* case to the reserve system, it appears clear from the entire opinions of the 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."[158]

b. *Professional Baseball Schools*

In *Professional Baseball Schools & Clubs, Inc. v. Kuhn*, the Eleventh Circuit considered a case in which the appellant owned a minor league baseball team and challenged the reserve system, the requirement that the team only play teams within its own league, and the general monopolization of professional baseball as illegal restraints on trade.[159] The lower court had dismissed this complaint, ruling that the defendant was protected by the antitrust exemption against such a suit.[160]

The appellate court upheld the decision of the lower court in a terse opinion, offering only a few sentences of explanation:

152. *See generally id.*

153. *See, e.g.*, PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 18–27 (3d ed. 1998) (treating *Finley* as the centerpiece in a Section entitled "The Legal Scope of the Commissioner's Authority").

154. *Kuhn*, 569 F.2d at 532.

155. *Id.* at 540–42.

156. *Finley*, 569 F.2d at 541. For more discussion of the referenced broad language, see *supra* notes 149–50 and accompanying text.

157. This is factually incorrect. As detailed in Part II.A.1, there are no fewer than *four* specific references to the reserve system when discussing the underlying legal rationale for the decision and the scope of the decision, plus many more references to the reserve system in the fact portions of *Flood*. *See supra* notes 97–103 and accompanying text.

158. *Finley*, 569 F.2d at 541.

159. *See generally* Prof'l Baseball Sch. & Club, Inc. v. Kuhn, 693 F.3d 1085 (11th Cir. 1982).

160. *Id.* at 1085.

> Although it may be anomalous, the exclusion of the business of baseball from the antitrust laws is well established. Each of the activities appellant alleged as violative of the antitrust laws plainly concerns matters that are an integral part of the business of baseball. The district court therefore properly dismissed the antitrust claims for want of subject matter jurisdiction.[161]

c. *New Orleans Pelicans Baseball*

When an ownership group attempted to buy an AA level minor league baseball team and move it to New Orleans in 1992, it was approved by the league's management, subject to the condition that if a team of higher classification wanted to move to New Orleans, it would prevent the original ownership group from doing so.[162] When an AAA level team decided it wanted to move to New Orleans, the would-be ownership group's deal fell through and it sued the league in the Eastern District of Louisiana.[163] The defendant filed a motion to dismiss, claiming it was protected by the antitrust exemption.[164]

The *Pelicans* court granted the motion to dismiss and did so with minimal analysis.[165] The plaintiff relied heavily on *Piazza*, but the court ruled that "[a]lthough *Piazza* presents an impressive dissent from precedent, this Court associates itself with the weight of authority."[166] The court based its decision mainly on the fact that most federal courts that had considered the issue construed *Flood* broadly and that the highest court that had considered it had also done so.[167]

d. *McCoy*

After a breakdown in labor talks led to a work stoppage that led to the cancellation of the end of the 1994 season and scheduled postseason, a group of fans and business owners who depended on spillover business from baseball games attempted to file a class action lawsuit against Major

161. *Id.* at 1085–86.

162. New Orleans Pelicans Baseball v. Nat'l Association of Professional Baseball Leagues, Inc., No. 93-253.F, 1994 U.S. Dist. LEXIS 21468 (E.D. La. Mar. 2, 1994).

163. *Id.* at *3–9.

164. *Id.* at *25–27.

165. *Id.* at *25–29.

166. *Id.* at *25; *see also id.* at *28 ("[W]hile the Court does find its reasoning impressive, it does not feel that *Piazza* warrants ignoring the strong precedent to the contrary.").

167. *Id.* at *28 ("In fact, at least one circuit court has addressed and rejected the same argument that the court in *Piazza* accepted . . . ." (citing *Kuhn*, 569 F.2d at 540–41 (7th Cir. 1978))).

League Baseball.[168] The groups alleged unfair restraints on trade, and the defendants moved to dismiss under the baseball antitrust exemption.[169] The district court for the Western District of Washington granted the motion to dismiss.[170]

The *McCoy* court, like the *Butterworth II* court (see below), relied on the fact that although Congress had been invited by the Supreme Court to overturn the trio of baseball exemption cases and had had ample opportunities, it had not done so.[171] The court also notes that the *Flood* court quoted *Toolson*'s "business of baseball" language approvingly as evidence that the exemption applies much more broadly than just the reserve clause.[172] The court concluded that the Supreme Court intended that the exemption be applied broadly, and that it would be outside of its bounds to enter a ruling contrary to that intent.[173]

e. *Minnesota Twins Partnership*

In 1997, the Minnesota Twins announced plans to relocate to North Carolina.[174] The state Attorney General, like Robert Butterworth in Florida, began issuing CIDs upon parties of interest in the matter.[175] These parties sued to have these CIDs quashed on the grounds that they were protected by the baseball antitrust exemption.[176] The district court refused to grant their motion, and the defendants appealed to the state supreme court.[177]

The state supreme court reversed the district court and ruled that the baseball antitrust exemption did cover franchise relocation.[178] While the court acknowledged the rationale offered by the *Piazza* court in narrowly applying *Flood* to the reserve clause as "intellectually attractive,"[179] it ultimately rejected it, writing that "*Piazza* ignores what *is* clear about *Flood*—that the Supreme Court had no intention of overruling *Federal Baseball* or *Toolson* despite acknowledging that professional baseball

168. McCoy v. Major League Baseball, 911 F. Supp. 454 (W.D. Wash. 1995).
169. *Id.* at 455, 458.
170. *Id.* at 455.
171. *Id.* at 457.
172. *Id.*
173. *Id.* at 458.
174. Minnesota Twins P'ship v. State, 592 N.W.2d 847 (Minn. 1999).
175. *Id.* at 849–50.
176. *Id.* at 850.
177. *Id.*
178. *Id.* at 856.
179. *Id.*

involves interstate commerce.[180] Although the facts of *Flood* deal only with baseball's reserve system, the Court's conclusion in *Flood* is unequivocal."[181]

f. *Butterworth II / Crist*

In 2001, MLB decided that it would "contract" by getting rid of two existing Major League teams.[182] One of the teams rumored to be on the list of possible contraction teams was the Tampa Bay Devil Rays. Florida Attorney General Robert Butterworth again got involved, and began serving CIDs upon MLB Commissioner Bud Selig and other parties.[183] These parties brought an action in federal court, claiming that the antitrust exemption prohibited the state Attorney General from serving them with CIDs. The district court granted their motion to dismiss.[184]

The district court forcefully rejected the narrow reading of the antitrust exemption espoused by *Piazza* and the Florida Supreme Court in *Butterworth I*.[185] It wrote that in the three Supreme Court cases involving the antitrust exemption, the Court had "never suggest[ed] in the slightest that the result turned on whether the antitrust claim at issue did or did not involve the reserve clause."[186]

The court also pointed out that *Federal Baseball* involved not only the reserve system but also allegations that the National and American Leagues had put the Federal League out of business by buying up many of the teams of that league or otherwise putting them out of business.[187] The court wrote that in *Toolson*, "the Supreme Court did not even mention [the reserve system] in its opinion, and its language gave not a hint that the applicability of the antitrust laws turned on that circumstance."[188] Instead, the Supreme Court wrote that "the business of baseball" was exempt from

180. Minnesota Twins P'ship v. State, 592 N.W.2d 847 (Minn. 1999).

181. *Id.*

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

183. *Id.*

184. *Id.* at 1316.

185. *See, e.g.*, *id.* at 1322–23 ("The Attorney General's assertion cannot be squared with the plain language and clear import of the many reported cases in this area. Nor can the Attorney General's assertion be squared with the United States Supreme Court's oft repeated rationale for continuing to recognize the exemption of the business of baseball: that any change in this long standing interpretation of the antitrust laws should come from Congress (which has let the decisions intact in relevant respects for now 79 years), not from the courts.").

186. *Id.* at 1323.

187. *Id.* at 1324.

188. *Id.*

federal antitrust law.[189] The court also emphasized that in other cases where the Supreme Court refused to exempt other similarly situated sports from federal antitrust law, it referred to *Federal Baseball* and *Toolson* as exempting "the business of baseball."[190]

The *Butterworth II* court also sharply disagreed with *Piazza*'s characterization of the *Flood* decision, writing that "[n]ot once did the Court intimate in any way that it was only the reserve clause that was exempt."[191] The court explained away *Flood*'s specific references to the reserve system by saying that the specific mention of this was only because those were the specific facts of that case, and it did not mean that other aspects of baseball were excluded, and these specific references to the reserve clause had no legal significance.[192] The court went on to catalog numerous mentions in the *Flood* opinion of "the business of baseball" or similar phrasing.[193] However, almost all of these are direct quotes of language in other opinions.[194]

The main point of the *Butterworth II* court's argument, however, is that *Flood* placed great emphasis on the fact that Congress failed to act to overturn *Federal Baseball* and *Toolson*, despite repeated opportunities to do so.[195] The court wrote that since nothing has changed in this area since *Flood*, this rationale is in fact stronger than ever, writing that "significantly, the arguments for and against having the courts, rather than Congress, make any change in this area also are the same today as they were when *Flood* was decided, except that now nearly 30 more years have passed without congressional action."[196]

In fact, Congress had done something by passing the Curt Flood Act in 1998. However, the *Butterworth II* court ruled that this did not affect their analysis because the issue presented was whether the antitrust exemption applied to the broader business of baseball.[197] As previously

189. *Id.* (quoting *Toolson*, 346 U.S. at 357).

