BASEBALL'S ANTITRUST EXEMPTION FOR FRANCHISE DECISIONS: ITS JUSTIFICATIONS AND ANTITRUST LAW IMPLICATIONS FOR OTHER PROFESSIONAL LEAGUES

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This Article considers Major League Baseball (MLB)'s antitrust exemption, specifically its origin and continuing justification as well as its judicial application to MLB franchise decisions, as it approaches the 100th anniversary of its creation by the United States Supreme Court. It concludes that the majority judicial view broadly construing this exemption is appropriate and its application to MLB franchise decisions has not harmed competition for purposes of antitrust law. The Article explains why MLB's antitrust exemption should be instructive to courts resolving antitrust litigation challenging other major professional sports leagues' core internal governance issues, asserting that its justifications support judicial application of the single entity defense or a rebuttable presumption of per se reasonableness in antitrust lawsuits challenging their franchise decisions.

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INTRODUCTION

This Article considers Major League Baseball (MLB)'s antitrust exemption, specifically its origin and continuing justification as well as its judicial application to MLB franchise decisions (e.g., number, location, and ownership of league clubs), which because of the exemption properly are not subject to review by antitrust courts and juries. As MLB's antitrust exemption approaches its 100th anniversary

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and the National Football League (NFL) currently defends yet another antitrust suit arising out of the Oakland Raiders' relocation to Las Vegas, the Article also explores how and why MLB's antitrust exemption should be instructive to courts resolving antitrust litigation challenging other professional sports leagues' core internal governance issues. The Article concludes that the majority judicial view broadly construing the exemption is the correct interpretation of Supreme Court precedent and that the exemption's application to MLB franchise decisions has not harmed competition. The Article also asserts that the justifications for MLB's antitrust exemption support (1) judicial application of the single entity defense; or (2) a rebuttable presumption of per se reasonableness in antitrust litigation challenging other major professional leagues' franchise decisions.

I. ORIGIN AND APPLICATION OF MLB'S ANTITRUST EXEMPTION

The origin of MLB's antitrust exemption is *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,[1] a 1922 case in which the U.S. Supreme Court first considered the application of federal antitrust law to professional sports.[2] Pursuant to a December 1915 "peace agreement" with the American League and National League (which had been in operation since 1876 and 1901, respectively), the recently-formed Federal League was dissolved.[3] However, the Baltimore club refused to be part of this settlement and brought an antitrust lawsuit with broad allegations that the American League and National League had conspired to monopolize professional baseball in violation of the Sherman Act.[4] It alleged that the two leagues had induced some Federal League club owners to "betray and desert the other clubs" by entering into the settlement in order "to wreck entirely the Federal League"[5] as well as through the "reserve clause" (providing their respective league clubs with perpetual rights to a player even after his contract expired, which prevented the Federal League from competing for those players).[6]

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1. 259 U.S. 200 (1922).

2. *Id*.

3. Thomas J. Ostertag, *Baseball's Antitrust Exemption: Its History and Continuing Importance*, 4 VA. SPORTS & ENT. L.J. 54, 55 (2004).

4. *Id*.

5. *Id*. at 56–57; *see also* Edmund P. Edmonds, *Over Forty Years in the On-Deck Circle: Congress and the Baseball Antitrust Exemption*, 19 T. MARSHALL L. REV. 627, 628–32 (1994) (discussing historical background about the events leading to *Federal Baseball* as well as the appointment of Judge Kenesaw Mountain Landis as the first Commissioner of Baseball).

6. Edmonds, *supra* note 5, at 630–31.

At trial, the plaintiff obtained a jury verdict and an $80,000 damages award, which was trebled under the antitrust laws.[7] This judgment was reversed by the District of Columbia Court of Appeals, which ruled that the exhibition of baseball games did not affect interstate trade or commerce under the Sherman Act.[8] The Supreme Court affirmed the federal appellate court, ruling that MLB's business activities are wholly intrastate because each game is played within a single state even if between clubs located in different states; therefore, MLB's business is not interstate "trade or commerce" subject to regulation by federal antitrust law.[9]

In 1953, in *Toolson v. New York Yankees*,[10] the Supreme Court reaffirmed the validity of *Federal Baseball* in a trilogy of antitrust cases collectively alleging broad violations of the antitrust laws against MLB.[11] The Court reasoned that MLB had been allowed to develop for more than thirty years based on *Federal Baseball*'s ruling that it was not subject to the antitrust laws.[12] It noted that Congress had not eliminated or otherwise modified MLB's judicially-created antitrust exemption, thereby expressing its intention that MLB was not subject to federal antitrust law.[13]

These two Supreme Court opinions, which were facially clear and definitive, did not completely eliminate the filing of antitrust claims against MLB and its clubs, including the Milwaukee Braves whose history dated to the year of the *Toolson* decision. In 1953, the Boston Braves relocated to Milwaukee[14] and immediately enjoyed on-field success and profitability. The club's success later ebbed, and in October 1964, the Braves' board of directors voted to move the team to Atlanta, where it would be the only MLB team in the Southeast with anticipated fan attendance and revenues greater than in Milwaukee.[15]

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7. *Id*. at 631.

8. *Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Balt., Inc.*, 269 F. 681 (D.C. Cir. 1920).

9. *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208–09 (1922).

10. 346 U.S. 356 (1953).

11. *Id*.

12. *Id*. at 357.

13. *Id*.

14. JOHN THORN & DAVID PIETRUSZA, TOTAL BASEBALL: THE ULTIMATE BASEBALL ENCYCLOPEDIA 182 (8th ed. 2004); *13 Major League Baseball Teams that Have Relocated*, WORLDATLAS, https://www.worldatlas.com/articles/13-major-league-baseball-teams-that-have-relocated.html [https://perma.cc/QCV3-SQX3].

15. As Selig notes:

> Their vision turned out to be flawed, however. Atlanta and its vast territory was no better a baseball market than was Milwaukee. In fact, the first 48 years in which the Milwaukee Brewers and Atlanta Braves would co-exist

On November 7, 1964, the National League club owners approved the Braves' relocation after the 1965 baseball season when its Milwaukee stadium lease expired.[16]

Bud Selig, then a thirty-year-old avid Braves fan and the largest holder of its public stock ($2000 shares purchased for $10/share), led a passionate but ultimately unsuccessful local public campaign to keep the team in Milwaukee by offering $7 million to purchase the club. On July 30, 1965 (his birthday), Selig created the "Milwaukee Brewers Baseball Club," a company without a team funded by a group of Milwaukee and other Wisconsin businessmen. It filed applications for an expansion club with the National League and American League that were denied by both leagues.

In August 1965, the State of Wisconsin brought a lawsuit in Wisconsin state court alleging that the National League and its member baseball clubs violated state antitrust law by allowing the Milwaukee Braves to move to Atlanta and by refusing to provide a replacement team in Milwaukee. In *State v. Milwaukee Braves*,[17] the Circuit Court of Milwaukee County made several findings of material fact, including (1) the National League and the American League and their respective member teams collectively had monopoly power over professional baseball, thereby giving them "unlimited power and discretion to determine the location of" franchises; (2) expansion by the National League was feasible; (3) the Braves franchise was profitable in Milwaukee; (4) Milwaukee had the economic and population bases necessary to support an MLB team; (5) the National League had no objective standards for evaluating the appropriateness of a club's relocation or any procedure to enable communities faced with the loss of a team an opportunity to be heard; and (6) the move of the Braves to Atlanta would cause a substantial economic loss to Milwaukee's metropolitan area.[18] The court issued an injunction barring the Braves from relocating unless the National League provided another baseball team for Milwaukee,[19] which was stayed pending a direct appeal to the Wisconsin Supreme Court.

> (1970–2017), the Brewers outdrew the Braves 25 times—more than half. And before the Braves had their great stretch in the '90s, the Brewers outdrew the Braves 15 out of 18 years. So much for the pot of gold in the Great Southeast.

FOR THE GOOD OF THE GAME: THE INSIDE STORY OF THE SURPRISING AND DRAMATIC TRANSFORMATION OF MAJOR LEAGUE BASEBALL, Chapter 2 (Heartbreak) (forthcoming July 2019) (manuscript at 8) (on file with author).

16. *See generally* Jeffrey M. Eisen, *Franchise Relocation in Major League Baseball*, 4 ENT. & SPORTS L.J. 19, 32–33 (1987).

17. 1966 Trade Cas. (CCH) ¶ 71, 738 (Wis. Cir. Ct.).

18. *Id.* at 82, 410–11.

19. *Id.* at 82, 411–12.

