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ALL BETS ARE OFF: PREEMPTING MAJOR LEAGUE BASEBALL'S MONOPOLY ON SPORTS BETTING DATA

Beatrice Lucas*

Abstract: Major League Baseball is in the process of collectivizing data used in sports betting. This could be exempt from antitrust scrutiny if the conduct falls within the “business of baseball.” Such an exemption raises the question of whether collecting official league data is sufficiently attenuated from the “business of baseball” to be subject to antitrust law, and if so, whether MLB violates the Sherman Act by excluding competitors from the league data market. This Comment makes a two-fold argument. First, it argues that the “business of baseball” should be constrained to cover activities directly linked to putting on baseball games. Second, this Comment argues that the collectivization of official league data for sports betting is not within the “business of baseball,” and that MLB is potentially violating the Sherman Act for excluding competitors through anticompetitive means. The unique “business of baseball” exemption has existed for almost one hundred years without limit, but that does not mean professional baseball can restrain trade in every industry it deals.

INTRODUCTION

“[B]aseball,” Justice Blackmun wrote, is our “national pastime[,] or, depending [][on [your] point of view, the great American tragedy.”¹ At its inception, baseball was a humble sport played by friends in an open field for fun.² Today, Major League Baseball (MLB) is a ten billion dollar industry.³ And now, in the wake of a recent United States Supreme Court decision, MLB adds an additional revenue stream: collectivizing and selling game data used for sports betting.⁴

* J.D. Candidate, University of Washington School of Law, Class of 2021. I would like to thank Professor Douglas Ross for his invaluable guidance on antitrust law and help making this Comment possible. I would also like to thank the editorial staff of *WLR* for their helpful comments and suggestions, and of course my husband, Jonathan Lucas, for being my sounding board and support system.

1. *Flood v. Kuhn*, 407 U.S. 258, 264 (1972) (internal citations omitted).

2. See Gilbert P. Laue et al., *Baseball*, ENCYC. BRITANNICA, <https://www.britannica.com/sports/baseball> [<https://perma.cc/W4NG-7Z8F>].

3. Maury Brown, *MLB Sees Record \$10.7 Billion in Revenues for 2019*, FORBES (Dec. 21, 2019, 7:02 PM), <https://www.forbes.com/sites/maurybrown/2019/12/21/mlb-sees-record-107-billion-in-revenues-for-2019/#3af151d85d78> [<https://perma.cc/C526-GFMG?type=image>]. 2019 was the seventeenth year in a row of record growth for the MLB. *Id.*

4. See Matt Rybaltowski, *Document Shows MLB Pitch for Sportsbooks to Become ‘Official League Data Licensee,’* SPORTS HANDLE (June 13, 2019), <https://sportshandle.com/mlb-authorized-gaming->

In 2018, the United States Supreme Court held the Professional and Amateur Sports Protection Act (PASPA) unconstitutional,⁵ leaving states free to legalize sports betting.⁶ Twenty-one states and Washington, D.C. have legalized some form of sports betting to date.⁷ Twenty-three other states are working on legislation at the time of this Comment.⁸

In an attempt to “protect the integrity of the game,”⁹ MLB has pushed to make official league data—the game and player statistics compiled by MLB and its authorized partners—the primary source of baseball statistics in sports betting.¹⁰ MLB’s campaign has two components: lobbying state governments and incentivizing sportsbooks to exclusively use official league data for sports betting.¹¹ MLB began lobbying before PASPA’s overruling.¹² Presently, MLB has convinced two states, Illinois and Tennessee, to pass laws mandating the exclusive use of official league data in sports betting.¹³

MLB’s efforts extend to the private sector: namely, pitching for sportsbooks to become Authorized Gaming Operators (AGOs).¹⁴ Sportsbooks serve as middleman in betting; they receive and distribute bets online and in person to facilitate the sports betting process.¹⁵ Sportsbooks supply data to help bettors make an informed wager.¹⁶ If a sportsbook becomes an AGO, MLB assures customers that every person betting through that sportsbook will be using only official league data.¹⁷

operator-program/ [https://perma.cc/BW2T-C8B8].

5. See *Murphy v. NCAA*, 584 U.S. ___, 138 S. Ct. 1461, 1478 (2018).

6. See Brett Smiley, *Legal Sports Betting Bill Tracker*, SPORTS HANDLE (Mar. 8, 2020), <https://sportshandle.com/legal-betting-legislation-tracker/> [https://perma.cc/QP5V-9YRQ].

7. *Id.*

8. *Id.*

9. James Drew, *Major League Baseball Wants Cut of the Action if Washington Legalizes Sports Gambling*, NEWS TRIBUNE (Oct. 11, 2019, 6:10 AM), <https://www.thenewstribune.com/news/state/washington/article236014943.html#> (last accessed July 14, 2020).

10. See *Official League Data*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/official-league-data/> [https://perma.cc/DR5X-NCPU].

11. See Rybaltowski, *supra* note 4; Rui Kenaya, *The NBA and MLB Quietly Hustle for a Cut of the Sports Betting Jackpot*, CTR. FOR PUB. INTEGRITY (June 8, 2018, 1:07 PM), <https://publicintegrity.org/politics/state-politics/the-nba-and-mlb-quietly-hustle-for-a-cut-of-the-sports-betting-jackpot/> [https://perma.cc/YV9U-EDHD].

12. See *Official League Data*, *supra* note 10.

13. See *id.*

14. See Rybaltowski, *supra* note 4.

15. See *Sportsbook*, LEXICO, <https://www.lexico.com/definition/sportsbook> [https://perma.cc/LR4A-ZF8F]. Sportsbooks are essentially the middleman: they receive and distribute bets either online or in person. See *id.*

16. See *Official League Data*, *supra* note 10.

17. See Rybaltowski, *supra* note 4.

In return, MLB licenses AGOs to market with the official MLB logo and attain the credibility that comes with it.¹⁸

However, collectivizing game data could violate section 1 of the Sherman Act, which prohibits competitors from acting in concert to unreasonably restrain trade.¹⁹ While lobbying the government for favorable laws remains beyond the reach of antitrust scrutiny,²⁰ joint ventures that foreclose competition could push the conduct into section 1 territory.²¹ Thirty teams make up MLB, each an individually operated entity.²² An agreement to sell official league data at a centralized level and exclude other collectors of game data potentially restrains trade in violation of the Sherman Act.²³

It is possible that MLB is acting as one legal entity, not as thirty distinct teams when it sells official league data, which would preclude a section 1 claim. However, this defense could give rise to a section 2 claim, which outlaws monopolization and attempts to monopolize.²⁴ If MLB's collectivization of game data provides it with a way to gain or maintain market power—by excluding rivals—such an act would bolster a section 2 claim.²⁵

On the other hand, it may not matter if MLB violated either section—even if MLB's conduct is a particularly insidious restraint on trade. This is because MLB has uniquely benefited from an aberration in antitrust law

18. *See id.*; *infra* Part I.

19. 15 U.S.C. § 1 (“Every [agreement] . . . in restraint of trade . . . is declared to be illegal.”).

20. *See* *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 555–56 (2014) (first citing *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); and then citing *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)) (creating the *Noerr-Pennington* doctrine, which stands for the proposition that defendants are immune from antitrust liability when petitioning the government for passage of favorable laws).

21. *See, e.g.*, *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring), *abrogated by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) (holding that a tying arrangement did not violate antitrust law because the company lacked market power in the tying market).

22. *See* Marc Edelman, *Why the “Single Entity” Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 891, 925 (2008); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984) (discussing whether corporations are a single entity or several for antitrust purposes depending on if they have a “complete unity of interest”).

23. The Court has “long held that concerted action . . . does not turn simply on whether the parties are . . . legally distinct entities” but instead favors a look at “how the parties involved in the alleged anticompetitive conduct actually operate.” *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 191 (2010).

24. *See* 15 U.S.C. § 2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . shall be deemed guilty of a felony . . .”).

25. *See* *United States v. Microsoft Corp.*, 253 F.3d 34, 50–51 (D.C. Cir. 2001).

ever since Justice Holmes declared baseball a mere “exhibition” and not interstate commerce.²⁶ Both section 1 and section 2 of the Sherman Act require that the conduct constitutes interstate commerce, and federal antitrust law cannot regulate an “exhibition[.]”²⁷ In the line of cases following Holmes’s fateful decision, so long as MLB’s conduct remained within the “business of baseball,” courts could not touch it.²⁸

Just how far the boundaries of the “business of baseball” extend remains unclear, including whether game data in sports betting falls under this exemption.²⁹ If game data in sports betting does qualify, the exemption will continue to expand, raising the question as to when, if ever, it will be constrained.