190. United States v. Shubert, 348 U.S. 222, 228 (1955). *See also* United States v. Int'l Boxing Club, 348 U.S. 236, 242 (1955); Radovich v. Nat'l Football League, 352 U.S. 445, 451 (1957) ("We now specifically limit the rule there established to the facts there involved, i.e., the business of organized professional baseball.").

191. *Butterworth II*, 181 F. Supp. 2d at 1327.

192. *See, e.g.*, *id.* at 1327 n.11 ("In saying that baseball was left to develop on the understanding that the reserve clause was not subject to the antitrust laws, the Court did not say any other aspect of baseball was subject to the antitrust laws . . . .").

193. *Id.* at 1328.

194. *Id.*

195. *Id.* at 1330–31.

196. *Id.* at 1331.

197. *Butterworth II*, 181 F. Supp. 2d at 1331.

discussed, the court ruled that it did, and since the Curt Flood Act only applied to the labor and employment context and had nothing to do with contraction, the court ruled that Congress had still taken no action regarding the broader antitrust exemption.[198]

Another factor in the *Butterworth II* decision was the existence of *Professional Baseball Clubs* as controlling precedent.[199] The court referred to that case as "a square and binding holding of the Eleventh Circuit that the 'business of baseball,' not just the reserve clause, is exempt from the antitrust laws."[200] The fact that *Professional Baseball Clubs* was terse and contained virtually no analysis did not affect the weight given to it as precedent by the district court, which wrote that:

> Far from a reason to disregard the holding, this simply confirms that the issue was easy and the result clear; the Supreme Court had thrice resolved the matter. The instant opinion to the contrary notwithstanding, lower courts are not in the habit of writing long and detailed opinions squarely resolved by controlling decisions of higher courts; there is quite enough other work to do. And in any event, short decisions of the Eleventh Circuit are no less binding in this court than long ones.[201]

Butterworth appealed the decision to the Eleventh Circuit, which decided the case in *Major League Baseball v. Crist*.[202] For the most part, the *Crist* court simply relied approvingly on the district court's analysis in upholding the decision.[203]

III. THE CURT FLOOD ACT

A. THE TEXT OF THE ACT

In 1998, Congress passed the Curt Flood Act of 1998,[204] which states:

> It is the purpose of this legislation to state that major league baseball

198. *Id.* at 1331 n.16.

199. *Id.* at 1331–32.

200. *Id.* at 1332.

201. *Id.* at 1332, n.17.

202. Major League Baseball v. Crist, 331 F.3d 1177 (2003). The change in party names was due to the election of new Florida Attorney General, Charlie Crist.

203. *Id.* at 1181 n.10 (stating:

> Lest there be any doubt about the matter, the district court forcefully destroyed the notion that the antitrust exemption should be narrowly cabined to the reserve system. Given the persuasiveness of the district court's reasoning, in conjunction with the fact that the Attorney General no longer argues that the antitrust exemption should be so narrowly construed, we see no need to expound upon the matter.

Id.).

204. Codified at 15 U.S.C. § 26b (2002).

> players are covered under the antitrust laws (i.e., that major league baseball players will have the same rights under the antitrust laws as do other professional athletes, e.g., football and basketball players), along with a provision that makes it clear that the passage of this Act does not change the application of antitrust laws in any other context or with respect to any other person or entity.[205]

Section (b) of the Act strictly limits the interpretation of the Act beyond the employment of major league players, saying:

> No court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than those set forth in subsection (a). This section does not create, permit or imply a cause of action by which to challenge under the antitrust laws, or otherwise apply the antitrust laws to, any conduct, acts, practices, or agreements that do not directly relate to or affect employment of major league baseball players to play baseball at the major league level, including but not limited to . . . .[206]

Section (b) then goes on to list several aspects of baseball to which the Curt Flood Act does not apply, including, relevantly, Number (3):

> [A]ny conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting franchise expansion, location or relocation, franchise ownership issues, including ownership transfers, the relationship between the Office of the Commissioner and franchise owners, the marketing or sales of the entertainment product of organized professional baseball and the licensing of intellectual property rights owned or held by organized professional baseball teams individually or collectively.[207]

Number (4) provides that the Act does not apply to "any conduct, acts, practices, or agreements protected by Public Law 87-331 (15 U.S.C. Sec. 1291 et seq.) (commonly known as the 'Sports Broadcasting Act of 1961')."[208] The next relevant part of the statute is Section (d)(4), which reads that "[n]othing in this section shall be construed to affect the application to organized professional baseball of the nonstatutory labor exemption from the antitrust laws."[209] Finally, Section (d)(5) reads "[t]he

205. *Id.*
206. *Id.*
207. *Id.* (emphasis added).
208. *Id.* The Sports Broadcasting Act of 1961 is covered *infra* Part IV.B.
209. *Id.* For a more detailed discussion of the nonstatutory labor exemption, see *infra* Part IV.A.

scope of the conduct, acts, practices, or agreements covered by subsection (b) shall not be strictly or narrowly construed."[210]

B. LEGISLATIVE HISTORY

The legislative history of the Act also supports the notion that the Act should not be read as acknowledging an exception for any of the activities listed in Part (b).[211] It is true that there are countless statements in the record made by Senators and Representatives that would support the assertion that the antitrust exemption is widely understood to apply to the entire business of baseball.[212] However, a closer examination of the legislative history shows that, as the text indicates, the drafters of the Curt Flood Act expressed the clear intention that it did not affect or express any sort of Congressional intent whatsoever with regard to the application or non-application of the exemption to the broader business of baseball.[213]

The Committee Report certainly makes it clear that it does not view the antitrust exemption, as it applies or does not apply to any aspect of baseball other than employment negotiations between major league players and team owners, to be affected at all by the Curt Flood Act. The Report explicitly states that "[a]s the bill expressly provides, it is not intended to affect the applicability or inapplicability of the antitrust laws in any other manner or context."[214] It goes on to explain that "[t]he specific areas listed in the four subparts of new subsection 27(b) are intended to be merely illustrative of the areas and/or issues as to which the law remains unchanged by this bill."[215]

This understanding of the bill was also made clear during the floor debate on the bill. Particularly illustrative is the following exchange, which took place on the floor of the Senate between Senator Paul Wellstone of Minnesota, Senator Orrin Hatch of Utah (the Chairman of the Judiciary Committee whose office issued the Committee Report on the bill and a co-

210. § 26b(d)(5).

211. S. Rep. No. 105-118 at 6 (1997).

212. *See, e.g.*, 139 CONG. REC. S2417 (daily ed. Mar. 4, 1993) (statement of Sen. Metzenbaum) ("The question is whether there is some overriding policy reason to continue to allow baseball to be totally exempt from the antitrust laws."); 140 CONG. REC. S10501 (daily ed. Aug. 3, 1994) (statement of Sen. Specter) ("Baseball is the one business, the only business, which does not have to abide by the antitrust laws of this country."); 142 CONG. REC. E42 (daily ed. Jan. 5, 1995) (statement of Rep. Conyers) ("Professional baseball is the only industry in the United States that is exempt from the antitrust laws without being subject to alternative regulatory supervision.").

213. S. Rep. No. 105-118 at 6 (1997).

214. *Id.* at 2.

215. *Id.* at 6.

sponsor of the bill) and Senator Patrick Leahy of Vermont (another member of the Judiciary Committee and co-sponsor):

> WELLSTONE: I also note that several lower courts have recently found that baseball currently enjoys only a narrow exemption from antitrust laws and that this exemption applies only to the reserve system. For example, the Florida Supreme Court in Butterworth v. National League, 644 So.2d 1021 (Fla. 1994), the U.S. District Court in Pennsylvania in Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993) and a Minnesota State court in a case involving the Twins have all held the baseball exemption from antitrust laws is now limited only to the reserve system. It is my understanding that S.53 will have no effect on the courts' ultimate resolution of the scope of the antitrust exemption on matters beyond those related to owner-player relations at the major league level.
>
> HATCH: That is correct. S.53 is 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.*
>
> LEAHY: I concur with the statement of the Chairman of the Committee.[216]

Hatch made several other statements on the Senate floor to the same effect, such as:

> This amendment . . . is absolutely neutral with respect to the state of the antitrust laws between all entities and in all circumstances other than in the area of employment as between major league owners and players. *Whatever the law was the day before this bill passes it will continue to be after the bill passes.*[217]

This understanding of the Curt Flood Act is also supported by President Clinton's signing statement, which stated that "[t]he Act in no way codifies or extends the baseball exemption . . . ."[218]

Overall, it seems very clear that (a) the Curt Flood Act explicitly applies federal antitrust laws to any surviving remnants of the reserve system, and (b) the Curt Flood Act does not alter the application or non-application of federal antitrust law to any other area of Major League

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216. 145 CONG. REC. S9621 (daily ed. July 31, 1998) (statements of Sens. Wellstone, Hatch, & Leahy) (emphasis added).