In a 4-3 decision, the Wisconsin Supreme Court reversed the trial court's judgment.[20] Assuming that the defendants' conduct violated Wisconsin antitrust law,[21] the court ruled that such law's use to require the National League to increase the number of its baseball clubs would conflict with the Supremacy[22] and Commerce[23] Clauses of the United States Constitution.[24] Because of MLB's common law exemption from federal antitrust law pursuant to *Federal Baseball* and *Toolson*, the court ruled that the use of state antitrust law to regulate the location and number of a professional sports league's clubs would conflict with federal antitrust policy and violate the Supremacy Clause.[25] Because any government regulation of an interstate professional sports league requires uniformity, the court also concluded that using state law to prohibit the National League from allowing the Braves to relocate from Wisconsin to Georgia and from denying an application for an expansion club in Milwaukee would violate the dormant Commerce Clause.[26] Although the United States Supreme Court refused to review this case, its subsequent ruling in *Flood v. Kuhn*[27] confirmed the *Milwaukee Braves* majority's ruling.[28]

In 1972, the U.S. Supreme Court reaffirmed the validity of MLB's antitrust exemption and made it clear that it applied broadly to the business of baseball. In *Flood*, the Court rejected a federal antitrust

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20. *State v. Milwaukee Braves, Inc.*, 144 N.W.2d 1 (Wis. 1966).

21. *Id.* at 11.

22. The Supremacy Clause declares that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. CONST., art. VI, cl. 2.

23. The Commerce Clause grants Congress the exclusive authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST., art. I, § 8, cl. 3.

24. *Milwaukee Braves*, 144 N.W.2d at 12–18.

25. *Id.*

26. *Id.* at 15–18. Wisconsin citizens were outraged by the *Milwaukee Braves* majority ruling, and the four justices in the majority subsequently were not re-elected. *See Supreme Court Former Justices*, WISCONSIN COURT SYSTEMS, https://www.wicourts.gov/courts/supreme/justices/retired/? [https://perma.cc/SLD8-MU2Z].

27. 407 U.S. 258, 258 (1972).

28. *Id. Milwaukee Braves* is consistent with the prevailing judicial view that the dormant Commerce Clause generally precludes state laws from directly regulating the internal affairs of national sports leagues or governing bodies because of the need for uniform external regulation of their interstate operations and to avoid burdening interstate commerce with potentially conflicting state statutes or common law. *See, e.g.*, *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633 (9th Cir. 1993) (application of a Nevada statute to the NCAA violates the Commerce Clause); *Partee v. San Diego Chargers Football Co.*, 668 P.2d 674, 678–79 (Cal. 1983) (en banc) (applying state antitrust law to national professional football league would burden interstate commerce and undercut the need for uniform national regulation in violation of the Commerce Clause).

law claim by MLB player Curt Flood seeking to invalidate the reserve clause. The Court acknowledged that "[p]rofessional baseball is a business and it is engaged in interstate commerce" and that its antitrust exemption "is an aberration 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."[29] The Court refused to judicially abrogate this fifty-year-old antitrust immunity because "[i]t rests on a recognition and acceptance of baseball's unique characteristics and needs."[30] Reiterating *Toolson*'s reasoning, it "expressed concern about the confusion and the retroactivity problems that inevitably would result" if it overturned *Federal Baseball* because MLB "has been allowed to develop and to expand unhindered" by the Sherman Act for the past fifty years.[31] The Court stated: "If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court."[32] Although it had refused to rule that any other professional sports[33] or entertainment businesses[34] are immune from antitrust liability, the Court concluded "we adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball."[35]

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

30. *Id.*

31. *Id.* at 283.

32. *Id.* at 284. In their dissenting opinion, Justices Marshall and Brennan asserted:

> We do not lightly overrule our prior constructions of federal statutes, but when our errors deny substantial federal rights, like the right to compete freely and effectively to the best of one's ability as guaranteed by the antitrust laws, we must admit our error and correct it. We have done so before and we should do so again here.

Id. at 292–93 (Marshall, J., dissenting).

33. *See, e.g.*, *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204 (1971) (basketball); *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957) (football); *United States v. Int'l Boxing Club*, 348 U.S. 236 (1955) (boxing).

34. *See, e.g.*, *United States v. Shubert*, 348 U.S. 222 (1955) (theatrical attractions).

35. *Flood*, 407 U.S. at 284. Analyzing *Flood* from the perspective of the parties, Justice Harry Blackmun (who wrote the Court's majority opinion), and Representative Emanuel Celler (who chaired 1952 congressional hearings regarding a proposed uniform antitrust exemption for professional sports leagues and the appropriate scope of MLB's common law antitrust exemption), a commentator asserted it "was not a formalistic opinion about *stare decisis,* but rather a dynamic prediction about the consequences of applying the antitrust laws to our national pastime," Stephen F. Ross, *The Story of* Flood v. Kuhn*: Dynamic Statutory Interpretation, at the Time*, *in* STATUTORY INTERPRETATION STORIES (William Eskridge, Philip Frickey & Elizabeth Garrett, eds. Foundation 2011).

Subsequently, in 1974 and 1982 per curiam decisions, two federal appellate courts broadly construed the scope of MLB's antitrust exemption to be the business of baseball, including MLB club location issues. In *Portland Baseball Club, Inc. v. Kuhn*,[36] the Ninth Circuit cited *Flood* in affirming the dismissal of an antitrust claim by the owner of the Pacific Coast League club in Portland challenging the amount of compensation it received for MLB's placement of an expansion club in Seattle.[37] The court stated "[w]e can do no better than to adopt [the lower court's] opinion as our own,"[38] which "exempt[ed] professional baseball from the application of the federal anti-trust laws."[39] In *Professional Baseball Schools & Clubs, Inc. v. Kuhn*,[40] the Eleventh Circuit upheld the dismissal of an antitrust challenge to MLB and the minor leagues' "franchise location system" because it "plainly concerns matters that are an integral part of the business of baseball" immune from antitrust scrutiny under *Flood* and its progeny.[41]

On the other hand, in *Piazza v. Major League Baseball*,[42] a federal district court held that MLB's antitrust exemption is limited to its player reserve system, thereby permitting an antitrust challenge to MLB's alleged "restraints on the purchase, sale, transfer and relocation of Major League Baseball teams and on competition in the purchase, sale, transfer and relocation of such teams."[43] The plaintiffs were a group of investors who offered $115 million to buy the San Francisco Giants and to move the club to Tampa Bay, Florida.[44] The National League did not approve their proposal, and the club was sold for $100 million to a new owner who agreed to keep it in San Francisco.[45]

Construing the binding precedential effects of *Flood* on lower courts narrowly, the *Piazza* district court rejected the defendants' motion to dismiss and explained:

> [B]efore *Flood,* lower courts were bound by both the *rule* of *Federal Baseball* and *Toolson* (that the business of baseball is not interstate commerce and thus not within the Sherman Act) and the *result* of those decisions (that baseball's reserve

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36. 491 F.2d 1101 (9th Cir. 1974).
37. *Id*. at 1102–03.
38. *Id.* at 1103.
39. *Portland Baseball Club, Inc. v. Kuhn*, 368 F. Supp. 1004, 1007 (D. Or. 1971).
40. 693 F.2d 1085 (11th Cir. 1982).
41. *Id*. at 1085–86.
42. 831 F. Supp. 420 (E.D. Pa. 1993).
43. *Id.* at 429 n.13 (quoting Complaint at 104, 831 F. Supp. 420 (E.D. Pa. 1993)).
44. *Id*. at 422–23.
45. *Id*. at 423.

> system is exempt from the antitrust laws). . . . In *Flood,* the Supreme Court exercised its discretion to invalidate the *rule* of *Federal Baseball* and *Toolson*. Thus no rule from those cases binds the lower courts as a matter of *stare decisis*. The only aspect of *Federal Baseball* and *Toolson* that remains to be followed is the result or disposition based upon the facts there involved, which the Court in *Flood* determined to be the exemption of the reserve system from the antitrust laws.[46]

The *Piazza* court, however, was mistaken in its characterization of *Federal Baseball* and the *Toolson* trilogy as involving challenges to MLB's then-existing perpetual reserve clause only; the allegations in those cases included much broader antitrust claims. *Piazza* did acknowledge that other courts[47] have broadly construed the antitrust exemption to encompass "the business of baseball" (i.e., "that which is central to [its] 'unique characteristics and needs'"), with a judicial consensus that "the exempted market includes (1) the reserve system and (2) matters of league structure."[48] Because the "physical relocation of a team and MLB's decisions regarding such a relocation could implicate matters of league structure," it recognized that if "a factual record were developed showing that this case concerns only restraints on the market for ownership *and* relocation of the Giants as inseparable activities, 'rule stare decisis' could require application of the exemption" under this broad view.[49] *Piazza* was settled before this fact issue was judicially resolved,[50] and it is unclear why in the court's view the relocation of a club could implicate "matters of league structure," but an MLB-approved sale of a club conditioned on the team remaining in its current host city could not.

In *Butterworth v. National League of Professional Baseball Clubs*,[51] the Florida Supreme Court followed *Piazza*, despite acknowledging it "is the only federal court to have interpreted baseball's antitrust exemption so narrowly," by holding that MLB's antitrust exception covers only its player reserve system.[52] Its ruling

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46. *Id*. at 437–38.