This Comment proceeds as follows: Part I explains the context of the sports betting industry as it relates to MLB’s conduct. Part II gives the legal background on the baseball exemption. Part III shows how the courts have grappled with the baseball exemption in a contemporary legal setting. Part IV proposes a limit to the baseball exemption that balances competing interests. Part V applies those confines to MLB’s conduct. Part VI concludes that collectivizing official league data used for sports betting is not directly linked to the “business of baseball” and should be subject to antitrust scrutiny.

I. SPORTS BETTING TODAY—MLB’S PATH ON PROPRIETARY GAME DATA

Sports betting is a multibillion-dollar industry.³⁰ After the Court ruled PASPA unconstitutional, MLB lobbied both state governments and sportsbooks to exclusively use MLB’s proprietary data. This market exclusivity would give MLB major profits to the detriment of healthy competition.

A. *Sports Betting: A League of Its Own*

Sports betting allows consumers to not only place bets on the final

26. *Fed. Baseball Club, Inc. v. Nat’l League of Pro. Baseball Clubs*, 259 U.S. 200, 208 (1922).

27. *Id.* at 207–09. *See* 15 U.S.C. §§ 1–2.

28. *Right Field Rooftops, LLC v. Chi. Cubs Baseball Club, LLC*, 870 F.3d 682, 688 (7th Cir. 2017); *Wyckoff v. Off. of the Comm’r*, 211 F. Supp. 3d 615, 626 (S.D.N.Y. 2016), *aff’d*, 705 F. App’x 26 (2d Cir. 2017).

29. *See Fed. Baseball*, 259 U.S. at 200.

30. OXFORD ECONS., ECONOMIC IMPACT OF LEGALIZED SPORTS BETTING 4 (2017), <https://www.americangaming.org/sites/default/files/AGA-Oxford%20-%20Sports%20Betting%20Economic%20Impact%20Report1.pdf> [<https://perma.cc/5HLG-GF3Y>].

outcome of a game but also discrete events such as, how many balls a pitcher will throw in the third inning, or if a specific player will hit a home run.³¹ Consumers can bet on sports either online or in person, depending on the laws of the state.³² Sportsbooks—the casinos and organizations that accept and pay out wagers—facilitate the betting process.³³ For instance, a person wishing to bet on the upcoming Mariners game will either login to an online sportsbook or go to a casino, put money down for a specific outcome in the game, and reap the rewards if their bet pays off.³⁴

Baseball managers, scouts, and players rely on statistics more than their peers involved with other sports due to baseball's discrete outcomes and large sample size of relevant data.³⁵ For the same reasons, this makes accurate and advanced baseball statistics particularly valuable to the sports bettor.³⁶ MLB wants to be the sole provider of this data.³⁷ Monetizing the supply of league data to sportsbooks would generate a healthy revenue stream, especially given how lucrative sports betting currently is (and is predicted to be).³⁸ If MLB gained an exclusive market in baseball data, independent data collectors could be driven out of the market and purveyors of sportsbooks could pay more for the same data. Ultimately, these costs may be passed on to consumers.

31. See Benjamin Cronin, *How to Bet on Baseball: The Ultimate Baseball Betting Guide*, PINNACLE (June 11, 2017), <https://www.pinnacle.com/en/betting-articles/Baseball/ultimate-baseball-betting-guide/JU3J9V9HPREQ3VMS> [<https://perma.cc/934F-ZHUL>].

32. See *Legal Sports Betting in the United States*, DRAFTKINGS SPORTSBOOK, <https://sportsbook.draftkings.com/help/sports-betting/where-is-sports-betting-legal> [<https://perma.cc/23UE-5FXM>].

33. See Brett Smiley, *Sports Betting 101: NFL Lines, Odds, Point Spreads and More*, SPORTS HANDLE (Aug. 9, 2017), <https://sportshandle.com/football-betting-nfl-lines-odds-point-spreads-explainer/> [<https://perma.cc/2U2U-TWHX>].

34. A bettor may bet on which team will win the World Series before gameplay has begun (futures bets), whether a certain player will hit a homerun against a specified team (props bets), or the total number of runs scored in a specific game (totals bets). See *How to Bet on Baseball*, DRAFTKINGS SPORTSBOOK, <https://sportsbook.draftkings.com/help/how-to-bet/baseball-betting-guide> [<https://perma.cc/5MLV-EJ8B>].

35. See Louis Menand, *What Baseball Teaches Us About Measuring Talent*, NEW YORKER (Apr. 1, 2019), <https://www.newyorker.com/magazine/2019/04/08/what-baseball-teaches-us-about-measuring-talent> [<https://perma.cc/MP26-S2NP>] (showing the history of scouting baseball talent and its relation to statistics).

36. See *id.*

37. See Rybaltowski, *supra* note 4.

38. See Matt Rybaltowski, *Here's How Much 'Official' League Data Actually Costs*, SPORTS HANDLE (Mar. 12, 2019), <https://sportshandle.com/sports-betting-official-data-cost/> [<https://perma.cc/H956-X3ME>] (finding that the cost is \$4,000 to \$6,000 a month per sportsbook with steep increases for additional games and in-game betting statistics).

B. MLB's Pitch: Aggressive Lobbying and an Incentive Program

In May 2018, the Supreme Court declared the PASPA unconstitutional—lifting the restriction on sports betting's legalization.³⁹ MLB spent months preparing in anticipation of this decision.⁴⁰ During its “multistate lobbying blitz,” MLB spared no expense to retain lobbying services for every state that expected to legalize sports betting if and when PASPA was overruled.⁴¹ MLB's goal was simple—to receive a slice of the profits.⁴² Experts expect the United States sports betting industry to generate more than \$41 billion annually.⁴³

MLB first lobbied state governments to mandate that consumers only use official league data when placing bets.⁴⁴ Because lobbying the government is for the most part lawful, no matter how anticompetitive, this does not implicate antitrust laws.⁴⁵ MLB's bet paid off when both Illinois and Tennessee passed legislation mandating official league data as the only data allowed in sports betting.⁴⁶

Beyond extensive lobbying efforts, MLB has also been working in the private sector to secure deals with sportsbooks that would authorize them to become AGOs.⁴⁷ If a sportsbook agrees to use official league data, MLB provides it with use of the MLB logo, “media and content extension opportunities,” and “product integration through MLB.TV.”⁴⁸ In return, MLB receives either a flat fee or a percentage of the revenues, depending on the size of the sportsbook.⁴⁹ Four sportsbooks have already joined the

39. See *Murphy v. NCAA*, 584 U.S. ___, 138 S. Ct. 1461, 1478 (2018). PASPA was struck down for violating the anti-commandeering doctrine; it “unequivocally dictate[d] what a state legislature may and may not do.” *Id.*

40. See Rui Kenaya, *The NBA and MLB Quietly Hustle for a Cut of the Sports Betting Jackpot*, CTR. FOR PUB. INTEGRITY (June 8, 2018), <https://publicintegrity.org/politics/state-politics/the-nba-and-mlb-quietly-hustle-for-a-cut-of-the-sports-betting-jackpot/> [<https://perma.cc/YV9U-EDHD>].

41. *Id.*

42. See *id.*

43. OXFORD ECONS., *supra* note 30.

44. See Brett Smiley, *Antitrust Tripwires: Legal Expert Explains Sports Betting Data Issues*, SPORTS HANDLE (June 4, 2019), <https://sportshandle.com/sports-betting-data-antitrust/> [<https://perma.cc/PP97-MMJ6>].

45. See *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 555–56 (2014).

46. See *Tennessee Sports Betting*, LEGAL SPORTS REP. (Dec. 10, 2019, 2:31 PM), <https://www.legalsportsreport.com/tn/> [<https://perma.cc/B96E-9NDQ>]; *Official League Data*, *supra* note 10.

47. See Rybaltowski, *supra* note 4.

48. *Id.*

49. See *id.* Apparently, Nevada sportsbooks do not need official league data to turn a profit: they earned more than \$47.1 million on baseball wagers in 2018. *Id.*

AGO program.⁵⁰

The fight over data primarily concerns “in-play betting” (or “live betting”) rather than the outcome of any single game.⁵¹ For example, a bettor could use this data to place a bet on if the next pitch will be a strike or whether Mike Trout will hit a home run in the bottom of the eighth inning against the Yankees.⁵² Sports betting cannot exist on an even-playing field absent accurate data; if two people bet on the same pitch, each relying on different, conflicting sources, the result could be unfair.