217. *See* 145 CONG. REC. S9496 (daily ed. July 30, 1998) (statement of Sen. Hatch) (emphasis added). *See also* 145 CONG. REC. S9497 (daily ed. July 30, 1998) (statement of Sen. Hatch) ("In other words, with respect to areas set forth in subsection (b), *whatever the law was before the enactment of this legislation, it is unchanged by the passage of the legislation.*") (emphasis added).

218. Statement on Signing the Curt Flood Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2150 (Oct. 27, 1998).

Baseball.[219] Neither the text nor the legislative history of the Act offers any evidence to support any sort of Congressional intent to change existing case law on the subject.[220]

Given that it did not change the application of antitrust law to baseball generally, and that the antitrust exemption with regard to the reserve clause and labor relations between players and management had already been rendered irrelevant by arbitration decisions, collective bargaining, and the nonstatutory labor exemption,[221] it seems safe to say that for all the time and effort spent passing the Act, it had little (if any) practical effect on the application of federal antitrust law to baseball.[222]

C. POPULAR MISCONCEPTIONS ABOUT THE STATUTE

However, some have erroneously argued that by explicitly mentioning "the marketing or sales of the entertainment product of organized professional baseball and the licensing of intellectual property rights owned or held by organized professional baseball teams individually or collectively,"[223] that Congress was acknowledging that these areas are, in fact, exempt from federal antitrust law.[224]

The most notable example of this is Professor Edmund Edmonds in a 1999 article.[225] The reason this is so notable is because Edmonds himself co-edited the three-volume compilation of the legislative history of the Curt

219. *Id.*

220. Far from being an "imaginative" reading of the statute, as Professor Edmonds asserts below (see *infra* note 227 and accompanying text), this is a well-accepted reading of the Act in the academic community. *See, e.g.*, ESKRIDGE ET. AL, *supra* note 75, at 612 (writing that the Act was "drafted to avoid any application of the antitrust laws to such matters as franchise relocation and the treatment of minor-league players, it is not clear that the statute changed the law in general . . . .").

221. The nonstatutory labor exemption is explained later and in more detail. *See infra* Part IV.A.

222. *See, e.g.*, ESKRIDGE ET AL., *supra* note 75, at 612 ("[I]t is not clear that the statute changed the law in general or, in particular, provides any rights to players that they had not already achieved through collective bargaining."); Edmund P. Edmonds, *The Curt Flood of Act of 1998: A Hollow Gesture After All These Years?*, 9 MARQ. SPORTS L.J. 315, 317 (1999) ("Although the legislation was hailed as significant by numerous Congressmen, one must ask whether this act is anything more than a hollow gesture to the memory of Curt Flood.").

223. Curt Flood Act, 15 U.S.C. § 27(b)(3) (1998).

224. *See also* J. Philip Calabrese, *Recent Legislation: Antitrust and Baseball*, 36 HARV. J. ON LEGIS. 531, 544–45 (1999) ("[T]he Act codifies a fairly broad antitrust immunity for the game and interrupts the judiciary's most recent reexamination of the issue.").

225. Edmonds, *supra* note 225.

Flood Act,[226] which makes his misunderstanding of the Act that much more surprising. Edmonds writes that:

> Congress has tried to foreclose any reliance on these three decisions [referring to *Piazza*, *Butterworth I*, and *Postema*] attempting to narrow the scope of the exemption and to reinforce the analysis presented in *Pelicans* and *Twins*. However, the nature of the language of the Act provides a slight crack in the otherwise air-tight nature of the legislation for an imaginative judge like John Padova [the judge who authored the *Piazza* opinion] to argue that the language of the statute must conform with the reality that the exemption has already been reduced to covering only the reserve clause. Major League Baseball and its supporters will certainly argue that such a reading goes against the meaning and intent of the legislators passing this statute. Furthermore, such a reading would defeat the meaning of all of the language in section three of the act.[227]

But if this is true, Congress could have simply stated explicitly that areas like intellectual property, franchise relocation, expansion, and any other aspects of baseball mentioned in Section (b)(3) of the Act[228] were exempt from federal antitrust law. From the actual language of the statute, it is completely unclear from where Edmonds draws the conclusion that Congress "has tried to foreclose any reliance" on the decisions of courts that have applied baseball's antitrust exemption narrowly.[229] As shown previously, the legislative intent was to intentionally leave court decisions such as the three that Edmonds refers to totally untouched.[230] This means that Edmonds' reading of "the meaning of the language in section three" of the statute, as well as the reading he ascribes to "Major League Baseball and its supporters," is precisely wrong and at odds with Congress's actual intent in drafting that section.[231] While interpreting statutes is undoubtedly an area of the law that lends itself to a certain amount of creativity, it is an odd approach to statutory interpretation to ignore both the text and legislative history of a law.

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226. BASEBALL AND ANTITRUST: THE LEGISLATIVE HISTORY OF THE CURT FLOOD ACT OF 1998 (Edmund P. Edmonds and William H. Manz eds., 2001).

227. Edmonds, *supra* note 225, at 323. Professor Edmonds also writes:

> Three particular provisions under subsection (d) bear mentioning. The first contained within subsection (d)(2) reiterating that only employment issues within Major League Baseball are subject to subsection (a). This provision presumably limits the impact of decisions like *Piazza* and *Butterworth* that tried to alter the long-standing position that the exemption applied to all aspects of the business of baseball.

Id. at 326.

228. Section (b)(3) of the Curt Flood Act is reprinted in its entirety earlier in the paper. *See supra* note 210 and accompanying text.

229. Edmunds, *supra* note 225, at 323.

230. *See supra* notes 217–21 and accompanying text.

231. Edmunds, *supra* note 225, at 323.

IV. OTHER LAWS AFFECTING BASEBALL'S ANTITRUST EXEMPTION

A. THE NONSTATUTORY LABOR EXEMPTION

While this paper mainly focuses on the specific judicially created antitrust exemption for baseball, it also definitely bears pointing out that relations between players and owners are now governed almost exclusively by the nonstatutory labor exemption, not antitrust law.[232] The nonstatutory labor exemption basically provides that where a restraint on trade essentially only affects the two parties (i.e., union and management) who are in a collective bargaining relationship where each side has relatively equal leverage, they may enter into restraints of trade that do not trigger some sort of compelling governmental interest.[233] The nonstatutory labor exemption was first used by the Court in 1965,[234] and it was based on the fact under the National Labor Relations Act, Congress had expressed a preference for labor disputes to be resolved through collective bargaining.[235] To honor Congress's wishes, therefore, a certain amount of collective, anticompetitive activity was sometimes necessary and should not be subject to federal antitrust regulation. While the *Flood* Court did not deal with the nonstatutory labor exemption implications of Curt Flood's situation (although Justice Marshall did address the issue in his dissent),[236] the growth in power of the players' union as well as the specific reference to the nonstatutory labor exemption in the Curt Flood Act[237] would require any court hearing such a case today to address the issue.[238]

For example, there are definitely portions of the current collective bargaining agreement that constitute restraints of trade and are vaguely reminiscent of the reserve system.[239] For the first three years on a Major

232. Federal Baseball Club of Baltimore v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 207–09 (1922).

233. For a good explanation of the nonstatutory labor exemption, its requirements, and its application to the professional sports context, see Mackey v. Nat'l Football League, 543 F.2d 606, 688 (8th Cir. 1976).

234. Meat Cutters v. Jewel Tea, 381 U.S. 676 (1965).

235. Codified at 29 U.S.C. § 151 (1935).

236. *Flood*, 407 U.S. at 293–95 (Marshall, J., dissenting).

237. *See supra* note 212 and accompanying text.

238. For a thorough (if dated) account of how prevalent the nonstatutory labor exemption has become with regard to sports labor matters, see Kieran M. Corcoran, Note, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045 (1994).

239. MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION COLLECTIVE BARGAINING AGREEMENT (2007), *available at* http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf.

League roster, a player's rights are unconditionally owned by his team, and he makes the league minimum or close to it, regardless of his level of production.[240] Some of the biggest bargains in baseball, in terms of level of production to salary, are found in young players within this three year window.[241] In the three years following the initial three years, the teams still own the rights to the players, but the players may at this point in their careers seek arbitration, although the arbitration system is set up so that only in the last of these three years does the player actually make close to their market value.[242] So while it is certainly tempting to wave away the reserve system as a relic of Major League Baseball's past, the reality is that a majority of current players play their entire career or almost their entire career (a) with one team controlling their rights, and (b) making less money than they could make if they were able to freely market themselves to all other teams.[243] While no one would argue the fact that these players are still much better off under the new system, it is similarly beyond argument that they would be better off still if they were not subject to this restraint of trade.