47. *Piazza*, 831 F. Supp. at 436–37 (citing *Prof. Baseball Schs. & Clubs, Inc. v. Kuhn*, 693 F.2d 1085 (11th Cir. 1982); *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 541 (7th Cir. 1978); *Postema v. Nat'l League of Prof. Baseball Clubs*, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992), *rev'd on other grounds*, 998 F.2d 60 (2d Cir. 1993); *Henderson Broad. Corp. v. Hous. Sports Ass'n*, 541 F. Supp. 263, 268–69, 271 (S.D. Tex. 1982); *State v. Milwaukee Braves, Inc.*, 144 N.W.2d 1, 15 (Wis. 1966)).

48. *Id*. at 440 (quoting *Postema*, 799 F. Supp. at 1489).

49. *Id*. at 441.

50. Deborah L. Spander, *The Impact of* Piazza *on the Baseball Antitrust Exemption*, 2 UCLA ENT. L. REV. 113, 113–14, 114 n.3 (1995).

51. 644 So. 2d 1021 (Fla. 1994).

52. *Id*. at 1024–25.

permitted the Florida attorney general to issue antitrust civil investigative demands to the National League to determine whether its member clubs' vote not to approve the sale of the San Francisco Giants club to an ownership group wanting to move it to Tampa Bay violated Florida's antitrust laws.[53] Dissenting, Senior Justice McDonald asserted: "[t]he composition of the leagues, that is, where professional baseball is played and with whom, is a fundamental consideration of professional baseball and at the heart of its business activity" and "[d]ecisions concerning ownership and location of baseball franchises clearly fall within the ambit of baseball's antitrust exemption."[54]

Consistent with *Butterworth*, in *Morsani v. Major League Baseball*,[55] a Florida appellate court held that MLB's antitrust exemption does not cover "decisions involving sales and locations of baseball franchises."[56] With little analysis and contrary to the ruling in *Milwaukee Braves*, it rejected MLB's assertion that the dormant Commerce Clause barred plaintiffs' Florida antitrust law claim that numerous defendants associated with MLB clubs conspired to prevent the purchase and relocation of the Minnesota Twins club to Tampa Bay.[57]

In 1998, the Curt Flood Act modified the Sherman Act by narrowing MLB's antitrust exemption.[58] The statute effectively provides MLB players with the same antitrust law rights and remedies as those of other major league professional team sport athletes.[59] It permits antitrust challenges by MLB players only to MLB clubs' conduct or agreements "directly relating to or affecting employment of major league baseball players to play

53. *Id*. at 1022, 1025, & n.8.

54. *Id.* at 1026 (McDonald, J., dissenting).

55. 663 So. 2d 653 (Fla. Dist. Ct. App. 1995).

56. *Id.* at 657.

57. *See id.* at 655, 657; *State v. Milwaukee Braves, Inc.*, 144 N.W.2d 1, 12, 17–18 (Wis. 1966).

58. Curt Flood Act of 1998, Pub. L. No. 105–297, 112 Stat. 2824 (1998) (codified as amended at 15 U.S.C. § 26b (2012)).

59. 15 U.S.C. § 26b (2012). As part of the collective bargaining agreement finalized in 1996, MLB's club owners and players agreed to take this proposal to Congress and to support this legislation. Nathaniel Grow, *The Curiously Confounding Curt Flood Act*, 90 TUL. L. REV. 859, 876–77 (2014). During the negotiations for the collective bargaining agreement, the players union had repeatedly and publicly accused the owners of engaging in actions that would have been antitrust violations but for MLB's exemption. *Id*. at 875–77. The MLB club owners were willing to support this federal legislation because of the Supreme Court's 1995 ruling that the non-statutory labor exemption bars antitrust litigation in labor disputes if there is an ongoing collective bargaining relationship between a professional sports league's clubs and players. *Id*. at 878–79; *Brown v. Pro Football, Inc.*, 518 U.S. 231, 234, 250 (1996).

baseball at the major league level."[60] The Act does not affect the applicability or inapplicability of federal antitrust law to anything other than MLB's labor relations issues, and it has no prospective or retroactive effect on judicial construction of the scope of MLB's antitrust exemption regarding any other matters.[61]

In 1999, in *Minnesota Twins Partnership v. State*,[62] the Minnesota Supreme Court followed the "'great weight of federal cases' hold[ing] that *Flood* exempts the entire business of baseball from federal and state antitrust claims."[63] It determined that the "sale and relocation of a baseball franchise, like the reserve clause discussed in *Flood*, is an integral part of the business of professional baseball and falls within the exemption."[64] Because an activity "exempt from the antitrust laws, cannot form the basis of an antitrust investigation,"[65] the court ruled that the Minnesota attorney general had no authority to request information regarding the proposed sale and relocation of the Minnesota Twins club to North Carolina and concern about MLB's potential boycott of Minnesota in violation of state antitrust law.[66] This ruling implicitly adopted the Wisconsin Supreme Court's 1966 *Milwaukee Braves* holding that MLB's federal antitrust exemption preempts the use of state antitrust law to challenge MLB decisions or conduct immune from scrutiny under *Federal Baseball*.

In 2003, in *Major League Baseball v. Crist*,[67] the Eleventh Circuit upheld the district court's decision to prohibit the Florida attorney general from investigating the decision of MLB clubs, including the Florida Marlins and Tampa Bay Devil Rays, to eliminate two clubs as a potential violation of Florida antitrust law.[68] Adopting the unanimous view of federal appellate courts that MLB's antitrust exemption broadly

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60. 15 U.S.C. § 26b(a).

61. *Id.* Rejecting an argument that the Curt Flood Act is a congressional endorsement of MLB's antitrust exemption, a federal district court concluded:

> I take Congress at its word and resolve this case without reliance on the Curt Flood Act as affecting the outcome one way or the other. I conclude that the business of baseball *is* exempt; the exemption was well established long prior to adoption of the Curt Flood Act and certainly was not *repealed* by that Act.

Major League Baseball v. Butterworth, 181 F. Supp. 2d 1316, 1331 n.16 (N.D. Fla. 2001), *aff'd on other grounds sub nom. Major League Baseball v. Crist*, 331 F.3d 1177 (11th Cir. 2003).

62. 592 N.W.2d 847 (Minn. 1999).

63. *Id.* at 854.

64. *Id.* at 856.

65. *Id.*

66. *Id.*

67. 331 F.3d 1177 (11th Cir. 2003).

68. *Id.* at 1189.

encompasses the "business of baseball," the Eleventh Circuit explained its reasons for affirming the lower court:

> [W]e believe that a good faith reading of Supreme Court precedent leaves us no choice but to reach the following conclusions: First, contraction is a matter that falls within the "business of baseball" and therefore cannot be the subject of a prosecution based upon federal antitrust law. Second, when the business-of-baseball exemption is triggered, baseball clubs are equally immune from prosecution under state antitrust law.[69]

In 2015, the Ninth Circuit followed its 1974 *Portland Baseball Club* precedent and *Crist* by ruling that MLB's antitrust exemption is broad and that franchise location matters fall within the exemption's core.[70] In *City of San Jose v. Office of the Commissioner of Baseball*,[71] the most recent case considering the scope of this exemption, the court affirmed the dismissal of San Jose's claims that MLB's rule requiring approval by three-fourths of its clubs and the league's purported delay in allowing the Oakland Athletics club's proposed move to the city (which was within the San Francisco Giants club's exclusive operating territory) violated federal and California antitrust laws.[72] Citing *Toolson*, it found that "restrictions on franchise relocation relate to the 'business of providing public baseball games for profit between clubs of professional baseball players.'"[73] Observing that "[l]imitations on franchise relocation are designed to ensure access to baseball games for a broad range of markets and to safeguard the profitability—and thus viability—of each ball club," the court determined that "[i]nterfering with [these] rules therefore indisputably interferes with the public exhibition of professional baseball."[74] It ruled that "antitrust claims against MLB's franchise relocation policies are in the heartland of those precluded by *Flood*'s rationale."[75]

The foregoing cases illustrate that numerous disputes have arisen regarding MLB's rules and decisions determining the number, location, or ownership of its member clubs. The great majority of courts have held that baseball's exemption from federal antitrust law precludes this core aspect of MLB's internal governance from antitrust challenge

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69. *Id*.
70. See *supra* text accompanying notes 38–51.
71. 776 F.3d 686 (9th Cir. 2015).
72. *Id*.
73. *Id*. at 690.
74. *Id*.
75. *Id*. at 691.

based on the Supreme Court's *Federal Baseball*, *Toolson*, and *Flood* rulings; these federal and state courts have broadly construed the exemption as applying to the "business of baseball." Further, this jurisprudence relies on the Supremacy Clause, dormant Commerce Clause, or both federal constitutional provisions to prohibit the use of state antitrust law to challenge these aspects of the business of baseball.

II. IN DEFENSE OF MLB'S ANTITRUST EXEMPTION

In this Part, we consider the views of those asked to defend MLB's exemption in congressional testimony and those who have otherwise supported it, taking into account in particular its application to various MLB franchise matters, along with the views of those who have opposed it.

