BASEBALL'S ANTITRUST EXEMPTION AND THE RULE OF REASON

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I. Introduction

The judicially crafted exemption granted to Major League Baseball ("MLB") is one of the most criticized judicial holdings in the history of the nation. It has been called "[b]aseball's most infamous opinion,"[1] labeled as a "grotesque legal anomaly,"[2] and a "source of embarrassment for scholars of [Justice] Holmes."[3] Some commentators have even gone so far as to suggest the Court only "exempted baseball from the antitrust laws because it was the national pastime."[4] However, despite widespread criticism and condemnation, MLB remains the only professional sports league to have enjoyed such a broad and longstanding exemption from antitrust laws.[5]

The purpose of this Comment is to analyze and discuss franchise relocation restrictions in MLB. Generally, franchise relocation restrictions prohibit individual teams from relocating to a new territory unless they have obtained the prior approval of a specified number

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[1] Eldon L. Ham, *"Aside the Aside: The True Precedent of Baseball in Law,"* 13 MARQ. SPORTS L. REV. 213, 215 (2003).

[2] *Id.* at 228.

[3] *Baseball and the American Legal Mind*, 75–76 (Spencer Weber Waller et al. eds., 1995).

[4] Roger I. Abrams, "Blackmun's List," 6 VA. SPORTS & ENT. L. J., 181, 183 (2006–7); see also Roger I. Abrams, Legal Bases: Baseball and the Law, 60 (1998).

[5] *See* Bruce Fein, *Taking the Stand: Baseball's Privileged Antitrust Exemption*, WASHINGTON LAWYER, Oct. 2005, Volume 20 No. 2, *available at* http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/october_2005/stand.cfm.

of members. Even though MLB's relocation restrictions are nearly identical to those of other professional sports leagues, the exemption permits MLB to exert greater control over individual franchises than other leagues. Under the 2008 version of MLB's Major League Rule 52,[6] "No franchise shall be granted for an operating territory within the operating territory of a *member without the written consent* of such member." (emphasis added).[7] Furthermore, Article 4.1 of the MLB constitution defines "operating territory" so as to grant franchises "exclusive territorial rights in the city which it is located and within fifty miles of that city's corporate limits."[8] Taken together, these rules create an "absolute barrier…in each geographic submarket by virtue of the absolute veto power granted to each MLB Club to preclude the entry of competition into its exclusive 'operating territory.'"[9]

This Comment first details the historical creation and development of MLB's exemption by identifying several noteworthy cases which will be discussed to demonstrate the prevailing view of the judiciary. Next, the comment will identify and describe the applicable antitrust laws which would be brought to bear in a judicial examination of MLB's franchise relocation restrictions. Recognizing that courts are unlikely to label MLB as single entity unable to conspire in restraint of trade, this section will analyze the restrictions under a Section 1 Rule of

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[6] *See* Major League Rules ("MLR") available at http://bizofbaseball.com/index.php?option=com_content&view=article&id=4452:rare-documents-mlb-constitution-and-by-laws-now-available-online&catid=43:bsn-news&Itemid=114

[7] *Id.* MLR 52(d)(1).

[8] *See* Complaint, City of San Jose v. Office of the Commissioner of Baseball, 2013 WL 2996788 (N.D.Cal.).

[9] *Id.*

Reason analysis.[10] This section further notes that vastly different circumstances could arise depending on judicial application and interpretation of the Rule of Reason. This section will conclude by outlining the modern Rule of Reason analysis and its applicability to franchise relocation restrictions in MLB.

Finally, this Comment concludes by identifying and evaluating a recent challenge to MLB's antitrust exemption. In a 2013 lawsuit filed by the City of San Jose (the "City"), at dispute is a proposed relocation of the Oakland Athletics within the operating territory of the San Francisco Giants ("Giants"). This lawsuit seeks to overturn MLBs antitrust exemption and specifically alleged MLB's franchise relocation rules violated the antitrust laws of the United States. It is contended that the competing interests of the parties present unique challenges which make it extremely difficult for the league to settle the lawsuit.[11] This section further discusses the City's likelihood of success, but recognizes the Court's historical unwillingness to deviate from the principles of *stare decisis* when examining the exemption. The potential of congressional action in removing or limiting the exemption is also discussed and dismissed as unlikely.[12] This Comment concludes by questioning whether MLB, and consumers in general, would be better or worse off if the exemption were removed and MLB's franchise relocation restrictions were subject to judicial scrutiny.

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[10] *Infra* Section III
[11] *Infra* Section IV.
[12] *Infra* Section IV C.

II. Creation and Survival of the Exemption

Although MLB did not formally consolidate into a single entity until 2000,[13] the creation of the exemption dates back to the early 1900's when organized baseball was still in its infancy. In 1903, rather than continue to compete with one another, the American League ("AL") and National League ("NL") entered into a "National Agreement" whereby each would operate a separate major league, and the champions would compete against one another in the World Series.[14] In order to protect their fledgling organization from competing leagues, the agreement required that contracts include a "reserve clause," which restricted player movement and permitted the rights to players to be sold or traded. [15] However, in 1914, the Federal League ("FL") was established, and began to compete with the AL and ML for fans and players.[16] Both leagues responded by threatening to blacklist players who defected to the FL, and often brought

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[13] *See* Baseball Almanac, *Year in Review: 2000 National League*, BASEBALL ALMANAC (Last visited Feb. 15, 2014) http://www.baseball-almanac.com/yearly/yr2000n.shtml.

[14] *See* Peter Bendix, *The History of the American and National League, Part I*, SB NATION, (Nov. 18, 2008) http://www.beyondtheboxscore.com/2008/11/18/664028/the-history-of-the-america

[15] *See* Baseball Reference, *Reserve Clause*, BASEBALL REFERENCE http://www.baseball-reference.com/bullpen/reserve_clause (last visited November 29, 2013).

[16] *See* ANDREW ZIMBALIST, MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND PUBLIC POLICY 16 (2003) (The FL owners attempted to lure players away from the MLB with promises of higher salaries and longer contracts, without the restrictions of a reserve clause. While this strategy ultimately failed to attract many players away from MLB, the existence of the FL contributed to a huge increase in average player salaries. "The advent of a rival league put strong upwards pressure on player salaries, which on average doubled between 1914 and 1915.").

civil suits against those who did.[17] In response to these restrictive policies, the FL owners filed an antitrust lawsuit against MLB in 1915.[18] Rather than engage in lengthy litigation, the AL and NL saw an opportunity to defeat their competition and elected settle the case.[19] However, because the settlement was unevenly distributed among the FL owners,[20] the Baltimore Terrapins' owners rejected the settlement, and pursued a separate antitrust claim against the two leagues.[21]

In *Federal Baseball Club of Baltimore v. National League*,[22] the Supreme Court ruled against the Baltimore club and unanimously upheld the appellate court's ruling.[23]

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[17] *Id.*

[18] The Terrapins' lawsuit alleged that MLB had cornered the market for baseball players. *See* ZIMBALIST, *supra* note 16.

[19] *See* Baseball Almanac, *Year in Review: 1915 Federal League*, BASEBALL ALMANAC, (Last visited Nov. 7, 2013), http://www.baseball-almanac.com/yearly/yr1915f.shtml ("The Federals agreed to disband after the American and National Leagues both agreed to pay $600,000 for distribution to owners, absorb two franchises (one American League and one National League) and recognize all former players as eligible picks at a Fed-controlled auction.").

[20] *See* ZIMBALIST, *supra* note 16 at 16; *See* Peter Bendix, *The History of Baseball's Antitrust Exemption*, SB NATION, (Dec. 3, 2008) http://www.beyondtheboxscore.com/2008/12/3/678134/the-history-of-baseball-s ("The owners of the Baltimore Federal League franchise attempted to purchase a Major League team, and were rebuffed. They tried to buy an International League franchise (the [International League] was the top minor league organization at the top) and were once again denied.").

[21] After the Terrapins' prevailed in the district court, the decision was reversed on appeal. *See* David Greenberg, *Baseball's Con Game: How did America's Pastime Get an Antitrust Exemption?* SLATE MAGAZINE (July 19, 2002), http://www.slate.com/articles/news_and_politics/history_lesson/2002/07/baseballs_con_game.html.

[22] Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Baltimore, 269 F. 681, 685 (D.C. Cir. 1920) aff'd sub nom. Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898 (1922).

[23] *See* ZIMBALIST, *supra* note 16 at 16; *See* Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Baltimore, 269 F. 681, 685 (D.C. Cir. 1920)

In so ruling, the court formed the basis of the modern day MLB's antitrust exemption by holding that professional baseball was not engaged in interstate commerce, and therefore, not subject to federal regulation under the Sherman Act.[24] Specifically, Justice Oliver Wendell Holmes reasoned the business of baseball was "purely state affairs," and that "personal effort, not related to production, is not a subject of commerce."[25]

After nearly a century of litigation surrounding the existence and legality of this exemption, MLB has been extremely successful in retaining the granted protections. This success is a largely a result of MLB's careful management of the exemption's exposure to judicial review. Historically, MLB has dealt with these legal challenges in primarily two ways: (1) settling lawsuits that represent a serious legal challenge to the exemption;[26] or

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aff'd sub nom. Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898 (1922) (Holding "The fact that the appellants produce baseball games as a source of profit, large or small, cannot change the character of the games. They are still sport, not trade.").

[24] *See* Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Baltimore, 269 F. 681, 685 (D.C. Cir. 1920) aff'd sub nom. Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed. 898 (1922).

[25] *Id.* at 208-09.

[26] *See generally* Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993) (A group of investors sought to purchase the San Francisco Giants in an effort to move the team to Tampa Bay, Florida, but MLB rejected the deal. The District Court refused to apply the exemption and held that "The antitrust exemption created by *Federal Baseball* is limited to baseball's reserve system." Faced with the possibility of losing their exemption forever, MLB elected to settle with the investors rather than appeal the decision and risk defeat in the Supreme Court); Butterworth v. Nat'l League of Prof'l Baseball Clubs, 644 So. 2d 1021 (Fla. 1994) (Florida Supreme Court agreed with the *Piazza* court and held that "[B]aseball's antitrust exemption extends only to the reserve system." The case was

(2) litigating and defeating less threatening lawsuits in the courtroom, thereby strengthening the validity of the exemption.[27]

Such was the case in *Toolson v. New York Yankees, Inc*.,[28] where Toolson's attorneys attempted to argue that *Federal Baseball* was no longer good law.[29] The Supreme Court disagreed with the appellate court's reasoning proffered by Toolson, and reaffirmed the 1922 *Federal Baseball* decision.[30] In so holding, the Court noted that in the thirty years since the creation of the exemption, Congress had not chosen to enact any legislation to overrule it.[31] In part, the Court reasoned:

> Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to

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never appealed to the Supreme Court because MLB approved the Tampa Bay Devil Rays as an expansion team in 1998.).

[27] *See generally* Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953); Flood v. Kuhn, 407 U.S. 258 (1972);

[28] 346 U.S. 356 (1953) (George Toolson, a minor-league player in the Yankees system, was reassigned but ultimately refused to report to his new team. The Yankees declared him ineligible, which prevented him from playing with any other team and, Toolson sued, claiming the reserve clause in his contract violated antitrust laws.)

[29] *See* Gardella v. Chandler, 172 F.2d 402 at 415 (2d Cir. 1949) (Second Circuit Court of Appeals disagreed with *Federal Baseball* and held "As the playing of the games is essential both to defendants' interstate and intra-state activities, the players' contracts relate to both."). Rather than continue to pursue an appeal to the Supreme Court and risk losing it's antitrust exemption, MLB settled the case and was able to preserve some ambiguity as to whether *Federal Baseball* or *Gardella* was good law; *See also* ZIMBALIST, *supra* note 16, at 18.