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240. *Id.*

241. Minnesota Twins first baseman Justin Morneau, in his third year in the Major Leagues, won the 2006 American League Most Valuable Player Award, and made only $385,000. 2006 Minnesota Twins Statistics and Roster, *available at* www.baseball-reference.com/teams/MIN/2006.shtml (last visited Mar. 1, 2008). Meanwhile, Philadelphia Phillies first baseman Ryan Howard, in just his second year in the Major Leagues, won the 2006 National League Most Valuable Player Award, making only $355,000. 2006 Philadelphia Phillies Statistics and Roster, *available at* www.baseball-reference.com/teams/PHI/2006.shtml (last visited Mar. 1, 2008). This means that the best players in each league made roughly 1/7 of the league average salary, which was $2.6 million in 2006. Associated Press, *Average MLB Salary a Record $2.6 Million*, MSNBC.COM, Apr. 7, 2005, http://www.msnbc.msn.com/id/7409653/.

242. *See* Corcoran, *supra* note 241.

243. Making a statement like this is obviously complicated by the quixotic task of trying to determine exactly how long the average Major League player stays in the Majors. The best research I could find on the subject was done by baseball researcher Dan Fox, which found that of all players in MLB history, 53% had careers of four years or less, and 74% had careers of eight years or less. Of course, that sort of broad historical data may not be the most informative. Fox also charted the average length of career by year of debut, and found that the general trend was that this number has been rising as time goes on, and for players who debuted in 1986, it crested at 8.2 years. This should not be read as saying that average career length has been going down since then, it is just that the data gets progressively less and less meaningful, since many players who have debuted since the mid-1980s are still playing, thus rendering the data incomplete. However, it seems fairly safe to say that the average current career length is somewhere in the 7.5–9 year range. And given that many star players routinely play for 15–20 years, the distribution of career length could well be right-tailed to the point where the median career length is much closer to 6 years, which is the magic year for being able to test the waters of free agency. Dan Fox, "Career Length Musings," *available at* http://danagonistes.blogspot.com/2006/07/career-length-musings.html.

However, even if the Curt Flood Act had not been passed, these players would still not be able to bring a federal antitrust claim against MLB. This is because courts apply the nonstatutory labor exemption to the relationship between MLB owners and the players union and allow them to set their own policies in this regard.[244] As one Sports Law casebook puts it:

> It is now inevitable that unionized professional athletes who seek to challenge restraints upon player mobility (or similar restraints) through antitrust will have no alternative but to decertify their bargaining representative and terminate the collective bargaining relationship.[245]

In the case of younger Major League players, it is generally acknowledged that allowing their teams to pay them below market value is good for the sport.[246] This is because there is such a wide range of income disparity and concurrent payroll disparity among MLB teams.[247] Providing incentives to teams to draft and develop the best young players has given many smaller and middle market teams an avenue by which to remain competitive. Without this system in place, the argument goes, the larger market teams could simply steal the best young talent from teams with less money after one year, and the fan bases of all but the richest teams would lose all hope of ever contending, making Major League Baseball only a viable enterprise in the largest markets.[248] Since making sure that every

244. The dominant case in this area is Brown v. Pro Football, Inc., 518 U.S. 231 (1996), in which the NFL Players' union was challenging the unilateral imposition of fixed salaries upon first and second year players on developmental squads that were inactive for games. In the opinion, the Court ruled that since this was the subject of collective bargaining between owners and players, antitrust law should not apply. *Id.* The seminal case in this area, however, and one on which the Court's decision in *Brown* seems substantially based upon, is Nat'l Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995). That opinion was written by Judge Ralph Winter, who also co-authored a landmark article on the subject of the application of antitrust law to sports. Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971). In *Williams*, Winter noted that an owners-players relationship is a fairly typical multiemployer bargaining scenario of the kind that has existed without legal disturbance for decades. To hold that owners could not collectively bargain with players "would disrupt collective bargaining as we know it." *Williams*, 45 F.3d at 693.

245. MICHAEL J. COZZILLIO & MARK S. LEVINSTEIN, SPORTS LAW: CASES AND MATERIALS 415 (1997).

246. Timothy Moreland, *Are Baseball Players Paid Too Much?*, HELIUM, *available at* http://helium.com/tm/154172/imagine-which-employees-could (last visited Mar. 1, 2008).

247. In 2006, the New York Yankees, the team with the highest payroll ($194,663,079), paid their players almost thirteen times as much as the Florida Marlins, the team with the lowest payroll ($14,998,500). 2006 MLB Team Payrolls, *available at* www.onestopbaseball.com/TeamPayroll.asp (last visited Mar. 1, 2008).

248. However, a cynic may point out that the fact that union leadership is comprised almost exclusively of veteran players who are already into their free agency years and would have their market leverage suddenly diminished if younger players were eligible for free agency may also have something to do with the current rules.

team has the ability to be competitive is necessary for the overall success of the league, the players have agreed to the current system in collective bargaining negotiations.[249] Because of this, the nonstatutory labor exemption would prevent a player from challenging this regime under federal antitrust law even if the Curt Flood Act did not prevent him from doing so.

B. THE SPORTS BROADCASTING ACT

Until 1961, it had been a violation of federal antitrust law for all franchises in a major professional sports league to negotiate together or set a uniform policy for individual franchises with a television or radio broadcast company.[250] However, such a policy was extremely problematic for leagues, for a couple of reasons. First and foremost, it caused a sort of prisoner's dilemma among the franchises—it would be in the best interests of all franchises to negotiate together and get the highest price for the entire league, but given that any such pact was legally unenforceable, it would be better for an individual franchise to strike its own broadcasting deals at lower prices.[251] Just as importantly, professional leagues wanted to market their products nationally, and to do so effectively, each league would want to make sure that the best match-ups, as well as the best teams and best individual players, were able to be regularly viewed or heard by people across the nation.[252] To remedy this problem, Congress passed the Sports Broadcasting Act of 1961, which provided:

> The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs . . . sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey as the case may be, engaged in or conducted by such clubs.[253]

This Act allowed all the major professional sports leagues to sign major deals with networks for their national broadcasting rights.[254] Since

249. MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, MLBPA INFO., *available at* http://mlbplayers.mlb.com/pa/info/faq.isp#mlbpa.

250. *See, e.g.*, United States v. Nat'l Football League, 116 F.Supp. 319 (E.D. Pa. 1953) (holding that it was a Sherman Act violation for the NFL to institute a policy that disallowed franchises from signing agreements that would allow them to broadcast their games into the home media markets of other franchises).

251. *See generally id.*

252. *Id.*

253. 15 U.S.C. § 1291 (2006).

254. *See generally* Lacie L. Kaiser, *Revisiting the Sports Broadcasting Act of 1961: A Call for*

the advent of cable television, all four major professional sports leagues have also signed supplementary deals with various cable channels.[255] Most recently, the four leagues have entered into agreements with satellite providers such as DirecTV and/or digital cable providers to enable consumers to pay a flat annual fee and have access to the original or local broadcast version of every single game in the league.[256] This allows consumers who are devoted fans of the league to choose which game they would like to watch but mostly allows fans of a specific team who do not live within that team's local broadcast market to still see all of that team's games.

However, there is some question as to whether these agreements are protected by the Sports Broadcasting Act, since it specifically applies only to "sponsored telecasting," and agreements such as this are funded directly with the fees paid by the consumer.[257] A group of consumers brought a class action suit against the National Football League, claiming that the NFL's agreement with DirecTV was not covered by the Sports Broadcasting Act, and therefore fans ought to be able to contract to get all of a specific team's games without having to pay for all games in the entire league.[258] The Third Circuit rejected the NFL's motion to dismiss, saying that the Sports Broadcasting Act did not cover this agreement,[259] and the NFL settled the case soon thereafter.[260]

Given that this case was not ultimately resolved, it remains unclear exactly how far the Sports Broadcasting Act extends and exactly which types of broadcasting contracts are covered by the Act. But this is one area which we can definitively state that Major League Baseball is exempt from federal antitrust law, although as the NFL's example shows, there are definitely still questions about exactly how broadly the Act applies and what types of broadcast contracts it covers.[261]

V. POLICY RATIONALES FOR THE ANTITRUST EXEMPTION

One issue that should be addressed is whether there is any compelling policy reason for MLB to be exempt from antitrust law. Unsurprisingly,

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Equitable Antitrust Immunity from Section One of the Sherman Act for All Professional Sports Leagues, 54 DEPAUL L. REV. 127 (2005).

255. *Id.* at 1239.

256. *Id.* at 1236–66.

257. *See* Shaw v. Dallas Cowboys, et al., 172 F.3d 299 (3d Cir. 1999).

258. *See generally id.*

259. *Id.* at 301–03.

260. Kaiser, *supra* note 257, at 1249–50.

261. *See Shaw*, 172 F.3d 299.