On December 10, 1992, the Subcommittee on Antitrust, Monopolies and Business Rights of the Committee of the Judiciary of the U.S. Senate held the Hearing on The Validity of Major League Baseball's Exemption From the Antitrust Laws, which was precipitated by the National League's failure to permit the sale and relocation of the San Francisco Giants club to Tampa Bay and the forced resignation of Commissioner Francis T. ("Fay") Vincent, Jr. in September 1992.[76] In his Opening Statement, Senator and Chair Howard Metzenbaum noted concerns regarding MLB's antitrust exemption as it pertained to franchise decisions. He claimed: (1) MLB maintained an "artificial scarcity of franchises" (i.e., "the number of cities which can support baseball franchises greatly exceeds the number of franchises established by the owners"); and (2) despite their purported commitment to franchise stability, MLB club owners "routinely threaten to abandon their home city whenever it suits them financially."[77]

As one of the lead witnesses before the Senate subcommittee, Bud Selig, a former disappointed fan of an MLB team (the Braves) that left his hometown (Milwaukee), a former unsuccessful applicant for an MLB expansion club, a then-current MLB club-owner, and the then-Chairman of the Major League Executive Council, provided a unique perspective regarding the appropriate scope and application of MLB's antitrust exemption. In 1970, his group of investors purchased the American League's Seattle Pilots out of bankruptcy and moved the club

76. Edmonds, *supra* note 5, at 651, 654 (1994). For a historical overview and summary of prior congressional hearings regarding the proposed repeal or limitation of MLB's antitrust exemption, *see generally id*.

77. *The Validity of Major League Baseball's Exemption from the Antitrust Laws: Hearing Before the Subcomm. On Antitrust, Monopolies, and Business Rights of the S. Comm. On the Judiciary*, 102d Cong. 3 (1992) [hereinafter *1992 Hearing Transcript*] (Opening Statement of Senator Metzenbaum).

to Milwaukee, renaming it the Brewers.[78] The fifty-year period from *Milwaukee Braves* to *City of San Jose* roughly approximates the period of time during which he was substantially involved in our national pastime's development and governance.[79]

In his testimony that day, Selig acknowledged the "unique role that our National Pastime plays in American society and the covenant that Baseball has with the millions of Americans who support our great game"[80]:

> My experience in Milwaukee[81] has convinced me that the appropriate policy for sports leagues is to prohibit franchise relocations except in the most dire of circumstances when the local community has over a sustained period demonstrated that it cannot support the team. This, I am happy to report, is baseball's policy. But if baseball were not exempt from the antitrust laws, a decision protecting franchise stability such as the one made in San Francisco would subject baseball to costly and unpredictable treble damage litigation. Without its exemption, baseball might not even have attempted to save the Giants for the people of San Francisco.[82]

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78. *See generally* SELIG, Chapter 3 (The Quest).

79. During his tenure as Commissioner, MLB's many progressive major accomplishments included unprecedented labor peace from 1994 to the present; substantially increased game attendance, total annual revenues, and revenue sharing among league clubs; the formation of Major League Baseball Advanced Media (a multi-billion dollar asset collectively owned by all league clubs); the consolidation of the American League and National League into an integrated league with a centralized governance structure; the introduction of interleague regular season games; the expansion of the playoffs by adding a "wild card" team, later increased to two, for each league; increased employment diversity and inclusion in MLB and its clubs through the "Selig rule"; and the first collectively bargained drug testing policy for MLB players and the development of the most comprehensive such policy of any U.S. major professional sport. *Id*.

80. *1992 Hearing Transcript*, *supra* note 78, at 105 (statement of Allan H. Selig).

81. Selig "was deeply and personally affected by what [he] consider[ed] to be a flagrant breach of that special covenant that Baseball has with its fans when the Braves were allowed to move from Milwaukee to Atlanta in 1966." *Id*. at 105–06. In his opinion, the Braves' thirteen-year stay in Milwaukee "was one of the great success stories in baseball" because the club led the National League in attendance for six of those years and were profitable as a result of "this tremendous support." *Id*. at 83, 108. He stated that Milwaukeeans "felt hostility, bitterness and a deep sense of betrayal towards Major League Baseball for allowing the Braves to abandon us." *Id*. at 109.

82. *Id*. at 83. In his written response to a post-hearing question from Senator Metzenbaum, Selig explained: "Baseball certainly could not have had absolute (or even reasonable) confidence that an antitrust jury (probably sitting in Florida) would agree with the reasonableness of a decision to keep the Giants in San Francisco." *Id*. at 142. His concern was based on the Ninth Circuit's ruling in *Los Angeles Memorial Coliseum Commission v. NFL*, 726 F.2d 1381 (9th Cir. 1984) that the NFL violated federal

> . . .
> As the record demonstrates, baseball has not abused its antitrust exemption. While we have not prohibited all franchise moves, we do not allow a club to relocate simply so that the owner can earn greater profits. Indeed, the National League rejected the move to Tampa-St. Pete despite the fact that it would have netted Bob Lurie an additional $15 million. This shows that profit is not the driving force in baseball's decisionmaking process.[83]
> . . .
> Because Baseball's internal governance decisions have not been subjected to the antitrust laws, Baseball has by far the best record of the professional sports in the area of franchise stability.[84]

After 1972 (the year in which *Flood* reaffirmed MLB's antitrust exemption), only one MLB club has moved (the Montreal Expos became the Washington Nationals in 2005); not a single U.S.-based team has relocated.[85] Since 1972, nine NBA clubs,[86] eight NFL clubs[87] (the Raiders will become the ninth when the club moves to Las Vegas in 2020), and several NHL clubs have relocated outside of their respective home territories.[88]

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antitrust law by refusing to permit the Oakland Raiders club to relocate to Los Angeles in 1980. *Id*. at 142–43. *See also Baseball's Antitrust Exemption: Hearing Before the Subcomm. on Econ. and Commercial Law of the H. Comm. on the Judiciary*, 103d Cong., 48 (1993) [hereinafter *1993 Hearing Transcript*] ("Baseball will not abandon the fans and communities that have supported us, and the decision on the Giants was simply a reaffirmation of baseball's longstanding policy of retaining teams in their home areas where at all possible. . . . Commissioner Bowie Kuhn tried for months to find a local owner who would keep the [Pilots] in Seattle. Only after the Pilots' owners put the team into bankruptcy and a judge ordered the sale of the club to our group were we able to relocate the franchise [to Milwaukee and it was renamed the Brewers].").

83. *1992 Hearing Transcript*, *supra* note 78, at 83 (statement of Allan H. Selig).

84. *Id*. at 114.

85. *13 Major League Baseball Teams that Have Relocated*, *supra* note 14.

86. *Relocated NBA Teams*, ALL ABOUT BASKETBALL, https://www.allaboutbasketball.us/nba/relocated-nba-teams.html [https://perma.cc/9X9Z-5486].

87. Marcus Hartman, *Las Vegas Raiders are Just Latest NFL Franchise to Gamble on Moving*, DAYTON DAILY NEWS (Mar. 27, 2017), https://www.daytondailynews.com/sports/las-vegas-raiders-are-just-latest-nfl-franchise-gamble-moving/t6dlHmCklnFAd97SVUC81O/ [https://perma.cc/X5UL-JR9T].

88. *See NHL Defunct Team Index*, SPORTSECYCLOPEDIA, http://www.sportsecyclopedia.com/toc/nhl/nhldefunct.html [https://perma.cc/7NB3-T43J].

Former MLB Commissioner Fay Vincent testified that MLB's antitrust exemption "has important significance."[89] He stated that it provides MLB with greater legal authority than other leagues to prevent franchise relocations and consequent harm to its host city and fans because it is not subject to an antitrust claim for refusing to permit a club to move to another city.[90] He explained that congressional removal of this exemption would not encourage MLB to expand its number of clubs, as that decision is driven primarily by economic interests and in some instances political pressure to place a new team in a particular locality, not by legal considerations such as potential antitrust liability.[91]

During a March 21, 1994 Senate subcommittee hearing on a proposed bill to subject professional baseball leagues and clubs to federal antitrust law, Commissioner Selig responded to questions about MLB's club expansion policy by observing that "the three other sports that do not have an antitrust exemption have not acted any differently [and their] results are the same as ours."[92] He noted that the NBA, NFL, and NHL had twenty-seven, twenty-eight, and twenty-six clubs, respectively;[93] MLB had twenty-eight clubs in 1994.[94] Because a major league sport has a responsibility to produce a high quality product and to avoid "expansion that neither the city or the sport is ready for," "[y]ou don't want to expand for the wrong reasons."[95] According to Selig, "What we want to make sure is, when we expand, whenever that's going to be . . . that it's done the right way so that those [clubs] perform brilliantly."[96] Regarding movement of an MLB club, he reiterated his 1992 congressional testimony that such a move should be permitted only if the team's current host city is not supporting it.[97]

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89. *1992 Hearing Transcript*, *supra* note 78, at 36–37 (statement of Fay Vincent).