MLB wants both state legislatures and sportsbooks to believe that official league data remains superior to its unofficial counterpart—and is therefore fairer to consumers. Multiple sources suggest otherwise.⁵³ Marquest Meeks, MLB’s senior counsel for sports betting and investigation, claims that official league data is the only reliable source of data and that using unofficial data risks delay and inaccuracy.⁵⁴ Meeks also asserts that “pirated” data—data collected at games by individuals—runs the risk of corrupting the game.⁵⁵ He believes an unofficial data source could try to fix games by bribing players to influence one result or the other.⁵⁶

However, studies show that apart from the minor difference in the data’s transmission speed, little else differentiates official game data from unofficial.⁵⁷ Further, some experts argue that speedier data transmission

50. Matt Rybaltowski, *FOX Bet Becomes an MLB Authorized Gaming Operator Days Before World Series*, SPORTS HANDLE (Oct. 15, 2019), <https://sportshandle.com/fox-bet-mlb-authorized-gaming-operator/> [<https://perma.cc/42XH-HUYN>]. Those sportsbooks are FOX Bet, MGM Resorts International, DraftKings, and FanDuel. *Id.*

51. *Official League Data*, *supra* note 10. The outcome of a game can be determined by anyone and does not rely on complex data. *See id.*

52. *See MLB Betting Guide: How to Bet on Baseball*, ODDS SHARK, <https://www.oddsshark.com/mlb/how-bet-baseball> [<https://perma.cc/RA83-SN8T>].

53. *See Official League Data*, *supra* note 10; Brett Smiley, *How ‘Unofficial’ Sports Betting Data May Be Better than ‘Official League Data,’* SPORTS HANDLE (June 5, 2019), <https://sportshandle.com/unofficial-official-league-data/> [<https://perma.cc/H8W7-DEBP>] (making the argument that unofficial data can be a better experience and more accurate than official league data); *Official and Unofficial Data in Sports Betting: Comparison and Evaluation*, SLOTEGRATOR (Oct. 1, 2019) [hereinafter *Official and Unofficial Data*], https://slotegrator.pro/analytical_articles/official-and-unofficial-data-in-sports-betting-comparison-and-evaluation/ [<https://perma.cc/85K8-JBZN>] (finding little else except speed of data transmission to differentiate official from unofficial data).

54. *See* Drew, *supra* note 9.

55. *Id.*

56. *See id.* For example, an unofficial data source could theoretically pay a player to strike out in the sixth inning so that those who had placed that bet could profit. *See id.*

57. *See Official and Unofficial Data*, *supra* note 53 (the source of the data is also mentioned as a difference between official and unofficial data).

is not necessarily better; high speed leaves less time for accuracy checks.⁵⁸ Even if the data is inaccurate, the market would presumably correct for this. Sportsbooks will have an incentive to buy the highest quality data for the lowest price, and data that is disreputable will naturally fall out of the market.

In a media briefing, Kenny Gersh, the MLB executive of gaming and new business ventures, stated that sportsbooks without official league data “won’t be around for long.”⁵⁹ This statement indicates that MLB is aware that it is engaging in exclusionary conduct, which is the basis for many antitrust claims.⁶⁰ But even if MLB’s conduct is exclusionary, it is possibly without consequence because of baseball’s antitrust exemption.

II. DEVELOPMENT OF THE BASEBALL EXEMPTION

MLB’s antitrust exemption is as unusual in the legal world as an eephus pitch.⁶¹ It is a protection for the “business of baseball” that emerged in the landmark *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*⁶² decision by the Supreme Court over 100 years ago.⁶³ *Federal Baseball* was the first in a trilogy of cases establishing the baseball exemption.⁶⁴ Today, it remains the basis of many courts’ decisions involving baseball antitrust cases.

A. *Relevant Antitrust Law for the Intersection of Sports Betting and MLB*

Plaintiffs often bring antitrust actions alleging both a section 1 and section 2 claim. The key difference between the claims is whether or not the actor works in concert with others.

58. *See id.*

59. Martin Derbyshire, *Why It’s Doubtful That Legal Sportsbooks Will Go Under Without MLB Data*, PLAYUSA (July 5, 2019), <https://www.playusa.com/major-league-baseball-official-data-scare-tactic/> [<https://perma.cc/NB3E-JY2U>]. A year earlier in a panel on sports betting, Mr. Gersh implied that unofficial data comes from “some guy in a garage who is watching the game on TV.” John Brennan, *MLB and AGA Execs Cross Swords in Fiery Sports Betting Panel at G2E*, US BETS (Oct. 11, 2018), <https://www.usbets.com/g2e-fiery-sports-betting-panel/> [<https://perma.cc/DQT4-VMGX>].

60. *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 595–96 (1985) (holding that a ski resort’s refusal to cooperate with competitors could be considered monopolization under section 2 of the Sherman Act if the refusal has no legitimate business purpose).

61. *Eephus Pitch*, MLB.COM, <http://m.mlb.com/glossary/pitch-types/eephus> [<https://perma.cc/B56L-FVJ7>]. An eephus pitch is an extremely rare type of pitch that is “known for its exceptionally low speed and ability to catch a hitter off guard.” *Id.*

62. 259 U.S. 200 (1922).

63. *Id.*

64. *See id.*; *Toolson v. N.Y. Yankees*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972).

1. *Applicability of Sherman Act, Section 1*

Section 1 of the Sherman Act states that “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is . . . illegal.”⁶⁵ Some restraints of trade are so nakedly anticompetitive that they require per se condemnation.⁶⁶ Restraints that do not qualify as “naked” often result in a burden-shifting analysis.⁶⁷ Once a plaintiff shows likely harm to consumers, the defendant may rebut that presumption with a plausible and legally cognizable competitive justification for the restraint.⁶⁸ When the anticompetitive effects outweigh the procompetitive justifications, the conduct is an unreasonable restraint on trade.⁶⁹

A section 1 claim requires concerted action that takes the form of a contract, combination, or conspiracy.⁷⁰ Competitors act in concert when they form an agreement as “separate economic actors,” pursue “separate economic interests,” and their agreement deprives the market of a “diversity of entrepreneurial interests.”⁷¹

Joint ventures are generally considered a procompetitive model, especially when they increase a firm’s efficiency and enable it to compete more effectively.⁷² However, joint ventures can harm competition in smaller markets by allowing one supplier to “unreasonably . . . deprive other suppliers of a market for their goods.”⁷³ The Court applied this legal principle in *McWane, Inc. v. FTC*⁷⁴ when a pipe manufacturer required its

65. 15 U.S.C. § 1.

66. *See, e.g.*, *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 692 (1978) (holding that an agreement within a professional organization to not quote a price until after the client had chosen an engineer was per se illegal because it eliminated the possibility of engineers competing with one another).

67. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 37 (D.C. Cir. 2005).

68. *See id.* at 35–36.

69. *See id.*

70. *See* 15 U.S.C. § 1; *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 315 (3d Cir. 2010) (explaining that concerted action requires a “unity of purpose or a common design and understanding or a meeting of minds’ or ‘a conscious commitment to a common scheme” (internal quotation marks omitted)).

71. *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 195 (2010).

72. *See* *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984); *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 76 (3d Cir. 2010).

73. *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O’Connor, J., concurring), *abrogated by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *see also* III B PHILIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 760b7, at 55 (4th ed. 2015) (explaining that a dominant firm can use exclusive deals to “strengthen[] or prolong[] [its] market position”).

74. *McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015).

distributors to buy exclusively from it—foreclosing competitors from entering the market and competing effectively—to unlawfully maintain its monopoly.⁷⁵

A joint venture will likely pass antitrust scrutiny if the firms have an agreement aimed at a common economic goal.⁷⁶ But characterizing an agreement among competitors as a joint venture will not save it from condemnation.⁷⁷ A lawful joint venture differs from an unlawful one based on the anticompetitive consequences that result.⁷⁸ An unlawful venture might possess absolute control over supply, impose production limits, and punish cartel members who stray from the quotas.⁷⁹ A lawful business agreement will have procompetitive elements such as increasing output or enhancing product quality.⁸⁰

A defense to unlawful concerted action is if the defendant claims that the alleged “competitors” actually constitute a single entity and therefore cannot act in concert.⁸¹ *American Needle v. National Football League*⁸² examined the single entity defense in the context of football. The thirty distinct National Football League (NFL) teams claimed that they acted as a single entity through the NFL when they exclusively licensed intellectual property.⁸³ The Court focused on the “competitive reality,” rather than the NFL teams’ legal status as distinct entities.⁸⁴ The NFL teams were distinct entities because the teams competed with each other not just in games but in ticket sales, to attract fans, and for contracts with players and managerial personnel.⁸⁵ The NFL teams did not have common objectives, and therefore they were “separate economic actors pursuing separate economic interests.”⁸⁶

75. *See id.* at 837. Foreclosure occurs when the opportunity for competitors to enter the market is “significantly limited.” *Id.*

76. *See Am. Needle, Inc.*, 560 U.S. at 195.

