Overcoming an "Aberration": San Jose Challenges Major League Baseball's Longstanding Antitrust Exemption

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I. INTRODUCTION

The Sherman Act is the cornerstone of American antitrust law, from which Major League Baseball (MLB) is exempt. The Supreme Court established the exemption in 1922,[1] and has since upheld it twice.[2] First, the Court held that professional baseball was exempt from American antitrust laws[3] because it did not constitute interstate commerce.[4] A half-decade later, the Court realized that professional baseball clearly constituted interstate commerce, but upheld the exemption nonetheless. The Court subsequently changed its reasoning, however, now basing the exemption on congressional inaction.[5] Congress narrowed the exemption in 1998 by passing the Curt Flood Act.[6] The Court has yet to analyze this Act, and its impact remains unclear.

In part, this exemption allows each individual team to maintain its own exclusive territory.[7] No team is allowed to infringe upon another's territory without first obtaining permission from the territory's owner, the Commissioner, or approval by 75% of all owners.[8] The City of San Jose's[9] lawsuit against MLB is the latest illustration of the exemption controversy.[10] Oakland's professional baseball team, the Oakland Athletics (A's), are attempting to move to San Jose, which is arguably within the San Francisco Giants' exclusive territory.[11] Because the A's were unable to obtain owner or Commissioner approval for the move, the City of San Jose sued MLB's Commissioner for violating American antitrust law by maintaining local monopolies on professional baseball teams.[12] The City of San Jose urged the judiciary to remove the exemption in its entirety.[13]

This Note advocates for either the judiciary or the legislature to overturn professional baseball's antitrust exemption, putting an end to MLB's longstanding monopoly over the sport. Part II presents the A's general history, the obstacles preventing their move to San Jose, and provides an overview of professional baseball's antitrust exemption. Part III

1. Fed. Base Ball Club of Balt. v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200, 208 (1922).
2. Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953); Flood v. Kuhn, 407 U.S. 258, 385 (1972).
3. *Fed. Base Ball Club*, 259 U.S. at 209–10.
4. *Id.*; *see* U.S. CONST. amend. I, § 8 (giving Congress the power to regulate interstate commerce, i.e., commerce between states); *see also* 15 U.S.C. § 2 (2012) (limiting Congress's antitrust power over interstate commerce).
5. *Flood*, 407 U.S. at 283–84.
6. Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (1998).
7. Major League Constitution, Art. VIII, § 8, 2012 (identifying each team's territory), *available at* http://www.bizofbaseball.com/docs/MLConsititutionJune2005Update.pdf (last visited Aug. 28, 2014).
8. *Inside the Major League Rules*, ROADSIDE PHOTOS, http://roadsidephotos.sabr.org/baseball/02-4rules.htm (last visited July 13, 2014); *A's Push Major League Baseball for Decision on Move to San Jose*, CBS SAN FRANCISCO (Apr. 17, 2012, 7:52 AM), http://sanfrancisco.cbslocal.com/2012/04/17/as-push-major-league-baseball-for-decision-on-move-to-san-jose/ [hereinafter *A's Push*].
9. I refer to San Jose as "City of San Jose" when discussing it in its capacity as the plaintiff in *City of San Jose v. Office of the Comm'r of Baseball*, No. C-13-02787 RMW, 2013 WL 5609346 (N.D. Cal. Oct. 11, 2013). In all other contexts I refer to the city simply as "San Jose."
10. *City of San Jose*, 2013 WL 5609346, at *1.
11. Major League Constitution, *supra* note 7.
12. *City of San Jose*, 2013 WL 5609346, at *2.
13. *Id.*

compares the strengths and weaknesses of each Supreme Court case and federal statute on the subject. Part IV analyzes the City of San Jose's ongoing lawsuit against the Commissioner's Office of Baseball, and asserts that the judiciary should rule in the City of San Jose's favor, thereby abolishing the exemption.

II. BACKGROUND

A. A History of Greatness

Believe it or not, the A's are one of the greatest franchises in MLB's history. Despite an overwhelming lack of recognition, the A's have won more World Series championships than any other MLB franchise, excepting the New York Yankees and the St. Louis Cardinals.[14] Although its last World Series win was in 1989, the A's have recently returned to their winning ways.[15] The A's were the American League West champions in the 2012 and 2013 seasons, and again made the playoffs in the 2014 season.[16]

B. The Oakland Coliseum

The A's have the fifth-oldest MLB stadium—the Oakland Coliseum (the Coliseum).[17] In June 2013, a post-game sewage problem at the Coliseum forced the A's and the Seattle Mariners to share a locker room.[18] "The pipes backed up on the lower levels of the stadium . . . creating a stink and pools of water in the clubhouses used by both teams and the umpires."[19] In addition to its old age, the Coliseum is the only stadium still shared between a MLB team and a National Football League team.[20] Because of the Coliseum's age, sewage problems, and dual-sport purpose, the A's are in pursuit of a new stadium.

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14. *Team That's Won The Most World Series Titles*, ELECTRO-MECH.COM (Apr. 29, 2009), http://www.electro-mech.com/team-sports/baseball/team-that%E2%80%99s-won-the-most-world-series-titles/; *List of World Series Champions*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_World_Series_champions (last modified Sept. 1, 2014, 8:46 PM).

15. *Oakland Athletics Team History & Encyclopedia*, BASEBALL REFERENCE, http://www.baseball-reference.com/teams/OAK/ (last visited Sept. 2, 2014).

16. *MLB Standings—2012*, ESPN, http://espn.go.com/mlb/standings/_/year/2012 (last visited Aug. 28, 2014) (displaying the 2012 season's final standings); *MLB Standings—2013*, ESPN, http://espn.go.com/mlb/standings/_/year/2013 (last visited Sept. 2, 2014) (displaying the 2013 season's final standings); *MLB Standings—2014*, ESPN, http://espn.go.com/mlb/standings (last visited Sept. 2, 2014) (displaying the current 2014 season standings).

17. *Major League Ballparks, Oldest to Newest*, THE ON DECK CIRCLE (Jan. 20, 2013), http://ondeckcircle.wordpress.com/2013/01/20/major-league-ballparks-oldest-to-newest/.

18. *A's, M's Forced Into Same Locker Room*, ESPN (June 17, 2013, 10:20 AM), http://espn.go.com/mlb/story/_/id/9393784/sewage-problem-puts-oakland-seattle-mariners-same-locker-room.

19. *Id.*

20. The facility is also home to the Oakland Raiders. *Stadiums Pro Football and Major League Baseball Have Shared*, FOOTBALL GEOGRAPHY (July 28, 2013), http://www.footballgeography.com/pro-football-and-major-league-baseball-sharing-stadiums/.

C. Attempts to Relocate

1. Fremont, CA (2006–09)

In 2006, the A's announced their intent to move to Fremont, California, 25 miles south of Oakland on the east side of the San Francisco Bay.[21] The A's chose Fremont after several years of searching for possible areas to relocate.[22] The City of Fremont agreed to build the A's a new stadium, Cisco Field, by the start of the 2011 season.[23] However, by 2009 the A's had scrapped its plan to move to Fremont, citing procedural holdups and expected project delays as reasons for their decision.[24] Of the more than $80 million the A's committed to the project, $24 million were unrecoverable.[25]

2. San Jose, CA (2009–Present)

After scrapping the Fremont relocation plan in 2009, the A's turned their sights to San Jose, California. However, San Jose, part of Santa Clara County, lies within the San Francisco Giants'[26] exclusive territory.[27] Under MLB rules, "each of the 30 teams enjoys a monopoly in its market. No other team is permitted to intrude upon the home team's territory."[28] Therefore, the A's may not move to San Jose unless they receive either the Giants' consent, or MLB's permission.[29] The resulting monopolization of local professional baseball teams led the City of San Jose to bring its lawsuit, contending that MLB's conduct violates American antitrust law.[30]

In 1990, the A's were thriving, drawing the third-largest nightly crowds in all of baseball.[31] By 1992, the Giants, conversely, were threatening to relocate to Tampa, Florida.[32] At that time, the Bay Area territorial rights were clearly divided: "the Giants had the rights to San Francisco and San Mateo Counties, and the A's controlled Alameda and

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21. *A's, Cisco Reach Ballpark Deal*, USA TODAY (Nov. 9, 2006, 4:07 PM), http://usatoday30.usatoday.com/sports/baseball/al/athletics/2006-11-09-athletics-fremont-ballpark_x.htm.

22. *Id.*

23. *Id.*

24. *A's Scrap Fremont Stadium Plans*, ESPN (Feb. 24, 2009, 9:43 PM), http://sports.espn.go.com/mlb/news/story?id=3931425.

25. *Id.*

26. The San Francisco Giants are a National League team, and the A's Bay Area rival.

27. Major League Constitution, *supra* note 7.

28. Complaint at 4–5, City of San Jose v. Office of the Comm'r of Baseball (N.D. Cal. Oct. 11, 2013) (No. CV13-02787), 2013 WL 2996788; *Inside the Major League Rules*, *supra* note 8; *San Jose Suit Appears to be Strong*, ESPN (June 19, 2013), http://espn.go.com/mlb/story/_/id/9403225/the-san-jose-legal-case-oakland-strong.