[30] *See Toolson*, 346 U.S. at 357.

[31] *Id.*

> develop, on the understanding that it was not subject to existing antitrust legislation […] We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.[32]

Thus, despite having carved out the exemption nearly thirty years ago, the Court declined to take responsibility to correct itself.[33] Furthermore, by refusing to overrule *Federal Baseball*, the Court greatly strengthened the validity of the exemption as MLB could now point to two separate Supreme Court decisions in support of its continued existence.

However, the *Toolson* ruling did little to discourage litigants and nearly twenty years later, the exemption was again challenged in *Flood v. Kuhn*.[34] At dispute was MLB's "reserve clause," and the case arose when the St. Louis Cardinals traded veteran outfielder Curt Flood to the Philadelphia Phillies in 1969.[35] After he was informed of the trade, Flood refused to report to Philadelphia's training camp, and sat out for the entire 1970 season.[36] Thereafter, Flood filed suit alleging the reserve clause was a violation

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[32] *Id.*
[33] *Id.*
[34] 407 U.S. 258 (1972) (Flood filed the lawsuit after being traded to the Philadelphia Phillies seeking injunctive relief from the reserve clause in his contract which prohibited him from negotiating with other teams after his contract expired).
[35] *Id.*
[36] *Id.* at 266.

of the Sherman Act and various civil rights statutes.[37] The case reached the Supreme Court in 1972, where the court openly acknowledged that both the *Federal Baseball* and *Toolson* decisions were "aberrations," professional baseball was in fact engaged in interstate commerce.[38] Despite this revelation, the Court again refused to overturn the exemption, citing principles of *stare decisis*.[39] Instead, the Court reiterated that it was the responsibility of Congress to remove the exemption by way of legislation.[40] Armed with a second Supreme Court affirmation of its exemption, MLB has been able to confidently operate, largely insulated from the competitive process, as an unregulated, legal monopoly.[41]

III. MLB Franchise Relocation Rules and Application of the Rule of Reason

Debates regarding judicial activism and the proper role of the court aside, the controversy surrounding the *Federal Baseball* decision stems from the role it played in granting MLB an exemption from the antitrust laws of the

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[37] *Id.* at 265-66.

[38] "Professional baseball is a business and it is engaged in interstate commerce…With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. Federal Baseball and Toolson have become an aberration confined to baseball." *Id.* at 282.

[39] *Id.* at 284-85.

[40] "The Court has emphasized that since 1922 baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action. Remedial legislation has been introduced repeatedly in Congress but none has ever been enacted. The Court, accordingly, has concluded that Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes. This, obviously, has been deemed to be something other than mere congressional silence and passivity…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." *Id.* at 283-84.

[41] *See* ZIMBALIST, *supra* note 16.

United States. Because of the exemption, MLB has been able to impose many rules and restrictions free from judicial inquiry or interference. Absent the exemption, the full force and effect of the antitrust laws would apply to the internal operations of MLB. Whether such a removal would be in the best interest of consumers or for professional baseball in general will be discussed later in this Comment.[42] For the moment however, it is important to examine the current state of antitrust law, and to discuss the specific analysis courts use to examine competitive restraints. As will be demonstrated, the removal of the exemption would not necessarily make franchise relocation restrictions illegal per se. Instead, the legality of these restrictions would depend on a myriad of factors including the market definition, and standard used to judge reasonableness.

A. MLB is a Joint Venture Subject to Section 1 of the Sherman Act.

In order for a cause of action to be brought against MLB, as a threshold inquiry, courts would need to determine which section of the Sherman Act to apply. As will be discussed, it seems clear that modern jurisprudence would place professional sports leagues squarely within the scope of Section 1 of the Sherman Act. Under Section 1, "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states...is declared to be illegal."[43]

Despite the broad language of the statute, courts have interpreted Section 1 to only prohibit "unreasonable"

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[42] *Infra* Part V.
[43] *See* 15 U.S.C. § 1 (1982).

restraints."[44] Therefore, a prima facie case under Section 1 is comprised of three elements: (1) a contract, combination, or conspiracy, (2) an unreasonable restraint on trade, and (3) the restraint must affect interstate commerce.[45] Notably, Section 1 primarily applies to collaborative activity between independent economic actors.[46] Moreover, Section 1 is most often applied to joint ventures, because single entities are incapable of entering into agreements with themselves. Therefore, joint ventures can not satisfy the first element.[47] However, it is important to note that the scope of Section 1 does cover instances whereby separate entities may be engaged in a joint venture.[48]

B. Historical Development of the Rule of Reason

Although the Rule of Reason analysis pre-dates the Sherman Act,[49] it was incorporated for use in antitrust

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[44] *See* United States v. Joint Traffic Assn., 171 U.S. 505 (1898) (Reasoning that Congress could not have intended that courts invalidate every agreement in restraint of trade); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 60 (1911) (Holding that Section 1 of the Sherman Act prohibits only unreasonable contracts, combinations or conspiracies in restraint of trade).

[45] *See* 15 U.S.C. § 1 (1982).

[46] *Id.*

[47] *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (Rejecting the concept of intra-enterprise conspiracy and holding that a corporation and its wholly-owned subsidiary are not capable of conspiring with one another for purposes of the Sherman Act).

[48] *Id.*

[49] *See* Tallis v. Tallis, (1853) 118 Eng. Rep. 482, 487 (K.B.) ("A covenant . . . is not void as being in restraint of trade, unless the restraint appears to be greater than the protection of the covenantee can reasonably require."); Hitchcock v. Coker, (1837) 112 Eng. Rep. 167, 173 (K.B.) ("[W]here the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered unreasonable in law.").

analyses by the Supreme Court[50] "to give the [Sherman] Act both flexibility and definition."[51] Unfortunately, this flexibility has enabled the courts to develop several competing standards for determining the reasonableness of a restraint.[52] In turn, this has resulted in no small amount of uncertainty for litigants locked in antitrust disputes. Furthermore, with no clarification from the Supreme Court, the lower courts have carried on as best they can, which has led to the establishment and utilization of several different versions of the analysis.

In *United States vs. Addyston Pipe*,[53] the court first attempted to formulate a method for distinguishing restraints that directly affected competition from those which "facilitated" interstate commerce.[54] There, the court examined an agreement among six pipe manufacturing corporations to divide their markets and business into distinct territories.[55] Writing for the majority, Judge Taft employed a means-oriented inquiry and held that "If the restraint exceeds the necessity presented by the main purpose of the contract, it is void."[56] In other words, a restraint is reasonable if it is no more restrictive than

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[50] *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911); Chicago Board of Trade v. United States, 246 U.S. 231 (1918); and Continental T. V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).
[51] *See* Nat'l Soc. of Prof'l Engineers v. U. S., 435 U.S. 679, 688 (1978).
[52] *See generally* Gabriel A. Feldman, *Misuse of the Less Restrictive Alternative inquiry in Rule of Reason Analysis*, 58 AMERICAN UNIVERSITY LAW REVIEW VOLUME 3, ISSUE 2 (2009); *See also* Renee Grewe, Antitrust Law and the Less Restrictive Alternatives Doctrine: A Case Study of its Application in the Sports Context, 9 SPORTS LAW. J. 227,231 (2002) (discussing the rule of reason standards used by different circuits and noting their scholarly support).
[53] 85 F. 271 (6th Cir. 1898).
[54] *Id.*
[55] *Id.*
[56] 85 Fed. At 282-83.

necessary, or if less restrictive alternatives are not available (the "least restrictive" approach).[57] Notably, the inquiry did not focus on the restraint's competitive impact, but rather looked to the necessity of the restraint to the underlying agreement or contract.[58]

In the years following *Addyston Pipe*, the Supreme Court began to retreat from the least restrictive approach and move towards a more flexible Rule of Reason analysis.[59] The court initiated this ideological shift in the 1911 case of *Standard Oil Co. v. United States*,[60] whereby thirty-seven oil companies under the control of a single holding company were accused of engaging in predatory practices to coerce competitors to join the company, and then to utilize its resulting power to fix prices.[61] In ordering the dissolution of the holding company, Justice White concluded that Section 1 only prohibited unreasonable restraints of trade,[62] and predatory tactics utilized by the holding company, qualified as such. Ultimately, the court held that the proper inquiry when examining a particular restraint for reasonableness should be on the "necessary effect" of that restraint.[63] In a particularly noteworthy aspect of the opinion, the Court reasoned that the mere restriction of competition did not necessarily constitute an

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[57] Feldman, *supra* note 52 at 568.
[58] *See* Peter C. Carstensen, *The Content of the Hollow Core of Antitrust: The Chicago Board of Trade Case and the Meaning of the "Rule of Reason" in Restraint of Trade Analysis*, in 15 RESEARCH IN LAW AND ECONOMICS 1, 62 (Richard O. Zerbe, Jr. & Victor P. Goldberg ed., 1992) (The measure of an agreements legality under the least restrictive approach is whether less restrictive alternatives are possible); Thomas E. Kauper, *The Sullivan Approach to Horizontal Restraints*, 75 CAL. L. REV. 893, 908–09 n.73 (1987) (The language in *Addyston Pipe* may "be read to encompass an examination of less restrictive alternatives.").
[59] ABA ANTITRUST SECTION, MONOGRAPH NO. 23, THE RULE OF REASON (1999) [Herein after ABA ANTITRUST SECTION].
[60] 221 U.S. 1 (1911).
[61] *Id.* at 32-40.
[62] *Id.* at 87-88.
[63] *Id*. at 65.

illegal restraint of trade.[64] Later that year, Justice White would clarify this sentiment in *United States v. American Tobacco Co.*,[65] by asserting that only agreements "which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade…injudiciously restrained trade."[66]

The shift towards a Rule of Reason analysis occurred in the case of *Board of Trade of Chicago v. United States*,[67] where the Supreme Court abandoned the least restrictive alternative approach and adopted a multi-factored balancing test (the "net effects" approach).[68] In *Chicago Board of Trade*, the court examined a "call rule" which required members of the leading organized grain trading market to purchase grain at a specific price.[69] The government relied on the *Addyston Pipe* standard and argued this constituted a violation of Section 1 of the Sherman Act because it was a direct restraint of interstate commerce.[70] The Supreme Court however, disagreed.[71] Writing for the majority, Justice Brandeis stated the appropriate question was "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[72] Moreover, the inquiry mandates consideration of the "facts peculiar to the industry, the nature of the restraint and its effect to determine whether

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[64] *Id.* at 80.
[65] 221 U.S. 106 (1911).
[66] *Id.* at 179.
[67] 246 U.S. 231, 238 (1918).
[68] *Id.*
[69] *Id.* (The rule required members to fix their bids at the day's closing bid until the opening of the next session).
[70] *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 272 (6th Cir. 1898) aff'd as modified, 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 (1899).
[71] *See* 246 U.S. at 238.
[72] *Id.* at 238–41.

that restraint promotes or restrains competition."[73] In applying this balancing test, Justice Brandeis determined the "call rule" was a reasonable regulation, and was not illegal under the Sherman act.

