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FORWARD

ALEXANDRA GLOVER, EDITOR-IN-CHIEF

Closing out Volume 11 with this Issue is a bittersweet honor. Featuring pieces written entirely by the Journal's staff, this Issue is a testament to the vitality and work ethic of its membership. The 2021-2022 year has not been without its difficulties, and it would be impossible to conclude without acknowledging those who have truly gone above and beyond.

The Editorial Board would first like to express its appreciation for the faculty advisors, Professors Jon Kappes and Don Gibson. Professor Kappes has been a wealth of information and support throughout both publications. Professor Gibson's commitment to editorial excellence is unparalleled. The *Arizona State Sports & Entertainment Law Journal* and its staff are fortunate to have their guidance and leadership.

I would personally like to recognize the herculean effort that the Editorial Board, Article Editors, and Associate Editors have applied to the editing and publication process. Without them, neither Issue in Volume 11 would have been possible.

Finally, a special "thank you" to Associate Editor Hunter Young. Hunter's patience, sense of humor, *and* name deserve mention.

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SPORTS & ENTERTAINMENT LAW JOURNAL

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NEW KIDS ON THE BLOCKCHAIN: A SMART SOLUTION TO COPYRIGHT ASSIGNMENTS & TERMINATIONS

ALEXANDRA GLOVER*

CONTENTS

ABSTRACT

"Blockchain" carries several different meanings, and each application of blockchain-related technology promises innovation and advancement. While many debate its economic viability, blockchain technology has advanced far beyond the financial realm. Smart contracts are simply one example of these advancements. United States copyright law, on the other hand, has adapted to change much more slowly. Assignments of copyright rights, and their eventual terminations, are inconsistently recorded, difficult to achieve, and inefficiently tracked. This frustrates many authors' inalienable right to copyright termination.

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* J.D. Candidate, Class of 2022, Sandra Day O'Connor College of Law, Arizona State University; Editor-in-Chief, *Arizona State Sports & Entertainment Law Journal*. A big "thank you" to my *SELJ* team, to my husband Jeff for his unwavering support, and to my son Kieran for always checking in on me while I burned the midnight oil.

Implementing a permissioned blockchain network to record copyright registrations and mobilizing smart contracts for all copyright assignments eliminates many of the issues that currently plague the United States Copyright Office system. By using the perfectly codable "if-then" statements within the termination statute and regulation, the proposed changes capitalize on modern blockchain advancements while protecting authors and ensuring the public's access to creative works.

INTRODUCTION

The year is 1980: John Lennon was just killed, Pac-Man was released to the clamoring masses, and Victor Miller finished a movie script.[1] The writing process was a whirlwind as he wrote against the clock on a strict budget. The script? "Friday the 13th." In 1980, Miller could not know the circumstances of the script's creation,[2] and its copyright ownership, would be hotly contested in a copyright termination lawsuit over three decades later. Rather, he was busy celebrating.

In 2021, Miller's script and film are legendary. Because over three decades passed, Miller attempted to terminate the copyright rights to the script, as permitted by copyright law. Instead of getting his copyright rights back, Miller got sued. During the litigation, he painstakingly recreated the circumstances of the script's creation, taking the judges back in time to 1980 to show he was entitled to copyright termination. Ultimately, Miller was successful.

It begs the question: do you remember what you were doing over thirty years ago? Does anyone? The United States Copyright Office expects copyright creators to clairvoyantly assign copyright rights to ensure three decades later, their copyright terminations are efficient and successful. This article argues that, with the help of blockchain technology, copyright assignments and terminations can finally join us in the twenty-first century.

Section I explains that uses for blockchain technology reach beyond cryptocurrency. Section II presents blockchain basics, and Section III analyzes smart contracts. Section IV provides an

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[1] Introductory section cites the following: Kyle Jahner, *'Friday the 13th' Copyright Case Is Rare Termination Rights Guide*, BLOOMBERG L. (Oct. 7, 2021, 2:01 AM), https://news.bloomberglaw.com/ip-law/friday-the-13th-copyright-case-is-rare-termination-rights-guide; Horror Inc. v. Miller, 15 F.4th 232 (2d Cir. 2021); *What Happened in 1980 Major Events*, PEOPLE HISTORY, https://www.thepeoplehistory.com/1980.html (last visited Nov. 29, 2021).

[2] *See Horror Inc.*, 15 F.4th 232 (analyzing oral agreements, short form agreements, and the fact that he used his own typewriter ribbon).

overview of the intricacies of exclusive copyright rights and Section V explores the complexities of copyright assignments. Section VI describes an author's inalienable right to then terminate these copyright assignments. Section VII proposes a resolution: smart contract assignments.

I. BLOCKCHAIN: A COIN WITH MANY FACES

"Blockchain" or "Bitcoin" were once terms that, when uttered, prophesied global change of near mythic proportion.[3] They promised a new decentralized page in history in which the "trusted" intermediaries on whom we were previously forced to rely upon would be obsolete, replaced by a "system based on cryptographic proof."[4] Today, "blockchain" is a more nebulous concept. There are cryptographic "coins" that act as investments,[5] money,[6] and novelty items.[7] Blockchain-based distributed ledger technology ("DLT") is also used for applications including supply chain management,[8] storing and transferring a patient's medical information,[9] and real property investments.[10] Unfortunately, blockchain networks have

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[3] *Beyond the Hype: Blockchains in Capital Markets*, *in* 12 MCKINSEY WORKING PAPERS ON CORPORATE AND INVESTMENT BANKING 1, 20 (Kevin Buehler et al. eds., 2015).