MLB still claims that there is.[262] In testimony in front of the Antitrust Subcommittee in 1994, interim commissioner Allan "Bud" Selig strongly advocated the position that MLB was unique among sports and did, in fact, need to be exempt from federal antitrust law.[263] Selig focused on the fact that MLB needed to be exempt from antitrust law so that, unlike the NFL and other major professional sports leagues,[264] it could control franchise relocation to preserve the best interests of the game.[265] If the MLB antitrust exemption were revoked, Selig claimed, it would be "inevitable that the most immediate consequence would be that a number of teams in small markets would attempt to abandon some of MLB's existing cities for what they perceive as better economic conditions elsewhere."[266] Because of the MLB antitrust exemption, Selig stated, "I am extremely proud of MLB's record on franchise stability. Because MLB's internal governance decisions have not been subjected to the antitrust laws, MLB has the best record of the professional sports in the area of franchise stability."[267]

However, a close examination of the facts shows that Selig was dramatically oversimplifying the relationship between the antitrust exemption and franchise instability.[268] The truth, some commentators argue, is that the exemption actually has a negligible effect on MLB's ability and willingness to exercise its veto power over franchise relocations.[269] When one looks at the facts behind the franchise relocations and expansions from 1953, though, a pattern starts to emerge: if MLB tries to exercise its veto power, the local constituency of the would-be new site of the team gets irate enough that the legislature steps in and starts to threaten to revoke the antitrust exemption, and MLB, not wanting to lose the exemption, relents and allows the relocation.[270] So essentially, every

262. Allan Selig, *Congressional Hearing: Major League Baseball and Its Antitrust Exemption*, 4 SETON HALL J. SPORT L. 277 (1994) (this article is an edited transcript of Selig's testimony in front of the Committee).

263. *Id. See also* Thomas R. Hurst & Jeffrey M. McFarland, *The Effect of the Repeal of the Baseball Antitrust Exemption on Franchise Relocation*, 8 DEPAUL-LCA J. ART & ENT. L. & POL'Y 263 (1998) (arguing that MLB's ability to control franchise relocation to the extent that other major professional sports cannot is the most important practical effect of the exemption).

264. For more information on the NFL's inability to control franchise relocation without violating antitrust law, see *infra* note 339 and accompanying text.

265. Selig, *supra* note 265, at 280–81.

266. *Id.* at 283.

267. *Id.* at 282.

268. Mitchell Nathanson, *The Irrelevance of Baseball's Antitrust Exemption: A Historical Review*, 58 RUTGERS L. REV. 1, 23–24 (2005).

269. *Id.* at 23.

270. *Id.* at 25–43 (detailing eight separate occurrences, although in fairness, in the most recent incident of this type, MLB did not technically relent and did block the relocation of the San Francisco Giants to Tampa (this was the issue in *Piazza* and *Butterworth I*). However, they did

time a franchise relocation has been particularly contentious, MLB has felt sufficiently threatened by the possibility of losing its antitrust exemption that it refrains from engaging in a restraint of trade.[271] Or, as one commentator puts it, "it should be noted that in its zeal to protect the exemption and reserve clause, it bargained away much of the power these tools supposedly gave it."[272] So in practice, then, it seems that while MLB technically has the power to block a team from relocating, these situations typically lead to enough legislative pressure on MLB that it refrains from doing so.

Another area of concern is what impact removing the antitrust exemption would have on the minor league system and amateur draft.[273] Minor league player contracts are restraints of trade in that players are subject to the reserve system for a number of years and are not free to market themselves to other organizations.[274] The system of minor league teams being affiliated with MLB franchises, and therefore only able to employ players that are under contract with those franchises, could also conceivably be challenged.

However, I do not believe that the minor league system would be seriously threatened by the lack of an antitrust exemption. It would depend on how the exemption was formally removed. If, for example, the Supreme Court or a consensus of lower courts agreed with the *Piazza* analysis, that the antitrust exemption only applied to the reserve clause, then the exemption with regard to minor league players' reserve clauses would not be eliminated, as the Curt Flood Act very specifically only applied to MLB players.[275] Even if minor league labor relations were subject to federal antitrust law, courts would likely still subject the system to a "rule of reason" analysis, which would mean an inquiry into whether the anticompetitive actions were outweighed by pro-competitive benefits.[276] In this case, it would seem that baseball would have a strong case that allowing teams to draft and develop their own young minor-league talent gives small and mid-market teams a better chance to compete with the large-market teams with much larger payrolls, and competitive balance

award Tampa an expansion team shortly thereafter, in part to pacify local interests and Congress.).

271. *Id.*

272. *Id.* at 40.

273. *See* ANDREW ZIMBALIST, MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND PUBLIC POLICY 25 (2003).

274. *Id.* at 25.

275. *See supra* note 207 and accompanying text.

276. Hurst, *supra* note 266, at 273.

benefits the league and the public as a whole. It is also the case that minor league baseball exists in enough places and would be a popular enough cause that it seems fairly certain that, if a court applied antitrust law to the minor leagues in a way that threatened their existence, enough legislators would swoop in and make sure that this did not happen. Finally, if the minor leagues were not exempt from antitrust regulation, they would in all probability simply adapt to the change in circumstances—there are currently multiple financially stable independent leagues that are not affiliated with MLB.[277]

Overall, one need only look to other sports to see exactly how important being exempt from antitrust law is for baseball's continued vitality.[278] Quite simply, football and basketball have not only managed to survive while being subject to antitrust regulation, but both have grown tremendously, particularly relative to baseball, over the past few decades.[279] There does not seem to be any material distinction between baseball and other sports that would explain why it would not be able to adapt and continue to thrive if subjected to federal antitrust law.

VI. LOOKING AHEAD

So what are the chances that either the Supreme Court would: (a) reconsider baseball's antitrust exemption and affirmatively rule that it does not, in fact, exist; (b) rule that a broad antitrust exemption did exist and overrule *Flood* anyway; or (c) Congress would pass a law to similar effect? Better than one might think, actually, in light of several recent developments.

A. THE EROSION OF THE POSITIVE INACTION DOCTRINE[280]

For one thing, the "positive inaction" doctrine, which formed the basis for the *Flood* court's decision,[281] has come under criticism both from

277. ZIMBALIST, *supra* note 276, at 26.

278. *See* Kathleen Turland, *Major League Baseball and Antitrust: Bottom of the Ninth, Bases Loaded, Two Outs, Full Count, and Congress Takes a Swing*, 45 SYRACUSE L. REV. 1329 (1995).

279. *Id.* at 1382.

280. *See* Morgen A. Sullivan, Note, *"A Derelict in the Stream of Law": Overruling Baseball's Antitrust Exemption*, 48 DUKE L.J. 1265, 1276–87 (1999) (providing a more thorough analysis of the positive inaction doctrine and how it relates to baseball's antitrust exemption).

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

commentators and from the Court itself in the years since *Flood* was decided.

In a 1989 civil rights case, the Court wrote that while *stare decisis* consideration is generally stronger in statutory as opposed to constitutional interpretations, "[i]t does not follow, however, that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it."[282] In 1990, the Court wrote that "[c]ongressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'"[283] The sentiment expressed in these two opinions is starkly at odds with the basis of the *Flood* opinion and shows a Court with a different take on the use of the failure of Congress to act as a reason to uphold a previous statutory interpretation.[284]

The most significant case in this area, however, is *State Oil Co. v. Khan*.[285] In this case, the Court held that the use of the positive inaction doctrine to justify upholding a past interpretation that the Court no longer agreed with should be particularly minimized in the field of antitrust law.[286] The Court stated that:

> In the area of antitrust law, there is a competing interest, well represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience. Thus, the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.[287]

Just as it reasoned that the importance of positive inaction should be minimized in antitrust cases, the *Khan* Court also took the view that *stare decisis* should be similarly limited:

> *Stare decisis* is not an inexorable command, particularly in the area of antitrust law, where there is a competing interest in recognizing and adapting to changed circumstances and the lessons of accumulated experience. Accordingly, this Court has reconsidered its decisions

282. Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989).

283. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (quoting United States v. Wise, 370 U.S. 405, 411 (1962)).

284. *Compare Patterson*, 491 U.S. at 175 n.1 (explaining that *stare decisis* considerations are stronger in statutory interpretation as opposed to constitutional) *with Pension Benefit Guar. Corp.*, 496 U.S. at 650 (explaining the problems with inferences drawn from congressional in action), *and Flood*, 407 U.S. at 284 (saying that baseball's exemption from antitrust laws has been agreed to by Congress and is entitled to *stare decisis*).

285. State Oil Co. v. Kahn, 522 U.S. 3 (1997).

286. *Id.* at 4, 20.

287. *Id.* at 20 (quoting Nat'l Soc. of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978).

> construing the Sherman Act where, as here, the theoretical underpinnings of those decisions are called into serious question. Because *Albrecht* has been widely criticized since its inception, and the views underlying it have been eroded by this Court's precedent, there is not much of that decision to salvage.[288]

Members of the academic community have also been critical of the Court's use of positive inaction in response to statutory interpretation as proof of Congressional acquiescence to that interpretation.[289]

Of particular note is an article by leading statutory interpretation expert William N. Eskridge, Jr. analyzing this phenomenon.[290] One problem Eskridge notes with the doctrine is that while "[i]n a long line of cases, the Supreme Court has held that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one,'"[291] this is precisely what the Court is doing in cases like *Flood*. Should it, in fact, matter that later Congresses may not act to overturn a court decision interpreting a law passed by an earlier Congress? Shouldn't the real question be about the original enacting Congress' intent?