After *Chicago Board of Trade*, it appeared the Rule of Reason's primary objective was to function as a balancing test to determine what the net competitive effects of the particular restraint were. If a restraint was net procompetitive (i.e. consumers received a benefit from the restraint that would otherwise not be present) it was therefore reasonable, and would not violate the Sherman Act.[74] This opinion would foreshadow modern jurisprudence by suggesting that "in some situations, even price fixing might survive Sherman Act scrutiny if defendants could successfully argue that their arrangement was harmless to consumers."[75]

i. The "Modern" Rule of Reason Analysis

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[73] *See* Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918); *See also* Arizona v. Maricopa County Medical Society, 457 U.S. 332, 343 (1982) (Holding that the rule of reason requires the trier of fact to consider all the circumstances of the case when determining whether an agreement imposes an unreasonable restraint on competition).

[74] *See generally* FEDERAL TRADE COMMISSION AND U.S. DEPARTMENT OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 1.2, at 4 (April 2000), available at http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-doj-issue-antitrust-guidelines-collaborations-among-competitors/ftcdojguidelines.pdf ("Rule of reason analysis focuses on the state of competition with, as compared to without, the relevant agreement. The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.").

[75] E. GELLHORN & W. KOVACIC, ANTITRUST LAW AND ECONOMICS 174-87 (4th ed. 1994).

Notably, in the current state of affairs, courts must apply both the *Chicago Board of Trade* and *Addyston Pipe* approaches in examining restraints (the "modern" Rule of Reason analysis).[76] Under the modern analysis, a restraint will only be upheld if it results in a net procompetitive effect *and* the benefits of that effect could not have been achieved by substantially less restrictive alternatives.[77] Although *Chicago Board of Trust* is still frequently cited, courts "have been decidedly reluctant to engage in the broad inquiry it mandated."[78]

In 1997, the U.S. Court of Appeals for the Second Circuit provided some clarity to modern Rule of Reason, by breaking the analysis down into three distinct stages.[79] As a threshold barrier, the modern Rule of Reason analysis first requires a plaintiff to demonstrate that the restraint's anticompetitive effects.[80] In so doing, courts will initially require plaintiffs to demonstrate that a restraint has caused a substantially adverse effect on competition, or is likely to in the future.[81] Second, after the plaintiff has successfully demonstrated the anticompetitive effects of a particular restraint, the defendant must come forward and offer a

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[76] *See* Feldman, *supra* note 52 at 582.
[77] *Id.*
[78] ABA ANTITRUST SECTION, *supra* note 59, at 102.
[79] Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997) ("First, the plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole on the relevant market. Then, if the plaintiff succeeds, the burden shifts to the defendant to establish the pro-competitive redeeming virtues of the action. Should the defendant carry this burden, the plaintiff must then show that the same procompetitive effect could be achieved through an alternative means that is less restrictive of competition.").
[80] *See e.g.* United States v. Topco Assocs., 405 U.S. 596, 606 (1972); *see also* I ABA SECTION OF ANTITRUST LAW DEVELOPMENTS 56 n.292 (4th ed. 1997) [hereinafter ANTITRUST LAW DEVELOPMENTS (FOURTH)].
[81] *Id.*

procompetitive justification.[82] Third, once the defendant establishes a legitimate procompetitive justification for the restraint, the plaintiff will have a final opportunity to rebut the justification by showing there is an "insufficient nexus between the restraint and procompetitive effect."[83] Finally, after a plaintiff has demonstrated anticompetitive effects, and defendant has successfully countered by providing a procompetitive justification, the competing claims will be balanced. If the balance reveals the restraint is substantially anticompetitive in nature, it is illegal; if the effects ambiguous or net procompetitive, the restraint is likely legal.[84]

C. Franchise Relocation Rules Scrutinized Under the "Modern" Rule of Reason

As previously noted, the *Federal Baseball* decision armed MLB with a general immunity from antitrust laws, and this immunity has enabled the league to implement restrictions on a variety of league operations, without any judicial inquiry into their potential anticompetitive effects. However, if the exemption were removed or repealed, these restrictions, including those governing franchise relocations, would be subject to scrutiny under the Sherman Act.[85] Along these lines, this section will discuss the viability of the franchise relocation restrictions as examined under a rule of reason analysis.

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[82] *Id.*; *see also* Law v. NCAA, 134 F.3d 1010, 1023 (10th Cir. 1998).
[83] ABA ANTITRUST SECTION, *supra* note 59, at 121.
[84] *See* California Dental Ass'n v. FTC, 128 F.3d 720, 727 (9th Cir. 1997) (Holding that the rule of reason analysis "requires balancing the anticompetitive effects and possible efficiency gains or business justifications of the challenged practice."), *rev'd*, 119 S. Ct. 1604 (1999); Clamp-All Corp v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 486 (1st Cir. 1988) (The rule of reason "forbid[s] only those arrangements the anticompetitive consequences of which outweigh their legitimate business justifications.").
[85] *Id.*

Notably, although MLB would likely attempt to employ a single entity defense, and claim to be subject to Section 2 of the Sherman Act, it is nearly certain courts would disagree and label the league a joint venture whose actions are subject to scrutiny under Section 1.[86] In any event, because courts have indicated that professional sports leagues consist of separate individual entities operating as a joint venture, MLB would be virtually barred from attempting to argue that it should be treated differently.[87] However, even though MLB would quite clearly be designated as a joint venture, the question of whether a particular league restraint is reasonable or not, involves a much more complicated analysis. For one thing, the majority antitrust scholars recognize that judicial review of competitive restraints would not automatically disqualify league restrictions as per se illegal. Instead, courts would examine the restraints for "reasonableness."[88] In other words, when ancillary restraints are necessary to ensure the product is available at all, the restraint in question must be analyzed under a Rule of Reason analysis.[89]

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[86] *See* Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381, 1401 (9th Cir.), *cert denied*, 496 U.S. 900 (1984); North American Soccer League v. National Football League, 670 F.2d 1249 (2d Cir. 1980), *cert denied*, 459 U.S. 1074 (1982); Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010).

[87] *Id.*

[88] *See also* Mackey v. Nat'l Football League, 543 F.2d 606, 619 (8th Cir. 1976); Smith v. Pro Football, Inc., 593 F.2d 1173, 1181 (D.C. Cir. 1978); *Am. Needle, Inc.*, 560 U.S. 183.

[89] *Supra* note 150; *see also Am. Needle, Inc.*, 560 U.S. at 203 (quoting National Collegiate Athletic Ass'n (NCAA) v. Board of Regents of the Univ. of Oklahoma, 468 U.S. 85, at 101 (1984)) ("When 'restraints on competition are essential if the product is to be available at all,' per se rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.").

Several of MLB's most restrictive policies,[90] and therefore, those most susceptible to legal challenge, are the rules controlling the terms and conditions for franchise relocations. As previously mentioned, when construed together, the carefully defined operating territories and the franchise relocations restrictions result in a single team's monopolistic control over its designated home territory. It is this combination of rules, that has led to numerous challenges of the exemption, including the most recent lawsuit initiated by the City of San Jose in which the city argued the "sole purpose and effect of Article VIII, Section 8 of the MLB Constitution is to shield Clubs from competition that otherwise would exist absent this veto power."[91]

Without the protection of its exemption, MLB would have a significantly more difficult time controlling the movement of its franchises. For one thing, any attempt to prevent a franchise from relocating, would likely be met with a lawsuit from a bereaved fan or owner.[92] However, due to competing judicial standards there exists no small amount of uncertainty as to how a particular court would determine the necessity of a given restraint. Thus, in an attempt to clarify this issue, the following will examine possible outcomes the courts could reach when applying

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[90] MLB is governed by the Professional Baseball Rules Book. Although not all of these documents are released to the public, the consists of four major sections: (1) the Major League Constitution; (2) a Basic Agreement; (3) the Major League Rules; and (4) a Professional Baseball Agreement.

[91] *See* Complaint, City of San Jose v. Office of the Commissioner of Baseball, 2013 WL 2996788 (N.D.Cal. 2013).

[92] *See*, *e.g.* Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381 (9th Cir.), *cert. denied*, 105 S. Ct. 397 (1984) (The Oakland Raiders successfully challenged NFL restrictions preventing the franchise from moving from Oakland to Los Angeles); *and* National Basketball Association v. San Diego Clippers Basketball Club, Inc., 815 F.2d 526 (9th Cir. 1987) (San Diego Clippers successfully challenged NBA restrictions on franchise relocations and defended its move from San Diego to Los Angeles).

the modern Rule of Reason analysis to MLB, specifically discussing potential effects on franchise relocation rules. Depending on the standards used by the courts, the current structure of franchise relocation rules could be drastically altered or remain completely unchanged, even absent the antitrust exemption.

i. Market Definition

The first step in any Rule of Reason analysis is to define the relevant market. Because antitrust laws are primarily concerned with market power, the presence or absence of that power can be a critical factor in determining whether a restraint on competition is unreasonably anticompetitive.[93] In defining the market, courts will examine both the relevant geographic and product markets.[94] Moreover, courts can choose to define a particular market broadly or narrowly. Some courts have adopted the following product market definition as described in the 1992 *Horizontal Merger Guideline*s; the relevant product market is one in which "a hypothetical monopolist can profitably impose a "small but significant and nontransitory" price increase, typically of around five to ten percent.[95] If such an increase in price would not be profitable, the identified group of products is too narrow, and products must be added until a market has been defined where it would be profitable. However, under a different approach, courts may construe product markets by determining the "reasonable interchangeability of use" by

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[93] *See Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1392 ("relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue.").

[94] *See*, *e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962).

[95] Dep't of Justice & Federal Trade Comm'n. *Horizontal Merger Guidelines* at § 1.11 (1992), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 at 20,572-73 (rev. 1997).

consumers of the "cross-elasticity of demand" that exists between the product in question and its reasonable substitutes.[96] These determinations are more often than not, indicative of the outcome of antitrust lawsuits, and the party that wins the market definition battle often prevails when the final verdict is read.

In the context of professional sports, the relevant product market can theoretically be as broad as all forms of entertainment in the United States, or as narrow as all league teams in a specific geographic area.[97] However, in numerous instances courts have declined to broadly define markets in the context of professional sports. For example, courts have narrowly defined markets such as professional championship boxing,[98] major league professional hockey,[99] and the NBA basketball.[100] Moreover, Justice Stevens concurrence in *NCAA v. Board of Regents*,[101] clearly articulated that the appropriate inquiry is whether there are other products available that can function as reasonable substitutes.[102]

Yet, as any casual sports fan can discern, there are currently no acceptable baseball-related alternatives or substitutes to MLB.[103] Despite the rise in prominence of international

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[96] *See* United States v. Grinnell Corp., 384 U.S. 563, 592-53; United States v. E.I. du Pont deNemours and Co., 351 U.S. 377, 400, 404 (1956).

[97] *See Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1393 (Although the NFL argued for a broad definition of "all entertainment" and the Oakland Raiders sought a narrow definition limiting the relevant market to NFL football in Southern California, the Ninth Circuit determined the market was something "in-between" was more accurate).

[98] *See* International Boxing Club v. United States, 358 U.S. 242, 249-51 (1959).

[99] *See* Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 501-02 (E.D. Pa. 1972).

[100] *See* Fishman v. Wirtz, 1981-2 Trade Cas. (CCH) paragraph 64, 378, at 74, 762-64 (N.D. Ill. 1981).

[101] 104 S. Ct. 2948 (1984).

[102] *Id*. at 2966 (citation omitted).

[103] For example, it is unlikely that many fans would consider international baseball leagues as a viable replacement for MLB.