[4] *Id.*; *see also* SATOSHI NAKAMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM 1 (2008).

[5] For example, Bitcoin. Adam Hayes, *How to Buy Bitcoin*, INVESTOPEDIA, https://www.investopedia.com/articles/investing/082914/basics-buying-and-investing-bitcoin.asp (Feb. 28, 2022).

[6] Cade Metz, *In First Day With Bitcoin, Overstock Does $126,000 in Sales*, WIRED (Jan. 10, 2014, 2:07 PM), https://www.wired.com/2014/01/overstock-bitcoin-sales/.

[7] *See* Rob Marvin, *23 Weird, Gimmicky, Straight-Up Silly Cryptocurrencies*, PC MAG. (Feb. 6, 2018) https://www.pcmag.com/news/23-weird-gimmicky-straight-up-silly-cryptocurrencies.

[8] Moritz Berneis, Devis Bartsch & Herwig Winkler, *Applications of Blockchain Technology in Logistics and Supply Chain Management—Insights from a Systematic Literature Review*, 5 MDPI LOGISTICS 43 (June 30, 2021), https://doi.org/10.3390/logistics5030043.

[9] Prasad Kothari et al., *Blockchain Predictions for Health Care in 2021*, 4 BLOCKCHAIN IN HEALTHCARE TODAY 162 (Feb. 10, 2021), http://dx.doi.org/10.30953/bhty.v4.162.

[10] *See generally How Tokenized Real Estate Assets Are Redefining the Market*, NASDAQ, https://www.nasdaq.com/real-estate-asset-tokenization (last visited Nov. 22, 2021).

also been criminally popular. The lack of financial intermediary, a blockchain cornerstone, has attracted otherwise illicit transactions.[11]

When blockchain technology fills a currency-like role—regulatory bodies, specifically those concerned with illegal activity, threaten its universal adoption.[12] Federal regulations broadly define "currency,"[13] potentially opening up cryptocurrencies for federal regulation.[14] The Internal Revenue Service has ensured that cryptocurrencies (or "virtual currencies") are accounted for and taxed appropriately.[15] The 2021 infrastructure bill may further escalate both regulation and taxation in the cryptocurrency arena.[16] Some theorize that intervening regulatory bodies will dash the libertarian dreams of cryptocurrency proponents, preventing the prophecy of global change from being fulfilled.[17]

Whether cryptocurrency adoption can, will, or should replace fiat, or traditional, currency transactions is not relevant for this article's purpose. DLT functions may be adopted into existing systems independently, without having to answer the more metaphysical questions relating to blockchain. Rather, this article focuses on the benefits and solutions blockchain technology can easily provide to an outdated and inefficient system: copyright assignments and terminations.

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[11] David Adler, *Silk Road: The Dark Side of Cryptocurrency*, FORDHAM J. CORP. & FIN. L. BLOG (Feb. 21, 2018), https://news.law.fordham.edu/jcfl/2018/02/21/silk-road-the-dark-side-of-cryptocurrency/.

[12] Todd Phillips, *The SEC's Regulatory Role in the Digital Asset Markets*, CENTER FOR AMERICAN PROGRESS (Oct. 4, 2021), https://www.americanprogress.org/article/secs-regulatory-role-digital-asset-markets/.

[13] 31 C.F.R. § 1010.100(m) ("The coin and paper money. . . that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance.").

[14] Phillips, *supra* note 12.

[15] I.R.S., PUB. NO. 2014-21 (2013), https://www.irs.gov/pub/irs-drop/n-14-21.pdf.

[16] Laura Davison, *How Taxing Crypto Got Changed by Biden's Infrastructure Law*, BLOOMBERG (Nov. 17, 2021, 1:38 PM), https://www.bloomberg.com/news/articles/2021-11-17/how-taxing-crypto-got-changed-by-infrastructure-law-quicktake.

[17] *Compare* Eric Lipton et al., *Regulators Racing Toward First Major Rules on Cryptocurrency*, N.Y. TIMES (Nov. 1, 2021), https://www.nytimes.com/2021/09/23/us/politics/cryptocurrency-regulators-rules.html, *with* Yun Li, *Ray Dalio Says if Bitcoin Is Really Successful, Regulators Will 'Kill It'*, CNBC (Sept. 15, 2021), https://www.cnbc.com/2021/09/15/ray-dalio-says-if-bitcoin-is-really-successful-regulators-will-kill-it.html.

II. ON THE BLOCKCHAIN: HOW IT WORKS

A "blockchain" is a decentralized and public ledger that creates and records transactions, then distributes them across a peer-to-peer network.[18] It is decentralized, meaning no central authority regulates the chain; rather, transactions are authenticated by several computers ("nodes") in a collective network.[19] The authentication process is referred to as "network consensus."[20] Transactions are verified, cleared, and stored through network consensus in a "block," which is then attached or linked to a preceding block, creating an immutable "chain."[21] Hence, "blockchain."

Blockchain networks may take a few different forms.[22] A public network, like Bitcoin, is fully decentralized and public, while a private network is partially decentralized and controlled by a single "highly trusted" organization.[23] The third form is a permissioned network, a hybrid between a fully public and private network.[24] In a permissioned network, the ability to verify, read, and write on the blockchain are controlled by a few predetermined, "permissioned" nodes.[25] This feature makes verification more efficient with no consolidation of controlling power.[26] In Section VII, this article argues a permissioned network would better achieve the goal of copyright assignments and copyright terminations via smart contract.