77. *See* FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 9 (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf [<https://perma.cc/DE76-7LBV>]. If it were any other way, any cartel “could evade the antitrust laws simply by creating a ‘joint venture’ to serve as the exclusive seller of their competing products.” *MLB Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring).

78. *See Am. Needle, Inc.*, 560 U.S. at 197.

79. *See NCAA v. Bd. of Regents*, 468 U.S. 85, 95–96 (1984).

80. *See MLB Props.*, 542 F.3d at 302–03.

81. *Am. Needle, Inc.*, 560 U.S. at 191.

82. 560 U.S. 183 (2010).

83. *See id.* at 188.

84. *Id.* at 196–97.

85. *See id.*

86. *Id.* at 197.

Whether actors are a single entity or not requires an analysis into each specific industry.⁸⁷ In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,⁸⁸ the defendants each sold copyrighted music to purchasers under blanket licenses, in addition to selling individual licenses for each composition.⁸⁹ The blanket licenses constituted agreements among competitors on price, but they also created efficiencies.⁹⁰ Because the blanket licenses lowered costs and made it easier for both buyers and sellers to do business, the agreements were not per se illegal.⁹¹

MLB could similarly defend itself from a section 1 claim because the AGO program increases efficiency and sportsbooks would have no need to buy data from one team and not the other.⁹² Even if this defense succeeds, it would not preclude a section 2 claim.⁹³

2. *Applicability of Sherman Act, Section 2*

Section 2 of the Sherman Act makes it unlawful to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize.”⁹⁴ The offense of attempted monopolization requires a dangerous probability that the defendant will achieve market power.⁹⁵ The offense of actual monopolization requires that the defendant have market power.⁹⁶ Both offenses require that a plaintiff prove that the defendant engaged in anticompetitive conduct to obtain or maintain that market power.⁹⁷

Market power is the ability to raise prices above a competitive level.⁹⁸ Direct proof of market power rarely exists, meaning that courts must look for circumstantial evidence in the market structure; such as the

87. *See id.* at 195.

88. 441 U.S. 1 (1979).

89. *See id.* at 5–6.

90. *See id.* at 21–22.

91. *See id.*

92. *See infra* Part V.

93. *See Am. Needle, Inc. v. NFL*, 560 U.S. 183, 195 (2010).

94. 15 U.S.C. § 2.

95. *See, e.g., Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 100 (2d Cir. 1998) (holding that territorial restrictions in the grocery store market were a per se violation of the Sherman Act).

96. *See id.* (“Despite the similar approaches, a lesser degree of market power may establish an attempted monopolization claim than that necessary to establish a completed monopolization claim.”).

97. *See United States v. Microsoft Corp.*, 253 F.3d 34, 50, 80 (D.C. Cir. 2001).

98. *See id.* at 51.

defendant's share in the relevant market.⁹⁹ There is no precise share of the market that is required to constitute a monopoly: 65% might be enough, and 80% certainly is.¹⁰⁰ A claim of attempted monopolization requires less market power than a monopolization claim.¹⁰¹

It is not unlawful under section 2 to have a monopoly because of a "superior product, business acumen, or historic accident."¹⁰² A court will look at whether the competitive process itself has been harmed when it differentiates legitimate business practices from anticompetitive conduct; harm to competitors alone is not sufficient for a section 2 claim.¹⁰³ Further, the defendant's actions must cause the harm.¹⁰⁴ As in a section 1 claim, the defendant may offer procompetitive justifications, and the plaintiff will attempt to show that the anticompetitive harm outweighs those justifications.¹⁰⁵

Commentators do not often mention the need for the conduct in a section 1 or 2 claim to affect interstate commerce. Because interstate commerce is so loosely defined, it is almost never a deciding factor in an antitrust case.¹⁰⁶ However, one exception remains—*Federal Baseball*.¹⁰⁷

B. "[P]ersonal effort, not related to production, is not a subject of commerce."¹⁰⁸

Justice Holmes created the baseball exemption in *Federal Baseball*

99. See *id.* Circumstantial evidence might be the defendant's "dominant share of a relevant market" that has entry barriers, such as regulatory requirements. *Id.*

100. See, e.g., *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997) ("Courts generally require a 65% market share to establish a prima facie case of market power."); *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 n.3 (8th Cir. 1994) (explaining that 80% market share is sufficient).

101. See generally *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945). In *United States v. Microsoft Corp.*, the D.C. Circuit held that Microsoft had monopolist market power because it had greater than 95% of the market and entry barriers were high, among other things. 253 F.3d 34, 54–55 (D.C. Cir. 2001). Entry barriers were that consumers preferred to use a reputable browser and developers typically want to write applications for browsers that will be used by the most consumers. *Id.*

102. See *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

103. See *Microsoft*, 253 F.3d at 58.

104. See *id.* at 58–59.

105. See *id.* at 59. In *Microsoft*, the Court upheld evidence of anticompetitive conduct because Microsoft had—among other anticompetitive practices—reduced its rivals' browser share usage by preventing the manufacturers from accommodating the browsers with no efficiency justification. See *id.* at 62.

106. See *Summit Health Ltd. v. Pinhas*, 500 U.S. 322, 330 (1991) (explaining that plaintiffs need not prove that interstate commerce itself has been affected but rather that potential harm would ensue).

107. 259 U.S. 200 (1922).

108. *Id.* at 209.

when he held that baseball does not constitute interstate commerce.¹⁰⁹ A century ago, when Justice Holmes wrote his opinion in *Federal Baseball*, three leagues existed: the Federal League, the National League, and the American League.¹¹⁰ The Federal League folded in 1915, largely due to interference from the other leagues.¹¹¹ The teams in the Federal League sued the American and National Leagues for conspiracy to monopolize baseball.¹¹² The teams in the Federal League sued the American and National Leagues for conspiracy to monopolize baseball.¹¹³ All parties eventually settled except for the Federal League's Baseball Club of Baltimore.¹¹⁴ The Baseball Club of Baltimore alleged that the other leagues monopolized all of the available baseball talent and caused the inevitable collapse of the Federal League.¹¹⁵

Justice Holmes drew a meticulous distinction for defining commerce.¹¹⁶ The transportation of a product or service across state lines was not subject to the Commerce Clause if the "commerce" was personal effort unrelated to production.¹¹⁷ Money moving across state lines for an entertainment event like baseball was only "incident[al]" to that event and not the "essential thing."¹¹⁸ Justice Holmes analogized to a lawyer traveling to another state to argue a case; the transportation to participate in commerce was ancillary to the main commercial event, and therefore not under the umbrella of the Clause.¹¹⁹ However, the Court's subsequent interpretations of the Commerce Clause soon made this ruling untenable.¹²⁰

109. *Id.*

110. See Laue, *supra* note 2; Gary Hailey, *Anatomy of a Murder: The Federal League and the Courts*, OUR GAME (June 22, 2015), <https://ourgame.mlblogs.com/anatomy-of-a-murder-the-federal-league-and-the-courts-de9889130b0a> [<https://perma.cc/PDY6-N3GM>].

111. See Hailey, *supra* note 110.

112. *See id.*

113. *See id.*

114. *See id.*

115. *See Nat'l League of Pro. Baseball Clubs v. Fed. Baseball Club, Inc.*, 269 F. 681, 683 (D.C. Cir. 1920).

116. *Fed. Baseball Club, Inc. v. Nat'l League of Pro. Baseball Clubs*, 259 U.S. 200, 209 (1922). This distinction was "insisted upon" because of *Hooper v. California*, a case involving insurance agents, who were not engaged in interstate commerce because their travel was only incidental to their work. *Id.* (citing *Hooper v. California*, 155 U.S. 648, 655 (1895)).

117. *Fed. Baseball*, 259 U.S. at 209.

118. *Id.*

119. *See id.*

120. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (growing wheat that never left the grower's property was able to be regulated by the Commerce Clause because it indirectly affected interstate commerce).