Baseball events such as the World Classic Tournament, or the increasing popularity of the Nippon Professional Baseball League in Japan, few consumers of MLB would view these as reasonable replacements. Therefore, in examining MLB's franchise relocation restrictions, it is likely a court would narrowly define the relevant market as professional baseball in the United States. Such a narrow market definition would make it extremely difficult for MLB to justify its relocation restrictions and would confer significant market power to MLB. Furthermore, under this market definition, overly restrictive franchise relocation rules such as those currently used by MLB could not be said to be reasonably necessary to enable MLB to compete due to the absence of any actual competitors with MLB.

Indeed, there appears to be a judicial consensus that product markets should be construed narrowly when scrutinizing the conduct of professional sports leagues.

However, this definition may be inaccurate. While it is likely true that there are no *baseball-related substitutes* for MLB, there are a myriad of other options available to sports enthusiasts throughout the course of the MLB season. For one thing, MLB broadcasts and schedules games that conflict with collegiate athletics as well as other professional sports leagues. In fact, because an entire MLB season from spring training to the World Series can stretch over nine months, at one point or another, MLB directly competes for ticket sales and viewership with the National Basketball Association ("NBA"), the NFL, and the National Hockey League ("NHL"). If a court were to deviate from the majority market definition and recognize that the proper market may instead be a broader "sports entertainment" market, it would be far easier to conclude that relocation restrictions are reasonably necessary to

improve the product and enhance competition against other entertainment offerings.

ii. Anticompetitive Effects of Franchise Relocations Restraints

After the relevant market has been defined, anticompetitive effects of a given restraint can be properly identified. Although the debate over the proper market definition is an important factor in the Rule of Reason analysis, plaintiffs must also be able to point to some anticompetitive effect of the restraint in question in order for a lawsuit to proceed. A plaintiff must demonstrate that the conduct or restraint in question has had or is likely to have a substantially adverse effect on competition.[104] Adverse are effects that result from conduct or policies which reduce output or substantially and unreasonably exclude competitors from a properly defined market. Plaintiffs typically demonstrate adverse effects in one of two ways: first, by a showing of proof of an actual effect on competition;[105] or alternatively, by proof that the conduct or restraint will lead to the exercise of market power.[106]

The principle of using evidence of actual anticompetitive effects on competition to support a finding of unreasonableness was laid out by the Supreme Court in *F.T.C. v. Indiana Federation of Dentists*.[107] Additionally, because the Court reasoned that the purpose of determining market power was to examine the potential for adverse effects to occur, the Court held that "proof of actual detrimental effects such as reduction of output" would

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[104] *See* Advanced Health-Care Servs., v. Radford Community hosp., 910 F.2d 139, 144 (4th Cir. 1990) (requiring plaintiffs to demonstrate that the scrutinized conduct "produced adverse effects within the relevant product and geographic market.").

[105] *See* United States v. Topco Assocs., 405 U.S. 596, 606 (1972); *see also* ANTITRUST LAW DEVELOPMENTS (FOURTH), *supra* note 80, at 55-65.

[106] *See* ANTITRUST LAW DEVELOPMENTS (FOURTH), *supra* note 80, at 55-65.

[107] 476 U.S. 447 (1986).

sufficiently render an elaborate market analysis unnecessary.[108] However, a plaintiff rarely will be able to demonstrate actual anticompetitive effects, in part because of the difficulty courts have in isolating a particular restraint's effect in the market.

Instead, the majority of Rule of Reason analyses necessarily require a thorough examination into market power. Market power is commonly defined as the ability to profitably raise prices above and beyond those which would normally be charged in a competitive market.[109] Notably, possession of market power must often be demonstrated before a Rule of Reason analysis will even take place.[110] In addition, although a higher market share increases the likelihood that a defendant has market power, "there is no bright-line test for the level of market share that generally indicates market power."[111] Moreover, this presumption can be overcome, and courts will also examine other factors such as entry conditions of the relevant market[112] and the relative stability of market shares.[113]

As a starting point, franchise relocation restrictions carry a certain anticompetitive stigma. In *Los Angeles*

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[108] *Id.* at 460.
[109] *See e.g.* NCAA v. Board of Regents, 468 U.S. 85, 109 n.38 (1984); Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367 (3d Cir. 1996).
[110] *See* Chicago Prof'l Sports Ltd. Partnership v. Nat'l Basketball Ass'n, 95 F.3d 593, 600 (7th Cir. 1996); Levine v. Central Florida Med. Affiliates, Inc., 72 F.3d 1438, 1552 (11th Cir.), *cert. denied*, 519 U.S. 820 (1996); Rothgery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 229 (D.C. Cir. 1986); *but see* NCAA v. Board of Regents, 468 U.S. 85, 101 (1986) (Proof of actual anticompetitive effects eliminated the need to determine whether market power existed or not).
[111] ABA ANTITRUST SECTION, *supra* note 59, at 110.
[112] *See* Allen-Myland, Inc. v. IBM 33 F.3d 194, 209 (3d. Cir.), *cert. denied*, 513 U.S. 1066 (1994)
[113] *See* Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1441 (9th Cir.), *cert denied*, 516 U.S. 987 (1995).

Memorial Coliseum,[114] the court stated that restrictions of this nature result in "competitive harms [which] are plain."[115] According to the court, these restrictions merely result in exclusive territories whose purpose and effect is to insulate teams from directly competing with one another, which ultimately facilitates "monopoly prices to the detriment of the consuming public." Because MLB would possess an extremely high market share in a narrowly defined market, a court examining MLB's relocation restrictions would likely agree with the *Los Angeles Memorial Coliseum* court's analysis. Moreover, with no substitutes available, one could seemingly argue that the restrictions have permitted MLB to establish monopoly prices, and therefore, that consumers have suffered an actual detriment.

Yet, evidence indicates there exists a legitimate question as to whether the franchise relocation rules actually cause adverse effects. This is especially true if the market is defined broadly. For one thing, ticket prices are not related to the presence or absence of a competing team within a defined territory.[116] Instead, ticket prices are much more closely related to the current league standing of the teams playing in a particular game. Furthermore, "teams which have an exclusive market do not charge demonstrably higher for a ticket than those which share their market with another club."[117] Therefore, even in a narrowly defined market, price inelasticity of demand is prevalent throughout MLB regardless of whether teams are competing in the same market or not. Additionally, it is also important to note that in a broadly defined market,

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[114] 726 F.2d 1381 (9th Cir.) *cert. denied*, 105 S.Ct. 397 (1984).
[115] *Id.* at 1395.
[116] *See* Frank P. Scibilia, *Baseball Franchise Stability and Consumer Welfare: An Argument for Reaffiming Baseball's Antitrust Exemption With Regard to its Franchise Relocation Rules*, 6 SETON HALL J. SPORTS L. 409, 439 n.175 (1996).
[117] *Id.* at 442.

MLB prices would be compared with those of other professional sports leagues. In this regard, an average ticket price for a MLB game is the lowest of the four major professional sports leagues (MLB, NBA, NFL, & NHL), and is just slightly higher than Major League Soccer.[118]

Exercise of market power is not the only way to prove anticompetitive effects. It is also necessary to determine whether the restrictions will result decrease in the output of MLBs product. Under the narrow market definition, individual baseball games are likely the output of MLB, whether they be attended in-person or televised. Franchise relocation restrictions certainly do not result in a lower output of professional games in a given season. However, some may argue that the restrictions can decrease output by denying certain cities the opportunity to obtain a MLB franchise. Yet, this argument is fundamentally flawed when discussing franchise relocations because an increase in output for one city would necessarily result in a decrease of output for another. Therefore, franchise relocation restrictions can not be said to decrease output because the net effect of a franchise relocation on output is zero.[119]

iii. Procompetitive Effects of Franchise Relocation Restraints

Next, MLB would be given an opportunity to justify the franchise relocation restrictions by identifying their procompetitive effects. As a general principle, the majority of courts have held that only procompetitive *economic*

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[118] *See* Brian Quarstad, *U.S. Pro Sports Attendance, Ticket Prices, Salaries and other Assorted Statistics*, IMSOCCER NEWS (May 11, 2012) http://www.insidemnsoccer.com/2012/05/11/u-s-pro-sports-attendance-ticket-prices-salaries-and-other-assorted-statistics/.

[119] For further discussion on franchise relocation restrictions and their effect on output *see* Scibilia, *supra* note 116, at 443-444.

justifications are relevant because the Sherman Act regulates *economic relationships*.[120] This sentiment was most clearly articulated in *National Society of Professional Engineers v. United States*,[121] where the Supreme Court held that only practices which promoted competition would be considered acceptable justifications for restraints. In so holding, the Court reasoned that the "Sherman Act reflects a legislative judgment that ultimately competition will not only produce lower prices, but also better goods and services."[122]

There have been a wide array of procompetitive justifications accepted by courts in analyzing Section 1 disputes.[123] For instance, horizontal agreements that result in the creation of a new product,[124] and restraints that ultimately provide for an expansion of output or an improvement[125] have been widely recognized. Furthermore, when examining vertical non-price related

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[120] *See* Chicago Prof'l Sports Ltd. Partnership v. Nat'l Basketball Ass'n, 754 F.Supp. 1336, 1359 (N.D. Ill. 1991), *aff'd*, 961 F.2d 667 (7th Cir.), *cert denied*, 506 U.S. 954 (1992); *but see* United States v. Brown Univ., 5 F.3d 658, 678 (3d. Cir. 1993) (Holding that the rule of reason should also examine social goals in balancing anticompetitive and procompetitive effects).

[121] 435 U.S. 679, 695 (1978).

[122] *Id.* at 695 ("[The' Sherman Act reflects a legislative judgment that ultimately competition will not only produce lower prices, but also better goods and services.").

[123] *See* Law v. NCAA, 134 F.3d 1010, 1023 (10th Cir.) (Citing ANTITRUST LAW DEVELOPMENTS (FOURTH), *supra* note 80, at 66-67), *cert denied,* 119 S. Ct. 65 (1998) (The Tenth Circuit Court of Appeals listed the following economic justifications: "increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice.").

[124] *See* Broadcast Music, Inc. v. CBS, 441 U.S. 1, 23 (1979) ("Joint ventures and other cooperative arrangements are also not usually unlawful […] where the agreement on price is necessary to market the product at all."); *NCAA*, 468 U.S. at 101; SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 969-70 (10th Cir. 1994), *cert. denied*, 515 U.S. 1152 (1995).

[125] *See* Rothgery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 222-23 (D.C. Cir. 1986), *cert denied*, 479 U.S. 1033 (1987).

restraints, courts have recognized several justifications such as providing incentives to dealers to continue to provide a service to consumers,[126] and to prevent divided loyalties among fellow distributors, as procompetitive in nature.[127]

As some commentators have noted, franchise relocation restrictions are necessary to promote franchise stability.[128] Clearly, at least some territorial restrictions are necessary in order to provide owners with the proper incentives to invest in their respective teams, and the surrounding area. Further strengthening this viewpoint is a Supreme Court decision recognizing that owners have a legitimate interest in protecting the existence of professional leagues and must act collectively to allow the league to function.[129] Indeed, these restrictions seem to reasonably promote franchise stability, as only one MLB team has relocated since 1972.[130] The effect of relocation restrictions on franchise stability is even more apparent in a broadly defined market, and MLB has cultivated the most stability among the major professional sports leagues in the United States.[131]

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[126] *See* Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977); Sports Ctr., Inc. v. Riddell, Inc., 673 F.2d 786, 791 (5th Cir. 1982).
[127] *See* Roland Mach. Co. v. Dresser Indus., 749 F.2d 380, 395 (7th Cir. 1984).
[128] *See generally* Allan Selig, MAJOR LEAGUE BASEBALL AND ITS ANTITRUST EXEMPTION, 4 SETON HALL J. SPORT L. 277 (1994).
[129] *See* Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381, 1401 (9th Cir.), *cert denied*, 496 U.S. 900 (1984).
[130] *See MLB Franchise Chronology*, MLB.COM (last visited Mar. 27, 2014), http://mlb.mlb.com/news/article.jsp?ymd=20040929&content_id=875187 &vkey=news_mlb_nd&fext=.jsp&c_id=null (In 2005, the Montreal Expos relocated to Washington D.C.).
[131] Nathan Grow, "*In Defense of Baseball's Antitrust Exemption*," 49 AM. BUS. L.J. 211, *230 (Summer, 2012) (Arguing that Congressional threats of revoking the exemption have resulted in valuable, procompetitive concessions from MLB).