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[18] Bryce Suzuki, Todd Taylor & Gary Marchant, *Blockchain: How It Will Change Your Legal Practice*, ARIZ. ATT'Y (Feb. 2018), https://www.azattorneymag-digital.com/azattorneymag/201802/MobilePagedArticle.action?articleId=1332400#articleId1332400.

[19] *Id.*; *see also* Sarah Anderson, *The Missing Link Between Blockchain and Copyright: How Companies Are Using New Technology to Misinform Creators and Violate Federal Law*, 19 N.C. J.L. & TECH. 1, 5 (2018), https://scholarship.law.unc.edu/ncjolt/vol19/iss4/1.

[20] Suzuki et al., *supra* note 18 ("Validators verify the correctness of each transaction and maintain consensus among each other regarding the state of the blockchain at any given time.").

[21] *Id.*

[22] David McCarville, *Smart Contracts & Real Estate*, FENNEMORE CRAIG, P.C. - BLOCKCHAIN & CRYPTOCURRENCY 1, 10 (Sept. 21, 2021) (on file with author).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

III. SMART CONTRACTS EXPLAINED

Smart contracts are electronic, self-executing instructions that are translated into computer code.[27] Nick Szabo first proposed the principle in 1994, long before blockchain was introduced to the marketplace.[28] Szabo wrote:

> New institutions, and new ways to formalize the relationships that make up these institutions, are now made possible by the digital revolution. I call these new contracts "smart," because they are far more functional than their inanimate paper-based ancestors. No use of artificial intelligence is implied. A smart contract is a set of promises, specified in digital form, including protocols within which the parties perform on these promises.[29]

Szabo equated their function to that of a vending machine, in that a vending machine only releases the requested item into the depository if the customer inserts the correct amount of money, without the need for a clerk to oversee the exchange.[30]

Smart contracts marry traditionally negotiated terms of a contractual agreement with the distributed, decentralized features of a blockchain network.[31] As with a traditional contract, smart contracts are supported by a formal agreement between parties, although drafted in computer code.[32] The parties draft their terms into conditional "if-then" statements, cryptographically "sign" the smart contract and "deploy" it to a blockchain-distributed ledger.[33] Once a condition is satisfied, the smart contract executes its coded response, like executing payment following the receipt of goods.[34] Indeed, smart contracts were designed to function alongside

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[27] Reggie O'Shields, *Smart Contracts: Legal Agreements for the Blockchain*, 21 N.C. BANKING INST. 177, 181 (2017), http://scholarship.law.unc.edu/ncbi/vol21/iss1/11.

[28] NICK SZABO, SMART CONTRACTS: BUILDING BLOCKS FOR DIGITAL MARKETS (1996), https://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart_contracts_2.html.

[29] *Id.*

[30] *Id.*

[31] O'Shields, *supra* note 27, at 179.

[32] *Id.*

[33] *Id.* at 179.

[34] *Id.*

blockchain technology and inherit several blockchain features, like immutability and security.[35]

A simple use-case demonstrates a smart contract's function. Assume a market asks a farmer for 100 ears of corn and the two parties negotiate price and a delivery date.[36] The market locks its funds into a smart contract and translates the following terms into code: *if* farmer delivers 100 ears of corn by June 1, *then* market pays $100 to farmer.[37] If the farmer misses the delivery date, the contract self-cancels; however, if the farmer timely delivers, the contract self-executes and the funds are deposited into the farmer's account.

A. ORACLES

A smart contract easily reviews internal ("on-chain") information through its blockchain network as network nodes verify transactions and reach consensus.[38] Smart contracts cannot directly access real-world ("off-chain") information.[39] Off-chain information exists outside of the blockchain, like prices, weather reports, or election results.[40] In order for a smart contract to determine whether a "if-then" statement conditioned on a real-world event triggers, it requires a data oracle to act as its bridge between the blockchain and off-chain information.[41] Oracles post off-chain data onto the blockchain, so that nodes may verify it and incorporate it onto the network.[42] An oracle may also be bi-directional, allowing a smart contract to send data off the chain.[43]

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[35] *Id.* at 181; *see also* Martín Buttazzi, *What Are Smart Contracts, and How Can We Benefit From Them?*, HEXACTA (Nov. 2, 2020), https://www.hexacta.com/what-are-smart-contracts-and-how-can-we-benefit-from-them/.

[36] *What Are Smart Contracts? A Beginner's Guide to Automated Agreements*, COINTELEGRAPH, https://cointelegraph.com/ethereum-for-beginners/what-are-smart-contracts-a-beginners-guide-to-automated-agreements (last visited Dec. 2, 2021) [hereinafter *What Are Smart Contracts?*].