90. *Id*. at 10.

91. *Id*. at 16–18.

92. *Professional Baseball Teams and the Antitrust Laws: Hearing on S.500 Before the Subcomm. on Antitrust, Monopolies and Business Rights of the S. Comm. on the Judiciary*, 103d Cong. 45 (1994) [hereinafter *1994 Hearing Transcript*] (statement of Allan H. Selig).

93. *Id*. at 42.

94. Brian Lokker, *History of MLB Expansion and Franchise Moves*, HOW THEY PLAY (Oct. 4, 2017), https://howtheyplay.com/team-sports/major-league-baseball-expansion-and-franchise-relocation [https://perma.cc/RW5N-VBK3].

95. *1994 Hearing Transcript*, *supra* note 93, at 44–45 (statement of Allan H. Selig).

96. *Id*. at 45.

97. He agreed that the strict relocation requirements adopted by former Commissioner Vincent were "very fair standards" that were still operative:

> One, that the franchise was losing substantial money, and had been losing money over a reasonably long period of time; second, there was a continuing decline in attendance which was persistent and not obviously

In February 13, 2002 testimony before the Committee on the Judiciary, United States Senate, Robert A. DuPuy, MLB's Executive Vice President and Chief Legal Officer, urged a vote against the proposed Fairness in Antitrust in National Sports (FANS) Act of 2001, which would have subjected MLB decisions to eliminate or relocate a club to federal antitrust law. It was proposed (but not enacted by Congress) in response to MLB club owners' 2001 vote to contract the current number of thirty league clubs to twenty-eight for the 2002 season, which ultimately did not occur. He explained that this vote was based on legitimate consumer welfare concerns consistent with the objectives of antitrust law:

> No one desires contraction. No one wants to deprive even a single fan of major league baseball. Commissioner Selig was one of the last to be convinced of contraction's necessity. But given the current economic structure of baseball, there are markets which have demonstrated over time that they cannot support a major league baseball team, let alon[e] a competitive major league team. Contraction is an attempt to face up to the economic realities of the industry so as to deliver a competitively balanced product at the highest level to as many fans as possible. Commissioner Selig and the owners are compelled to confront the current imbalance in the game. Without a competitive product on the field, interest in the game will erode. With more and more entertainment options available, fans will turn to other more competitive sports.[98]

In their testimony during the December 10, 1992 Senate Subcommittee Hearing, Professors Andrew Zimbalist (Smith College) and Roger G. Noll (Stanford University), two sports economists who testified MLB's antitrust exemption should be repealed, and Professor Gary R. Roberts (then Tulane Law School), a sports law professor who expressed a contrary view, all agreed that the application of federal antitrust law to MLB alone without additional federal legislation would not necessarily advance consumer welfare.

Zimbalist and Noll testified that MLB's monopolistic league structure caused an undersupply of clubs (twenty-six) insufficient to

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> correctable; three, there was a substantial defect with the facilities, the stadium was inadequate and was not likely to be corrected in the near term; and fourth, the community had made clear that it was unwilling to address or deal with these problems.

Id. at 50.

98. *The Application of Federal Antitrust Laws to Major League Baseball: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 27 (2002) (statement of Robert A. DuPuy).

satisfy a then-existing market demand for at least forty MLB teams,[99] which had enabled club owners to engage in opportunistic conduct.[100] But Noll acknowledged that removal of MLB's antitrust exemption "is not likely, by itself, to solve the problem of scarcity in franchises" because "[i]n other sports, susceptibility to antitrust has not forced more rapid expansion"[101] and it "has not proved to be an effective remedy to solving the problem of insufficient numbers of teams.[102] He asserted that "[i]n all sports, expansion occurs only if it is in the financial interests of most of the existing teams to expand."[103] He also claimed that repealing MLB's antitrust exemption would limit but not prevent MLB's exercise of control over the number and location of its clubs because it has "a legitimate business interest in assuring that [club] owners are reputable and financially able to operate a team, and that a franchise location is financially viable"[104] under federal antitrust law. Regarding club relocations, he observed:

> [T]he effect on sports fans is always no worse than a break-even affair. The fans in the new city gain and the fans in the

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99. *1992 Hearing Transcript*, *supra* note 78, at 316, 359.

100. *Id*. at 312–17, 365–66. In his March 31, 1993 congressional testimony regarding MLB's antitrust exemption, Professor Stephen F. Ross (then University of Illinois College of Law) asserted it should be repealed because "Major League Baseball currently abuses the monopoly power it enjoys by virtue of the exemption . . . [by] artificially limit[ing] expansion into areas that can support a major league team [and by its] clubs extort[ing] taxpayers for subsidized stadia." *1993 Hearing Transcript*, *supra* note 83, at 165 (statement of Professor Stephen F. Ross). *See also* Stephen F. Ross, *Reconsidering Flood v. Kuhn*, 12 U. MIAMI ENT. & SPORTS L. REV. 169, 196 (1995) (antitrust law should be applied to MLB's club relocation and expansion decisions because MLB's characteristics and needs are no different than those of other leagues). In a May 15, 2015 speech, former United States Supreme Court Justice John Paul Stevens, a former antitrust lawyer, asserted that MLB's antitrust exemption should not immunize MLB franchise relocation issues from antitrust scrutiny:

> [T]he development of the farm system in baseball was both unique to baseball and the product of the reserve clause [and] an exemption was needed to protect the farm system. Reliance interests therefore provided a rational basis for the *stare decisis* justification in the *Toolson* and *Flood* cases, both of which dealt only with the reserve clause. . . . There are no reliance interests that would justify treating baseball's geographic decisions differently from other sports or exempting any other aspects of the baseball business from the antitrust laws.

Transcript of Speech, Justice John Paul Stevens (Ret.), Sports Lawyers Association 41st Annual Conference Luncheon 8–9 (May 15, 2015), https://www.supremecourt.gov/publicinfo/speeches/JPS_SportsLawyersAssociation_05-15-15.pdf [https://perma.cc/3AVL-8PJV].

101. *1992 Hearing Transcript*, *supra* note 78, at 365.

102. *Id.* at 366.

103. *Id.* at 365.

104. *Id.*

> old city lose. And, usually the former exceeds the latter because teams typically draw better in their new home than in the old one, at least for a while.[105]

In response to a post-hearing question regarding whether elimination of MLB's antitrust exemption would promote or reduce franchise stability,[106] Zimbalist stated it "goes straight to the heart of the public policy dilemma" and "if [it] is lifted and Congress does nothing else it will result in substantial uncertainty regarding the continued monopolistic practices of baseball."[107] He opined "it is possible . . . that lifting the exemption would hurt cities' bargaining power vis a vis baseball franchises, as was the case with the NFL's Raiders and the city of Oakland."[108]

Roberts agreed with Zimbalist and Noll that, like those of other major professional leagues, MLB's limit on the number of its clubs provides inherent monopoly power and the consequent potential to harm consumer welfare by its clubs' rational profit-maximizing conduct, which is not effectively remedied by federal antitrust law.[109] He explained that "[a]ntitrust law condemns behavior which creates or entrenches excess market power" but "[i]t was not designed and it has no rational doctrinal structure to control . . . the exercise of monopoly power."[110] However, he opposed the repeal of MLB's antitrust

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105. *Id.*; *see also* Matthew J. Mitten & Bruce W. Burton, *Professional Sports Franchise Relocations From Private Law and Public Law Perspectives: Balancing Marketplace Competition, League Autonomy, and the Need for a Level Playing Field*, 56 MD. L. REV. 57, 109 (1997) ("If a team leaves one city and moves to another, the people in the former host city have suffered a loss, whereas the citizens of the new host city have simultaneously received a benefit. Hence, it is probably impossible to accurately measure the net effect of a sports franchise relocation on consumer welfare.").

106. *1992 Hearing Transcript*, *supra* note 78, at 323.

107. *Id.* at 327.

108. *Id.*

109. *Id.* at 333–34; *see also* David Haddock, Tonja Jacobi & Matthew Sag, *League Structure & Stadium Rent-Seeking—The Role of Antitrust Revisited*, 65 FLA. L. REV. 1, 64 (2013) ("Stadium rent-seeking occurs at the intersection of flawed political and market structures. Courts may well take the view that although franchise leverage is an artifact of a distorted market, the injury in the form of public subsidies is political in nature and not within the scope of antitrust law.").