29. *Inside the Major League Rules*, *supra* note 8; *1903 AL-NL Peace Agreement*, BIZ OF BASEBALL (Nov. 29, 1999), http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=54:1903-al-nl-peace-agreement&Itemid=47; Brian Costa, *Baseball's Battle for Silicon Valley*, WALL ST. J. (June 28, 2013, 1:27 PM), http://online.wsj.com/article/SB10001424127887323873904578571490506017364.html.

30. City of San Jose v. Office of the Comm'r of Baseball, No. C-13-02787 RMW, 2013 WL 5609346, at *4 (N.D. Cal. Oct. 11, 2013).

31. Costa, *supra* note 29.

32. Mike Axisa, *Remember When the Giants Almost Moved to Tampa Bay?*, CBS SPORTS (Aug. 2, 2013, 5:22 PM), http://www.cbssports.com/mlb/eye-on-baseball/22990372/photos-remember-when-the-giants-almost-moved-to-tampa-bay.

Contra Costa Counties. Neither team had Santa Clara County."[33] The Giants' then-owner, Bob Lurie, approached the A's then-owner, Walter Haas, requesting permission to move the Giants to San Jose.[34] To keep the Giants in the Bay Area, Haas granted Lurie permission without requesting any consideration in return.[35] The A's contend that at the time of the agreement, MLB Commissioner Bud Selig said, "Walter Haas, the wonderful owner of the Oakland club who did things in the best interests of baseball, granted permission."[36]

After obtaining the A's permission, the Giants' attempt to build a publicly financed stadium in Santa Clara failed.[37] Lurie sold his ownership in the team, and the Giants stayed in San Francisco.[38] Fast-forward to 2014 and the only thing stopping the A's from moving to San Jose is the San Francisco Giants, who are unwilling to surrender their exclusive territorial rights to Santa Clara County.[39] Both franchises want rights to the area, as San Jose is the largest of the three cities and is filled with corporate sponsors, disposable income, and potential fans.[40]

In 2012, the A's and Giants disputed the territorial split's enforceability.[41] The A's claimed the MLB-recorded minutes clearly indicated the Giants had to relocate to Santa Clara County as a condition of the agreement.[42] Furthermore, A's owner Lew Wolff claimed "the team [had] exhausted all viable options for a new stadium within its territory . . . and that moving to San Jose [was] the only way the team [could] survive in northern California."[43]

Conversely, the Giants claimed the A's previously reaffirmed the split,[44] and the Giants' current owners bought the team under the belief that they had exclusive rights to San Jose.[45] The Giants also contend that they have "spent tens of millions of dollars trying

33. Ken Belson, *In Tug of War Over San Jose, A's and the Giants Remain at a Standoff*, N.Y. TIMES (Apr. 2, 2013), http://www.nytimes.com/2012/04/02/sports/baseball/as-and-giants-in-tug-of-war-over-rights-to-san-jose.html?pagewanted=all&_r=0.

34. Costa, *supra* note 29.

35. *San Jose Suit Appears to be Strong*, *supra* note 28.

36. *Id.*

37. John Woolfolk, *San Jose Sues MLB Over Stalled Oakland A's Move*, SAN JOSE MERCURY NEWS (June 18, 2013, 11:05 AM), http://www.mercurynews.com/ci_23485245/san-jose-sues-mlb-over-stalled-oakland-move.

38. Costa, *supra* note 29.

39. *San Jose Sues MLB Over A's Vote*, ESPN (June 19, 2013, 12:44 AM), http://espn.go.com/mlb/story/_/id/9399631/san-jose-sues-mlb-vote-oakland-athletics-potential-move (discussing how Commissioner Selig's investigation committee had yet to make a decision after four years).

40. Costa, *supra* note 29.

41. Woolfolk, *supra* note 37.

42. Press Release, Oakland Athletics, Statement by Oakland A's Ownership Regarding A's and Giants Sharing Bay Area Territory (Mar. 7, 2012, 12:46 PM), *available at* http://oakland.athletics.mlb.com/news/article.jsp?ymd=20120307&content_id=27081248&vkey=pr_oak&c_id=oak.

43. Costa, *supra* note 29.

44. Woolfolk, *supra* note 37.

45. Ira Boudway, *San Jose Sues Over Baseball's Weird Business Geography*, BLOOMBERG BUSINESSWEEK (June 19, 2013), http://www.businessweek.com/articles/2013-06-19/san-jose-sues-over-baseballs-weird-business-geography. The Giants are essentially claiming promissory estoppel, defined by section 90 of the Restatement (Second) of Contracts. It states: "A promise which the promisor should reasonably expect to induce action . . . of a definite and substantial character on the part of the promisee and which does induce such action .

to woo fans and sponsors" in San Jose.[46] Therefore, allowing the A's to take control of the territory would "erode their investment."[47] Finally, the Giants assert the A's current owner, Lew Wolff, knew that San Jose was within the Giants' exclusive territory when he bought the team.[48]

As of March 2014, there is a vast disparity between the values of these two teams.[49] In 2014, Forbes named the Giants the fifth most valuable MLB franchise,[50] valued at $1 billion.[51] The valuation attributed $456 million to the Giants' city and market size.[52] Additionally, AT&T Park, the Giants' stadium, generated $240 million in revenue during the 2013 season.[53] In contrast, the A's $495 million valuation made them the third lowest valued MLB franchise.[54] The A's city and market size represented $137 million of that value, and the Coliseum contributed a mere $85 million to the team's 2013 revenue.[55]

. . is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). The Giants's claim plausibly fits within the Restatement's language. The Giants's argument assumes the A's should have reasonably believed that their promise, that the Giants's territory included San Jose, induced the Giants's current owner to purchase the team and build AT&T Park in the South Bay. From this, it follows that injustice can be avoided only by enforcing the A's promise.

46. Belson, *supra* note 33. Once again relying on promissory estoppel as stated in RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

47. *Id.*

48. Boudway, *supra* note 45. This fits the mold of an equitable estoppel argument. The Court defined equitable estoppel as a legal doctrine barring one "who by his language or conduct leads another to do what he would not otherwise have done" from "subject[ing] such person to loss or injury by disappointing the expectations upon which he acted." Dickerson v. Colgrove, 100 U.S. 578, 580 (1879). The Giants claim that the A's current owner, without objection to the territorial divide, purchased the team believing that the Giants had exclusive rights to San Jose. This led the Giants to build AT&T Park in the South Bay, where it would not have otherwise built. The Giants' argument would be that the A's, having communicated their agreement with the current territorial split and thus inducing the Giants to relocate to the South Bay, is now prohibited by equitable estoppel from violating the territorial divide and building in San Jose.

49. *MLB Team Valuations: San Francisco Giants*, FORBES (Mar. 2014), http://www.forbes.com/teams/san-francisco-giants/; *MLB Team Valuations: Oakland Athletics*, FORBES (Mar. 2014), http://www.forbes.com/teams/oakland-athletics/.

50. MLB is comprised of 30 separate franchises. *MLB Team Valuations: San Francisco Giants*, *supra* note 49. *See generally Inside the Major League Rules*, *supra* note 8 (displaying all 30 franchises).

51. *MLB Team Valuations: San Francisco Giants*, *supra* note 49.

52. *Id.*

53. *Id.*

54. *MLB Team Valuations: Oakland Athletics*, *supra* note 49.