Eskridge also notes that the Court also has generally been very skeptical of the use of subsequent legislative history in statutory interpretation, as it has not jumped over the normal hurdles required of a statute (passage by both houses of Congress, presidential ratification, etc.), which were constitutionally designed to ensure that statutes truly represented the will of the people.[292] Given that even nonbinding resolutions passed by one or both houses are not entitled to weight in statutory interpretation, Eskridge asks, "[i]f subsequent legislative statements directly supporting a statutory interpretation are not valid evidence, how can subsequent legislative silence, usually just indirectly supporting a statutory interpretation, be considered any more authoritative?"[293]

Eskridge's final criticism of the use of positive inaction in statutory interpretation is more realistic than theoretical.[294] Eskridge looks into

288. *State Oil Co.*, 522 U.S. at 4 (citations omitted).

289. *See, e.g.*, John C. Grabow, *Congressional Silence and Search for Legislative Intent: A Venture into "Speculative Unrealities*, 64 B.U. L. REV. 737 (1985); Laurence H. Tribe, Commentary, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 74 n.17 (Amy Gutman, ed., Princeton University Press 1998) (1997).

290. William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988).

291. *Id.* at 95 (quoting Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980) (quoting United States v. Price, 361 U.S. 304, 313 (1960))).

292. ESKRIDGE, *supra* note 75, at 96.

293. *Id.*

294. *Id.* at 98.

several prominent Supreme Court cases which have used positive inaction to justify upholding a previous statutory interpretation (including, notably, *Flood*) and then researches the failed legislative action that those Courts rely upon, and concludes that "legislative inaction rarely tells us much about relevant legislative intent."[295] Going through the specific evidence in *Flood*, Eskridge finds that the proposed laws in question (both of which passed one house of Congress) would have expanded baseball's antitrust exemption to all athletic activities.[296] But Eskridge notes that equally plausible explanations for this would be if legislators disagreed with exempting sports from antitrust law entirely, were indifferent to the entire subject, or members of the approving chamber passed the bill for public relations reasons, knowing that the other chamber would not go along.[297] Given these alternate plausible explanations, one sees the problem with the *Flood* Court's reliance on this as evidence that Congress agreed with the *Federal Baseball* and *Toolson* decisions.[298]

B. SIGNIFICANT CHANGES IN THE SUPREME COURT'S PERSONNEL AND JURISPRUDENCE

Related to the increased criticism of the positive inaction doctrine is a dramatic shift in the composition of the Supreme Court.[299] Of course, it goes without saying that in the thirty-five years since the *Flood* decision was issued there has been total turnover on the Court.[300] But this turnover is particularly relevant to the issue of baseball's antitrust exemption because many of the current justices have given signs that their respective legal philosophies would be skeptical of upholding *Flood* should it ever be granted certiorari again.[301] It is undeniable that the Supreme Court today

295. *Id.* at 94.

296. *Id.* at 99.

297. Eskridge, *supra* note 75, at 100.

298. *Id.*

299. *See generally* Megan McArdle, *How Conservative is the Supreme Court? How Deep is the Ocean? How High is the Sky?*, THE ATLANTIC, Sept. 19, 2007, *available at* http://meganmcardle.theatlantic.com/archives/2007/09/how_conservative_is_the_suprem.php (discussing the Supreme Court's conservative nature and continuing trend in that direction). *See, e.g.*, Gonzalez v. Raich, 545 U.S. 1, 57–74 (Thomas, J., dissenting) (showing a willingness to overturn precedent); Hillside Dairy, Inc. v. Lyons, 539 U.S. 59, 68 (2003) (Thomas, J., dissenting) (showing a willingness to overturn precedent); Johnson v. Transp. Agency, Santa Clara County, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting) (revealing Scalia's criticism of statutory interpretation).

300. *See generally* McArdle, *supra* note 302.

301. *See generally Raich*, 545 U.S. at 58–74 (Thomas, J., dissenting) (showing a willingness to overturn precedent); *Hillside Dairy, Inc.*, 539 U.S. at 68 (Thomas, J., dissenting) (showing a

has a much more conservative slant than did the Court that decided *Flood*.[302] And while individual Justices do, of course, have very different views on all legal subjects, many of the more conservative jurists on the Court are skeptical of the use of Congressional inaction and stare decisis to avoid overruling past statutory interpretations that now seem incorrect.[303]

First and foremost among these Justices is Antonin Scalia, who has been a thoughtful and outspoken critic of many of the tools the Court uses in statutory interpretation.[304] Scalia criticized the idea that Congressional inaction should be interpreted as acquiescence in a 1987 dissent in which he wrote that, "[t]his assumption, which frequently haunts our opinions, should be put to rest. It is based, to begin with, on the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant."[305] Scalia went on to point out that the Court actually had no way of knowing what the failure of Congress to act in response to a matter of interpretation meant:

> [I]t [is] impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.[306]

Scalia famously concludes his discussion by writing "I think we should admit that vindication by congressional inaction is a canard."[307] With regard to stare decisis, Scalia has explicitly acknowledged its importance by noting that it is a "pragmatic exception" to originalism, of which he is famously a strong proponent.[308] However, he has shown a willingness to overrule past Court decisions when he feels that they were

willingness to overturn precedent); *Johnson*, 480 U.S. at 671 (Scalia, J., dissenting) (revealing Scalia's criticism of statutory interpretation).

302. McArdle, *supra* note 302.

303. *See, e.g.*, *supra* note 304.

304. *Johnson*, 480 U.S. at 671 (Scalia, J., dissenting) (revealing Scalia's criticism of statutory interpretation).

305. *Id.*

306. *Id.* at 672; *see also* Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 262 (1987) (Scalia, J., concurring in part and dissenting in part) (writing that Congressional inaction is "[t]he least possible theoretical justification of all" and that "[t]here is no conceivable reason why congressional inaction" should form the basis of upholding an otherwise faulty past statutory interpretation).

307. *Johnson*, 480 U.S. at 672 (Scalia, J., dissenting).

308. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 140 (Amy Gutman ed., Princeton University Press 1998) (1997).

clearly wrongly decided, in areas ranging from abortion law[309] to criminal procedure.[310]

Like Justice Scalia, Justice Clarence Thomas has also been outspoken in his reservations about the Court's use of lack of congressional action in response to a statutory decision as evidence of congressional approval, writing that "[t]o the extent that the 'pre-emption-by-silence' rationale ever made sense, it, too, has long since been rejected by this Court in virtually every analogous area of the law."[311] Thomas has spoken publicly about the importance of stare decisis in our system,[312] but in decisions has shown a willingness to overturn precedent that surpasses even Scalia.[313]

Of course, the fact that two justices may be inclined to overturn *Flood* is largely inconsequential,[314] as it would of course take five votes to accomplish this and get rid of the antitrust exemption. But Scalia and Thomas, in addition to being more skeptical of Congressional inaction and *stare decisis* as the basis for propping up otherwise faulty decisions, are also representative of the growing legal conservatism movement that has also adopted these stances.[315] Seven of nine current Justices were appointed by Republican Presidents, and the two newest Justices, Justice Roberts and Justice Alito, appear to have conservative judicial

309. Planned Parenthood v. Casey, 505 U.S. 833, 979–1002 (1992) (Scalia, J., dissenting) (writing that the Court should overturn Roe v. Wade, 410 U.S. 113 (1973)). Justice Scalia wrote that "*Roe* was plainly wrong—even on the Court's methodology of 'reasoned judgment,' and even more so (of course) if the proper criteria of text and tradition are applied." *Casey*, 505 U.S. at 983 (Scalia, J., dissenting).

310. South Carolina v. Gathers, 490 U.S. 805, 823–25 (1989) (Scalia, J., dissenting) (advocating that the Court should overturn Booth v. Maryland, 482 U.S. 496 (1987). Justice Scalia stated, "I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face." *Gathers*, 490 U.S. at 825 (Scalia, J., dissenting).

311. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 615 (1997) (Thomas, J., dissenting).

312. Douglas T. Kendall, *A Big Question About Clarence Thomas*, WASH. POST, Oct. 14, 2004, at A31 (quoting Thomas, who says, "Stare decisis provides continuity to our system, it provides predictability, and in our process of case-by-case decision-making, I think it is a very important and critical concept.").

313. *Raich* and *Hillside Dairy, Inc.*, are both opinions where Justice Thomas dissented and argued that past Court precedent should be overturned; Justice Scalia joined neither dissent. *See, e.g.*, *Raich*, 545 U.S. 1, 58–74 (Thomas, J., dissenting); *Hillside Dairy, Inc.*, 539 U.S. 59, 68 (Thomas, J., dissenting).