110. *1992 Hearing Transcript*, *supra* note 78, at 334; *see also* Mitten & Burton, *supra* note 105, at 117–18 ("The federal antitrust laws do not affirmatively require a monopolist professional sports league or its member teams to deal fairly with a current or prospective host city."). Courts have uniformly rejected antitrust claims asserting that sports leagues and their clubs unlawfully abuse their monopoly power in their business dealings with current, past, or prospective host cities. *See, e.g.*, *Hamilton Cty. Bd. of Comm'rs v. NFL*, 491 F.3d 310 (6th Cir. 2007) (dismissing Hamilton County, Ohio's antitrust claim that the NFL and its clubs illegally used their monopoly power over major league professional football to enable the

exemption because it does not cause MLB to engage in anticompetitive conduct and its abolition "would be unlikely to further the public interest."[111] Regarding MLB's "deciding how many teams there will be, where those teams will be located, and who will own them,"[112] he observed:

> It [is] this area, however, in which antitrust law most clearly does not properly apply; franchising decisions are an exercise of monopoly power, but they rarely if ever create or entrench market power. Thus, it is within this sphere of decision-making that there is the greatest chance for courts to create much mischief to the detriment of the public by misusing antitrust law in unjustified and highly political ways, as happened in the infamous *Oakland Raiders* case . . . It is the substantial potential for misuse of antitrust law in this type of case that causes me to oppose simply abolishing baseball's antitrust exclusion.[113]

Using the then-existing controversy regarding the National League's disapproval of the proposed purchase of the San Francisco Giants and the club's relocation to Tampa Bay as an example, Roberts noted that "antitrust law could not sensibly be applied to cause a result

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Cincinnati Bengals club to obtain a highly favorable publicly subsidized lease at the expense of its taxpayers to play in a new football stadium); *Warnock v. NFL*, 356 F. Supp. 2d 535, 537 (W.D. Pa. 2005), *aff'd*, 154 Fed. Appx. 291 (3d Cir. 2005) (holding that a Pittsburgh municipal taxpayer lacked standing to sue the NFL and its member clubs for allegedly violating antitrust law by acting in concert to force the league's host cities, including Pittsburgh, to build new football stadiums to prevent their teams from relocating); *St. Louis Convention & Visitors Comm'n v. NFL*, 154 F.3d 851, 852–53 (8th Cir. 1998) (dismissing the St. Louis Convention & Visitors Commission's antitrust claims against the NFL arising out of the Rams club's relocation to St. Louis and lease to play its games in the Trans World Dome).

111. *1992 Hearing Transcript*, *supra* note 78, at 336; *see also* Nathaniel Grow, *In Defense of Baseball's Antitrust Exemption*, 49 AM. BUS. L.J. 211, 215 (2012) ("MLB's operations are nearly identical to the other leagues in most significant respects despite its antitrust immunity, with the anticompetitive conduct attributed to baseball's exemption largely endemic to all major professional sports leagues," so removing it will not provide any significant public policy benefits given precedents from antitrust litigation against other leagues).

112. *1992 Hearing Transcript*, *supra* note 78, at 342.

113. *Id.* at 342–343. In order to use antitrust law to promote the local interests of sports fans by requiring MLB to permit a club to move to an area in which there is no existing team (despite the detriment to fans in its existing location), some commentators have advocated that MLB's antitrust exemption for franchise relocation issues should be repealed by Congress or the Supreme Court. *See, e.g.*, Philip L. Gregory & Donald J. Polden, *The Baseball Exemption: An Anomaly Whose Time Has Run*, 24 COMPETITION 154, 177 (2015); Connie Mack & Richard M. Blau, *The Need for Fair Play: Repealing the Federal Baseball Antitrust Exemption*, 45 FLA. L. REV. 201, 209 (1993).

more in the public interest than the decision of the league owners."[114] Absent its antitrust exemption, he stated that similar to the Oakland Raiders' antitrust litigation against the NFL,[115] MLB "almost certainly would have faced a prolonged and expensive legal battle in a politically biased forum that might have resulted in a distorted application of the law, the creation of bad precedent, and injury to the public interest."[116]

Because antitrust litigation concerning sports franchise relocation disputes "cannot predictably lead to results that generally benefit the public interest," Roberts emphasized:

> [T]here is no sensible set of principles under current antitrust doctrine to explain when or why . . . a sports league (even if it happens to have monopoly market power) might violate section 1 of the Sherman Act if it grants or rejects a proposal to expand its membership, to allow a change in ownership of a member franchise, or to allow the relocation of a member franchise's home games.[117]

Judicial precedent rejecting certain antitrust law challenges to other professional leagues' structure and franchise practices establishes that MLB's substantially similar franchise practices[118] also are not unlawful, even without its antitrust exemption. In *Mid-South Grizzlies v. NFL*,[119] the Third Circuit ruled that the NFL's refusal to provide the owner of a former World Football League team with an expansion club in Memphis, Tennessee, did not violate federal antitrust law.[120] The court concluded the plaintiff did not prove this refusal had any anticompetitive economic effects.[121] It did not reduce intrabrand economic competition among NFL clubs because the closest then-

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114. *1992 Hearing Transcript*, *supra* note 78, at 345.

115. *See supra* text accompanying notes 109–10.

116. *1992 Hearing Transcript*, *supra* note 78, at 344.

117. *Id.* at 345; *see also 1993 Hearing Transcript*, *supra* note 83, at 75–96 (reiterating his 1992 congressional testimony); Gary Roberts, *On the Scope and Effect of Baseball's Antitrust Exclusion*, 4 SETON HALL J. SPORT L. 321, 335 (1994) (summarizing his 1992 congressional testimony and reiterating that MLB's antitrust exemption "is not a cause of any easily identifiable injury to the public, primarily because it is impossible to predict that the courts would properly apply antitrust law to baseball in a way that would enhance the public interest").

118. In 2000, Commissioner Selig centralized the operations of the American League and National League, so that the two formerly separate leagues now effectively function as a single major professional baseball league under the auspices of the Office of the Commissioner of Baseball. *Commissioners*, MLB.COM, http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com_bio_9 [https://perma.cc/WFF9-BSY5].

119. 720 F.2d 772 (3d Cir. 1983).

120. *Id.* at 777, 785, 787.

121. *Id.* at 787.

existing NFL club was in St. Louis (over 280 miles away), which would not have competed with a club in Memphis for fan support.[122] Nor did it reduce interbrand economic competition between the NFL and any other professional football leagues in the United States.[123] According to the court, "the exclusion was patently pro-competitive, since it left the Memphis area, with a large stadium and a significant metropolitan area population, available as a site for another league's franchise, and it left the Grizzlies' organization as a potential competitor in such a league."[124]

Consistent with *Mid-South Grizzlies*, in *Seattle Totems Hockey Club, Inc. v. National Hockey League*,[125] the Ninth Circuit held that a sports league's denial of a prospective club owner's application for an expansion franchise did not violate §2 of the Sherman Act's prohibition against monopolization.[126] The court found no antitrust injury because there was no showing that the plaintiff's exclusion from the league reduced competition among existing league teams.[127] It also ruled that the league's challenged conduct was not an effort to monopolize professional hockey in North America, because the plaintiff was "not competing with the NHL; [it was] seeking to join it."[128]

For the same reasons, MLB's antitrust exemption as applied to its club ownership rules and decisions does not immunize economically anticompetitive conduct that otherwise would violate federal antitrust law. Courts have ruled that professional sports league rules and decisions regarding approval of the sale of an existing club to a prospective owner generally do not have any anticompetitive effects. In *Levin v. NBA*,[129] a federal district court ruled that the NBA club

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122. *Id.*

123. *Id.* at 784–85.

124. *Id.* at 786. For scholarly commentary, see Thomas A. Piraino, Jr., *The Antitrust Rationale for the Expansion of Professional Sports Leagues*, 57 OHIO ST. L.J. 1677, 1677–78 (1996) (quoting *NCAA v. Bd. of Regents*, 468 U.S. 85, 107–08 (1984)) (arguing that "owners' refusal to expand their leagues to meet demand for additional franchises . . . has the effect of reducing the importance of consumer preference in setting price and output [and] is not consistent with this fundamental goal of antitrust law"); Stephen F. Ross, *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 CASE W. RES. L. REV. 133, 150–51 (2001) (noting "considerable conceptual and remedial problems with any finding that a sports league's refusal to expand to permit a *particular* franchise to enter its joint venture constitutes an unreasonable restraint of trade").

125. 783 F.2d 1347 (9th Cir. 1986).

126. *Id.* at 1350.

127. *Id.*

128. *Id.*

129. 385 F. Supp. 149 (S.D.N.Y. 1974); *see also Fishman v. Estate of Wirtz*, 807 F.2d 520, 542–44 (7th Cir. 1986) (league's mere selection of one prospective franchise owner over another one is not anticompetitive). *But see Sullivan v. NFL*, 34

owners' refusal to approve the sale of the Boston Celtics club to the plaintiffs did not violate § 1 because "[they] wanted to join with those unwilling to accept them, not to compete with them . . . [which] did not have an anticompetitive effect nor an effect upon the public interest."[130] The court explained that the "Celtics continue as an operating club, and indeed are this year's champion."[131]

MLB's franchise relocation rules and approval requirements (a club's move to a location outside its assigned operating territory must be approved by three-fourths of the MLB clubs[132]) would not be *per se* illegal[133] or unlawful in any other way without the exemption under federal antitrust law, which prohibits anticompetitive conduct that harms consumer welfare in economic terms.[134] For example, under the applicable rule of reason analysis, the National League's 1992 disapproval of the offer to buy the Giants and to relocate the club to Tampa Bay did not reduce the potential for any significant economic competition with any then-existing MLB club for fan support because the nearest club, the Atlanta Braves, was 455 miles away. Absent MLB's antitrust exemption, based on *Mid-South Grizzlies* and *Seattle Totems*,[135] the antitrust claims in the *Piazza* and *Butterworth* cases properly could have been dismissed as a matter of law because the National League's decision did not have any anticompetitive effects.[136] *Morsani*, which alleged that MLB clubs violated Florida's antitrust laws by conspiring to prevent the purchase and relocation of the Minnesota

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F.3d 1091, 1099 (1st Cir. 1994) (ruling that NFL rule prohibiting public ownership of a club "compromises the entire process by which competition for club ownership occurs" and rejecting NFL's contention that, as a matter of law, its clubs do not compete against each other for the sale of their ownership interests).