By extension, franchise relocation restrictions often have trickle down effects to consumers which result in procompetitive justifications. For one thing, the Supreme Court has already recognized that exclusive territories and relocation rules help foster fan loyalty.[132] Furthermore, it has been argued that the restrictions prevent "franchises jumping from town to town to take advantage of the 'honeymoon' period that relocated teams enjoy in their first few years."[133] The restraints do far more than prevent hurt feelings, as the loss of a franchise can mean financial devastation for a city with substantial debt on a stadium that can no longer be used to generate expected tax revenues.[134]

Given the numerous procompetitive effects of the franchise relocation rules, a court could very well determine the restrictions are reasonably related to the goal of fostering fan loyalty and promoting stability. Depending on the approach used to determine the reasonableness of the restrictions, on balance, the procompetitive effects could outweigh any identifiable anticompetitive ones. After a defendant has come forward with a reasonable procompetitive justification courts have historically been reluctant to continue with the analysis. Although a justification often results in the end of the analysis and judgment for the defendant, the modern Rule of Reason employs an additional step whereby justifications are balanced against anticompetitive effects.

iv. Determining the Reasonableness of Franchise Relocation Restrictions

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[132] *Id.* at 1396.
[133] Allan Selig, MAJOR LEAGUE BASEBALL AND ITS ANTITRUST EXEMPTION, 4 Seton Hall J. Sport L. 277, 283 (1994).
[134] 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, 105 (1997).

The final step in a modern Rule of Reason analysis would be for the courts to balance the anticompetitive effects and procompetitive justifications and determine whether MLB's franchise relocation restrictions are reasonable. When conducting a modern Rule of Reason analysis, a critical factor is often the standard used by a court in determining the reasonableness of a particular restraint ("Least restrictive"[135] vs. "Less restrictive"[136]). Regrettably, it is also the factor most suspect to different interpretations by the judiciary,[137] and the Supreme Court has not yet reconciled the various conflicting interpretations. This uncertainty has left the lower courts to conjecture on the appropriate standard for examining restraints for reasonableness. Depending on the approach

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[135] *Infra* notes 138-146 and accompanying text.

[136] *Infra* notes 150-157 and accompanying text.

[137] The modern test has not been uniformly applied across the federal circuits and courts have greatly varied on just how restrictive a restraint can be without being unreasonable. The D.C. Circuit places the burden on the defendant to demonstrate the least restrictive alternative was utilized, regardless of whether the net effect of the restraint was procompetitive or not. *See* Kreuzer v. American Academy of Periodontology, 735 F.2d 1479 (D.C. Cir. 1984). The U.S. Court of Appeals for the Fourth Circuit requires the plaintiff to demonstrate the "same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition." *See* Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997); The Eleventh Circuit places the burden on the plaintiff to demonstrate the restraint was not "fairly necessary" to achieve the procompetitive effects. *See* Am Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1065 (11th Cir. 2005; The Sixth, Eighth and Ninth Circuits all impose a higher burden on the plaintiff, and require it to demonstrate that legitimate goals of the defendant can be achieved in a "substantially less restrictive manner." *See* Care Heating & Cooling, Inc. v. Am. Standard, Inc., 427 F.3d 1008, 1012 (6th Cir. 2005) (quoting Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 718 (6th Cir. 2003)); Hairston v. Pac. 10 Conference, 101 F.3d 1315, 1319 (9th Cir. 1996); Flegel v. Christian Hosps. Ne.–Nw., 4 F.3d 682, 688 (8th Cir. 1993) (quoting Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991)).

used, courts may reach two very different conclusions, and faced with conflicting precedents, the outcome of litigation under the modern Rule of Reason analysis is not always certain.

Some courts will require that the restraint be the least restrictive alternative available to achieve the alleged procompetitive justification (the "least restrictive" approach.)[138] Under this approach, a restraint is illegal if the alleged procompetitive justification can be achieved by a less restrictive alternative capable of fulfilling the same purpose (i.e. in a way that results in a less anticompetitive effect).[139] Such an approach encourages judicial micro-managing, as courts will be called upon to determine whether a restraint truly is the least restrictive of all other

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[138] *See* Kreuzer v. Am. Acad. of Periodontology, 735 F.2d 1479, 1495 (D.C. Cir. 1984) (Holding that "it must be shown that the means chosen to achieve that end are the least restrictive available."); Sullivan v. National Football League, 34 F.3d 1091, 1103 (1st Cir. 1994) (required the least restrictive alternative to achieve the procompetitive effects); Chicago Prof'l Sports, 961 F.2d 667, 675 (1992) (Procompetitive justification rejected due to the availability of a less restrictive alternative. The court held that "One basic tenet of the rule of reason is that a given restriction is not reasonable, that is, its benefits cannot outweigh its harm to competition, if a reasonable, less restrictive alternative to the policy exists that would provide the same benefits as the current restraint."); International Salt Co. v. United States, 332 U.S. 392, 397-398, 68 S.Ct. 12, 92 L.Ed. 20 (1947) (Availability of less restrictive means than those used resulted in summary judgment for violations of the antitrust laws.).

[139] *See* Sullivan v. National Football League, 34 F.3d 1091, 1103 (1st Cir. 1994) (required the least restrictive alternative to achieve the procompetitive effects); Chicago Prof'l Sports, 961 F.2d 667, 675 (1992) ("One basic tenet of the rule of reason is that a given restriction is not reasonable, that is, its benefits cannot outweigh its harm to competition, if a reasonable, less restrictive alternative to the policy exists that would provide the same benefits as the current restraint."); *see also* Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381, at 1396 (9th Cir.), *cert denied*, 496 U.S. 900 (1984) ("Because there was substantial evidence going to the existence of [reasonable] alternatives, [the court found] that the jury could have reasonably concluded that the NFL should have designed its 'ancillary restraint' in a manner that served its needs but did not so foreclose competition.").

alternatives. Thus, if a court applied this version of the Rule of Reason analysis to MLB, the franchise relocation rules in their current form would almost certainly be struck down.

Such was the case in a relocation dispute involving the National Football League ("NFL") and one of its franchises.[140] In the case of *Los Angeles Memorial Coliseum v. National Football League*,[141] the United States Court of Appeals for the Ninth Circuit held that a rule requiring a three-fourths vote by the individual franchises to approve a relocation into another team's home territory was an unreasonable restraint of trade.[142] In its examination of the relocation rule, the court sought to determine "whether it reasonably serves the legitimate collective concerns of the owners or instead permits them to reap excess profits at the expense of the consuming public."[143] The court first noted that the rule plainly resulted in competitive harm by providing teams with "Exclusive territories [that] insulate each team from competition…allowing them to set monopoly prices to the detriment of the consuming public."[144] Furthermore, although the court noted the rule did serve some legitimate purpose to the NFL,[145] they concluded there were less

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[140] *See* Los Angeles Memorial Coliseum Commission v. National Football League, 726 F.2d 1381, 1401 (9th Cir.), *cert denied*, 496 U.S. 900 (1984).
[141] *Id.*
[142] *Id.* at 1392.
[143] *Id.*
[144] *Id* at 1395.
[145] *Id.* at 1396. (The court determined the NFL had a legitimate interest in "preventing transfers from areas before local governments, which have made a substantial investment in stadia and other facilities, can recover their expenditures." The court further noted that this could result in an erosion of local confidence and a possible "decline in interest.").

restrictive alternatives that could have been employed to accomplish the same result.[146]

As a result, it is unlikely that a restraint structured in the format of MLB's current franchise relocation restrictions would survive judicial scrutiny as the least restrictive alternative for controlling franchise movement. Indeed, the franchise relocation rule struck down in the *Los Angeles Memorial Coliseum* case, was nearly identical to MLB's current relocation restrictions. Given the opportunity to review MLB's relocation rule, any court employing the least restrictive approach would be hard pressed to reach a different outcome. However, this is not to say that MLB, the NFL, or any other professional sports league could not maintain any restrictions over franchise movement under the least restrictive alternative approach. Instead, such restraints would need to be "more closely tailored to serve the needs inherent in producing the 'product' and competing with other forms of entertainment."[147]

Fortunately, MLB can take some comfort in the fact that "most lower courts have only required that the restraint be "'reasonably necessary' to achieve the desired effects.'"[148] While this does not prevent a court from following the *least* restrictive alternative approach, the modern view is that this approach is "too narrow and difficult to implement."[149] One possible reason for the movement away from the least restrictive approach may be that it is often difficult to know where to stop; there may

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[146] *Id.*
[147] *Id.* at 1397.
[148] ABA ANTITRUST SECTION, *supra* note 59, at 123.
[149] *Id.* at 165; *see also* Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 GEO. L.J. 1605, 1620 (1986) (The least restrictive alternative approach would be "too demanding since it would place joint venture organizers at the hazard that others might come along later and think of some method of achieving similar efficiencies in a manner that is somewhat less restrictive.").

always be a less restrictive option available. Moreover, to hold that the existence of a less restrictive alternative makes a restrictive covenant illegal may be too harsh of a penalty. This is especially true in situations where agreements by joint ventures result in substantial efficiencies while only creating minimal anticompetitive effects.

Instead, a majority of courts have routinely articulated much lower standards, and merely held that an ancillary restraint[150] must be "reasonably necessary" or less restrictive than other alternatives (the "less restrictive" approach.)[151] The reasonably necessary approach does not require restraints of competition to be the least restrictive, rather the question is "whether the restriction …is actually 'fairly necessary' in the circumstance of the particular

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[150]ABA ANTITRUST SECTION, *supra* note 59, at 123-24 (In analyzing competitive restraints of joint ventures courts often mention the doctrine of ancillary restraints. Ancillary restraints are distinguished from naked restraints in that they are restrictions which are "part of a larger endeavor whose success they promote." Antitrust law acknowledges that some restrictive covenants may be necessary to the success of a joint venture, and "any alleged anticompetitive effects caused by these agreements must be evaluated in light of the procompetitive benefits of the joint venture itself."); *See also* Rothgery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 224 (D.C. Cir. 1986) (Ancillary restraints are lawful if *reasonably necessary* to achieve the efficiency sought by a legitimate joint venture).