314. After all, in *Flood*, Justices Douglas and Marshall dissented and were joined by Justice Brennan. *See generally* Flood v. Kuhn, 407 U.S. 258 (1972).

315. *See, e.g.*, Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 Const. Commentary 311 (2005). Calabresi, a leading conservative scholar, argues that stare decisis should be given dramatically less weight by the Court than it currently receives. *Id.*

philosophies.[316] Given this, it seems safe to say that the main theoretical underpinnings of the *Flood* decision are much weaker today than they were thirty-five years ago.

C. A CHANGE IN CONGRESSIONAL LEADERSHIP

Another factor is the recent takeover of Congress by the Democrats. While the Democrats, as a political party, are not significantly more likely to affirmatively step in and pass legislation that would affirmatively strip baseball of its antitrust exemption, this change in power gave Senator Patrick Leahy of Vermont the powerful position of Chairman of the Judiciary Committee.[317] This is relevant to the matter of baseball's antitrust exemption because Leahy has long been an opponent of the exemption, and has publicly stated his agreement with the central premise of this paper—namely, that the broader business of running professional baseball is not exempt from federal antitrust law.[318] Leahy has stated on the record:

> It was against this backdrop that in 1998 Congress finally did act and eliminated the judicially-created exception preserved in limited form by Justice Blackmun in the *Flood* case . . . . Between the narrowness of the way the Supreme Court had perpetuated baseball's antitrust exemption—only as it applied to labor-management relations—and our work in the Congress, in which we struck the last remaining remnant of the judicially-created exception to the applicability of the antitrust laws, it seems that there is no longer any basis to contend that a general, free-floating baseball antitrust exemption somehow continues to exist. . . . In my view, the heavy burden of justifying any exception from the rule of law is, and should be, squarely on the proponents of any antitrust exemption.[319]

While this certainly does not mean that removing any doubt as to whether baseball is exempt from antitrust regulation is Leahy's first priority, it certainly does not bode well for the exemption and its supporters. It seems entirely possible that at some point Leahy may want to revisit the issue of the scope of baseball's antitrust exemption, and now that he is in a position to set the Judiciary Committee agenda and call hearings on the matter, he is in a position where he can easily do so.

316. SupremeCourtUS.gov, The Justices of the Supreme Court, *available at* http://www.supremecourtus.gov/about/biographiescurRent.pdf (last visited Feb. 9, 2008).

317. United State Senate Committee on the Judiciary, Chronology of Committee Chairs, http://judiciary.senate.gov/chairman.cfm.

318. *See Hearing on Judicial Nominations Before the Senate*, 105th Cong. 144 Cong. Rec. S10, 417 (statement of Sen. Leahy).

319. ZIMBALIST, *supra* note 276, at 24.

D. POTENTIAL CIRCUMSTANCES OR ISSUES THAT COULD RAISE THE ISSUE OF THE ANTITRUST EXEMPTION

However, even if all the "pieces are in place" for the Supreme Court to overrule or narrow *Flood*, or for Congress to take action and eliminate or narrow the scope of the antitrust exemption, there is no chance that either event will happen unless there is an issue that arises where MLB engages in some sort of restraint of trade and tries to invoke the exemption's protection. One cannot predict the future, of course, but there are several possible areas of contention that could conceivably come up, and soon.

1. Major League Baseball Advanced Media ("MLBAM")

On January 1, 2001, Major League Baseball stepped into the digital age when it acquired the domain name "mlb.com"[320] and handed control of the site over to MLBAM, which is the subsidiary corporation formed in 2000 that is in charge of all of MLB's digital and online content.[321] In the slightly more than six years it has been in existence, MLBAM has become a crucial part of MLB's operation.[322]

MLBAM current accounts for 6% of MLB's total revenues, which translated to a total of $312 million in 2006, or more than $10 million per team.[323] The main source of this revenue is the popular "mlb.tv" service.[324] For an annual fee of $79.95, mlb.tv allows a subscriber with an internet connection to watch live feeds of virtually every Major League game on their computer. MLBAM also offers a similar program, Gameday Audio, which gives subscribers access to the live radio feeds. MLBAM also operates the official websites of each and every MLB franchise, which are prohibited from operating their own official sites.[325] MLBAM also controls the majority of official ticket and merchandising sales through the site.[326]

The reason this could present a possible antitrust problem is because all MLBAM revenue is split into thirty even portions and each team

320. Major League Baseball Advanced Media (MLBAM), *available at* www.verisign.com/static/039548.pdf.

321. Maury Brown, *MLBAM: The Stealthy Money Machine*, THE HARDBALL TIMES, Dec. 5, 2005, *available at* http://www.hardballtimes.com/main/article/mlbam-the-stealthy-money-machine/.

322. *Id.*

323. Maury Brown, *The Ledger Domain: Why the Free Spending?*, BASEBALL PROSPECTUS, Dec. 4, 2006, *available at* http://www.baseballprospectus.com/article.php?articleid=5741.

324. Tim Marchman, *Share the Wealth*, THE NEW REPUBLIC ONLINE, Feb. 22, 2005, *available at* http://www.tnr.com/doc.mhtml?i=w050221&s=marchman022205.

325. Brown, *supra* note 324.

326. *Id.*

receives an identical amount.[327] This could become an issue because some MLB teams are undeniably more popular, profitable, and successful than others. For example, while there does not seem to be any empirical data on the subject, it is common sense that the New York Yankees (a) sell more tickets through MLBAM (b) sell more merchandise through MLBAM, and (c) attract more subscribers to mlb.tv and Gameday Audio, than a small market team like the Kansas City Royals or the Tampa Bay Devil Rays.[328]

If MLBAM revenues continue to grow at a rapid pace, it will become more and more tempting for a popular, large-market team like the Yankees to try to figure out a way to retain more than one-thirtieth of MLBAM revenue. [329] If they so decided, the Yankees could sue Major League Baseball claiming that MLBAM constituted an illegal horizontal restraint of trade. After all, the Yankees could argue, their competitors are the other 29 MLB franchises, and one way they could compete would be to: (a) run their own website and sell their own advertising, (b) sell their own tickets online, (c) sell their own merchandise online, (d) offer their own online access to the live video and audio feeds of Yankees television and radio broadcasts.

If such a case were to come to pass, MLB would probably not be protected by the Sports Broadcasting Act, since such a claim would involve something more than the video and audio broadcasts, which would probably not be "sponsored telecasting" within the meaning of that Act.[330] If MLB could not fall back upon its special broadcasting immunity, it would then have to claim that its general antitrust immunity protected it from such a suit, which would force a court to decide whether baseball had a general exemption from antitrust regulation or not.[331]

2. Franchise Relocation

The area in which the antitrust exemption has been litigated most in recent years has been league involvement in the sale and relocation of individual franchises.[332] MLB has the right to only allow a franchise owner to move his or her franchise to a location that the league approves.[333] This was the issue in the *Piazza* and *Butterworth* cases, which involved the

327. Brown, *supra* note 326.

328. Maury Brown, *Inside the Forbes Valuations*, Apr. 21, 2006, *available at* http://www.maurybrown.com/?p=144.

329. *Id.* (noting that MLBAM revenues more than doubled from 2003 to 2005).

330. 15 U.S.C. § 1291 (1961).

331. *Id.*

332. *See supra* note 16.

333. *See Piazza*, 831 F. Supp. at 422; *Butterworth I*, 644 So. 2d at 1021.

league denying prospective buyers of the San Francisco Giants from moving that franchise to Tampa, Florida.[334] General Counsel for the Commissioner's Office Thomas J. Ostertag argues that MLB is still exempt from antitrust law with respect to decisions regarding the number and location of franchises,[335] and that "[s]uch considerations may be more important today than ever."[336]

It does not take too much imagination for one to conjure up scenario in which MLB would have to defend itself against an antitrust claim for blocking the relocation of a team—one needs merely to look at other sports. The NFL had to deal with exactly such a scenario in the late 1970s and early 1980s, when the notoriously litigious Oakland Raiders owner Al Davis wanted to move his franchise to Los Angeles.[337] The NFL tried to block the move, since the Los Angeles area already had another franchise (the Rams), and the suit followed.[338] A jury found that the NFL had imposed an unreasonable restraint of trade in violation of the Sherman Act, and this verdict was upheld by the Ninth Circuit, eventually paving the way for the Raiders to move to Los Angeles.[339]

If a similar case were to arise in MLB, MLB would certainly claim that it should be spared from suffering a fate similar to the NFL because it is immune from such antitrust claims under *Flood*.[340] This is precisely what happened in *Piazza*, although in that case the court ruled that MLB was not immune from antitrust claims on matters of franchise relocation, and MLB quickly settled the case.[341] Although there has not been a great deal of talk lately about the relocation of any MLB franchises, this issue will undoubtedly rise again in some form, and it would not be surprising at all if such a case led to a Supreme Court ruling or legislative action on the issue.

334. *Piazza*, 831 F. Supp. at 422; *Butterworth I*, 644 So. 2d at 1021.

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

336. *Id.*

337. Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381 (9th Cir. 1984).

338. *Id.*

339. *Id.* at 1390.