[37] *Id.*

[38] *Oracles*, USE ETHEREUM (Jan. 3, 2022) https://ethereum.org/en/developers/docs/oracles/.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

B. ENFORCEABILITY OF SMART CONTRACTS

Smart contracts are also legally enforceable. With traditional contracts, courts analyze whether the common law requirements of offer, acceptance, and consideration are satisfied in determining legal enforceability.[44] Where a traditional contract is legally enforceable, it follows that its coded smart contract terms would also be enforceable.[45]

Many legal developments have bolstered digital contract enforceability. The Uniform Electronic Transactions Act ("UETA"), enacted in 1999 and adopted by forty-seven states provides that, with few exceptions, a computer programs' electronic record and accompanying electronic signatures have the same legal effect as if written traditionally.[46] UETA also recognizes the validity of "electronic agents," defined as "a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual."[47]

Additionally, the Electronic Signatures Recording Act ("E-Sign Act") recognizes the validity of electronic records and signatures in interstate commerce, going further than the UETA.[48] The E-Sign Act also provides that a transaction's digital contract or record "may not be denied legal effect, validity, or enforceability solely because its formation, creation, or delivery involved the action of one or more electronic agents" if it can be "legally attributable to the person to be bound."[49] Even if traditional legal principles fail to find that a smart contract operating on a blockchain network is a legal "contract," the paradigm has already shifted in favor of doing so. Some states like Arizona and Nevada have already changed their iterations of the UETA to expressly sanction blockchain networks and smart contracts.[50]

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[44] Stuart D. Levi & Alex B. Lipton, *An Introduction to Smart Contracts and Their Potential and Inherent Limitations*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 26, 2018), https://corpgov.law.harvard.edu/2018/05/26/an-introduction-to-smart-contracts-and-their-potential-and-inherent-limitations/.

[45] *Id.*

[46] *Id.*; *see also* Unif. Elec. Transactions Act § 5 (Unif. L. Comm'n 1999).

[47] Unif. Elec. Transactions Act § 2(6).

[48] 15 U.S.C. § 7001(h).

[49] *Id.*

[50] *See* 2017 Ariz. H.B. 2417; Nev. Rev. Stat. Ann. § 719.090 (2018).

C. SMART CONTRACT PROS & CONS

Smart contracts inherit several benefits from operating on blockchain networks.[51] These benefits include the lack of a third-party intermediary and irreversible transactions.[52] Additionally, smart contracts offer: (1) transparency, as blockchain nodes acknowledge the terms and store them in a decentralized architecture; (2) affordability, minimizing transaction and agency costs through self-verification and execution; (3) autonomy through self- execution of the contracts themselves, and; (4) efficiency, as they replace the analog processes of the traditional contract system.[53]

However, using a smart contract is not always, well, *smart*. First, though they are eventually translated into code and maintained on the blockchain, the initial programming is done by hand.[54] Human error is still possible, leading to potential vulnerabilities.[55] Smart contracts are also not easily amended because of their immutability.[56] It can be difficult to fix errors. Though smart contracts are "self-executing," transferring tangibles like real property or money through blockchain transactions is not always effective.[57] Yet another criticism of smart contracts attacks their defining feature: objectivity.[58] By their very nature, smart contracts "cannot include ambiguous terms nor can certain potential scenarios be left unaddressed."[59] Finally, smart contracts do not easily handle complex transactions. Reaching network consensus demands simple instructions.[60]

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[51] Buttazzi, *supra* note 35.

[52] *Id.*

[53] *Id.*

[54] *What Are Smart Contracts?*, *supra* note 36.

[55] *See, e.g.*, Ernesto Frontera, *A History of 'The DAO' Hack*, COINMARKETCAP (Nov. 6, 2021), https://coinmarketcap.com/alexandria/article/a-history-of-the-dao-hack.

[56] Levi et al., *supra* note 44.

[57] *Id.* For example, where the property subject to a smart contract conveyance is destroyed, or where a payor has insufficient funds, the network merely verifies that the condition-precedents to the transfer have been satisfied—not that the transfer actually occurred. *See also* Ivan Kot, *Smart Contracts in Real Estate: Still Room for Perfection*, FINEXTRA (Nov. 27, 2020), https://www.finextra.com/blogposting/19557/smart-contracts-in-real-estate-still-room-for-perfection.

[58] Levi et al., *supra* note 44.

[59] *Id.*

[60] Kot, *supra* note 57.

Nevertheless, smart contracts excel in simple "if-then" transactions, like intellectual property assignments.

IV. OFF THE CHAIN: COPYRIGHT RIGHTS

Perhaps not every transaction belongs on the blockchain.[61] However, copyright complexities and rationale demonstrate why copyright is perfectly positioned to take advantage of this new, decentralized era.[62]

A. INTRODUCING: COPYRIGHT

Since the dawn of American time, one thing has been clear—the framers of the Constitution cared about copyright. In 1783, the Continental Congress passed a resolution that encouraged the states to adopt copyright laws.[63] James Madison argued for copyright protections in his Federalist Papers and helped draft Article I, Section eight, Clause eight of the Constitution—the Copyright Clause.[64] Pursuant to the Copyright Clause, Congress enacted the Copyright Act to "promote the Progress of Science," by granting "authors" certain exclusive rights in their "original works of authorship."[65] The first federal Copyright Act was enacted in 1790, with major revisions in 1909 and in 1976.[66] This article focuses on the Act of 1976 (the "Act"), which governs all recently created works.[67]

The value of copyright lies is in the incentive it creates. Copyright establishes a marketable right to the use of one's expression, while it also supplies the economic incentive to create and disseminate ideas.[68] Copyright law continuously balances an

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[61] *See* Martin Glazier, *Enterprise Blockchain Doesn't Work Because It's About the Real World*, COINDESK, (Mar. 31, 2021), https://www.coindesk.com/markets/2021/03/31/enterprise-blockchain-doesnt-work-because-its-about-the-real-world/.