55. *Id.*

Immediately below is a diagram displaying how the Bay Area is divided between the A's and the Giants, as of February 2014.[56]

In 2009, MLB Commissioner Selig created a committee to study the A's potential move to San Jose.[57] In 2012, losing patience with Selig's committee, the A's began pushing for an owners' vote regarding their proposed move to San Jose.[58] The A's would need approval of at least 75% of team owners to overturn the Giants' territorial rights to the South Bay.[59] However, MLB's other owners would likely be reluctant to open the "floodgates to team movement" by voting in the A's favor.[60] As of the summer of 2013, Commissioner Selig's committee was still evaluating the move.[61] On June 18, 2013, with no owners' vote imminent, "the city of San Jose filed a lawsuit against MLB in federal court that challenge[d] the League's long-held right to block franchises from moving without [owner] approval."[62] The suit has virtually extinguished any chance of Commissioner Selig bringing the matter to an owners' vote.[63]

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56. *See* Costa, *supra* note 29 (depicting a similar territorial map).
57. *San Jose Sues MLB Over A's Vote*, *supra* note 39.
58. *A's Push*, *supra* note 8.
59. *Id.*; *Inside the Major League Rules*, *supra* note 8; Major League Constitution, *supra* note 7, at art. V, § 2(b)(3).
60. Boudway, *supra* note 45.
61. *San Jose Sues MLB Over A's Vote*, *supra* note 39.
62. Costa, *supra* note 29.
63. *Id.*

3. Lease Extension (Summer 2014)

On July 3, 2014, the A's "finalized an agreement on a 10-year extension to stay [in Oakland] through the 2024 season."[64] The Coliseum Authority agreed to pay for any structural improvements made prior to the start of the 2015 season in exchange for the A's spending over $10 million on a new scoreboard.[65] In addition to lowering the A's rent and allowing the team to keep $5.3 million in city parking taxes, the deal includes an "escape clause" that allows the A's to leave Oakland following the 2018 season.[66] The A's will face a penalty of $1.6 million per year if they exit the lease prior to 2024.[67] "The deal also requires the team to engage in good faith discussions about building a new ballpark in Oakland."[68] Although the Oakland–Alameda County Coliseum Authority approved the deal, it also requires formal approval "by the Oakland City Council and Alameda County Board of Supervisors."[69] Commissioner Selig gave A's owner Lew Wolff permission to "immediately 'seek a temporary or permanent location outside the city of Oakland' unless a new stadium deal was agreed upon."[70] The City Council voted to approve the ten-year lease on July 16, 2014, subject to several modifications opposed by the A's management.[71] The most substantive proposed amendment altered the lease's terms to free Oakland and Alameda County from liability for the Oakland Raiders' perceived lease violations.[72] Those opposing the deal argued it would "shortchange the city and buy time for the team to continue its stymied effort to move to San Jose."[73] On July 22, 2014, after reviewing the Oakland City Council's modifications, "team owner Lew Wolff . . . agreed to the terms of the lease to keep the team playing at the Oakland Coliseum."[74] The Alameda County Board of Supervisors approved the deal on July 29, 2014.[75] The deal effectively put an end (at least for now) to the A's attempt to move to San Jose.

64. *A's Finalize Deal to Stay at Coliseum*, ESPN (July 3, 2014), http://espn.go.com/mlb/story/_/id/11173281/oakland-athletics-say-commissioner-bud-selig-approved-move-city-approves-stadium-deal.

65. *Id.*

66. Matthew Artz, *Oakland Approves A's Lease – but with Modifications*, SAN JOSE MERCURY NEWS (July 17, 2014), http://www.mercurynews.com/athletics/ci_26163613/oakland-approves-lease.

67. *Athletics Agree to 10-Year Lease to Stay in Oakland*, FOX NEWS LATINO (July 23, 2014), http://latino.foxnews.com/latino/sports/2014/07/23/athletics-agree-to-10-year-lease-to-stay-in-oakland/.

68. *Alameda County Approves A's Lease Extension*, USA TODAY (July 29, 2014), http://www.usatoday.com/story/sports/mlb/2014/07/29/alameda-county-approves-as-lease-extension/13340127/.

69. *A's Finalize Deal to Stay at Coliseum*, *supra* note 64.

70. *Id.*

71. Artz, *supra* note 66.

72. *Id.* ("[T]he Oakland Raiders want to knock down the Coliseum to build a yet unfunded football stadium at the site. At [the July 16, 2014] council meeting, several fans spoke against the lease extension fearful that it would force out the Raiders without securing a commitment from Wolff to build in Oakland.").

73. *Id.*

74. *Athletics Agree to 10-Year Lease to Stay in Oakland*, *supra* note 67.

75. *Alameda County Approves A's Lease Extension*, *supra* note 68.

D. Professional Baseball's Antitrust Exemption

For over 92 years, MLB has operated under an exemption from American antitrust laws.[76] The Supreme Court has repeatedly upheld this exemption.[77] As a result, the League is able to monopolize the professional baseball market without legal scrutiny.[78]

1. The Origin of the Exemption

The exemption originated in the 1922 Supreme Court case *Fed. Base Ball Club of Balt. v. Nat'l League of Prof'l Base Ball Clubs*.[79] The case arose when the Federal Base Ball Club of Baltimore, a Federal League[80] incorporated baseball team, alleged that the defendants, the National and American Leagues of Professional Base Ball Clubs,[81] conspired to monopolize baseball in violation of American antitrust statutes.[82] The plaintiff claimed that the defendants did so by buying up and inducing all other clubs in the Federal League to dissolve.[83] The Court determined that baseball did not constitute interstate commerce, even though the League required players to cross state lines and paid for their travel.[84] These facts were insufficient to change the character of the business, as the Court determined that the "transport" was merely incidental to the game itself, which, although made for profit, was not "trade of commerce in the commonly accepted use of those words."[85] The Court held that baseball was a purely intrastate affair and was therefore out of the Sherman Act's reach.[86]

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76. Fed. Base Ball Club of Balt. v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200, 208 (1922).

77. *See generally* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953) (upholding professional baseball's antitrust exemption); Flood v. Kuhn, 407 U.S. 258 (1972) (upholding professional baseball's antitrust exemption).

78. Complaint at 4–5, City of San Jose v. Office of the Comm'r of Baseball, (N.D. Cal. Oct. 11, 2013) (No. CV13-02787), 2013 WL 2996788; *Inside the Major League Rules*, *supra* note 8; *San Jose Suit Appears to be Strong*, *supra* note 28.

79. *See generally Fed. Base Ball Club*, 259 U.S. at 208 (holding professional baseball does not constitute interstate commerce and is therefore exempt from antitrust laws).

80. The Federal League was in competition with the National and American Leagues of Base Ball, trying to establish itself as a third professional league. STUART BANNER, THE BASEBALL TRUST 48 (2013).

81. These two leagues agreed to form MLB in 1903, with the champion of each league playing each other at the end of each season in the World Series. *1903 AL-NL Peace Agreement*, *supra* note 29.

82. *Fed. Base Ball Club*, 259 U.S. at 207.

83. *Id.*

84. *Id.* at 209–10.

85. *Id.* at 209.

86. *Id.* at 208. Congress's antitrust power is limited to interstate commerce. *See generally* 15 U.S.C. §§ 1, 2 (1890) (refraining from allotting Congress power to restrain intrastate commerce). The Sherman Act, passed in 1890, is a federal anti-monopoly and antitrust statute. *Sherman Antitrust Act*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/sherman_antitrust_act (last visited Sept. 6, 2014). Section 1 of the Act states, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1890). Additionally, section 2 makes any monopolization a felony, whether successful or merely attempted. 15 U.S.C. § 2 (1890). To violate section 2, a monopolist must not only have monopoly power, but must also engage in monopolistic or anticompetitive practices. E. THOMAS SULLIVAN ET AL., ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS 591 (Matthew Bender & Co., Inc. eds., 6th ed. 2009). United States Attorneys initiate proceedings concerning violations of the Act. *Sherman Antitrust Act*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/sherman_antitrust_act (last visited Sept. 6, 2014). The federal government, a state, or a private party may all be possible injured parties. *Id.* If the court finds that the defendant indeed violated the Act, the injured party is entitled to treble damages (three times the amount of the injury it suffered). *Id.*

2. Subsequent Litigation and Statutory Development

There have been numerous Supreme Court cases and statutes passed regarding baseball's antitrust exemption since the Court's 1922 *Fed. Base Ball Club* decision. The exemption held strong for nearly eight decades, but Congress narrowed it in 1998.[87] In its current lawsuit, the City of San Jose requested the Supreme Court to finish what Congress started and do away with MLB's antitrust exemption in its entirety.[88]

a. Subsequent Cases

The Supreme Court upheld professional baseball's antitrust exemption, declared in *Fed. Base Ball Club*, in both 1953[89] and 1972.[90] However, *Toolson v. N.Y. Yankees* drastically altered the basis of the Supreme Court's reasoning underlying professional baseball's antitrust exemption.[91] Later, in *Flood v. Kuhn*, the Court questioned the justification for professional baseball's exemption, but upheld it nonetheless.[92]

i. The Toolson v. New York Yankees *Case*

In 1949, George Toolson pitched for the Newark Bears, the New York Yankees' class AAA affiliate.[93] Following that season, the Newark Bears sent Toolson down to the Binghamton Triplets, a class A team.[94] Toolson, understandably, refused to report to Binghamton.[95] "[P]ursuant to the provisions of his contract with the Newark team and the regulations which govern the structure of 'Organized Baseball' in general," Binghamton placed him on its ineligible list.[96] As a result, the Yankees refused to allow Toolson to play professional baseball.[97]

After sitting out the entire 1950 season,[98] Toolson filed suit against the New York Yankees, alleging that professional baseball violated the Sherman Act by prohibiting him

87. Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (1998).

88. *See generally* Complaint, City of San Jose v. Office of the Comm'r of Baseball (N.D. Cal. Oct. 11, 2013) (No. CV13-02787), 2013 WL 2996788 (describing the City of San Jose's grievance with MLB and proposed remedies).

89. *See generally* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953) (upholding professional baseball's antitrust exemption).

90. *See generally* Flood v. Kuhn, 407 U.S. 258 (1972) (upholding professional baseball's antitrust exemption).