Today, virtually any trade affects commerce, from homegrown cannabis¹²¹ to the Utah prairie dog.¹²² Accordingly, *Federal Baseball* is now out of step with almost every interpretation as to what constitutes interstate commerce—yet the exception is still good law.¹²³

C. *The Court Doubles Down on the Baseball Exemption*

Despite the discrepancy in Commerce Clause jurisprudence, the Court reaffirmed the baseball exemption thirty-one years later in *Toolson v. New York Yankees*.¹²⁴ This one-paragraph, per curiam opinion refused to depart from *Federal Baseball*.¹²⁵ Without considering the merits of the case, the Court stated that “Congress had no intention of including the business of baseball within the scope of the federal antitrust laws” and that “if there are evils in this field [of baseball] which now warrant application to it of the antitrust laws it should be by legislation.”¹²⁶ This opinion solidified the baseball exemption in antitrust law.¹²⁷

Justice Burton dissented, reasoning that baseball would fall under the definition of interstate commerce established since *Federal Baseball*.¹²⁸ Instead of viewing congressional inaction as acquiescence to the baseball exemption, Justice Burton thought congressional inaction made it unreasonable to find that the baseball exemption exists.¹²⁹

By 1953, these two Supreme Court cases—totaling six paragraphs—established and reaffirmed the baseball exemption.¹³⁰ Instead of reversing

121. *See Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

122. *See People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990, 994 (10th Cir. 2017), *cert. denied*, ___ U.S. ___, 138 S. Ct. 649 (2018).

123. *See* Legal Info. Inst., *Commerce Clause*, CORNELL L. SCH., https://www.law.cornell.edu/wex/commerce_clause [<https://perma.cc/6E4R-F8X7>] (“From the *NLRB* decision in 1937 until 1995, the Supreme Court did not invalidate a single law on the basis of the Commerce Clause.”).

124. 346 U.S. 356 (1953) (per curiam).

125. *See id.* at 357.

126. *Id.*

127. *See Miranda v. Selig*, 860 F.3d 1237, 1243 (9th Cir. 2017).

128. *See Toolson*, 346 U.S. at 360.

129. *See id.* at 364–65.

130. *See, e.g., United States v. Darby*, 312 U.S. 100, 113 (1941) (finding that Congress could regulate activities that merely affected interstate commerce). In a Second Circuit opinion concerning whether employment relations with umpires falls under the baseball exemption (they do), Judge Friendly acknowledged that *Federal Baseball* was “not one of Mr. Justice Holmes’ happiest days, that the rationale of *Toolson* is extremely dubious,” and that “the distinction between baseball and other professional sports was unrealistic, inconsistent and illogical.” *Salerno v. Am. League of Pro. Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970).

course, the Court threw the third strike in *Flood v. Kuhn*.¹³¹ After Curtis Flood played twelve seasons for the St. Louis Cardinals,¹³² the team traded him to the Philadelphia Phillies without his knowledge or consent.¹³³ Opposing the trade, Flood asked the Commissioner to make him a free agent.¹³⁴ When the Commissioner denied his request, he challenged the reserve clause under antitrust laws.¹³⁵

Justice Blackmun, writing for the majority of the Court, chose to follow the “established” line of cases rather than depart from them.¹³⁶ He acknowledged that professional baseball engages in interstate commerce, *Federal Baseball* and *Toolson* have become an “aberration confined to baseball,” and if change was to be made it should be by legislation.¹³⁷ He reasoned that the law had been allowed to develop since 1922, and that, by not acting, Congress had signaled its intention to keep the exemption in baseball.¹³⁸ Further, overruling *Federal Baseball* would result in confusion and issues of retroactivity for the legislature.¹³⁹ The Court recognized the inconsistency and illogic of this line of cases but reasoned that to hold otherwise would invalidate Congress’s positive inaction.¹⁴⁰

Justice Douglas and Justice Marshall wrote dissenting opinions.¹⁴¹ Justice Douglas took part in the majority of *Toolson* but believed this decision was a fundamental error and lived to regret it.¹⁴² Justice Douglas’s dissent in *Flood* was clear: “[*Federal Baseball*] . . . is a derelict in the stream of law that we, its creator, should remove.”¹⁴³ Justice

131. 407 U.S. 258 (1972).

132. *Id.* at 264. Flood batted over .300 for six of his twelve years with the Cardinals, participated in three World Series, and won seven Golden Glove awards. *Id.*

133. *See id.* at 265.

134. *Id.* In the letter to the Commissioner Flood stated, “After twelve years in the Major Leagues, I do not feel I am a piece of property to be bought and sold irrespective of my wishes.” Howard Burns, *Curtis Flood’s Sacrifice: Sports’ Most Meaningful Trade*, BLEACHER REP. (July 13, 2011), <https://bleacherreport.com/articles/766021-curt-floods-sacrifice-sports-most-meaningful-trade> [<https://perma.cc/2N4Y-T44M>].

135. *See Flood*, 407 U.S. at 265. A reserve clause gives a baseball club the exclusive right to renew a contract with a player and bind them to the contract until traded or retired. *See Reserve clause*, THE MERRIAM-WEBSTER DICTIONARY (2016).

136. *See Flood*, 407 U.S. at 282.

137. *Id.* at 282–83.

138. *See id.*

139. *See id.*

140. *See id.* at 283–84.

141. *See id.* at 286, 288.

142. *See id.* at 286 n.1 (Douglas, J., dissenting) (citations omitted).

143. *Id.* at 286.

Douglas lamented that baseball players were “victims” of the reserve clause, and that this practice “is commonly called an unreasonable restraint of trade.”¹⁴⁴ Instead of viewing congressional inaction as the reason to uphold *Federal Baseball*, he said the Court should read into the fact that Congress has not exempted professional sports as a whole from antitrust law.¹⁴⁵

In his dissent, Justice Marshall focused on the importance of antitrust law, reminding everyone that the Sherman Act remains the “Magna Carta of free enterprise.”¹⁴⁶ Like Douglas, Marshall believed that Congress’s inaction did not signal a green light for the baseball exemption, but simply that Congress’s concern had not risen enough to elicit action.¹⁴⁷ He reasoned that the Court itself unnecessarily distinguished professional baseball players and it should be the Court that fixes this injustice.¹⁴⁸

After *Flood*, the baseball exemption solidified into firm precedent that the Court refused to expand past baseball’s confines to other sports or entertainment.¹⁴⁹ Both *United States v. Shubert*¹⁵⁰ and *United States v. International Boxing Club of New York*¹⁵¹ rejected creating an antitrust exemption similar to that of baseball. Chief Justice Warren wrote the majority opinion in both. In *Shubert*, he called *Toolson* a “narrow application of the rule of *stare decisis*,”¹⁵² and in *International Boxing* he stated that following *Federal Baseball* is not compelled solely because boxing is a professional sport.¹⁵³ *Stare decisis* is the linchpin of the baseball cases. Baseball’s unique legal standard governs to this day, despite many Justices recognizing its illogic.¹⁵⁴

144. *Id.* at 287.

145. *See id.* at 288.

146. *Id.* at 291 (Marshall, J., dissenting) (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)).

147. *See id.* at 292.

148. *See id.* at 292–93.

149. *See* *United States v. Shubert*, 348 U.S. 222, 230–31 (1955) (traveling theater companies); *United States v. Int’l Boxing Club*, 348 U.S. 236, 242 (1955) (professional boxing); *Radovich v. NFL*, 352 U.S. 445, 451–52 (1957) (professional football); *Haywood v. NBA*, 401 U.S. 1204, 1205 (1971) (professional basketball).

150. 348 U.S. 222 (1955).

151. 348 U.S. 236 (1955).

152. *See Shubert*, 348 U.S. at 282 (emphasis in original).

153. *See Int’l Boxing Club*, 348 U.S. at 241. In *Radovich v. NFL*, Justice Clark wrote that *Federal Baseball* applies to baseball only. 352 U.S. 445, 451–52 (1957). Because professional football had substantial interstate activity, it was clearly subject to antitrust law. *See id.* The Court recognized this same principle in *Haywood v. NBA*, and called arguments for exemptions in other professional sports “foreclosed.” 401 U.S. 1204, 1205 (1971).

154. *See supra* section I.B.

III. THE CONTEMPORARY BASEBALL EXEMPTION

Recent cases have challenged the baseball exemption. The courts have grappled with applications of the Curt Flood Act of 1998 (CFA),¹⁵⁵ as well as with finding the boundary of the “business of baseball.” But neither line of cases establishes a workable test. Additionally, Congressional legislation has not established a clear boundary for the “business of baseball” as it pertains to antitrust law.