[62] For our purposes here, the existence of an author and a copyrightable work are assumed. *See* 17 U.S.C. § 102(a).

[63] 24 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, AT 326–27 (Gaillard Hunt ed., Government Printing Office, 1922).

[64] U.S. CONST. art. I, § 8, cl. 8; Craig W. Dallon, *Original Intent and the Copyright Clause: Eldred v. Ashcroft Gets It Right*, 50 ST. LOUIS U. L.J. (2006) (citing *The Federalist No.* 43, at 222).

[65] 17 U.S.C. § 102.

[66] *Copyright Timeline,* ASS'N RSCH. LIBR., https://www.arl.org/copyright-timeline/ (last visited Feb. 28, 2022).

[67] 17 U.S.C. § 102.

[68] Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 557 (1985).

author's incentive to create with providing the public access to creative works.[69] The Act aims to ensure that the rights granted to authors are not so broad that authors can fully limit the public's access; likewise, that the public's access is not so broad that authors are disincentivized to create.[70]

The "author"[71] of an "original"[72] copyrightable work receives a bundle of divisible, intangible copyright rights in their work from the point of "fixation."[73] Simply, once an author gives their creative works a tangible form—they receive copyright rights that exist separately from the work's material object. Subject to limited exception, these rights are also exclusive to the author under Section 106 of the Act.[74] Section 106 empowers the original author to exclusively capitalize on their creations, for example, by creating copies or derivatives.[75] Additionally, an author has exclusive rights as to each copyright layer.[76] If the author pens an original composition on sheet music and then records it, the author's Section 106 rights extend to both the musical composition (the notes and lyrics) and the sound recording.[77]

The author may also transfer any of the author's exclusive rights (an assignment) or permit others to use the work (an exclusive or

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[69] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").

[70] *See generally* Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 3, 433 (2007).

[71] "One to 'whom anything owes its origin.'" Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).

[72] 17 U.S.C. § 102.

[73] A work is fixed "when its embodiment . . . is sufficiently permanent or stable to permit it to be perceived." 17 U.S.C. §§ 101, 102(a); Sebastian Pech, *Copyright Unchained: How Blockchain Technology Can Change the Administration and Distribution of Copyright Protected Works*, N.W. J. TECH. & INTELL. PROP. 1, 6 (2020).

[74] 17 U.S.C. § 106 ("They include the right to: (1) to reproduce the copyrighted work; (2) to prepare derivatives of the copyrighted work; (3) to distributed copies of the copyrighted work; (4) to publicly perform the copyrighted work; (5) to publicly display the copyrighted work, and; (5) to digitally perform the work if it is a sound recording.").

[75] *Id.*

[76] *Copyright Permissions: Understanding Layers of Rights*, COPYRIGHTLAWS.COM (Feb. 11, 2019), https://www.copyrightlaws.com/copyright-permissions-layers-of-rights/.

[77] *Id.*, *see also* 17 U.S.C. § 101.

non-exclusive license).[78] Transferring ownership of the copyrighted material does not convey the author's exclusive rights.[79] Rather, a consumer must expressly contract for an assignment of the rights.[80] Disputes as to whom authorship is attributed and which rights have been assigned often arise because exclusive rights are granted in, and generally remain with, the original author. [81] Whether the work was properly registered determines whether the rights can be enforced at all.

B. ENFORCING COPYRIGHT RIGHTS

Authors may not enforce their exclusive rights in a copyrightable work of U.S. origin unless they also register the work with the United States Copyright Office ("USCO").[82] In addition to granting the author, now the work's registered copyright holder, legally enforceable copyright ownership, registration provides the author with prima facie evidence of valid copyright ownership and establishes a publicly recorded claim to a copyrighted work.[83]

Through this process, all enforceable, copyrighted works within the U.S. are registered with the USCO. Registration is simple. It requires logging into the USCO website, entering relevant data about the work and its date and circumstances of fixation, paying a fee, and uploading a copy to be maintained with the Library of Congress.[84] Theoretically, this creates a record that can be easily accessed and verified, that is also difficult to change—similar to a blockchain network.

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[78] "The author may transfer all or a subset of these rights 'by any means of conveyance or by operation of law.'" John Wiley & Sons, Inc. v. DRK Photo, 882 F.3d 394, 410 (2d Cir. 2018) (quoting § 201(d)(1)).

[79] 17 U.S.C. § 202.

[80] 17 U.S.C. §§ 109, 202.

[81] *See, e.g.*, Silvers v. Sony Pictures Ent., Inc., 402 F.3d 881 (9th Cir. 2005).

[82] "No civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title." 17 U.S.C. § 411(a).

[83] *Copyright Basics*, COPYRIGHT.GOV (Oct. 17, 2021), https://www.copyright.gov/circs/circ01.pdf.

[84] *Register Your Work: Registration Portal*, COPYRIGHT.GOV, https://www.copyright.gov/registration/ (last visited Oct. 17, 2021).

V. COPYRIGHT ASSIGNMENT CONTRACTS[85]

Unfortunately, the consistency and reliability of copyright recordkeeping ends at registering the work.