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

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

93. BANNER, *supra* note 80, at 112.

94. Toolson v. N.Y. Yankees, Inc., 101 F. Supp. 93, 93–94 (S.D. Cal. 1951). Minor League Baseball (MiLB) is a feeder system, controlled by MLB, which develops young talent into major league-ready players. *MiLB.com Frequently Asked Questions: The Business of MiLB*, MILB, http://www.milb.com/milb/info/faq.jsp?mc=business#3 (last visited Sept. 2, 2014). The highest level of MiLB is AAA, these players are considered closest to making the MLB. *Id.* Below AAA is AA, and then A. *Id.* Toolson was sent from AAA to A, so he essentially received a drastic demotion. *Toolson*, 101 F. Supp. at 93–94.

95. *Toolson*, 101 F. Supp. at 93–94.

96. *Id.* at 93. The MLB reserve clause allowed the original team that signed a player to have continuing and exclusive rights to that player's services as long as it wished. CHARLES E. QUIRK, SPORTS AND THE LAW: MAJOR LEGAL CASES 153 (1996). As a result, the Yankees had exclusive control over where Toolson could play. *Id.*

97. *Toolson*, 101 F. Supp. at 93.

98. BANNER, *supra* note 80.

from playing for a team other than Binghamton.[99] In its 1953 decision, the Supreme Court upheld professional baseball's antitrust exemption, declaring that Congress had not intended to subject baseball to antitrust laws.[100] The Court reasoned that Congress had the authority to regulate professional baseball but chose not to do so.[101] The Court's determination that Congress had the power to regulate professional baseball implied that professional baseball constituted interstate commerce.[102] This was a shift from the Court's decision in *Fed. Base Ball Club*, where it determined that baseball did not constitute interstate commerce and was therefore outside Congress's scope of regulation.[103]

ii. The Flood v. Kuhn *Case*

Flood was the first Supreme Court case to cast doubt upon the *Fed. Base Ball Club* decision. In this 1972 Supreme Court case, Justice Harry Blackmun stated that although he viewed baseball's antitrust exemption as an "aberration," he saw "merit in consistency" in upholding it.[104]

Curt Flood was a star outfielder for the St. Louis Cardinals.[105] After 12 years with the Cardinals, Flood was traded to the Philadelphia Phillies in 1969.[106] Flood opposed the trade and refused to report to Philadelphia.[107] Instead, he wrote a letter to then-MLB Commissioner Bowie Kuhn requesting to become a free agent.[108] This would allow him to sign with whatever team he pleased.[109] Commissioner Kuhn denied Flood's request, and Flood initiated an antitrust suit against the Commissioner, the presidents of the two leagues, and every MLB team.[110]

Flood was the first Supreme Court case to explicitly confirm that professional baseball is a business engaged in interstate commerce.[111] The Court admitted "Federal Baseball and Toolson have become an aberration confined to baseball."[112] However, the Court noted, it is an "aberration" that has been recognized in five consecutive Supreme Court cases over a 50-year span.[113] The Court refused to overturn a decision that Congress, "by positive inaction, has allowed" to stand.[114] Furthermore, the Court explained that a judicial overturning of *Fed. Base Ball Club* was unlikely because of the problems associated with applying the new law retroactively.[115] The Court suggested, as did the *Toolson* Court, that

99. *Toolson*, 101 F. Supp. at 93–94.
100. Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953).
101. *Id.*
102. *Id.*
103. Woolfolk, *supra* note 37.
104. Flood v. Kuhn, 407 U.S. 258, 282–84 (1972).
105. BANNER, *supra* note 80, at 187.
106. *Flood*, 407 U.S. at 265.
107. *Id.* at 266.
108. *Id.* at 265.
109. *Id.*
110. *Id.*
111. *Flood*, 407 U.S. at 282.
112. *Id.*
113. *Id.*
114. *Id.* at 283–84.
115. *Id.* at 283.

if a change were to occur, it would need to come through legislative action, which would apply prospectively.[116]

iii. The City of San Jose v. Office of the Comm'r of Baseball *Case*

City of San Jose is the most recent federal court decision regarding the City of San Jose's lawsuit against MLB for allegedly preventing the A's from moving to the City, and therefore violating American antitrust law by maintaining local monopolies on professional baseball teams. In October 2013, a U.S. District Court in California dismissed the City of San Jose's antitrust claim against MLB, holding that the "alleged interference with the A's relocation to San Jose is exempt from antitrust regulation."[117] The court determined that the main issue presented was whether *Fed. Base Ball Club*, *Toolson*, and *Flood* were limited to baseball's reserve clause,[118] or whether the exemption broadly covers the entire "business of baseball."[119] The court concluded the latter, finding support from every federal circuit court that had ever considered the issue post-*Flood*.[120] This does not, however, mean that the court agreed with the exemption. The court called the legitimacy of the exemption into question on many occasions, referring to it as "unrealistic," "inconsistent," and "illogical."[121] Despite its questionable legitimacy, the court noted that the exemption had survived for many years and declared it a precedent that the court was obligated to follow.[122]

The court briefly provided justifications for its decision to dismiss the City of San Jose's claim. First, the court cited the "congressional inaction" discussed in *Flood*.[123] Next, the court explained that the Curt Flood Act[124] explicitly declared baseball's antitrust exemption still applies to franchise relocation.[125] Finally, the court noted that the Supreme Court has made it clear that "if any change is to be made, it [must] come by legislative action that, by its nature, is only prospective in operation."[126] The City of San Jose appealed this decision to the Ninth Circuit.[127]

iv. Other State Court Decisions

In a 1993 Pennsylvania U.S. District Court case, *Piazza v. Major League Baseball*, Judge John Padova held that professional baseball's antitrust exemption encompassed only

116. *Flood*, 407 U.S. at 283.

117. City of San Jose v. Office of the Comm'r of Baseball, No. C-13-02787 RMW, 2013 WL 5609346, at *92 (N.D. Cal. Oct. 11, 2013).

118. *See supra* note 96 (explaining MLB reserve clause). The Curt Flood Act abolished the MLB reserve clause, which allowed a team to resign a player once his contract expired even if he wanted to play elsewhere. *See* Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (1998) (abolishing the reserve clause).

119. *City of San Jose*, 2013 WL 5609346, at *2.

120. *Id.* at *7–8.

121. *Id.* at *10.

122. *Id.* at *5.

123. *Id.* at *10.

124 *Infra* Part II.D.2.b.ii.

125. *City of San Jose*, 2013 WL 5609346, at *10.

126. *Id.*

127. City of San Jose v. Office of the Comm'r of Baseball, No. C-13-02787 RMW, 2013 WL 5609346 (N.D. Cal. Oct. 11, 2013), *appeal docketed*, No. 14-15139 (9th Cir. Jan. 27, 2014).

the reserve clause and did not extend to the entire business of baseball.[128] The Florida Supreme Court made a similar conclusion the following year.[129] Because free agency undercuts the reserve clause,[130] if the Supreme Court were to uphold these decisions, baseball's antitrust exemption would be virtually meaningless, as franchise location and exclusive territorial rights would be subject to antitrust legislation.[131]

b. Subsequent Statutory Development

In the years since *Toolson* and *Flood*, there have been over 50 congressional proposals regarding the "applicability . . . of the antitrust laws to baseball."[132] Congress, however, failed to enact any of the proposed remedial legislation.[133] But in 1998, Congress finally overcame its reluctance to narrow the exemption. The Curt Flood Act of 1998, which amended the Clayton Act, is the only instance of Congress narrowing baseball's antitrust exemption.[134] The Curt Flood Act did not completely lift professional baseball's exemption but instead removed labor issues from the exemption by placing them within the scope of antitrust law.[135]

i. The Clayton Act

The Clayton Act, originally passed in 1914, was "[a]n Act to protect trade and commerce against unlawful restraints and monopolies."[136] More specifically, the Clayton Act "provided more detailed provisions to prohibit anticompetitive price discrimination, kept corporations from making exclusive dealing practices, and expanded the ability for individuals to sue for damages."[137]

ii. The Curt Flood Act of 1998

After nearly 90 years of failing to address professional baseball's antitrust exemption, Congress enacted the Curt Flood Act in 1998.[138] The 1996 collective bargaining agreement (CBA) between team owners and the players included a clause that required both parties to "ask Congress to pass a law clarifying that [MLB] players are covered under the antitrust

128. Piazza v. Major League Baseball, 831 F. Supp. 420, 437 (E.D. Pa. 1993).

129. QUIRK, *supra* note 96, at 161; *see generally* Butterworth v. Nat'l League, 644 So.2d 1021 (Fla. 1994) (narrowing baseball's antitrust exemption).

130. Free agency allows a player to sign with whichever team he wishes upon the expiration of his contract with his current team. *Free Agency Primer: A Rundown of the Rules About Free Agency in Major League Baseball*, ABOUT.COM, http://baseball.about.com/od/majorleaguebasics/a/freeagentprimer.htm (last visited Sept. 2, 2014).