A. *Legislation at Last?*

Congress has passed one piece of legislation concerning the baseball exemption: the CFA.¹⁵⁶ The CFA codified an agreement between MLB owners and the players’ union in the wake of the 1994 players’ strike that led to the cancellation of the World Series that year.¹⁵⁷ The original version repealed the entire baseball exemption except for specific, narrow applications; such as the reserve clause in Minor League Baseball, franchising agreements, and public broadcasting agreements.¹⁵⁸ However, the original version never went to a vote.¹⁵⁹

Shortly thereafter, MLB and the players’ union jointly drafted their own version of the legislation and submitted it to the Senate for consideration.¹⁶⁰ Rather than completely abandoning the baseball exemption, the new bill made it clear that it only altered the antitrust laws’ applicability with regard to the players’ employment.¹⁶¹ This version of the CFA passed.¹⁶²

The CFA officially removed major league baseball employment contracts from the antitrust exemption, but ensured that almost everything else about the law had not changed.¹⁶³ It specifically stated that it did not cover “any conduct, acts, practices, or agreements of persons not in the

155. 15 U.S.C. § 26b.

156. *Id.*

157. See Nathaniel Grow, *The Curiously Confounding Curt Flood Act*, 90 TUL. L. REV. 859, 872–73 (2016).

158. *See id.* at 880.

159. *See id.* at 881.

160. *See id.* at 882.

161. *See id.* at 883. “[T]he revised draft also included a new introductory section stating that the legislation’s purpose was ‘to clarify that major league baseball players are covered under the antitrust laws’ without changing ‘the application of the antitrust laws in any other context or with respect to any other person or entity.’” *Id.*

162. 15 U.S.C. § 26b(a)–(b).

163. *See id.* § 26b(b).

business of organized professional major league baseball,” leaving it to the courts to continue figuring out what exactly is the business of baseball.¹⁶⁴

Courts have found the CFA unhelpful in interpreting what constitutes the “business of baseball.” In *Laumann v. National Hockey League*,¹⁶⁵ television and internet subscribers brought a putative class action against MLB and other sports broadcasters alleging that their territorial restrictions on broadcasting violated the Sherman Act.¹⁶⁶ MLB claimed the antitrust exemption as a defense.¹⁶⁷ The district court recognized that the scope of the antitrust exemption is “far from clear” but declined to extend the exemption to anything not central to the business of baseball.¹⁶⁸ The court noted that the CFA was not applicable to this case because it only applied to employment contracts, but did not if media falls under the business of baseball.¹⁶⁹ In this case, television broadcasting was inherently interstate commerce and it did not fall under *Federal Baseball’s* exemption.¹⁷⁰ The court indicated that subsequent interpretations should construe the exemption narrowly, and apply it only to the reserve clause.¹⁷¹

Conversely, some courts have interpreted the CFA as Congress’s explicit acceptance of the baseball exemption.¹⁷² In *City of San Jose v. Office of the Commissioner of Baseball*,¹⁷³ San Jose sued MLB for alleged attempts to stymie the relocation efforts of the Oakland Athletics.¹⁷⁴ The Athletics wanted to relocate to San Jose, but franchising agreements prohibited the move because San Jose fell within San Francisco Giants territory.¹⁷⁵ The Ninth Circuit found that the antitrust exemption precluded San Jose’s claims because the location of baseball clubs is “the league’s basic organizing principle.”¹⁷⁶ As such, it is part of the “business of baseball” and it is not the court’s place to interfere.¹⁷⁷ Further, the court

164. *Id.* § 26b(b)(6).

165. 56 F. Supp. 3d 280 (S.D.N.Y. 2014).

166. *Id.* at 285.

167. *See id.* at 295.

168. *Id.* at 295–97.

169. *See id.*

170. *See id.* at 295.

171. *See id.* at 295–96.

172. *See City of San Jose v. Off. of the Comm’r of Baseball*, 776 F.3d 686, 691 (9th Cir. 2015).

173. 776 F.3d 686 (9th Cir. 2015).

174. *See id.* at 688.

175. *See id.*

176. *Id.* at 690–91.

177. *See id.* at 690.

interpreted the CFA as clear evidence of congressional acquiescence to the baseball exemption because Congress refused to legislate against it.¹⁷⁸

Ultimately these cases demonstrate that the CFA does not add much, if anything, to clarify the baseball exemption. If this is the legislation the Court held out for, perhaps it misplaced its confidence in Congress.

B. Recent Cases Attempt to Find the Boundaries of the “Business of Baseball” Exemption

Three recent circuit court cases addressed the baseball exemption but none provided any clear guidance as to its boundaries. In *Right Field Rooftops, LLC v. Chicago Cubs Baseball Club, LLC*,¹⁷⁹ owners of rooftop-businesses outside Wrigley Field sued the Chicago Cubs claiming they monopolized their baseball games when they erected signs that blocked the rooftops’ view of the games.¹⁸⁰ The court held that erecting signage that blocked the stadium was not “attenuated to the business of baseball.”¹⁸¹ Rather, it was “part and parcel” of providing baseball games for profit and was therefore exempt.¹⁸²

*Wyckoff v. Office of the Commissioner of Baseball*¹⁸³ involved a dispute about the employment relations between baseball scouts and the baseball clubs.¹⁸⁴ The court held that the antitrust exemption applied because the scouts’ employment was central to the business of baseball, rather than “incidental” or “wholly collateral.”¹⁸⁵ Because scouts played a “direct and critical” role in selecting teams’ players, they also played a crucial role in determining the success of those teams.¹⁸⁶ This, too, fell squarely within the “business of baseball.”¹⁸⁷

In *Miranda v. Selig*,¹⁸⁸ a class of minor league players brought an antitrust suit against the Commissioner of Baseball and the thirty baseball clubs claiming that the reserve clauses in the minor league players’

178. *See id.* at 690–91.

179. 870 F.3d 682 (7th Cir. 2017), *cert. denied*, ___ U.S. ___, 138 S. Ct. 2621 (2018).

180. *Id.* at 687.

181. *Id.* at 689.

182. *Id.* at 689.

183. 211 F. Supp. 3d 615 (S.D.N.Y. 2016), *aff’d*, 705 F. App’x 26 (2d Cir. 2017).

184. *Id.* at 616.

185. *Id.* at 626.

186. *Id.*

187. *Id.*

188. 860 F.3d 1237 (9th Cir. 2017).

employment contracts unduly restrained competition.¹⁸⁹ After extensively reviewing precedent, the court found it “undeniably true” that the employment of minor league players “falls squarely within” the baseball exemption.¹⁹⁰ Although the minor league teams encouraged the court to break from *stare decisis*, the court refused, stating that circuit courts must follow the Supreme Court lest “anarchy . . . prevail.”¹⁹¹

The circuit courts remain reluctant to break from the Supreme Court’s trilogy of baseball cases. The Second and Seventh Circuits indicate that there is a line across which conduct related to baseball would land afoul of the business of baseball—precisely where that line is remains unclear. The lack of clarity will continue until either the Court acts or Congress passes legislation that addresses the full scope of the exemption.

IV. MLB’S UNIQUE EXEMPTION SHOULD BE CONSTRAINED

Logic does not support baseball’s exemption from antitrust law. Nor is it without consequences; the exemption presents measurable harm. Instead of leaving it unconstrained, the test for whether conduct is within the “business of baseball” should be simplified and articulated. This Comment presents the following solution: if the conduct is directly related to putting on baseball games, it should be exempt from antitrust law.

A. *The Harm of the Exemption*

The baseball exemption would be of little consequence if it did not harm competition, and thus consumers. But ample evidence of harm does exist. For example, MLB compensates minor league players so poorly that their salaries fall well below the poverty line.¹⁹² Conversely, Major League players’ employment contracts are not exempted from antitrust law because of the CFA; on average these players earn \$4 million a year.¹⁹³ As a result, most minor league players—arguably the backbone of MLB’s billion-dollar enterprise¹⁹⁴—make less than \$10,000 a year, are

189. *Id.* at 1239.

190. *Id.* at 1242.

191. *Id.* at 1243 (quoting *Hutto v. Davis*, 454 U.S. 370, 375 (1982)).

192. See Theodore McDowell, Comment, *Changing the Game: Remediating the Deficiencies of Baseball’s Antitrust Exemption in the Minor Leagues*, 9 HARV. J. SPORTS & ENT. L. 1, 4 (2018). Minor league players were purposefully left out of the CFA, and the Save America’s Pastime Act swiped their minimum wage protections. Patrick Pinak, *Minor League Players Earn Less than School Janitors*, FANBUZZ (May 15, 2020), <https://fanbuzz.com/mlb/minor-league-baseball-salary/> [https://perma.cc/8JDW-5J56?type=image].