[151] *See* Nat'l Bancard Corp. (NaBanco) v. VISA U.S.A., Inc., 596 F. Supp. 1231, 1256-57 (S.D. Fla. 1984) aff'd, 779 F.2d 592 (11th Cir. 1986) (In examining restraints for adverse effect on competition, "the relevant question is not whether the challenged practice is the most competitive device that can be imagined, or the 'least restrictive,' but simply whether it is reasonable; i.e., not "unduly" restrictive of competition."); Law v. Nat'l Collegiate Athletic Ass'n, 902 F. Supp. 1394, 1410 (D. Kan. 1995) aff'd, 134 F.3d 1010 (10th Cir. 1998) ("It is unnecessary for plaintiffs to demonstrate that [a particular restraint] is the least restrictive alternative available…or that comparable benefits could be achieved through viable, less restrictive means.").

case."[152] In other words, while joint venturers may not have to use the least restrictive means for accomplishing a goal, "the venture may be required to show that its choice of restrictions was reasonable given an array of possible approaches."[153]

Under this lower threshold, restraints need only be "substantially related to the efficiency-enhancing or procompetitive purposes" of the joint venture.[154] These efficiency justifications can often be very powerful arguments, and can sway a court to uphold restrictions that are traditionally condemned as per se illegal. For example, in *Broadcast Music v. Columbia Broadcasting*,[155] the Supreme Court examined a blanket license arrangement and held that "a bulk license of some type [was] a necessary consequence" to achieve certain efficiencies, and "a necessary consequence of an aggregate license is that its price must be established."[156] According to *Broadcast Music*, challenged restraints should be examined to determine if it is designed to "increase economic efficiency and render markets more, rather than less, competitive."[157]

Therefore, MLB stands a far better chance of successfully retaining its franchise relocation restrictions if they are examined under a less restrictive alternative

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[152] *See* Fleer Corp. v. Topps Chewing Gum, Inc. 658 F.2d 139, 151 (3d Cir. 1981) (*quoting* Am. Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, at1248 (3d Cir. 1975)); *Cf.* Consolidated Farmers Mutual Ins. Co. v. Anchor Savings Ass'n, 480 F.Supp. 640, 653 (D.Kan.1979) (lending policies were reasonable and did not need to constitute the least restrictive alternative).

[153] See Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 54 ANTITRUST L.J. 893, 911 (1986)

[154] *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 296 (1985) (Holding that a purchasing cooperative was required to "establish and enforce reasonable rules in order to function effectively.").

[155] *See* Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979).

[156] *Id.* at 21.

[157] *Id.* at 20.

approach. Today, it is clear that at least some competitive restraints are necessary in professional sports because "[c]ompetitive balance is a prerequisite for a successful team sports league in the long run."[158] MLB would likely argue that the relocation restrictions actually promote competition and should therefore be upheld as "reasonable" by the courts.[159] However, as was the case in *NCAA v. Board of Regents*,[160] even valid procompetitive justifications may not permit a restraint to escape review merely because they provide an efficiency. There, the court held that even if individual aspects of an agreement are procompetitive, if on balance the restraint is not reasonably necessary to achieve the proffered efficiencies, it can be illegal.

IV. Swinging for the Fences: The City Of San Jose takes on MLB

Of course, none of the antitrust analysis discussed above currently applies to MLB, as a result of the *Federal Baseball* decision and MLB's exemption from antitrust law. However, the existence of the exemption has done little to prevent potential litigants from pursuing claims against MLB. As a result, MLB has been forced to defend the exemption time and time again; a task which it has effectively and efficiently accomplished.

Despite the leagues impressive judicial record, a recent lawsuit has once again challenged its validity and thrust MLB into the public limelight. On June 18, 2013 the City

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[158] *See* ZIMBALIST, *supra* note 16 at 151.

[159] *See* Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, *supra* note 97 (Reasoning that Collective action in areas such as League divisions, scheduling and rules must be allowed, as should other activity that aids in producing the most marketable product attainable).

[160] 468 U.S. 85 (1984).

of San Jose filed a complaint in the Northern District of California, after numerous attempts to relocate the Oakland Athletics ("Athletics") were met with indifference and refusal from MLB.[161] The City's lawsuit claimed antitrust violations and damages resulting from tortious interference of a contract because of perceived actions undertaken by MLB to block the proposed relocation.[162] Although the district court judge agreed that MLB's exemption is "unrealistic, inconsistent or illogical,"[163] he predictably dismissed the city's antitrust claims, citing principles of *stare decisis*.[164] While MLB claimed victory,[165] the City of

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[161] Jill Tucker and John Shea, *San Jose sues MLB over A's Blocked Move*, SF GATE (June 18, 2013), http://www.sfgate.com/athletics/article/San-Jose-sues-MLB-over-A-s-blocked-move-4607373.php

[162] *See* City of San Jose v. Office of Comm'r of Baseball, C-13-02787 RMW, 2013 WL 5609346 (N.D. Cal. Oct. 11, 2013) ("Because interference claims are not exclusively premised on the alleged violation of antitrust law, but are also based on MLB's alleged delay in rendering a relocation decision in frustration of the Option Agreement, the court consider[ed] these claims independently of the antitrust claims." The court held that "The alleged tortious interference with contract was an independently unlawful act sufficient to support the City's tortious interference with prospective economic advantage claim, although the claims may be duplicative.").

[163] *Id.* at 10 (*quoting* Radovich v. National Football League, 352 U.S. 445, 452 (1957).

[164] "[W]e continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom." City of San Jose v. Office of Comm'r of Baseball, C-13-02787 RMW, 2013 WL 5609346 (N.D. Cal. Oct. 11, 2013) *quoting* Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir.1970); Associated Press, *S. Jose's Claims Against MLB Denied*, ESPN (Oct. 11, 2013) http://espn.go.com/mlb/story/_/id/9809824/judge-rejects-san-jose-antitrust-claims-vs-mlb.

[165] MLB Attorney's stated "Major League Baseball is pleased that the Court dismissed the heart of San Jose's action and confirmed that MLB has the legal right to make decisions about the relocation of its member Clubs." *See* Paul Hagen, *Judge Dismisses Antitrust Claims in San Jose* Lawsuit, MLB.COM, (Oct. 11, 2013), http://mlb.mlb.com/news/article/mlb/judge-

San Jose appealed the decision to the Ninth Circuit Court of Appeals,[166] and the battle is unlikely to end there. As both sides continue to posture and prepare for the next round of litigation, the question remains; is the City's lawsuit merely another minor annoyance for MLB, or does this case present unique challenges MLB will be forced to overcome?

For reasons that will be discussed,[167] it seems unlikely that MLB will be able to offer an amicable settlement offer to the City of San Jose, and if the case is not settled, the City will be forced to appeal to the Supreme Court. Fortunately for MLB, and as noted below, the City is unlikely to convince the Court to overrule a precedent that has stood, largely untouched, for nearly a century. While this likelihood certainly provides MLB with a major bargaining advantage, it comes with a price. With litigation comes increased attention, not only from activist judges, but from the public and members of the legislature as well.

A. Analyzing MLB's Predicament

The recent lawsuit brought against MLB by the City of San Jose presents unique challenges for the league. Unlike the franchise relocation disputes of the 1950s[168] and the 1998 expansion which did not involve encroachment

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dismisses-antitrust-claims-in-san-jose-lawsuit?ymd=20131011&content_id=62837526.

[166] Howard Mintz, *San Jose and A's: City appeals antitrust case against MLB*, SAN JOSE MERCURY NEWS (1/23/2014) http://www.mercurynews.com/crime-courts/ci_24978139/san-jose-appeals-antitrust-case-against-mlb.

[167] *Infra* Section IV A.

[168] *Supra* note 130 (In 1953 the Boston Braves were relocated to Milwaukee and the Saint Louis Browns moved to Baltimore. In 1954, the Philadelphia Athletics were sold and relocated to Kansas City).

into an already occupied territory,[169] San Jose is located squarely within the operating territory of the San Francisco Giants.[170] With the Giants locked into a lease on their new stadium until 2066,[171] the team's owners are not inclined to willingly give up their territorial rights, or negotiate the rights away.[172] The team has enjoyed considerable financial success operating in the San Francisco bay area and worst case scenario would be for another team to move into the heart of Silicon Valley, build a new stadium, and actively seek to poach away lucrative corporate ticket sales.

In one scenario, MLB may pressure the owners of the San Francisco Giants owners to permit the relocation, but ultimately the team retains the power to protect its home territory, and only a seventy-five percent vote of all owners could overturn this exercise of territorial rights.[173] While a three-fourths vote would veto the Giants territorial

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[169] Grow, *supra* note 131 at *262-64.

[170] Howard Bryant, "*Nowhere Men*," ESPN (June 17, 2011), http://sports.espn.go.com/mlb/columns/story?id=6665421 (Ironically, the San Francisco Giants have territorial rights to the city of San Jose as a result of a "loose, gentlemen's agreement between the [San Francisco Giants and Oakland Athletics] 20 years ago allowing the giants rights to the territory for a ballpark that was never built…").

[172] Susan Slusser, "*A's Want Stadium Issue on Agenda for May Owners' Meetings*," THEDRUMBEAT (April 16, 2012, 12:19 PM), http://blog.sfgate.com/athletics/2012/04/16/as-to-put-stadium-issue-on-agenda-for-may-owners-meetings/.

[173] *See* Major League Constitution, Article VIII, Section 4, available at http://bizofbaseball.com/index.php?option=com_content&view=article&id=4452:rare-documents-mlb-constitution-and-by-laws-now-available-online&catid=43:bsn-news&Itemid=114; *see also* CBS San Francisco, *San Jose Files New Suit Against MLB Over Proposed A's Move*, CBS San Francisco (last visited Feb. 15, 2014), http://sanfrancisco.cbslocal.com/2014/01/23/san-jose-files-new-suit-against-mlb-over-proposed-as-move/ ("The MLB constitutional provisions challenged by San Jose are a measure giving the San Francisco Giants territorial rights over Santa Clara County, which would take a vote of three-fourths of the 30 club owners to change, and a measure requiring a three-fourths vote of approval before a club can relocate.").

rights, doing so would open a Pandora's Box for owners everywhere. Not only would San Francisco have the ability to sue MLB by arguing they would suffer significant economic loss by losing control of Santa Clara County, but the precedent such a veto would set is nearly as damaging as losing the exemption entirely. Owners feel secure in their investments because they are protected by territorial monopolies. Once a team's territorial rights have been vetoed, the floodgates could open and similar disputes could arise all across the nation. If the owners veto the Giants rights, other cities seeking a professional baseball team are sure to follow San Jose's example.

Of course this issue would be moot should the Athletics find a suitable location for a new stadium other than San Jose.[174] This would represent the best case scenario for MLB, and would also solve the well-documented complaints the Athletics have with their current facility.[175] Unfortunately for MLB, this would do little for the long-term financial security of the Athletics.[176] If baseball is a business, it seems unlikely that the Athletics would want to relocate to a new stadium in the same area it has failed to financially succeed in over a new stadium in

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[174] *See* Jana Katsuyama, *Group Works to Keep the A's in Oakland with Waterfront Ballpark*, KTVU.com (last visited Feb. 15, 2014), available at http://www.ktvu.com/news/news/local/group-works-keep-s-oakland-waterfront-ballpark/ncxQC/.

[175] Associated Press, "*A's, M's Forced Into Same Locker Room*," ESPN (June 17, 2013), http://espn.go.com/mlb/story/_/id/9393784/sewage-problem-puts-oakland-seattle-mariners-same-locker-room

[176] Christopher M. Clapp & Jahn K. Hakes, *How Long a Honeymoon? The Effect of New Stadiums on Attendance in Major League Baseball*, JOURNAL OF SPORTS ECONOMICS VOL. 6 NO. 3, 237-63 (Aug. 2005) (Study determined that attendance "honeymoon" effect of a new stadium—after separating quality-of-play effects—increases attendance by 32% to 37% the opening year of a new stadium." Attendance remains above normal levels for only six to ten seasons for ballparks built after 1974).

an area widely recognized as extremely lucrative. MLB therefore, is currently poised in an impossible situation; the owners can not conceivably vote to force the relocation, and the league can not dispose of the issue by installing an expansion team.