131. QUIRK, *supra* note 96, at 161.

132. Flood v. Kuhn, 407 U.S. 258, 281 (1972).

133. *Id.* at 283.

134. Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (1998).

135. *Id.*; Woolfolk, *supra* note 37.

136. Clayton Act, 15 U.S.C.A. § 12 (2002); *Clayton Act*, ANTITRUSTLAWS.ORG, http://www.antitrustlaws.org/Clayton-Act.html (last visited Sept. 2, 2014) [hereinafter *Clayton Act website*]. The Clayton Act is codified in its entirety at 15 U.S.C.A. §§ 12–27.

137. *Clayton Act website*, *supra* note 136.

138. BANNER, *supra* note 80, at 246.

laws to the same extent as professional athletes in other sports."[139] The players made this a condition to their agreement to the CBA because it was the only way to ensure that free agency would not come into question every time the current CBA expired.[140] The owners agreed to this stipulation as a result of the 1994–95 players strike.[141] The owners' primary concern was retaining the exemption as it applied to franchise relocation, which the agreement did not affect.[142] On October 27, 1998, President Bill Clinton signed the Curt Flood Act.[143] The Act's purpose was to acknowledge that MLB players are indeed covered by antitrust laws.[144] However, it also made clear that the Act "does not change the application of the antitrust laws" to any other aspect of professional baseball.[145]

iii. Application of the Antitrust Laws to MLB

The Curt Flood Act of 1998 amended the Clayton Act, subjecting MLB to antitrust laws.[146] However, this came with many anomalies. The exemption still applies to "any conduct, acts, practices, or agreements that do not directly relate to or affect employment of major league baseball players . . . ."[147] Among these exceptions is "any conduct . . . or agreements of persons engaging in . . . the business of organized professional baseball relating to or affecting franchise . . . location or relocation . . . ."[148] Furthermore, the section only provides MLB players with standing to sue.[149] The main effect of this section was to make baseball vulnerable to antitrust claims for controlling player movement.[150]

3. Non-exemption of Professional Sports from the Antitrust Laws

Toolson and *Flood* upheld baseball's antitrust exemption that was first established in *Fed. Base Ball Club*.[151] However, no other professional sport has enjoyed such an exemption.[152] Focusing on football in particular, the Supreme Court in *Radovich v. National Football League* held that, unlike professional baseball, football was subject to

139. *Id.*; *1996 Major League Baseball Collective Bargaining Agreement: ARTICLE XXVIII—Antitrust*, FACTS ON FILE (1996), http://www.fofweb.com/History/HistRefMain.asp?iPin=E13390&SID=2&DatabaseName=American+History+Online&InputText=%22Olympic+Games%22&SearchStyle=&dTitle=Major+League+Baseball+Collective+Bargaining+Agreement+(excerpts)&TabRecordType=All+Records&BioCountPass=84&SubCountPass=72&DocCountPass=4&ImgCountPass=3&MapCountPass=0&FedCountPass=&MedCountPass=3&NewsCountPass=0&RecPosition=162&AmericanData=Set&WomenData=&AFHCData=&IndianData=&WorldData=&AncientData=&GovernmentData= at art. XXVIII.

140. BANNER, *supra* note 80, at 246.

141. *Id.*

142. *Id.* at 247.

143. Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (1998).

144. *Id.*

145. *Id.*

146. *Id.*

147. 15 U.S.C.A. § 26b(b) (2002).

148. 15 U.S.C.A. § 26b(b)(3).

149. 15 U.S.C.A. § 26b(c).

150. Boudway, *supra* note 45.

151. *See generally* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953) (upholding professional baseball's antitrust exemption); Flood v. Kuhn, 407 U.S. 258 (1972) (upholding professional baseball's antitrust exemption).

152. QUIRK, *supra* note 96, at 154–55.

American antitrust law.[153] The *Radovich* Court reasoned that *Toolson* applied exclusively to baseball, determining "that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."[154] The only distinction the Court has made between professional baseball and football, for antitrust purposes, is that professional football engages in much more interstate activity, placing it within the Sherman Act's reach.[155] The *Radovich* Court conceded that if this had been the first time baseball's exemption was under judicial review, the Court would have subjected the sport to antitrust laws.[156] However, *Radovich* declared that baseball is "simply the beneficiary of an old case from an earlier era that had never been overruled,"[157] and only the legislature may change the exemption.[158] In the decades following *Toolson*, American courts have likewise held professional basketball,[159] boxing,[160] golf,[161] and hockey[162] subject to antitrust legislation.[163]

III. ANALYSIS

This Part considers the strengths and weaknesses of each of the important baseball antitrust cases and statutes described above. This examination also discusses the impact that the laws have on both the game and its fans. In addition, this Part notes each case and each statute's relevant criticisms.

A. Analyzing the Fed. Base Ball Club *Case*

The Supreme Court first established professional baseball's antitrust exemption in its landmark 1922 *Fed. Base Ball Club* decision.[164] Baseball's antitrust exemption essentially allows MLB to maintain local monopolies on professional baseball teams.[165] Therefore, it enables "MLB to control the number, location and movement of teams."[166] This is because a team may not relocate without permission from the territory's owner, the Commissioner, or approval from 75% of team owners.[167]

153. Radovich v. Nat'l Football League, 352 U.S. 445, 451–52 (1957).

154. *Id.* at 451.

155. *Id.*

156. *Id.* at 452.

157. BANNER, *supra* note 80, at 140.

158. *Radovich*, 352 U.S. at 452.

159. *See generally* Washington Prof'l Basketball Corp. v. Nat'l Basketball Ass'n, 147 F. Supp. 154 (S.D.N.Y. 1956) (declaring that the National Basketball Association is subject to antitrust laws).

160. United States v. Int'l Boxing Club of N.Y., Inc., 348 U.S. 236, 240–44 (1955).

161. Deesen v. Prof'l Golfers' Ass'n of Am., 358 F.2d 165, 166 (9th Cir. 1966), *cert. denied*, 87 S. Ct. 72 (1966) (declaring that golf is a business and is therefore subject to antitrust laws).

162. *See generally* Peto v. Madison Square Garden Corp., 384 F.2d 682 (2d Cir. 1967), *cert. denied*, 88 S. Ct. 1185 (1968) (declaring that the business of professional hockey is subject to antitrust laws).

163. QUIRK, *supra* note 96, at 154–55.

164. *See generally* Fed. Base Ball Club of Balt. v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200 (1922) (holding that professional baseball does not constitute interstate commerce and is therefore exempt from antitrust laws).

165. Costa, *supra* note 29.

166. *Id.*

167. *A's Push*, *supra* note 8.

1. The Game Has Changed

In making its decision, the Court first determined that professional baseball did not constitute interstate commerce even though teams and their players had to cross state lines to play.[168] In 1922, MLB had 16 teams scattered throughout seven states and Washington, D.C.[169] Of these teams, none were located west of Missouri.[170] As a result, it would have been extremely difficult for a fan to keep up with baseball unless he lived in one of the select cities with a team, as radio and television programs did not yet broadcast games.[171] It would have been nearly impossible for a person on the Pacific Coast to truly engage in the sport, as he had no local product.

However, baseball has changed significantly in the nearly 100 years since the *Fed. Base Ball Club* decision. By 1939, each team had a local radio deal, and MLB's first national radio deal came in 1950.[172] MLB supplemented radio with its first national television package in 1966.[173] In addition to—and in part because of—the emergence of regional and national broadcasting, the average value of an MLB franchise has drastically increased.[174] The average 2014 MLB franchise valuation was $811 million, over 85 times greater than the average valuation in 1920, after adjusting for inflation.[175]

In addition to broadcasting and revenue expansion, the number and location of teams have also made today's game radically different from that of 1922. The Brooklyn Dodgers and New York Giants, both moving to California in 1958, became the first MLB teams to migrate to the Pacific Coast.[176] In the years since, MLB teams have relocated or established themselves in Arizona, Arlington, Colorado, Houston, Kansas City, Los Angeles, Miami, Milwaukee, Montreal, Oakland, New York, San Diego, Seattle, Tampa Bay, Toronto, and Washington, D.C.[177] Although baseball may have been an intrastate activity at the time of the *Fed. Base Ball Club* decision, most agree that today's game constitutes a nationwide, interstate activity, and is therefore subject to American antitrust legislation. The Supreme

168. *Fed. Base Ball Club*, 259 U.S. at 208–09.

169. *MLB Season History – 1922*, ESPN, http://espn.go.com/mlb/history/season/_/year/1922 (last visited Sept. 2, 2014).

170. *Id.*

171. Michael J. Haupert, *The Economic History of Major League Baseball*, EH.NET ENCYCLOPEDIA (Oct. 18, 2013), http://eh.net/encyclopedia/the-economic-history-of-major-league-baseball/.