A. SIGNED WRITING REQUIREMENT

If a copyright holder wishes to fully transfer an exclusive right or use of their work, it must be contractually transferred.[86] An assignment must be in writing and signed by the rights owner, under Section 204(a) of the Act.[87] However, the assignment does not have to be recorded with the USCO to be valid.[88]

These inconsistent recordation mechanisms cause confusion and could affect the validity of a copyright transaction.[89] Consider an author who fully assigns their properly registered, copyrighted work to Party 1. The author does not record the assignment. The USCO record would still (correctly) reflect the work is registered, but incorrectly reflect the copyright's owner. The original author then mistakenly or fraudulently executes a second assignment of the work to Party 2. Because the first assignment was not recorded, Party 2 reviews the USCO records and sees the original author owns the rights to the work. However, this second transaction fails. The author conveyed rights to a work that they no longer had, and Party 2 captured none of the rights they believed they were purchasing.[90]

The system's flaw is exacerbated by the nature of copyrighted works. Complex assignment contracts may be too difficult to comprehend or too vague.[91] Multiple, successive assignments to multiple assignees can raise a dispute when parties attempt to enforce their rights.[92] Assignments get more complicated when the work is a work made for hire, if the original author dies and passes

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[85] Herein, "assignment" means both an assignment and an exclusive license—both requiring a signed writing.

[86] 17 U.S.C. § 204(a).

[87] *Id.*

[88] Pech, *supra* note 73, at 6.

[89] *Id.* at 6-8.

[90] Josh Conley, *The Use of Blockchain in Intellectual Property Management*, ZARLEY L. (Mar. 22, 2018), https://www.zarleylaw.com/the-use-of-blockchain-in-intellectual-property-management/.

[91] John Wiley & Sons, Inc. v. DRK Photo, 882 F.3d 394, 410 (2d Cir. 2018).

[92] *See, e.g.*, Ackoff-Ortega v. Windswept Pac. Ent. Co., 120 F. Supp. 2d 273, 275 (S.D.N.Y. 2000) (three assignments to different assignees caused a dispute when parties were unclear who held renewal rights).

their copyright rights to an heir, or both.[93] While a confusing copyright assignment may cause controversy and frustration, an assignment cannot transfer an author's termination right.

VI. TERMINATION RIGHTS

Assignments of copyright rights may later be terminated by the original author. In pursuit of the balance between author incentive and public access, copyright protection is subject to limited duration. Prior to the Copyright Act of 1976, authors of a copyrighted work enjoyed an initial term of copyright ownership, with an additional term if the copyright was properly renewed.[94] The purpose for renewal rights was to benefit authors by allowing them to recapture the rights to works that later became successful.[95] The incentive to the author was a "second bite at the apple."[96] The benefit to the public, if the author opted out of their renewal right, was more works in the public domain.[97]

After *Fred Fisher Music Co. v. M. Witmark & Sons*, it became clear that renewal rights, as written, did not fully serve their intended purpose.[98] The Court held that renewal rights were property and thus freely transferable by contract.[99] After this controversial decision, nearly all copyright assignments also conveyed the renewal rights, which reduced the likelihood an author would ever get their "second bite at the apple."[100] Shortly thereafter, renewal rights were out, and termination rights were in.

A. INALIENABLE TERMINATION RIGHTS

To help ensure authors got the protection intended by renewal rights, the Copyright Act of 1976 granted authors *inalienable* termination rights.[101] Section 203(a)(5) states that terminating assigned copyright rights may take effect "notwithstanding any

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[93] *See* Marvel Characters, Inc. v. Kirby, 726 F.3d 119 (2d Cir. 2013) (heirs of a freelance artist whose art depicted iconic Marvel characters attempted to enforce their rights, while the defendant claimed they were works made for hire).

[94] 17 U.S.C. § 23.

[95] William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 446 (2000).

[96] *Id.*

[97] *Id.*

[98] *See* Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 651 (1943).

[99] *Id.*

[100] Patry, *supra* note 95.

[101] *Id.* (emphasis added).

agreement to the contrary."[102] Because this right is not assignable, authors are free to decide how to use it. "Some artists may choose to exercise their termination right and reclaim ownership of their work. Other artists may use it as leverage to negotiate (or renegotiate) a better deal."[103]

The court in *Waite v. Universal Music Group* summarized the purpose of the termination right thus:

> Aspiring singers, musicians, authors and other artists—sometimes young and inexperienced and often not well known—tend to have little bargaining power in negotiating financial arrangements with recording companies, publishers, and others who promote and commercialize the artists' work. They often grant copyright in that work as part of the bargain they strike for promotion and commercialization. Accordingly, when an artistic work turns out to be a "hit," the lion's share of the economic returns often goes to those who commercialized the works rather than to the artist who created them . . . The idea was that termination of these rights would more fairly balance the allocation of the benefits derived from the artists' creativity.[104]

Today, authors may freely assign their exclusive Section 106 rights, while the right to terminate these assignments remains inalienable. But how does one enforce termination?

B. DETERMINING TERMINATION ELIGIBILITY

Copyright ownership is a temporal analysis. The term for an initial copyright ownership is measured by the life of an author, plus seventy years.[105] However, if the author assigned their copyright to a second party, a thirty-five-year termination clock begins to tick.[106]

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[102] 17 U.S.C. § 203(a)(5) (excluding works made for hire).

[103] Dylan Gilbert et al., *Making Sense of the Termination Right: How the System Fails Artists and How to Fix It*, PUB. KNOWLEDGE (Dec. 2019), https://publicknowledge.org/policy/making-sense-of-the-termination-right-how-the-system-fails-artists-and-how-to-fix-it/.