130. *Levin*, 385 F. Supp. at 152.

131. *Id.*

132. Major League Constitution, art. V, § 2 (b)(3), https://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/League%20Constitutions%20&%20Bylaws/MLConsititutionJune2005Update.pdf [https://perma.cc/V4F2-DRB8].

133. *See, e.g.*, *NBA v. SDC Basketball Club, Inc.*, 815 F.2d 562 (9th Cir. 1987); *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir. 1984); *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577 (Bankr. D. Ariz. 2009).

134. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (holding federal antitrust laws provide a remedy for consumers "deprived of money by . . . anticompetitive conduct"). Sports fans' disappointment and emotional distress caused by the relocation of a team or a city's inability to obtain a team are not injuries for which federal antitrust law provides a remedy. *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988) (finding loss of opportunity to lead cheers at football games as result of NCAA's suspension of university's football program is not compensable under antitrust law).

135. See *supra* text accompanying notes 120–29.

136. See *supra* text accompanying notes 48–52.

Twins to Tampa Bay in the mid-1990's, also could have been judicially dismissed for the same reason.[137]

It is important to note that the National League's decision resulted in the Giants' sale to a new owner who agreed to keep the club in San Francisco, which time has proven to be clearly the best long-run decision for most baseball fans. It is, however, difficult to see an antitrust jury in Florida (and, perhaps, Pennsylvania, the judicial forum and home state of the plaintiffs in *Piazza*) reaching this conclusion. The Giants' annual game attendance has exceeded that of the Tampa Bay Rays (which began play as an expansion club in 1998) in twenty of the past twenty-one years.[138] During this time, the Giants have made the playoffs seven times and won the World Series three times, among the best on-field and off-field performances of any MLB team in the past two decades.[139] This illustrates that antitrust law cannot "sensibly be applied to cause a result more in the public interest than the decision of the league owners" and MLB's exemption prevents unwarranted litigation regarding franchise relocation disputes "in a politically biased forum."[140]

There is, however, precedent holding that a league's disapproval of a club's move into another's territory may violate antitrust law. In

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137. See *supra* text accompanying notes 55–56.

138. *Tampa Bay Rays Attendance, Stadiums, and Park Factors*, BASEBALL REFERENCE, https://www.baseball-reference.com/teams/TBD/attend.shtml [https://perma.cc/7EAJ-UWFZ]; *San Francisco Giants Attendance, Stadiums, and Park Factors,* BASEBALL REFERENCE, https://www.baseball-reference.com/teams/SFG/attend.shtml [https://perma.cc/S8CS-M5PL] [hereinafter BASEBALL REFERENCE, *Giants Attendance*]. In January 2019, the Rays announced the club's plan to renovate its home stadium, Tropicana Field, by removing its upper deck seating, which will reduce its capacity from 31,042 to 25,000–26,000 seats for the upcoming season in an effort to enhance the gameday experience for fans and to increase attendance. Tom Schad, *Tampa Bay Rays Reduce Seating Capacity at Tropicana Field to Create 'Intimate Experience,'* USA TODAY (Jan. 4, 2019, 10:36AM), https://www.usatoday.com/story/sports/mlb/rays/2019/01/04/rays-tropicana-field-close-upper-deck-reduce-capacity/2481217002/ [https://perma.cc/UH57-NHA7].

139. Since the 2000 season, the Giants' annual home attendance exceeded 3,000,000 and the team was one of the top five National League clubs in home attendance 17 times. The other two years, the Giants' attendance was at least 2,800,000, placing the team among the top seven National League clubs in home attendance. BASEBALL REFERENCE, *Giants Attendance*, *supra* note 138.

140. See *supra* text accompanying notes 111–113. *See also* Jeffery Borland & Robert Macdonald, *Demand For Sport*, 19 OXFORD REV. ECON. POL'Y 478, 480 (2003) ("Most objectives of sporting leagues can ultimately be reduced to the idea of maximizing fan interest. Fan interest is, of course, the essence of demand, so that the activities of league administrators are integrally related to knowing about demand. For example, with responsibility for the design of the sporting competition, [they] must be concerned with issues such as how the geographic composition of teams in the league will affect live attendance and TV ratings, and with achieving [game] quality and sufficiently even competition to maximize fan interest.").

Los Angeles Memorial Coliseum Commission v. National Football League (*Raiders I*),[141] the Ninth Circuit upheld a Los Angeles jury verdict finding that the NFL unreasonably restrained trade by refusing to allow the Oakland Raiders to move to Los Angeles to compete with the Rams for fan support and awarding the Raiders a multi-million-dollar treble damages award.[142] Absent its antitrust exemption, MLB would face the same risk of parochial and unpredictable antitrust litigation as well as treble damages liability if it refused to allow a club to relocate into another's territory. In this limited situation, as Selig testified during his 1992 congressional testimony, the *Raiders I* antitrust law precedent would constrain MLB's ability to ensure franchise stability consistent with the league's and its fans' best interests.[143]

In summary, MLB's antitrust exemption generally does not immunize conduct that otherwise would violate federal antitrust law. Instead, it allows MLB to avoid antitrust claims seeking judicial intervention to resolve franchise disputes, which are usually "zero sum" matters inherently incapable of "fair" resolution by courts and juries. In light of the numerous relocations of NBA, NFL, and NHL clubs since *Flood*, MLB's antitrust exemption seems unquestionably behind its commendable comparative record of franchise stability in recent decades.[144]

III. ANTITRUST LAW IMPLICATIONS FOR OTHER PROFESSIONAL LEAGUES

The justifications for MLB's antitrust exemption discussed heretofore support judicial application of the single entity defense to bar Sherman Act § 1 challenges to other leagues' rules and decisions regarding the number and ownership of their clubs and whether to permit a club to relocate to an area in which there would be no economic competition with another league team. League rules and decisions regarding these specific matters are the product of collective

141. 726 F.2d 1381 (9th Cir. 1984).

142. *Id.* at 1386, 1401.

143. See *supra* text accompanying notes 79–80.

144. In addition to residents of Milwaukee suffering intense disappointment with the departure of the Braves after the 1965 season, millions of fans of the New York Giants and Brooklyn Dodgers had their hearts broken after those teams left for the West Coast before the 1958 baseball season. MLB's record of franchise relocation in the 53 years since the Braves' move to Atlanta (only four relocations, with three of those cities later receiving new teams), reflects the increased recognition by MLB, consistent with Commissioner Selig's 1992 testimony, of the "covenant that Baseball has with the millions of Americans who support our great game." See *supra* text accompanying note 80.

action among existing league clubs, but these aspects of internal governance do not reduce any actual or potential economic competition among those clubs. If courts adopt this approach for these purposes, other professional sports leagues will be effectively treated similarly to MLB for purposes of antitrust law, specifically § 1.

In *American Needle, Inc. v. National Football League*,[145] the Supreme Court rejected the NFL's assertion that a professional sports league's joint exclusive licensing of its member clubs' individually-owned trademarks through a collectively-owned business entity (NFL Properties) is not subject to antitrust challenge under § 1, which prohibits concerted action that unreasonably restrains trade.[146] The Court held that a legally separate single business entity such as NFL Properties is subject to "§ 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity."[147] Conversely, § 1 is inapplicable if "they control a single aggregation of economic power"[148] and have "a complete unity of [economic] interest."[149] It determined that NFL clubs are independently owned and operated, and absent an agreement to the contrary among themselves, they would be actual or potential economic competitors in the market for the licensing of their respective trademarks.[150] Concluding that NFL clubs are not pursuing the "common interests of the whole" through NFL Properties, but rather the interests of each club itself when collectively licensing their individually-owned trademarks, the Court ruled that NFL Properties' business operations effectively constituted concerted action among the thirty-two NFL clubs subject to § 1.[151] Because league clubs must cooperate to produce games, however, the Court stated that "per se rules of illegality are inapplicable, and instead the restraint [NFL Properties' exclusive product category trademark licensing] must be judged according to the flexible Rule of Reason."[152]

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145. 560 U.S. 183 (2010). Believing that a generally pro-business majority would recognize the single entity defense and hold that professional sports league governance decisions are not subject to § 1, the NFL (as well as American Needle, Inc.) filed a petition for a writ of certiorari despite winning this case in the lower courts. *Am. Needle, Inc. v. NFL*, 538 F.3d 736 (7th Cir. 2008) (affirming district court ruling that NFL clubs function as a single economic entity in licensing their individual trademarks through NFL Properties, a jointly-owned subsidiary).