193. Pinak, *supra* note 192.

194. See Robbie Stratakos, *Minor League Players Are the Ones Suffering from MLB’s Standstill*, BASEBALL ESSENTIAL (June 4, 2020), <https://www.baseballessential.com/news/2020/06/04/minor->

not paid for overtime, and often must work extra jobs to support themselves financially.¹⁹⁵ If Minor Leaguers could use antitrust law to argue for better wages, then they could bargain for higher salaries instead of being forced to accept what is offered.

Another example of harm, as shown in *City of San Jose*, is that MLB forbids teams from relocating too close to another existing franchise.¹⁹⁶ This allows each area with a major league baseball team to develop a monopoly on the area and raise ticket prices without fear of competition.¹⁹⁷

Lastly, although not exhaustively, MLB has set up territorial broadcasting restrictions so that consumers cannot watch their home team if they are in the franchise area *of that team*.¹⁹⁸ If you wanted to watch a baseball game in Seattle, even if you pay \$119 per year for MLB.TV, you cannot watch the Mariners unless you also have purchased a cable subscription.¹⁹⁹ In these ways, the baseball exemption has undoubtedly caused harm to consumers.

B. *Clarifying the Standard*

How does a court determine whether conduct falls within the “business of baseball”? Courts have cited and adhered to *Toolson*’s “business of baseball” standard religiously,²⁰⁰ but its vague standard offers no guidance for judges, litigants, or MLB on how to conduct such an analysis. The “business of baseball” is especially outdated now that baseball has evolved beyond a pastoral game between friends and into a multibillion-dollar enterprise.²⁰¹ Baseball has entered the technological age along with everything else; MLB has its own television service, seven applications, countless merchandise, and now, a presence in the sports betting

league-players-are-the-ones-suffering-from-mlbs-standstill/ [https://perma.cc/97RF-PXSW].

195. *See id.*

196. *See City of San Jose v. Off. of the Comm’r of Baseball*, 776 F.3d 686, 691 (9th Cir. 2015).

197. *See Ari Khuner Haber, Comment, Keeping the A’s in Oakland: Franchise Relocation, City of San Jose, and the Broad Power of Baseball’s Antitrust Exemption*, 22 UCLA ENT. L. REV. 1, 26–27 (2014).

198. *What is MLB.TV’s Blackout Policy?*, MLB.TV, <https://www.mlb.com/live-stream-games/help-center/blackout-policy> [https://perma.cc/X3SR-MRNNH].

199. *See Nigel Chiwaya, Blackout Blues: Major League Baseball’s Broadcast Restrictions Crimp the Cord-Cutters*, NBC NEWS (July 18, 2019), <https://www.nbcnews.com/news/sports/mlb-baseball-blackout-map-2019-2020-n1031311> [https://perma.cc/JR4Y-D9FB].

200. *See supra* section II.B.

201. OXFORD ECONS., *supra* note 30.

industry.²⁰² However, despite these advancements, the baseball exemption should not be stripped away entirely. Any adopted standard must also consider the reliance interests of MLB and how it has conducted business for the past 100 years.²⁰³

There must be a clear and discernable test for what constitutes the “business of baseball.” The lack of a specific test for the exemption has created a continual expansion, far past the point of reason. The “business of baseball” exemption has been stretched to cover conduct that is only tangentially related to the actual game of baseball. Most fields of trade, and indeed every other professional sport, are subject to antitrust law. If the circuit courts produced any type of test, it is that the alleged conduct must be “attenuated” or “wholly collateral” or “incidental” to the business of baseball to be subject to antitrust laws.²⁰⁴ These “tests” act more as vague benchmarks rather than the practical guidelines needed in this area of law.

Accordingly, the test should be clear as to the definition of the “business of baseball”: only that conduct directly linked to putting on baseball games remains exempt from antitrust law.²⁰⁵ Hypothetically, this might include player’s contracts, which determine who is on the field playing baseball. It could also include agreements on where the baseball park is, without which the game could not go on. *Right Field Rooftops* offers an example of something that would *not* be covered under this new interpretation: advertisement would be inherently separate from the act of

202. Curiously, MLB has long taken a strong stance against betting, especially after the “Black Sox” scandal of 1919. See generally *Black Sox Scandal*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Black-Sox-Scandal> [<https://perma.cc/DA7U-8K5S>] (outlining the conspiracy of eight Chicago White Sox players to throw the World Series in exchange for money from gamblers). Recently, around the time MLB was lobbying for the invalidation of PASPA, it changed its tune. See Lindsey Folton, *MLB Commissioner Admits the League Is Rethinking Its Stance on Gambling*, FOX SPORTS (Feb. 8, 2017), <https://www.foxsports.com/mlb/story/mlb-commissioner-admits-the-league-is-rethinking-its-stance-on-gambling-020817> [<https://perma.cc/6MJH-B5XK>] (noting that MLB Commissioner Rob Manfred said the MLB is “reexamining [its] stance on gambling” and that gambling “can be a form of fan engagement” and “fuel the popularity of a sport”).

203. See *Flood v. Kuhn*, 407 U.S. 258, 283 (1972) (noting the concern of retroactivity problems with overturning *Federal Baseball*). But see *id.* at 286 (Marshall, J., dissenting) (“To the extent that there is concern over any reliance interests that club owners may assert, they can be satisfied by making our decision prospective only.”).

204. See *Right Field Rooftops, LLC v. Chi. Cubs Baseball Club, LLC*, 870 F.3d 682, 689 (7th Cir. 2017), *cert. denied*, ___ U.S. ___, 138 S. Ct. 2621 (2018); *Wyckoff v. Off. of the Comm’r of Baseball*, 211 F. Supp. 3d 615, 626 (S.D.N.Y. 2016), *aff’d*, 705 F. App’x 26 (2d Cir. 2017).

205. This is similar to Nathaniel Grow’s conclusion, who believes that the exemption should be narrowed “to those activities directly related to the business of providing baseball entertainment to the public.” Nathaniel Grow, *Defining the “Business of Baseball”: A Proposed Framework for Determining the Scope of Professional Baseball’s Antitrust Exemption*, 44 U.C. DAVIS L. REV. 557, 605 (2010).

putting on a game of baseball.²⁰⁶ Similarly, merchandise may be distant enough from the game itself to be excluded by this test.²⁰⁷ These hypotheticals demonstrate that the direct link test should be interpreted to mean that the game of baseball cannot go on without the conduct in question.

Whether they would pass this test or not, the reserve clause, franchising agreements, and certain broadcasting agreements should remain exempted because they are specifically mentioned in the CFA.²⁰⁸ The courts should not disturb this. This solution allows MLB to keep the exemption in its traditional areas of concern and would not require MLB to restructure its entire empire, which defeats most, if not all, reliance interests arguments. The only issue at stake for MLB is for conduct not already legislated on or adjudicated. It is only future conduct not directly linked to the game of baseball that would be impacted. As to the concern of retroactivity problems, courts could apply the test prospectively. Most importantly, this solution would clarify the scope of the baseball exemption and avoid the uncertainty of the circuit court tests.

Both antitrust and Commerce Clause jurisprudence have changed significantly in the 100 years following *Federal Baseball*. And over the course of that time, the exemption has caused considerable harm.²⁰⁹ The fact that MLB continues to rely on the current state of the law remains the only basis for keeping the exemption.²¹⁰ A practical solution addresses this; the exemption should not be eliminated entirely but constrained by a workable test. This strikes a balance between the interests of enforcement against unlawful trade and giving MLB the latitude it needs.²¹¹

V. MLB'S CONDUCT REGARDING SPORTS BETTING SHOULD BE SUBJECT TO ANTITRUST LAW

MLB's conduct related to collectivizing official league data for sports betting does not fit within a narrow baseball exemption nor a broad one. Selling league data is not part of the business of baseball—it is a

206. See *Right Field Rooftops*, 870 F.3d at 690–91.

207. See Grow, *supra* note 205, at 620.

208. See Grow, *supra* note 157, at 880.

209. See McDowell, *supra* note 192, at 4 (outlining the hardships minor league players face as a result of the reserve clause); Nathaniel Grow, *Save America's Pastime Act: Special-Interest Legislation Epitomized*, 90 U. COLO. L. REV. 1014, 1015 (2019) (addressing the part of the 2018 pending bill that excludes minor league baseball players from the Fair Labor Standards Act).