More importantly, the City is acutely aware of the leagues position, and if history is any indication, the longer this showdown continues, the more likely congressional action becomes. Although pressuring MLB's owners into action has worked in the past, the stakes are much higher this time around. If Congress' attempts to pressure MLB to approving the relocation fall on deaf ears, more substantial tactics may be considered. Because MLB has historically acquiesced to the demands of Congress, the two have never been forced into a significant showdown, and Congress could respond by introducing legislation aimed at curbing the exemption. At that point, MLB will be out of options, and forced to decide whether to open Pandora's Box by vetoing the Giant's rights, or risk losing the exemption it has worked so diligently to defend. While some may believe MLB would be forced to use the veto, it is also plausible that the owners may stand up and challenge Congress to act against the interests of some of their biggest campaign contributors.

Viewed under this lens, the recent case of *City of San Jose v. Commissioner of Baseball*,[177] poses unique challenges for MLB. For one thing, it is unlikely the league will be able to persuade the City to drop the lawsuit. First and foremost, MLB's primary goal is to retain immunity from antitrust scrutiny. Historically, MLB has carefully guarded the exemption by dutifully managing its exposure to the Supreme Court.[178] While the league has

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[177] C-13-02787 RMW, 2013 WL 5609346 (N.D. Cal. Oct. 11, 2013).

[178] When franchise relocation conflicts have materialized in the past, MLB has been able to fend off attacks on its exemption via monetary settlements with aggrieved individuals. *See* Piazza v. Major League Baseball, 831 F.

successfully retained the exemption for over 90 years, undoubtedly it still prefers to prevent legitimate contests from appearing before the Supreme Court. Although MLB has continuously managed to thwart any serious assault on the exemption by settlement or league expansion[179] neither tactic seems to be a feasible option for dealing with the City of San Jose. The City is not interested in a monetary settlement, and for reasons discussed below, it is unlikely an expansion team would ever be established in San Jose.

Due to the current rules concerning franchise relocation, MLB teams enjoy absolute monopolies over their respective territories.[180] The current dispute arose because of the City's continued attempts to obtain a franchise, despite being located squarely within the defined territory of the San Francisco Giants.[181] The Giants do not want to see a team establish itself in a new stadium and compete for fans, lucrative box suites, and television deals in the lucrative Silicon Valley.[182] As a result, the San Francisco Giant's ownership group (San Francisco Baseball

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Supp. 420 (E.D. Pa. 1993); additionally, when challenges have been brought by public employees, MLB has settled disputes through league expansion. *See* Butterworth v. Nat'l League of Prof'l Baseball Clubs, 644 So. 2d 1021 (Fla. 1994).

[179] *Id.*

[180] *See supra* notes 7-10 and accompanying text.

[181] "Late Oakland owner Walter Haas gave the Giants the OK to assume rights to San Jose in a favor of sorts to former San Francisco owner Bob Lurie when his team was considering moving to Florida. The deal basically happened with a handshake -- and "without compensation," the A's wrote -- and then was approved by baseball's owners." *See* Associated Press, *A's Seek Territorial Rights Resolution*, ESPN, (Mar. 7, 2012), http://espn.go.com/mlb/story/_/id/7658699/oakland-athletics-san-francisco-giants-odds-territorial-rights

[182] *Id.* ("They cherish their hold on technology-rich Silicon Valley, with Santa Clara County making up 43 percent of the club's territory and generating a significant number of fans, corporate sponsors and other supporters.").

Associated LP) has refused to consent to allow the Athletics to move into their territory, thereby blocking the proposed relocation.[183] It is this wrinkle that will likely prevent MLB from avoiding litigation by expansion. Because the dispute is not really related to the actual distance between stadiums,[184] but instead concerns the ability to capture the attention of the Silicon Valley fan base, the Giants are naturally opposed to any infringement upon its territory.

Because of the Giants' steadfast refusal to allow another team to establish itself in San Jose via relocation or expansion, the City of San Jose has been forced to pursue litigation attacking MLBs exemption. As will be discussed, despite the City's high hopes of striking a blow to the exemption and obtaining a MLB franchise, drastic changes are unlikely to be realized.

B. The City of San Jose's Lawsuit is Unlikely to Result in an Overruling of the Exemption

Notwithstanding a recent Supreme Court decision declining to shield a professional sports league from antitrust laws, the fact remains that courts have been reluctant to apply antitrust laws to MLB.[185] Historically,

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[183] *Id.*

[184] "[A]fter the Giants built a shiny new stadium in San Francisco, many wondered why they wouldn't let the A's move to the South Bay, with a proposed stadium location 50 miles from AT&T Park. (For reference, the distance between Camden Yards in Baltimore and Nationals Park in Washington, another similar two-team market, is less than 40 miles.)" *See* Al Yellon, *Oakland A's Unwrap Christmas Present: A New Stadium In San Jose*, BASEBALL NATION (Dec. 26, 2011), http://www.baseballnation.com/2011/12/26/2661744/oakland-athletics-san-jose-new-stadium-christmas-present.

[185] Historically, the Supreme Court has upheld MLB's antitrust exemption and asserted that it is the responsibility of Congress to remove the exemption by way of legislation. *See* Toolson v. New York Yankees 346 U.S. 356 (1953); Flood v. Kuhn, 407 U.S. 258, 282-83 (1972). *But see* Am. Needle Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2217 (2010) (The Supreme Court unanimously declined to extend antitrust immunity to

MLB has been extremely successful in fending off attacks against its exemption, and in the process has garnered two Supreme Court affirmations of the exemption's validity. As a result, the legal viability of the exemption is stronger now than ever before. Furthermore, given how successful MLB has been at settling cases which could pose a serious threat to the exemption, removal vis-à-vis judicial review is even more unlikely.

Nevertheless, those who believe judicial removal is likely to occur often point to the historical diminishment of the exemption's scope. Indeed, these arguments have some merit, as over the last twenty years several courts have shown a willingness to divert from a broad application of MLB's exemption. Since 1990, there has been an even split of judicial rulings on the status of MLB's exemption with "One state ruling and one federal ruling [holding] that the exemption applies only to the reserve clause; and one state and one federal ruling held that it applies broadly to the business of baseball."[186] Finally, one recent Supreme Court ruling on antitrust issues in professional sports leagues "effectively broaden[ed], rather than reduce[d], the scope of the Sherman Act."[187]

While the Supreme Court has, to be sure, shown an increased willingness to interfere in the affairs of sports leagues,[188] the possibility of judicial review specifically

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collective action by the NFL teams. The Court held the teams could not be considered a "single entity" and their actions were subject to antitrust scrutiny under the rule of reason).

[186] *See* ZIMBALIST, *supra* note 16 at 22-23.

[187] Judd Stone & Joshua D. Wright, Antitrust Formalism is Dead! Long Live Antitrust Formalism!: Some Implications of American Needle v. NFL, 2009-2010 Cato Sup. Ct. Rev. 369, 395 (2010).

[188] *See generally Am. Needle Inc.*130 S. Ct. 2201 (By refusing to permit the NFL to escape antitrust scrutiny, the Court has signaled its increased willingness to address antitrust issues in the context of professional sports leagues); See *also* Michael J. Mozes & Ben Glicksman, *Adjusting the*

striking down MLB's exemption is simply unrealistic. In order for such a review to occur: (1) a viable lawsuit capable of reaching the Supreme Court must be brought by a party uninterested in settling; and even more unlikely, (2) the Court must be willing to ignore *stare decisis* and deviate from nearly a century of case law upholding the exemption. Fortunately for MLB, even in the event that the case does reach the Supreme Court, there is a legitimate question regarding the issue of standing that would allow the court to deflect the exemption issue entirely.[189] Moreover, after a casual examination of Supreme Court decisions related to the exemption, it is likely the Court would be eager to utilize the standing issue as a means of sidestepping any decision on the validity of the exemption. This conclusion is evidenced by the Court's retreat on successive occasions to the position that it is the responsibility of Congress to overturn the exemption.[190] While those opposed to the exemption might desire swift and unequivocal action by the Supreme Court, it is far more

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Stream? Analyzing Major League Baseball's Antitrust Exemption After American Needle, 2 HARV. J. SPORTS & ENT. L. 265, 290 (2011). ("*American Needle*…has made the Court's position on antitrust in professional sports more clear than it has been at any time since *Federal Baseball*…In the context of professional baseball, [American Needle] is probably most important as a signal of the Court's willingness to address antitrust issues in professional sports, and to do so with a heavy handedness that has not been seen since Federal Baseball.").

[189] MLB claimed the City lacks standing because the option contract with the Oakland Athletics was never breached and therefore, the City's injuries are too tenuous to be actionable under state and federal antitrust law. *See* Motion to Dismiss at 8-9, City of San Jose v. Office of the Comm'r of Baseball, (N.D. Cal. Aug. 7, 2013) (No. 5:13-cv-02787)

[190] *See* Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953); *see also* Flood v. Kuhn, 407 U.S. 258 (1972); This position is puzzling given that as far back as 1951, "The members of Congress did not consider the legislature the best place for defining the legal parameters of the baseball monopoly." The House Sub-Committee on the Study of Monopoly Power concluded the courts "could better determine the legality of [MLB's] operations." *See* CHARLES A. SANTO & GERARD C.S. MILDNER, SPORT AND PUBLIC POLICY: SOCIAL, POLITICAL, AND ECONOMIC PERSPECTIVES

likely, and perhaps more preferable, that the issue will be tossed aside and left for Congress to address.

Furthermore, as discussed below, the argument for deferral to Congress has ample merit given their increased willingness to become involved in the arena of professional sports.[191] This route is also preferable given that the judicial system has issued many odd legal outcomes in sports cases, particularly because some judges refuse to view these matters as mere business arrangements.[192] Unsurprisingly, some judges are susceptible to allowing their interest as fans to enter into their reasoning. The exemption itself was created as a result of judicial interpretation, and indeed, a legislative solution may be superior to a simple revocation. If such a revocation were to occur, any number of new and strange rules could be imposed to fill the void.

C. Can the City's Lawsuit Prompt Congressional Action?

Given the Supreme Court's trend of deferring to Congress, congressional action is likely the more realistic threat to the continued survival of MLB's antitrust exemption. However, this is not to say congressional

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[191] *See* Patrick Gavin, *Congress Ponders Football's BCS System*, Politico.com (last visited Feb. 15, 2014), http://www.politico.com/news/stories/0709/24655.html; (In 2009, Congress formed a committee to hold hearings regarding the possibility of restructuring the NCAA Men's Football program. The committee was to investigate issues relating to the replacement of the Bowl Championship Series with a different structured playoff format).

[192] It has been suggested that the *Federal Baseball* decision was a result of the justices' love for baseball and of their desire to promote and foster the growth of the sport. Indeed, Justice Holmes himself was a "former amateur baseball player. *See* ZIMBALIST, *supra* note 16 at 16; *but see* Samuel A. Alito Jr., *The Origin of the Baseball Antitrust Exemption* Journal of Supreme Court History 34," no. 2 (July 2009): 183–95.

action is imminent, or even particularly likely.[193] It is important to note that despite numerous judicial suggestions that Congress is the appropriate entity to remove the exemption should it deem appropriate, the exemption continues to exist.