340. *See Flood*, 407 U.S. at 285.

341. *Piazza*, 831 F. Supp. at 422. MLB was presumably worried about the harm of a possible Third Circuit precedent affirming Judge Padova's narrow interpretation of the antitrust exemption in *Piazza*. *Id.*

3. The Extra Innings Package

The "Extra Innings Package" is a service that MLB provides in conjunction with certain cable and satellite providers, whereby a customer pays an annual fee, and in exchange, gets access to more than sixty out-of-market games per week.[342] MLB began offering the service in 1996 only on DirecTV, but had offered it on both DirecTV and cable since 2001.[343] However, in January 2007, it was reported that Major League Baseball was entering into an agreement with DirecTV that would give DirecTV exclusive broadcast rights to MLB Extra Innings.[344] The deal was reportedly worth a total of $700 million over seven years to MLB, $30 million more annually than it would have made had it kept offering the package on other services like cable and Dish Network as well as DirecTV.[345]

This situation could have conceivably led to a lawsuit by fans with cable subscriptions alleging that the deal between MLB and DirecTV constituted an antitrust violation. The NFL, which also has an exclusive deal with DirecTV regarding its Sunday Ticket package (the football equivalent of Extra Innings), has faced possible antitrust problems of its own in this area.[346] While it is not clear whether the Sports Broadcasting Act protects such deals, where the revenue is gained exclusively from subscribers' annual fees,[347] outgoing Chairman of the Senate Judiciary Committee Arlen Specter introduced a bill in December 2006 that would repeal the NFL's Sports Broadcasting Act antitrust exemption.[348] The bill did not pass, and now that Specter is no longer the Chairman of the Committee since the Democrats have taken control of the Senate, he

342. MLB Extra Innings, Frequently Asked Questions, http://www.indemand.com/sports/mlb/faqs/faqs.jsp (last visited Feb. 9, 2008).

343. Brown, *supra* note 326.

344. Richard Sandomir, *Extra Innings Exclusively on DirecTV*, N.Y. TIMES, Jan. 20, 2007, at D6.

345. Richard Sandomir, *Extra Innings Throws a Curve, and Fans Cry Foul*, N.Y. TIMES, Jan. 26, 2007, at D2. DirecTV was paying a large premium for having the exclusive rights to the package in hopes that doing so would convince loyal baseball fans to switch from other providers to DirecTV. *Id.*

346. Associated Press, *Specter Wants to Revisit NFL's Antitrust Status*, WASH. POST, Dec. 8, 2006, at E05.

347. *See Shaw*, 172 F.3d 299. In *Shaw*, a class action suit was filed based on the NFL's deal with DirecTV. *Id.* at 300. The NFL argued that it was protected by the Sports Broadcasting Act because although the revenue from Sunday Ticket came from subscribers' annual fees, the televised games being provided were the feed of the network broadcast, which was "sponsored telecasting" within the meaning of the Act. *Shaw*, 172 F.3d 299. The Court seemed to disagree, but the case was settled before the matter could finally be resolved. *Id.* at 303.

348. Brown, *supra* note 346.

presents less of a threat to the NFL (and presumably, by extension, the MLB as well). However, as detailed previously in the paper, the incoming Chairman, Patrick Leahy, is no great fan of MLB claiming exemption from antitrust law either.[349]

However, after the deal was initially announced, there was a substantial negative reaction from baseball fans.[350] Lawmakers, particularly Senator John Kerry, were not far behind, calling for an FCC inquiry into the negotiations and holding hearings on the deal.[351] Eventually, MLB bowed in to the pressure and backed out of the exclusive deal with DirecTV.[352] In April, MLB agreed to a non-exclusive deal with DirecTV for substantially less money and also agreed to provide the Extra Innings package to iN Demand, a company that provides the service to individual local cable providers.[353] Since the deal is no longer exclusive, a lawsuit could not be brought on behalf of fans that could not get the deal. However, this episode shows that MLB realizes that its antitrust exemption does not offer strong protection for such actions.

If Congress ever does take the dramatic step of stripping MLB of its Sports Broadcasting Act protection, or if a court rules that a deal between MLB and DirecTV or a cable provider is not "sponsored telecasting" within the meaning of the Act and therefore not exempt from antitrust regulation under the Act, things could get interesting. In such a case, MLB, unlike the NFL, would have the fallback option of claiming that whether or not it is protected by the Sports Broadcasting Act is irrelevant, because it has a broad, general antitrust exemption.[354] This would force a Court to determine whether such a general exemption exists, or whether the exemption is narrowly confined to the labor context, in which case MLB would be subject to federal antitrust liability in the broadcasting context.

CONCLUSION

As has hopefully become clear, the area of law surrounding baseball's antitrust exemption is a confusing, jumbled mess. Starting with a poorly

349. *See supra* notes 321–22, 346 and accompanying text.

350. *See, e.g.*, Maury Brown, *DirecTV Deal Gets Blood Boiling*, BASEBALL PROSPECTUS, Jan. 26, 2007, *at* http://www.baseballprospectus.com/unfiltered/?p=167; John Donovan, *Out of Luck: Readers Hacked Off About an MLB-DirecTV Alliance*, SPORTSILLUSTRATED.COM, Jan. 26, 2007, *available at* http://sportsillustrated.cnn.com/2007/writers/john_donovan/01/26/directv.feedback/index.html. *See also* Sandomir, *supra* note 348.

351. Associated Press, *MLB Has Deal to Keep "Extra Innings" on Cable TV*, ESPN.COM, Apr. 4, 2007, http://sports.espn.go.com/mlb/news/story?id=2826280.

352. *Id.*

353. *Id.*

354. *See Flood*, 407 U.S. at 285.

reasoned decision in *Federal Baseball* and continuing through the Court's refusal to correct its own error in *Toolson* and *Flood*, baseball's exemption from antitrust law was never on solid ground theoretically, and in the years since *Flood*, courts have split widely on exactly how broadly or narrowly this exemption extends.[355]

At one extreme, courts like *Butterworth II* and *McCoy* rule that in upholding *Federal Baseball* and *Toolson*, the *Flood* Court was upholding the language that "the business of baseball" was exempt from antitrust regulation, and therefore that all restraints of trade enacted by MLB should be exempt.[356] On the other extreme, courts like *Piazza* and *Butterworth I* counter that the reserve clause-specific language in *Flood* shows that the Court was implicitly narrowing the scope of the exemption, and that only restraints of trade in the course of reserve clause issues should be exempt.[357] It is this latter view that I adopt in this paper. I argue that since Congress subsequently explicitly revoked the antitrust exemption with regard to the reserve clause with the Curt Flood Act of 1998,[358] a court hearing an antitrust exemption claim can now say, as Senator Leahy does,[359] that MLB's antitrust exemption no longer exists.

Although *Flood* claimed to rest in part on baseball's "unique characteristics and needs,"[360] a comparison of baseball with the other major professional sports leagues show that the sport has nothing materially separating it from these other sports, which have not only survived, but thrived without a general exemption from federal antitrust regulation.[361]

It could happen a number of ways: (1) The Supreme Court could clarify that *Flood* should indeed be read narrowly, which, coupled with the Curt Flood Act, would interpret the exemption out of existence; (2) The Supreme Court could explicitly overrule *Flood*, which would also get rid of the exemption; (3) A consensus or near-consensus of lower courts could build in favor of a narrow reading of *Flood*, which would make MLB so wary of litigating the issue that it could no longer act in reliance on the

355. Jeffrey Gordon, *Baseball's Antitrust Exemption and Franchise Relocation: Can a Team Move?* 26 FORDHAM URB. L.J. 1201, 1202 (1999).

356. *Id.*

357. *Id.*

358. 15 U.S.C. § 26b.

359. Morgen A. Sullivan, *A Derelict in the Stream of the Law: Overruling Baseball's Antitrust Exemption*, 48 DUKE L.J. 1265, 1285–86 (1999). *See also supra* notes 321–322 and accompanying text.

360. *Flood*, 407 U.S. at 282.

361. Murray Chass, *Baseball's Antitrust Exemption Suffers a Minor Setback*, N.Y. TIMES, Aug. 4, 1995, at B7.

exemption; or (4) Congress could step in and resolve the issue, passing a law that says that baseball is not exempt from federal antitrust law.

Although it espouses a minority viewpoint, the *Piazza* court convincingly argued that *Flood* does not, in fact, give baseball a general exemption from federal antitrust law.[362] MLB has yet to articulate any legitimate policy rationale for such an exemption, and the success of the other major professional sports leagues in the absence of any exemption would undercut any attempt to do so. The recent Congressional turnover has placed in positions of great power several legislators who have expressed skepticism about baseball's supposed antitrust exemption in the past.[363] There are a number of issues on baseball's horizon that could force legal challenges to the exemption. When taken together, all of these factors make it highly likely that in the near future we could see baseball's antitrust exemption done away with once and for all.

362. *Piazza*, 831 F. Supp. at 438.
363. *See* Brown, *supra* note 346; *see also* Associated Press, *supra* note 354.