146. *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 194, 201 (2010).

147. *Id.* at 191.

148. *Id.* at 194.

149. *Id.* at 196 (citation omitted).

150. *Id.* at 200.

151. *Id.* at 197 (citation omitted).

152. *Id.* at 203 (citing *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 (1984)).

American Needle does not hold that all sports league internal governance rules and clubs' collective decisions are always subject to § 1 antitrust analysis as a matter of law. The dispositive question is whether league clubs are economic competitors in the allegedly restrained relevant market. Because "[t]hey compete with one another, not only on the playing field, but to attract fans, for gate receipts, and for contracts with managerial and playing personnel,"[153] a professional sports league clubs' collective product distribution[154] and labor market restraints[155] are agreements within § 1.

In contrast to collective licensing of clubs' individually-owned trademarks, league rules and agreements regarding the number and ownership of clubs are core functions necessary to collectively produce the league's particular brand of on-field athletic competition. Because this joint conduct does not reduce economic competition among league clubs (i.e., there is a complete unity of economic interest), it is not "concerted action" for purposes of § 1 under *American Needle*.[156] For the same reason, *American Needle* also supports judicial application of the single entity defense to league decisions concerning whether to permit a club to relocate to an area in which it would not economically compete with an existing league team.[157]

Because the economic value of a second club's business operations in a particular geographical market is a collectively-produced and owned league asset,[158] it is arguable that the single entity defense should preclude § 1 challenge of a league's refusal to allow an existing club's relocation into another club's exclusive territory or to place an expansion franchise therein. In *Los Angeles Memorial Coliseum Comm'n v. National Football League* (*Raiders II*),[159] the Ninth

153. *Id.* at 196–97.

154. *Laumann v. NHL*, 907 F. Supp. 2d 465 (S.D.N.Y. 2012) (holding that alleged agreements among MLB and NHL clubs, respectively, to create local television territories and broadcasting rights for each club, and to grant their respective leagues the exclusive right to sell television and internet broadcasting rights to those games outside these local territories, are subject to § 1 scrutiny because the clubs are actual or potential competitors for the sale of these rights).

155. *See, e.g.*, *McNeil v. NFL*, 790 F. Supp. 871 (D. Minn. 1992) (holding agreements among league clubs to reduce competition for player services are subject to § 1).

156. See *supra* text accompanying notes 145–147.

157. See *supra* text accompanying 132–139.

158. In his 1992 congressional testimony, former MLB Commissioner Fay Vincent testified that the economic value of an area in which an expansion team is placed or to which a club relocates is an MLB asset collectively owned by all member clubs, rather than one individually owned by a new or relocated MLB club. *1992 Hearing Transcript*, *supra* note 78, at 32–33.

159. 791 F.2d 1356 (9th Cir. 1986).

Circuit ruled that at the time of the Oakland Raiders' proposed 1980 move to Los Angeles, the NFL as a whole owned the economic value of placing a second club in this market in addition to the Los Angeles Rams.[160] When the Raiders subsequently moved to Los Angeles after a successful antitrust suit against the NFL, the club individually appropriated this economic value, which increased the club's value by approximately $25 million.[161] The Raiders' move out of Oakland created a potential economic opportunity for another NFL club to relocate to the San Francisco Bay area (also collectively owned by the NFL) because the Raiders and the San Francisco 49ers clubs both had been profitable in this market.

On the other hand, because league clubs sharing the same territory are economic competitors for local fan support, sponsors, and media rights, *American Needle* likely forecloses judicial application of the single entity defense in § 1 antitrust litigation challenging the league's refusal to permit a club to relocate into another club's territory. In *Raiders I*, the Ninth Circuit upheld the lower court's rejection of the NFL's single entity defense and a Los Angeles jury verdict finding that the NFL unreasonably restrained trade by refusing the Raiders' proposed move to Los Angeles to compete with the Rams for fan support.[162]

A better view is that the antitrust law and public policy reasons underlying MLB's antitrust exemption for MLB's club relocation decisions justify characterizing other professional leagues' decisions regarding franchise relocation issues as *per se* reasonable unless the plaintiff proves the league's refusal (or approval) of the proposed relocation has (1) a net anticompetitive effect on intrabrand economic competition among its clubs or net adverse effects on consumer welfare in the two affected markets; or (2) an anticompetitive effect on interbrand economic competition.[163] In *Raiders I*, it was very unlikely

160. *Id.* at 1371.

161. The court upheld the injunction permitting the Raiders to play NFL football in Los Angeles, but ruled it provided the club with "a windfall benefit beyond the scope of the antitrust verdict." *Id.* at 1372. "[T]he accumulated value of that business opportunity is not something to which the Raiders became entitled as a result of the [antitrust] liability verdict," this "excess value should have been offset against the Raiders' lost profits from the two years they were precluded from moving to Los Angeles . . . less the value of the 'Oakland opportunity' that was returned to the NFL." *Id.* at 1372–73.

162. See *supra* text accompanying note 141.

163. If the plaintiff provides this evidence, the legality of the league's club relocation decision would be subject to full rule of reason analysis under § 1 pursuant to *American Needle* and/or Sherman Act § 2 monopolization or

that a Los Angeles jury gave any consideration to the effects of the lost intrabrand economic competition between the Raiders and 49ers or NFL fans' welfare in the San Francisco Bay area, much less whether these losses were outweighed by any increased economic competition between the Raiders and Rams or NFL fans' welfare in Los Angeles.

The foregoing threshold proof under the rule of reason would legally protect a professional sports league's legitimate collective interest in maintaining geographical stability among its clubs. It would uphold the league's ability to prevent a future game of musical chairs by clubs seeking to relocate only for greater profitability (often short-term), as exemplified by the Raiders' move to Los Angeles in 1982 after successful antitrust litigation against the NFL, the club's return to Oakland in 1995, and its planned relocation to Las Vegas in 2020. Although most of the significant antitrust litigation over league franchise relocation and expansion decisions has been brought against the NFL, since *Raiders I* both the NBA[164] and the NHL[165] have also been involved in club relocation antitrust litigation.

The proposal discussed above should be especially useful in ensuring that a league is not subject to "Catch-22" antitrust litigation and potential liability to local communities and public stadium authorities regardless of its decisions concerning a club's proposed relocation. As referenced in this Article's introduction, in December 2018 the City of Oakland brought § 1 antitrust litigation alleging that NFL clubs conspired to promote franchise relocations to obtain multi-million-dollar public subsidies for new playing facilities required to be shared by the moving club for approval to relocate, thereby increasing the profitability of all NFL clubs at the public's expense. The complaint asserts that the city made "extraordinary efforts" to keep the Raiders in Oakland, but it couldn't match the $750 million subsidy that Las Vegas offered the club ($378 million of which it paid to the NFL for approval to relocate there). Oakland seeks treble damages for this alleged anticompetitive conduct (but not an injunction to prevent the relocation).[166] It is not difficult to imagine essentially the same lawsuit being brought by Las

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attempted monopolization analysis. *See generally Am. Football League v. NFL*, 323 F.2d 124 (4th Cir. 1963).

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

165. *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577 (Bankr. D. Ariz. 2009).

166. *City of Oakland v. Oakland Raiders*, No. 18-cv-7444 (N.D. Cal. Dec. 11, 2018). The City of St. Louis filed a pending antitrust suit against the Rams and the NFL with similar allegations arising out of the club's 2017 relocation to Los Angeles. *St. Louis Reg'l Convention & Sports Complex Auth. v. NFL*, No. 1722-CC00976, 2017 WL 1423439 (Mo. Cir. Ct. Apr. 12, 2017).

Vegas had that city's "extraordinary efforts" to attract the Raiders resulted in the NFL's decision not to approve the club's move there.

CONCLUSION

After reviewing judicial precedent regarding the scope of MLB's antitrust exemption; the legitimate business reasons for many of MLB's franchise decisions (e.g., number, location, and ownership of its clubs); congressional testimony from MLB executives, sports economists, and sports law professors regarding the exemption's benefits and its potential limitation or repeal; and law review and other commentary, we conclude that sound antitrust law and public policy justifications support the majority judicial view broadly construing the exemption as applying to the business of baseball, which includes franchise decisions. We further conclude that the justifications for immunizing MLB's franchise rules and decisions from antitrust liability also support judicial application of the single entity defense or a rebuttable presumption of legality for other leagues' franchise rules and decisions for purposes of § 1 of the Sherman Act. Disputes regarding these internal governance matters are best resolved by league rules and clubs' collective decisions, which necessarily must consider and effectively respond to sport-specific consumer welfare issues, rather than externally by judges and juries in case-by-case antitrust litigation.