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

211. See *NCAA v. Bd. of Regents*, 468 U.S. 85, 100–01 (1984) (explaining that sometimes “horizontal restraints on competition are essential if the product is to be available at all”).

byproduct. MLB may use revenue derived from the sale of league data to partially fund putting on the game itself, but the generation of data is not directly linked to the game. League data is not just “attenuated” but wholly *unrelated* to baseball.²¹² Just because bets are placed on baseball games does not make league data directly linked to putting on baseball games. The exemption should not apply.

Assuming antitrust laws apply, the AGO program could violate section 1 or section 2.²¹³ If the thirty major league clubs act in concert to implement a joint venture with sportsbooks that harms competition, section 1 is implicated. If the thirty teams could be considered a single entity for section 1 purposes, MLB could also violate section 2 if it used market power to drive unauthorized data providers out of business.

A. Single Entity Defense or Not, MLB May be Violating Section 1 or 2 of the Sherman Act

In response to a claim under section 1, MLB would surely argue the single entity defense. It is possible that *American Needle* precludes this defense because it held that the thirty-two NFL teams acted as competitors when selling NFL merchandise.²¹⁴ MLB’s sale of official league data is similar to the NFL’s intellectual property in that it is another form in which the teams could compete against one another. The thirty MLB teams compete through ticket sales, merchandise, viewership, and—of course—the game itself. It is plausible that the MLB teams act as separate economic actors and are, if they are not acting in concert, competing against each other in the sale of data.

However, despite *American Needle*, MLB can persuasively argue that it is acting as a single entity in the sale of league data. If every team sold data individually then sportsbooks would have to separately contract with thirty teams—a single team’s data is not useful for a bettor without the opposing team’s data. MLB could rely on *Broadcast Music* and claim that selling data at a centralized level lowers cost and increases efficiency—a common economic goal.²¹⁵

A section 1 claim is dependent on separate economic actors and cannot apply if MLB is successful in the single entity defense.²¹⁶ This is not prohibitive because similar evidence can support a section 2 claim for monopolization or attempt to monopolize.

212. *Right Field Rooftops, LLC v. Chi. Cubs Baseball Club, LLC*, 870 F.3d 682, 689 (7th Cir. 2017), *cert. denied*, __ U.S. __, 138 S. Ct. 2621 (2018).

213. *See supra* section II.A.

214. *See Am. Needle, Inc. v. NFL*, 560 U.S. 183, 197 (2010).

215. *See Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 36–37 (1979).

216. *See Am. Needle, Inc.*, 560 U.S. at 189–90.

B. MLB's Conduct Harms Competition

Whether the single entity defense applies or not, the AGO program most likely excludes competitors under either a section 1 claim that there is an unlawful agreement between competitors or a section 2 claim that MLB is leveraging its monopoly. The plaintiff or enforcement agency will need to show that there is harm to competition, and that no procompetitive justification outweighs it.²¹⁷

Mr. Gersh, the MLB-executive of gaming and new business ventures, practically admitted as much when he claimed that sportsbooks not using official game data would not “be around for long.”²¹⁸ The incentive is certainly there: MLB stands to gain \$28 million a year from sale of league data alone.²¹⁹ As the head of a multibillion-dollar industry, MLB has the resources to get rid of competitors. Without a competitive market to constrain it, the price of official league data could balloon. If enough suppliers of league data cannot compete, there is potential for harm to consumers.

The “ultimate question” for either claim remains whether MLB’s conduct harms competition.²²⁰ In this case, the operative analysis is whether the AGO program substantially limits unauthorized data providers’ opportunities to compete.²²¹ If MLB manages to require only official league data by using AGOs, it would force smaller data competitors out of the market. Once MLB dominates the market, prices will most likely go up. The AGO program would also deprive sportsbooks of the ability to negotiate for data rights with each individual team, forcing them to buy data from all the teams at potentially inflated costs.

Another aspect of the theory of harm argues that the AGO program deprives unauthorized data providers of distribution channels, which raises costs and blocks new competitors from entering the market. If all of the major sportsbooks are tied to the AGO program then new data

217. See *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 34 (D.C. Cir. 2005).

218. Martin Derbyshire, *Why It's Doubtful that Legal Sportsbooks Will Go Under Without MLB Data*, PLAYUSA, <https://www.playusa.com/major-league-baseball-official-data-scare-tactic/> [<https://perma.cc/NB3E-JY2U>]. Evidence of anticompetitive intent, however, is not sufficient to warrant an antitrust violation. See *United States v. Microsoft Corp.*, 253 F.3d 34, 60 (D.C. Cir. 2001).

219. See Gregory Pelnar, *The Antitrust Perils of Sports Data for U.S. Sports Leagues*, 2020 CPI ANTITRUST CHRON. 28, 31 (citing NIELSEN CO. & AM. GAMING ASS'N, HOW MUCH DO LEAGUES STAND TO GAIN FROM LEGAL SPORTS BETTING? (2018), <https://www.americangaming.org/wp-content/uploads/2018/10/Nielsen-Research-All-4-Leagues-FINAL.pdf> [<https://perma.cc/UUQ8-UZSZ>]).

220. *McWane, Inc. v. FTC*, 783 F.3d 814, 835 (11th Cir. 2015).

221. See *id.*

providers must prove that they are reputable to these sportsbooks as well as offer an attractive deal that still turns a profit. In fact, even the way MLB speaks on the topic can cause harm by creating an artificial fear of “pirated” data and labeling only official league data as trustworthy.²²² All potential aspects of harm have the same result: inflated costs for the consumer.

These claims have teeth in part because the procompetitive justification is so slight. Evidence that official league data is more accurate or reliable than non-official league data does not exist, unlike *Broadcast Music* where music composers needed a restraint on trade for market efficiency.²²³ Further, no plausible reasoning supports MLB’s claim that it must have the league data market to itself to “protect the integrity of the game.”²²⁴ In fact, as history has shown, both those inside the organization and outside actors can compromise the integrity of the game.²²⁵

Of course, any theory of harm would need an enforcement agency or a court proceeding to investigate, and it is impossible to say whether MLB’s conduct is unlawful without more information. A first step would be to open up the possibility of any antitrust enforcement in baseball. As this is a 100-year-old doctrine, this first step would be a mighty one.

CONCLUSION

Professional baseball remains exempt from antitrust law, and case law resoundingly establishes that this streak will continue. Unlike when the Court decided *Federal Baseball*, baseball is no longer a quaint game played by friends but is instead a ten billion dollar industry. MLB takes advantage of the baseball exemption by keeping wages low for minor league players,²²⁶ forbidding teams from relocating too close to their current franchises,²²⁷ and enforcing territorial broadcasting restrictions, to name a few.²²⁸ MLB is exempt from antitrust scrutiny in these areas because they relate to the “business of baseball.”

No court has drawn a clear line as to what conduct is in the “business

222. Drew, *supra* note 9.

223. See *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 33 (1979).

224. See Drew, *supra* note 9.

225. Ken Rosenthal & Evan Drellich, *The Astros Stole Signs Electronically in 2017—Part of a Much Broader Issue for Major League Baseball*, ATHLETIC (Nov. 12, 2019), <https://theathletic.com/1363451/2019/11/12/the-astros-stole-signs-electronically-in-2017-part-of-a-much-broader-issue-for-major-league-baseball/> [<https://perma.cc/6ATS-GB7M?type=image>] (outlining how the Houston Astros “stole” the other teams’ catcher’s signs to the pitcher so that they could signal to their batter by banging on a trash can as to what the next pitch would be).

226. See McDowell, *supra* note 192, at 4.

227. See *City of San Jose v. Off. of the Comm’r of Baseball*, 776 F.3d 686, 691 (9th Cir. 2015).

228. See *What is MLB.TV’s Blackout Policy?*, *supra* note 198.

of baseball” and what is not. The Supreme Court has stated it will not overturn *Federal Baseball* because of stare decisis and assumed congressional acquiescence. This is a mistake. The baseball exemption needs new constraints to be workable. The exemption should be limited to only conduct directly linked to putting on baseball games. This solution would not make MLB reorganize the entire structure of professional baseball and would give players and business partners some protection from longstanding unfair business practices.

Specifically, collectivizing official league data used for sports betting is not directly linked to the “business of baseball” and should be subject to antitrust scrutiny. If that were the case, MLB may be violating the Sherman Act by excluding competitors from the market of league data.

Because of its unique exemption from generally applicable law, MLB continuously expanded its monopolies for 100 years. It is time to limit the “business of baseball.”