Yet, Congress has not ignored the effects of the exemption entirely or failed to intervene when necessary. In 1998, Congress stepped upped to the plate and passed the Curt-Flood Act[194] which limited the scope of baseball's exemption, and explicitly made antitrust laws applicable to MLB players. Notably, the Curt-Flood Act excluded franchise relocation from the scope of its purview.[195] While this exclusion may indicate Congress's hesitation to do away with the exemption entirely, it does not by itself, prevent antitrust laws from applying to MLB's franchise relocation rules in the future.[196] Furthermore, Congress has demonstrated an increased willingness to exert its influence in the arena of sports league regulation.[197] This trend has

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[193] For one thing, MLB owners are a major source of revenue for political donations. In fact, "MLB organizations pumped in over $24 million to politicians, PACs and independent expenditure groups throughout the 2012 election cycle." See Louis Serino, "*Baseball's (political) heavy hitters*," SUNLIGHT FOUNDATION (Mar. 29, 2013), http://sunlightfoundation.com/blog/2013/03/29/politics-mlb-teams-are-heavy-hitters-republicans/

[194] 15 U.S.C. § 26b (2013).

[195] 15 U.S.C. § 26b(b)(3) (2013).

[196] *See* Mozes & Glicksman, *supra* note 128, at 290 n.70 (2011) (The Act states that "[n]o court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than those set forth in subsection (a) of this section." Id. at § 26b(b). Senator Orrin Hatch of Utah, a co-sponsor of the bill, noted on the Senate Floor, "With regard to all other context or other persons or entities, the law will be the same after passage of the Act as it is today." 145 Cong. Rec. S9621 (daily ed. July 31, 1998) (statement of Sen. Hatch). President Clinton agreed. See Statement on Signing the Curt Flood Act of 1998, 34 Weekly Comp. Pres. Doc. 2150 (Oct. 27, 1998) ("The Act in no way codifies or extends the baseball exemption ....").

[197] *See e.g.* H.R. Res. 68, 111th Cong. (2009) (Seeking to alter the landscape of College Football via legislation); Allen Schwarz, *Congress*

proven to be equally true in regards to baseball, where Congress has often used the threat of removing the exemption to pressure MLB into action.[198] Because of this power to influence MLB policy decisions, it has been argued that the exemption's continued existence may be far more valuable to Congress than MLB.[199] While this may be true, it also demonstrates Congress' acknowledgment of the exemption's questionable legality. If MLB were ever placed in a situation where it was unable to meet the demands of Congress, repeal of the exemption through legislation may not be such an unlikely scenario.

In fact, Congress has repeatedly leveraged the possibility of removing the exemption into pressuring MLB. In 1951 the U.S. House of Representatives' Subcommittee on the Study of Monopoly Power held several hearings to examine "baseball's operations and allegedly monopolistic aspects," including franchise relocation restrictions.[200] The hearings also addressed

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Examines N.F.L. Concussions, N.Y. TIMES, (Mar. 4, 2010), http://www.nytimes.com/2010/01/05/sports/football/05concussions.html?_r=0 (House Judiciary Committee hearing held to investigate the link between professional football and brain injuries.); Brad Wolverton, *Bill in Congress Aims to Give NCAA Athletes Greater Protections*, THE CHRONICLE OF HIGHER EDUCATION, (Aug. 1, 2013), http://chronicle.com/blogs/players/bill-in-congress-aims-to-give-ncaa-athletes-greater-protections/33327 (Legislation introduced in the U.S. House of Representatives sought to require NCAA colleges to guarantee multi-year scholarships to star players).

[198] JOHN WILSON, PLAYING BY THE RULES: SPORT, SOCIETY, AND THE STATE, 258 (1994) ("The possibility of 'trading' [league] expansion for state protection was [a] part of public policy debate as early as the 1950s.").

[199] Grow, *supra* note 131 (Arguing that Congressional threats of revoking the exemption have resulted in valuable, procompetitive concessions from MLB).

[200] *See* 2 JAMES EDWARD MILLER, THE BASEBALL BUSINESS: PURSUING PENNANTS AND PROFITS IN BALTIMORE, 13 (1990) (In the 1950s and 1960s, congress held hearings to pressure "baseball to expand, to improve the

concerns regarding the geographic distribution of teams,[201] as there were a mere sixteen teams located in ten cities.[202] Due to increasing pressure resulting from the subcommittee's final report, by 1954 "MLB had acquiesced to congressional threats to revoke its antitrust exemption by relocating each of the three struggling franchises identified in [the report]."[203]

In addition to pressuring MLB to relocate franchises, the legislature has often influenced league expansion as well. Congress has frequently convened hearings to discuss MLB's antitrust exemption for the primary purpose of influencing MLB to expand.[204] One prominent example occurred in 1992 after MLB owners refused to approve the sale and relocation to Tampa Bay of the San Francisco Giants.[205] Faced with proposed legislation aimed at revoking the exemption,[206] MLB

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situation of the minor leagues or to [permit] increased television or radio coverage.").

[201] *Id.* (Specifically, MLB's failure to relocate or expand franchises in response to the nation's changing demographics).

[202] *See MLB Season History – 1951*, ESPN (last visited Mar. 27, 2014), http://espn.go.com/mlb/history/season/_/year/1951.

[203] Grow, *supra* note 131 at *263.

[204] *Id.* at 267-68. (Pressure resulting from the 1976 U.S. House of Representatives Select Committee on Professional Sports hearings would eventually result in the 1977expansion which placed teams in Seattle and Toronto. In 1987, a group of senators and representatives created the Task Force on the Expansion of Major League Baseball and after threatening to introduce legislation attacking the exemption, MLB expanded in 1993 by adding teams to Denver and Miami).

[205] Murray Chass, "*BASEBALL; Look What Wind Blew Back: Baseball's Giants,*" N.Y. TIMES, (Nov. 11, 1992), http://www.nytimes.com/1992/11/11/sports/baseball-look-what-wind-blew-back-baseball-s-giants.html

[206] "The bill's proposed mission was "To amend the Clayton Act to make the antitrust laws applicable to the elimination or relocation of major league baseball franchises." *See* H.R. 3288 107th Congress 1st Session available at http://thomas.loc.gov/cgi-bin/query/z?c107:H.R.3288 (last visited Feb. 8, 2014),

announced that it would expand again,[207] and in 1998, baseball franchises arrived in Tampa Bay and Phoenix.[208]

Despite Congress' history of pressuring MLB, the legislature has not yet seen fit enact blanket legislation applying antitrust laws to MLB. Moreover, Congress had the opportunity to limit the exemption when they passed the Curt-Flood Act in 1998, and chose not to address concerns regarding relocation restrictions. It is not as though these restrictions were not part of the public debate at that time either, and the legislation was passed at the same time there was significant concern the San Francisco Giants would be sold and relocated to Tampa Bay, Florida. Furthermore, it is unlikely that Congress would sufficiently align itself behind the interests of the City of San Jose. Among other things, universal support for unfettered competition between individual franchises over cities and territories does not exist.

Quite clearly, cities who already enjoy the privilege of having a baseball franchise would be opposed to legislation which would make it easier for their beloved team to leave. For example, baseball fans in Oakland, would want the current franchise relocation restrictions to be fully enforced so as to prevent the Athletics from abandoning the city to relocate to a newer stadium. On the opposite end of the spectrum, consumers of baseball in San Jose likely see the restrictions as manifestly unfair. Congressional debates over the subject are likely to mirror this contentious relationship, and it would be no easy task craft substantial antitrust legislation specifically targeting MLBs exemption.

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[207] Chass, *supra* note 205.

[208] *See Expansion of 1998*, BASEBALL REFERENCE (last visited Mar. 27, 2014), http://www.baseball-reference.com/bullpen/Expansion_of_1998 (last visited Feb. 8, 2014).

V. Conclusion

To be sure, commentators who vehemently protest the exemption's continued existence,[209] will be closely monitoring City of San Jose's lawsuit. Because of the competing interests of all parties involved, this lawsuit represents a very real threat for MLB, and one it may be unable to prevent from reaching the Supreme Court. Those who would wish to see the exemption overruled however, are likely to walk away disappointed. Despite the novel nature of the City's case, the Court has twice upheld the exemption's validity and is unlikely to reverse course now.

Despite the similarity of MLBs franchise relocation restrictions to those of the other major professional sports leagues, by virtue of the exemption, MLB is capable of exercising far greater levels of control over its individual franchises. However, despite being subject to the antitrust laws of the United States, other professional leagues have been able to survive, and even thrive. In fact, the NFL is currently far more profitable than MLB, and the NBA has seen a historic increase in value over recent years.[210] Therefore in any discussion related to antitrust laws and MLBs restrictions, ultimately the question that must be asked whether the exemption is even necessary anymore.

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[209] *See* Mozes & Glicksman, *supra* note 128, at 292. ("If MLB were brazen enough to raise the exemption as a defense to such a suit in the Supreme Court, the Court would be right to strike it down and should take the opportunity to remove the exemption entirely.").

[210] *See* Chad Language, *A Look At Franchise Values Across The NFL, NHL, MLB And NBA*, SPORTING CHARTS (Nov. 28, 2012) (Updated: July 15, 2013), http://www.sportingcharts.com/articles/off-the-charts/a-look-at-franchise-values-across-the-nfl-nhl-mlb-and-nba.aspx; *see also* Kurt Badenhausen, *As Stern Says Goodbye, Knicks, Lakers Set Records As NBA's Most Valuable Teams*, FORBES (Jan. 22, 2014) http://www.forbes.com/fdc/welcome_mjx.shtml ("The average NBA franchise is worth (equity plus debt) $634 million, up 25% [in 2014 as compared to 2013].").

The answer may very well depend on which version of the Rule of Reason is eventually adopted by the Supreme Court. In the absence of an exemption, it would be one thing for a court to utilize the less restrictive approach and require MLB to demonstrate that its territorial restrictions were reasonably related to a procompetitive aspect of the league. However, it would be quite another for the courts to apply the least restrictive approach. Under this approach, judicial mistakes would be amplified as courts struggle to determine whether a certain set of restrictions represents the optimal balance between efficiency and competition. The end result could very well be another *Federal Baseball* decision, as courts may be ill-equipped to deal with antitrust issues in professional sports where market definitions are far from apparent and the effects of restraints are highly speculative. Indeed, there are very real concerns over the continued existence of professional sports leagues if every location dispute was subject to micro-management by the judiciary.

Finally, too often are the negative effects of the exemption amplified and dissected, while the benefits remain undiscussed. Bidding wars between cities and ownership groups seeking to obtain a franchise are bad for the business of baseball and would inevitably place a significant burden on the judicial system. Additionally, although consumers often see franchise relocation restrictions as working against their interests, this view forgets that the restrictions equally confine ownership groups. The City of San Jose's lawsuit very clearly demonstrates this point as the Oakland Athletics have been prohibited from obtaining a new stadium in a profitable territory. However, if the exemption were removed and MLBs franchise restrictions struck down by a court as unreasonable restraints on competition, owners would find

it far easier to hold cities hostage for new stadiums and favorable lease deals. The restrictions ultimately function as another hurdle in an owner's attempts to pick up and move to a new territory, and removing that hurdle could have untold consequences, the least of which being widespread and frequent relocations resulting in league-wide instability.

Whatever the outcome of the City of San Jose's lawsuit, the competing concerns discussed in this Comment should be carefully examined and weighed. As the saying goes, "The grass is always greener on the other side." Although the current MLB system is often difficult to navigate and characterized by dealings of wealthy owners carving up a map, who knows what system would inevitably replace it. Consumers therefore, should not be so quick to bemoan the existence of MLBs antitrust exemption. It can not be denied that MLB has enjoyed a significant period of stability, one which has fostered on-field competition and rivalries. These rivalries and storylines are driving forces behind increased interest in the game, and as long as there is consumer interest, the game of baseball will continue to thrive.