[104] Waite v. UMG Recordings, Inc., 450 F. Supp. 3d 430, 432 (S.D.N.Y. 2020).

[105] 17 U.S.C. § 302(a).

[106] 17 U.S.C. § 203(a)(1)-(3).

For assignments made after January 1, 1978, authors have the right to terminate an assignment thirty-five years after the transfer was made.[107] Section 203 provides several calculations to help an author determine when they are eligible to terminate copyright assignments and recapture their rights.[108] Authors are given a five-year notice window that starts in the thirty-fifth year.[109] Before the copyright may be terminated, notice must be served to all current copyright holders between two and ten years prior to the end of the termination period, or, as early as year twenty-five and as late as year thirty-eight.[110]

Confusing? The USCO provides helpful "if-then" charts to determine termination eligibility:[111]

SECTION 203: Grants Executed by the Author on or after January 1, 1978, that did not Convey the Right of Publication

SELECT A DATE OF TERMINATION			DEADLINES FOR SERVING AND RECORDING A NOTICE OF TERMINATION		
			The **Notice of Termination** must be served on the grantee and recorded with the Copyright Office *before* the **Date of Termination**.		
If the grant was executed on Date X in the Year...	...then the **Date of Termination** must be between...		If the **Date of Termination** is Date Y in the Year...	...then the **Notice** must be served *on or after* Date Y in the Year...	...and the **Notice** must be served *before* Date Y in the Year
	Date X in the Year	and Date X in the Year			
1978	2013	2018	2013	2003	2011
1979	2014	2019	2014	2004	2012
1980	2015	2020	2015	2005	2013
1981	2016	2021	2016	2006	2014
1982	2017	2022	2017	2007	2015
1983	2018	2023	2018	2008	2016
1984	2019	2024	2019	2009	2017
1985	2020	2025	2020	2010	2018
1986	2021	2026	2021	2011	2019
1987	2022	2027	2022	2012	2020

C. SMALL ERRORS, BIG CONSEQUENCES

The intricate process for serving and recording notice is codified in 37 C.F.R. § 201.10. The notice of termination must include a statement of statutory authority,[112] the name of each assignee whose rights are being terminated, a brief statement that reasonably identifies the assignment, the effective date of

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[107] *Id.* at (a)(3).

[108] *Id.*

[109] *Id.*

[110] *Id.* at (a)(4).

[111] *See, e.g.*, *Termination Table § 203*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/comp3/docs/termination-table-section203rp.pdf (last modified Jan. 2019).

[112] 37 C.F.R. § 201.10 (covering notices of termination under §§ 203, 304(c), or 304(d)).

termination, and several other items when applicable to the circumstances.[113] The terminating party must make a reasonable inquiry to determine where to send the notices, and the notices must be sent via first class or certified mail.[114] The original author, or in the case of a joint work, a majority of the original authors, must sign the notices.[115]

To file a termination notice is to walk a precariously thin line. Failing to comply with the notice formalities before the termination period expires may result in a failed copyright termination effort.[116] However, if the author complies with the formalities, the USCO records the termination notice; once the thirty-five-year period is exhausted, the author recaptures their rights.[117]

The middle ground between compliance and noncompliance is hazy. While there is a "harmless error" provision that permits the notice to remain effective regardless of an immaterial mistake, there is also no clear process in place for amending a recorded notice.[118] Additional factors further muddy the waters, depending on how many copyright assignments were conveyed over the termination period's three decades, how many authors and assignees have since moved or died, and how many layers of copyright were involved.

VII. SMART CONTRACTING: RESOLVING EXISTING COPYRIGHT ASSIGNMENT AND TERMINATION PROBLEMS

The issue is that copyright assignments can be confusing and complicated, and though the author retains an inalienable right to terminate them, the outdated USCO system means an author may struggle to enforce termination. A solution forms when smart contracts, copyright assignments, and termination are brought together. Specifically, copyright assignments should be executed as

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[113] *See id.* § 201.10(b).

[114] *See id.* § 201.10(d).

[115] *See id.* § 201.10(b).

[116] *Id.*; Mtume v. Sony Music Ent., 408 F. Supp. 3d 471, 476 (S.D.N.Y. 2019) (incorrectly calculated date of termination may or may not have been a harmless error); Burroughs v. Metro-Goldwyn-Mayer, Inc., 491 F. Supp. 1320, 1326 (S.D.N.Y. 1980), *aff'd*, 636 F.2d 1200 (2d Cir. 1980) (notice omitted five titles and was served prior to the effective date, thus termination notice failed).

[117] 37 C.F.R. § 201.10.

[118] *See* Siegel v. Warner Bros. Ent. Inc., 658 F. Supp. 2d 1036, 1093 (C.D. Cal. 2009) (noting "differing views on how stringent courts should be in applying the harmless error safety valve").

smart contracts on a permissioned USCO network. Because assignments must be conveyed by contract, the current system is ripe for blockchain adoption.