172. *Id.*

173. *Id.*

174. Kurt Badenhausen et al., *Baseball Team Values 2014 Led By New York Yankees At $2.5 Billion*, FORBES (Mar. 26, 2014), http://www.forbes.com/sites/mikeozanian/2014/03/26/baseball-team-values-2014-led-by-new-york-yankees-at-2-5-billion/; Haupert, *supra* note 171.

175. Badenhausen, *supra* note 174; Haupert, *supra* note 171; Calculating Inflation Adjusted MLB Average Franchise Value from 1920, BUREAU OF LABOR STATISTICS, http://www.bls.gov/data/inflation_calculator.htm (select 1920 under desired "From" date; insert 1920 value of MLB average franchise and set inflation calculator date to 2014; then select "Calculate" to obtain value) (last visited Aug. 28, 2014).

176. *Baseball Owners Allow Dodgers and Giants to Move*, HISTORY, http://www.history.com/this-day-in-history/baseball-owners-allow-dodgers-and-giants-to-move (last visited Sept. 2, 2014); *1957 Major League Baseball Standings and Head-to-Head*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/leagues/MLB/1957-standings.shtml (last visited Sept. 2, 2014) (displaying the 1957 MLB standings and showing that there was yet to be a team located on the West Coast).

177. *MLB Franchise Chronology*, MLB.COM, http://mlb.mlb.com/news/article.jsp?ymd=20040929&content_id=875187&vkey=news_mlb_nd&fext=.jsp&c_id=null (last visited on Sept. 2, 2014).

Court confirmed this belief in 1972.[178] As the City of San Jose argues, "modern baseball is squarely within the realm of interstate commerce. MLB Clubs ply their wares nationwide, games are broadcast throughout the country on satellite TV and radio, as well as cable channels, and MLB Clubs have fan bases that span from coast to coast."[179]

2. The Exemption's Impact: Monopolization as Defined Under the Sherman Act

Violations of section 2 of the Sherman Act first require monopoly power.[180] Monopoly power is "the power to control prices or exclude competition."[181] According to former MLB Commissioner Fay Vincent, the antitrust exemption's only value is that owners "can get together and prohibit people from coming into their markets."[182] MLB exerts monopoly power by controlling the number and location of teams.[183] However, to be guilty of monopolization under section 2 of the Sherman Act, one must have monopoly power and engage in monopolistic or exclusionary practices.[184] MLB fans do not have any alternatives that are "reasonably interchangeable" with watching baseball.[185] Because no substitutes exist, MLB can increase prices or reduce quality without worrying about losing fans.[186] By dividing the nation into exclusive territories and refusing to allow competition within a team's assigned market, MLB is effectively reducing its output.[187] Artificially low output forces consumers to pay the owners higher prices than they would in a competitive market.[188] In competitive markets, consumers have the ability to switch to a substitute product in response to price increases or stagnant quality.[189] However, MLB's monopolization effectively denies its fans this ability.[190] By reducing output, raising prices, and eliminating alternatives, MLB creates a transfer of wealth from consumers to owners.[191]

3. Criticism of the Fed. Base Ball Club *Decision*

Although subsequently affirmed in *Toolson* and *Flood*, the Court's *Fed. Base Ball Club* decision has endured criticism. The first of such criticism arose in Judge Jerome Frank's concurring opinion in *Gardella v. Chandler*, a 1949 Second Circuit case.[192] Judge Frank referred to the Court's decision in *Fed. Base Ball Club* as an "impotent zombi,"

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

179. Woolfolk, *supra* note 37; Boudway, *supra* note 45.

180. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

181. *Id.*

182. Costa, *supra* note 29.

183. *See* Major League Constitution, *supra* note 7, at Art. V, § 2(b) (outlining MLB procedure for adding new Clubs, relocating Clubs, and the sell or transfer of Clubs).

184. SULLIVAN ET AL., *supra* note 86, at 591.

185. LEWIS KURLANTZICK, LEGAL ISSUES IN PROFESSIONAL BASEBALL 216 (2005).

186. *Id.*

187. *Id.* at 239.

188. This is an example of MLB's monopolistic conduct. *See generally* KURLANTZICK, *supra* note 185 (explaining how a monopoly reduces consumer options while simultaneously increasing prices, regardless of quality).

189. *Id.*

190. *Id.*

191. This transfer of wealth is the byproduct of MLB's monopolistic conduct. KURLANTZICK, *supra* note 185, at 216–17.

192. Gardella v. Chandler, 172 F.2d 402, 409 (2d Cir. 1949); QUIRK, *supra* note 96, at 155.

suggesting that if a litigant presented the issue de novo, the Court "would certainly find that the Sherman and Clayton acts would apply to baseball."[193] Justice Douglas also criticized the Court's *Fed. Base Ball Club* decision.[194] In his *Flood* dissent, Douglas declared that the only beneficiaries of baseball's antitrust exemption are the owners, whose records demonstrate a tendency of predatory practices harmful to consumers.[195] Such practices included creating a shortage of teams, charging high prices, and providing no alternatives.[196]

Legal experts have also criticized the *Fed. Base Ball Club* decision. These critics claim that the Court's narrow reading of the Commerce Clause is analogous to its infamous 1890 *United States v. E.C. Knight* decision.[197] In *E.C. Knight*, while holding that "manufacturing is not commerce," the Court refused to break up a monopoly responsible for 95% of the sugar refined in America.[198] Chief Justice Melville Fuller incorrectly reasoned, "[t]he fact that an article is manufactured for export in another State does not of itself make it an article of interstate commerce."[199]

B. Analyzing the Toolson v. New York Yankees *Case*

The Supreme Court first upheld professional baseball's antitrust exemption in 1953.[200] However, the Court provided a different rationale than it did in *Fed. Base Ball Club*, reasoning that Congress had the authority to regulate professional baseball but simply chose not to do so.[201] Congress cannot regulate purely intrastate commerce,[202] and yet the *Toolson* Court declared that Congress has the power to regulate professional baseball.[203] While the Court never explicitly stated that professional baseball constituted interstate commerce, it implied as much when it insisted Congress had authority to regulate professional baseball.

Justice Harold Burton filed an eight-page dissent to this decision.[204] Burton argued that by 1953 professional baseball clearly constituted interstate commerce.[205] Supporting this assertion, he noted that teams were constantly traveling across state lines, MLB purchased many materials in interstate commerce, fans often traveled from one state to another for games, and teams now had national television and radio deals.[206] Justice Burton also cited the House of Representatives Subcommittee on Monopoly Power report, which declared that professional baseball constituted interstate commerce.[207] The 1952 report stated there were approximately 380 separate professional baseball teams across 42 states,

193. QUIRK, *supra* note 96, at 155.
194. Flood v. Kuhn, 407 U.S. 258, 286 (1972).
195. *Id.* at 287.
196. *Id.*
197. QUIRK, *supra* note 96, at 152.
198. *Id.*
199. BANNER, *supra* note 80, at 76.
200. Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953).
201. *Id.*
202. U.S. CONST. amend. I, § 8; BANNER, *supra* note 80, at 75.
203. *Toolson*, 346 U.S. at 357.
204. *Id.* at 357–65.
205. *Id.* at 357–58.
206. *Id.*
207. *Id.* at 358.

Canada, Cuba, and Mexico.[208] The report also indicated that in 1950, MLB's gross receipts totaled $32 million.[209] As a result, Justice Burton contended that professional baseball was within Congress's authority to regulate and should be subject to the Sherman Act.[210]

Justice Stanley Reed, joining Justice Burton, claimed that Congress had no reason to omit baseball from the Sherman Act, reasoning that *Fed. Base Ball Club* was a decision based on intrastate commerce.[211] "[T]he view adopted by the Court in *Toolson*—that Congress intended to exempt baseball from the Sherman Act—was almost certainly wrong."[212] Baseball was so insignificant when Congress enacted the Sherman Act that it probably did not even consider it upon promulgation.[213]

Some scholars suggest that Congress did not act on the antitrust issue because it was waiting for the Supreme Court to act, and that the Court refrained from acting because it was waiting for Congress to do so.[214] However, perhaps Congress did not act because it was uncertain whether it had the authority to do so.[215] One thing is certain: the *Toolson* Court clarified that Congress had authority to regulate MLB.

The *Toolson* Court may have declined to overturn *Fed. Base Ball Club* because of the potential impact of the holding's retroactive application.[216] If the Court held that professional baseball was subject to antitrust laws, the reserve clause would have been declared illegal.[217] Had this occurred, thousands of professional baseball players would have had "plausible arguments that they had lost money over their careers due to their inability to sell their services to the highest bidder."[218] Under the Sherman Act, each of these players would have been entitled to treble damages.[219] This would have been a devastating punishment for baseball, as owners would have been liable for acts that were legal when they occurred.[220] Comparatively, it is likely that many justices would have considered this to be more unjust to team owners than the reserve clause was to players.[221] As a result, the consequences of retroactively applying the law provided the Court with a substantial reason to let the exemption stand and to wait for Congress to change the law prospectively.[222]

C. Analyzing the Flood v. Kuhn *Case*

Justice Blackmun delivered the *Flood* opinion, stating that although he viewed baseball's antitrust exemption as an "aberration," he saw "merit in consistency" in

208. *Toolson*, 346 U.S. at 358.
209. Collected from ticket sales for home, away, and exhibition games, concessions, radio and television payments, and other miscellaneous sources of revenue. *Id.* at 359 n.3.
210. *Id.* at 359.
211. BANNER, *supra* note 80, at 119.
212. *Id.* at 120.
213. *Id.*
214. *Id.* at 121.
215. *Id.*
216. BANNER, *supra* note 80, at 121.
217. *Id.* at 121–22.
218. *Id.* at 122.
219. *Sherman Antitrust Act*, *supra* note 86.
220. BANNER, *supra* note 80, at 122.
221. *Id.*
222. *Id.*

upholding it.[223] This was the first Supreme Court decision to explicitly confirm that professional baseball is a business engaged in interstate commerce and is therefore subject to congressional regulation.[224] However, the *Flood* Court concluded that it would not overturn the exemption because Congress had allowed it to stand for the past 50 years.[225] In support of its decision, the Court mentioned a few of the potential consequences that removing the exemption would have caused if applied retroactively.[226]

In his dissent, Justice Douglas argued that baseball is "big business that is packaged with beer, with broadcasting, and with other industries."[227] Justice Douglas also suggested that team owners were the only beneficiaries of professional baseball's antitrust exemption, and that this protection allowed the owners to frequently engage in predatory practices.[228] Justice Douglas went on to classify MLB's exemption as a "derelict" that the Court, "its creator, should remove."[229] In response to the majority's claim that Congress, through "positive inaction," chose to let the exemption stand, Justice Douglas argued that Congress's unwillingness to extend the exemption to any other professional sport was more persuasive than its silence on the issue in baseball.[230] Although Justice Douglas did not elaborate on this point, he seemed to imply that Congress realized the exemption is an aberration and has therefore denied its application to every other professional sport.

Justice William Marshall also dissented.[231] His opinion focused mainly on the unfairness of the reserve clause, suggesting that those unfamiliar with baseball would perceive Curt Flood as a slave to league owners "who bartered among themselves for his services."[232] Marshall concluded that it was the Court's job to correct its error that made MLB players powerless in their choices of employment.[233] Marshall suggested that the Court simply apply the new rule prospectively to avoid the perceived burden arising from retroactive application of a decision to overrule *Fed. Base Ball Club*.[234] However, the majority rejected this proposition, claiming "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation."[235] This principle was reasserted when the *Radovich* Court announced "that it had washed its hands of baseball and the antitrust laws, deferring to the legislature."[236]

Since 1972, the "American legal community" has generally sided with Justice Douglas' *Flood* dissent that "professional baseball is big business that should be subject to the same antitrust . . . regulation" as every other professional sport.[237] These critics

223. Flood v. Kuhn, 407 U.S. 258, 282–84 (1972); "[S]ince *Flood*, every antitrust case against Major League Baseball that has survived a motion to dismiss has been settled. Thus, the Supreme Court has had no opportunity to clarify [the case's meaning]." Marianne McGettigan, *The Curt Flood Act of 1998: The Players' Perspective*, 9 MARQ. SPORTS L.J. 379, 388 (1999).

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

225. *Id.* at 283–84.

226. *Id.* at 283.

227. *Id.* at 287.

228. *Id.*

229. *Flood*, 407 U.S. at 283.

230. *Id.* at 288.

231. *Id.*

232. *Id.* at 289.

233. *Id.* at 292.

234. *Flood*, 407 U.S. at 293.

235. *Id.* at 273.

236. JEROLD J. DUQUETTE, REGULATING THE NATIONAL PASTIME 49 (Praeger Publishers 1999).

237. QUIRK, *supra* note 96, at 159.

contend that the line of Supreme Court cases maintaining baseball's antitrust exemption is wrong and should be reversed by either judicial or legislative action.[238] Furthermore, many law review articles have explained how baseball's antitrust exemption gives it a competitive advantage over all other professional sports.[239]

Additionally, many legal scholars have criticized Justice Blackmun's majority opinion in *Flood*. One critic stated that Blackmun "confused the *business* of baseball with the glorious *game* of baseball."[240] Critics also condemned Justice Blackmun for letting his love of the game "cloud his analytic judgment."[241] The Court received further criticism for not applying the "normal process of legal reasoning" in making its decision.[242] These scholars argued that had the Court followed this "normal process," it would have ruled for Curt Flood and overturned professional baseball's exemption.[243] These critics claimed that the Court reaffirmed the exemption simply "*because* of baseball's special cultural status" as America's national pastime.[244]

Others have also argued that Justice Blackmun sided with the team owners because they, like him, were old white men.[245] Justice Blackmun grew up when baseball was foreign to labor, money, and race disputes.[246] The owners tried to instill this perception of the game in their public relations, where they argued that the 1960's wave of players were "brasher, blacker, less willing to submit quietly to authority," and were trying to change the game.[247] However, when the *Flood* case first came to the Court, professional baseball was in the midst of economic and cultural battles between the old white owners and the new young players of various races.[248] The game clearly was not how Justice Blackmun chose to envision it when writing his opinion.[249] The Court's decision caused some to believe that it ruled against Flood simply to support the "owners in this broader generational struggle."[250] The Court's decision, which created doubt in the law, rather than strengthening the justifications for it, made it appear as though baseball's exemption rested "on the nostalgia of elderly men for the glory days of the national pastime rather than on any defensible legal basis."[251]

D. Analyzing the City of San Jose v. Office of the Comm'r of Baseball *Case*

In the ongoing case, *City of San Jose*, the California district court dismissed the City's antitrust claim against MLB.[252] However, in doing so, the court did not seriously consider the merits of the City's claim. The opinion began with this 1970 Second Circuit quote:

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238. *Id.*
239. *Id.*
240. BANNER, *supra* note 80, at 214.
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. BANNER, *supra* note 80, at 214.
246. *Id.*
247. *Id.*
248. *Id.* at 214–15.
249. *Id.* at 215.
250. BANNER, *supra* note 80, at 215.
251. *Id.*
252. City of San Jose v. Office of the Comm'r of Baseball, No. C-13-02787 RMW, 2013 WL 5609346, at *16 (N.D. Cal. Oct. 11, 2013).

"[W]e continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions . . . ."[253] The purpose of this statement was to advise the City of San Jose that this particular court was not vested with the power to overturn the Supreme Court's *Fed. Base Ball Club* decision. In writing his opinion, Senior District Judge Ronald Whyte briefly gave a statement of the facts, and then spent approximately six pages discussing previous cases regarding baseball's antitrust exemption.[254] Implicit in the district court's opinion, however, is the idea that perhaps the judiciary will give the City of San Jose's claim more serious consideration on appeal. After declaring that this particular court did not have the power to overturn the exemption, the court proceeded to refer to it as "illogical" and "inconsistent."[255] Conversely, the court also noted that the Supreme Court has previously stated that any change to the exemption would have to be initiated by Congress, ensuring that the City of San Jose does not get its hopes too high.[256]

E. Analyzing the Baseball Amendment to the Clayton Act

The Curt Flood Act was the first and only instance in which Congress regulated professional baseball.[257] The Act was a result of the 1996 CBA between team owners and the players.[258] Both parties agreed to invite Congress to pass a law subjecting MLB players' employment to antitrust laws.[259] However, the Act went on to list the various ways in which the law remained unchanged.[260] This caused confusion as to whether Congress had declared that all other areas of professional baseball were still exempt, or whether it had merely declined to determine whether the exemption still applied to baseball issues other than player employment.[261]

Scholars began questioning the Act's implications almost immediately after its enactment. Some believed Congress was implying that baseball in its entirety was subject to antitrust laws because it subjected part of baseball to said laws.[262] However, MLB Players Association representative Steven Fehr claimed that the Act had been "carefully drafted to avoid taking any position on how antitrust law should apply" to any aspect of baseball aside from player employment.[263] Because the Supreme Court has never clarified the meaning of the Curt Flood Act, and owners constantly claim that "they enjoy a broad antitrust immunity, many people, including some judges, accept it as true, while others, including members of the press, simply repeat the assertion rather than explain that opinions on the state of the law differ."[264]

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253. *Id.* at *1.
254. *Id.* at *3–10.
255. *Id.* at *1.
256. *Id.*
257. Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (1998); BANNER, *supra* note 80, at 247.
258. BANNER, *supra* note 80, at 246.
259. *Id.*
260. *Id.* at 247.
261. *Id.*; Steven A. Fehr, *The Curt Flood Act and Its Effect on the Future of the Baseball Antitrust Exemption*, 14 ANTITRUST 25, 29 (2000) (discussing the ambiguity surrounding Congress's intended effect of the Curt Flood Act).
262. BANNER, *supra* note 80, at 247.
263. *Id.*
264. McGettigan, *supra* note 223, at 385.

IV. RECOMMENDATION

This Part evaluates arguments in favor of a possible Ninth Circuit decision to uphold, as well as a suggested outcome of overruling baseball's antitrust exemption in *City of San Jose*. This examination also discusses San Jose's option of seeking congressional assistance to overturn the exemption. This Part concludes by discussing the possibility of a settlement between MLB and the City of San Jose.

A. The Ninth Circuit Might Uphold the Exemption

Based on the Supreme Court's reluctance to overturn *Fed. Base Ball Club*,[265] the Ninth Circuit will likely uphold baseball's antitrust exemption.[266] In *Flood*, the Court declined to overturn an exemption that had existed for over 50 years "when Congress, by its positive inaction" allowed it to stand.[267] Nearly 50 more years have passed without Congress removing the exemption in its entirety.[268] If the Ninth Circuit follows similar reasoning as the *Flood* Court, it may indicate that the *Fed. Base Ball Club* exemption is stronger than ever. The Ninth Circuit may find further support for a decision to uphold the exemption in Congress's willingness to leave baseball's exemption largely intact, while refusing to extend the antitrust exemption to other professional sports.[269] This might suggest that baseball holds a special place in Congress's eye.

If the Ninth Circuit does rule in MLB's favor and upholds the antitrust exemption, the City of San Jose will have the option of appealing to the Supreme Court, where the exemption originated nearly a century ago.[270] Should the Supreme Court find in MLB's favor, the City of San Jose will be out of judicial options. However, the City may have better luck appealing to Congress rather than the judiciary anyway.[271] In fact, the Supreme Court was clear in *Flood* that if any change in professional baseball's exemption were to occur, Congress would need to initiate it.[272] Then again, *Flood* was over 40 years ago, so the current justices might view the matter differently. The Curt Flood Act demonstrated Congress's willingness to narrow professional baseball's exemption,[273] but it would be the City of San Jose's job to convince Congress to remove the exemption in its entirety.

If the City's appeals to the judiciary and legislature both fail, MLB and its owners will continue to enjoy a monopoly and the ability to engage in predatory practices to increase revenues.[274] The A's will be unable to relocate to San Jose, effectively prohibiting the team from opting out of its new lease with the deteriorating Coliseum following the 2018 season.

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265. Flood v. Kuhn, 407 U.S. 258, 285 (1972); Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953) (upholding professional baseball's exemption).

266. The Ninth Circuit may uphold the exemption by declining to review the district court's dismissal of San Jose's antitrust claim.

267. *Flood*, 407 U.S. at 283–84.

268. The Curt Flood Act narrowed MLB's antitrust exemption, declaring that American antitrust laws apply to player employment. Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (1998).

269. QUIRK, *supra* note 96, at 158.

270. In *Fed. Base Ball Club*, the Supreme Court determined professional baseball's exemption from American antitrust law. Fed. Base Ball Club of Balt. v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200, 208 (1922).

271. Woolfolk, *supra* note 37 (citing University of Virginia law professor Gordon Hylton's argument).

272. Flood v. Kuhn, 407 U.S. 258, 283 (1972).

273. Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (1998).

274. *Flood*, 407 U.S. at 287.

B. The Ninth Circuit Should Overturn the Exemption

The Ninth Circuit should grant the City of San Jose's appeal and overturn professional baseball's antitrust exemption established in *Fed. Base Ball Club*. The sport has drastically changed since the exemption came about in 1922, and professional baseball now constitutes interstate commerce.[275] Therefore, the Commerce Clause grants Congress the power to regulate it.[276] If Congress objects to the court's decision, it can overturn it by passing new legislation.[277] If the court were to overturn the exemption in its entirety, baseball would no longer be exempt from antitrust legislation and MLB would have to do away with its exclusive territories and predatory practices.[278] As a result, "MLB will find itself facing a new form of free agency. Any owner of any franchise will be able to move the team anywhere the owner wishes."[279] This means that if the San Francisco Giants thought they would be more profitable as the third team in New York, they would be free to move back regardless of any objections made by the Yankees or Mets.[280]

There are many economic reasons why the Ninth Circuit should overturn professional baseball's exemption. A new ballpark in San Jose would provide developers in the city with incentives to build new hotels, restaurants, and businesses in the surrounding area.[281] This would drastically increase San Jose's economic activity.[282] Conversely, the City of San Jose alleges in its complaint that "failure to obtain the stadium would result in a loss of $1.8 billion in direct spending over 30 years."[283] Furthermore, overturning the exemption would abolish MLB's horizontal restraint[284] on competition, relieving consumers of such harms as decreased output and increased prices.[285] Additional economic benefits accompanying the A's approved move to San Jose include increased fan attendance and increased "fan intensity" in the relevant market.[286]

C. Chances of a Settlement?

MLB has settled previous lawsuits brought by cities claiming that baseball's antitrust exemption prevented them from obtaining a team.[287] However, it has been 20 years since

275. *Id.* at 282.
276. U.S. CONST. amend. I, § 8.
277. *Id.*
278. *Flood*, 407 U.S. at 287.
279. *San Jose Suit Appears to be Strong*, *supra* note 28.
280. *Id.*
281. Complaint at 15–16, City of San Jose v. Office of the Comm'r of Baseball (N.D. Cal. Oct. 11, 2013) (No. CV13-02787), 2013 WL 2996788.
282. *Id.*
283. *Id.* at 57 exh. 1, at iii.
284. A horizontal restraint is an agreement between competitors to restrain competition. SULLIVAN ET AL., *supra* note 86, at 163. Examples of such agreements include price fixing, bid rigging, group boycotts, and other activities that restrict output or exclude competition. *Id.* Section 1 of the Sherman Act bans horizontal restraints. *Id.*
285. Complaint at 27, City of San Jose v. Office of the Comm'r of Baseball (N.D. Cal. Oct. 11, 2013) (No. CV13-02787), 2013 WL 2996788.
286. *Id.* at 21.
287. *Suit Claimed MLB Reneged on Expansion*, ESPN (Sept. 26, 2003), http://sports.espn.go.com/mlb/news/story?id=1624096 (describing MLB's settlement with a group of Tampa Bay investors seeking an expansion team).

MLB last faced a serious antitrust threat.[288] That occurred when MLB blocked the Giants' attempted move to St. Petersburg, Florida, forcing owner Bob Lurie to sell to local owners in San Francisco.[289] Upon Florida's threat to sue, MLB quickly created the Tampa Bay Devil Rays, suppressing any would-be challenge to its antitrust exemption.[290] However, the City of San Jose's case is different. Here, MLB has not actually blocked the A's from moving to San Jose. Commissioner Selig instead told the team that his committee would look into the matter, expecting the A's to negotiate use of the territory with the Giants in the meantime.[291]

Additionally, the Bay Area is a two-team territory, unlike Tampa, which was seeking its first and only team.[292] Furthermore, the Bay Area is the only MLB two-team market that does not share the exact same territory.[293] Therefore, if MLB were to settle with the City of San Jose and eventually allow the A's to relocate there, MLB would also have to compensate the Giants for being coerced into giving up rights to part of their exclusive territory.[294] For these reasons, a settlement between MLB and the City of San Jose does not seem likely. As a result, the courts will be forced to determine whether they want to enforce justice or continue to uphold the "aberration"[295] that is professional baseball's antitrust exemption.

V. CONCLUSION

Based on strong dissenting opinions, criticism from legal scholars, and the law as applied to all other professional sports, the judiciary should find for the City of San Jose and abolish professional baseball's antitrust exemption. As a result, MLB would lose its monopoly over the sport. Keeping in mind that the goal of American antitrust law is to protect consumers, the judiciary should jump at the opportunity to remove the exemption, which would limit consumer harm by preventing MLB from restricting output while simultaneously raising prices. If the judiciary overturns the exemption, the A's will be free to move to San Jose following the 2018 season and could finally build the new stadium that they deserve.

288. *San Jose Sues MLB Over A's Move, Hopes Antitrust Threat Trumps Problematic Legal Case*, FIELD OF SCHEMES (June 19, 2013), http://www.fieldofschemes.com/2013/06/19/5352/san-jose-sues-mlb-over-as-move-hopes-antitrust-threat-trumps-problematic-legal-case/.

289. *Id.*

290. *Id.*

291. *Id.*

292. Costa, *supra* note 29 (discussing the Bay Area territorial split between the A's and the Giants).

293. The A's and the Giants split the Bay Area, whereas teams in Chicago, Los Angeles, and New York share their respective territories. Complaint at 16, City of San Jose v. Office of the Comm'r of Baseball (N.D. Cal. Oct. 11, 2013) (No. CV13-02787), 2013 WL 2996788; Costa, *supra* note 29.

294. Major League Constitution, *supra* note 7.

295. Flood v. Kuhn, 407 U.S. 258, 282–84 (1972).