A. FIRST: ADOPT A PERMISSIONED USCO NETWORK

Fully addressing the current system's inefficiencies requires adopting a permissioned blockchain network at the USCO level. A permissionless network means that a blockchain operating on the network is verified by several public nodes.[119] It is fully decentralized across unknown parties, with no central authority.[120] However, these features are not desirable here. Rather, a permissioned network allows for more control and efficiency.[121] A permissioned network allows only designated nodes to interact and participate in consensus validation, and the network is distributed across known parties.[122] These networks are highly customizable, and fewer nodes means swifter (and more environmentally friendly) network consensus.[123]

Adopting a permissioned network at the USCO level means all copyright registrations and assignments would be captured. Merely arguing for moving assignments on-chain does not resolve current issues, as blockchains operating on different networks may not interact with each other.[124] This would mean assignments could be as confusing as they are today. Rather, adopting a permissioned network at the copyright mothership brings all registrations and assignments under its umbrella, much like the early "internet" conjoined disparate computer networks into a singular internet protocol suite.[125]

Additionally, a bi-directional data oracle would monitor off-chain information, like calendar dates, and changes to a party's address.[126] A bi-directional oracle would allow for the copyright

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[119] Jessica Groopman, *Permissioned vs. Permissionless Blockchains: Key Differences*, TECHTARGET (June 1, 2021), https://searchcio.techtarget.com/tip/Permissioned-vs-permissionless-blockchains-Key-differences.

[120] *Id.*

[121] *See id.*

[122] *Id.*

[123] *Id.*

[124] Mike Orcutt, *How to Get Blockchains to Talk to Each Other*, MIT TECH. R. (May 24, 2018), https://www.technologyreview.com/2018/05/24/142734/how-to-get-blockchains-to-talk-to-each-other/.

[125] *Id.*

[126] *See, e.g.*, *Using Oracle Intelligent Track and Trace*, ORACLE CLOUD (Mar. 2022), https://docs.oracle.com/en/cloud/saas/track-and-trace-cloud/user-guide/using-oracle-intelligent-track-and-trace.pdf.

termination information housed on-chain to be transferred off-chain, like sending termination notices to assignees and notices of recordation to authors via first class mail.[127]

While it may seem unreasonable to expect the USCO to adopt such wide-sweeping reform, change is already upon us. Federal government processes have already begun to adopt DLT, using private developers working on government contracts to write and implement DLT programs.[128] Using government contract resources also means the USCO can incorporate its own permissioned network into existing infrastructure without having to code the program itself, presenting a streamlined consumer interface to the public with relatively minimal government involvement.[129]

B. SECOND: ASSIGNMENT CONTRACTS, BUT MAKE THEM SMART

In addition to altering existing processes, this article proposes a new, mandatory third step: recording assignments as smart contracts with the USCO network. A copyright author already registers their copyright with the USCO, but with a permissioned network in place, each initial copyright registration would place copyright ownership "on-chain." This allows for future, swifter network consensus in subsequent assignments.

Next, parties would negotiate their assignment terms and, register them on the USCO network. They would enter data in the provided fields regarding: (a) to whom ownership transfers; (b) which rights are being assigned; (c) where to send notices, and; (d) when the assignment terminates. This process essentially eliminates all of the current system's failings. It correctly records copyright assignments with the USCO, tracks new rights holders' identities and addresses, and cleanly builds in a copyright termination trigger, with the date calculated in advance.

Finally, instead of sending the current copyright holder a notice of copyright termination directly, the copyright author would signal the termination intent to the network.[130] This places the author's

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[127] *See Oracles*, *supra* note 38.

[128] *See, e.g.*, *Simba Chain, Inc.*, GOVTRIBE (2018), https://govtribe.com/vendors/simba-chain-inc-dot-87b18.

[129] *Bringing the Blockchain to the Federal Government Contracting Workspace, Part I*, WARD & BERRY, PLLC (Mar. 18, 2021), https://www.wardberry.com/bringing-the-blockchain-to-the-federal-government-contracting-workspace-part-i/.

[130] Signing the smart contract could likely satisfy current USCO notice requirements under the UETA/E-Signature Act.

intent to terminate on-chain. The smart contract would not send a termination notice to the rights holders until the condition-precedent, the statutory termination notice period, triggers. Once the rights holders receive notice of the author's copyright termination, the parties can negotiate the termination and the terms of the assignment, as they currently do.

1. *BUILT-IN "IF-THEN" CODING*

Copyright assignments and the termination statute are already built on a foundation of straightforward conditional statements.[131] Here, the coded conditions of the smart contract could include: recording the identities of successive owners ("*if* UMG transfers $1,000 to Waite, *then* USCO records UMG as the copyright owner"); transferring the value itself ("*if* Waite assigns ownership, *then* UMG transfers $1,000 to Waite"); and, stating which rights are conveyed ("*if* UMG transfers $1,000 to Waite, *then* Waite assigns all exclusive rights to UMG"), and when they terminate ("*if* Waite triggers termination, *then* USCO sends termination notice to UMG"). Additionally, since agreements to transfer the inalienable termination right are unenforceable, the right underlying the conditional termination trigger cannot erode over time.

One of the difficulties of recapturing copyright rights by terminating an assignment under the current system is the likelihood that the author's successor would also assign their copyright rights to a second party, and that second party to a third. Considering their immutability, this is also a limitation for smart contracts. Successive copyright assignments would benefit from DLT as each assignment would be recorded on the USCO's blockchain network. However, executing this with a smart contract is more difficult than merely assigning the smart contract to successive parties.

One means to circumvent the issue of successorship is to bifurcate the smart contracts into "master" and "alternate" contracts.[132] This leverages the technical ability of a smart contract by programing an alternate contract to "call" the master contract, amending the master contract at a later date.[133] This codes the initial assignment to redirect (call) the master smart contract to an alternate smart contract.[134] Doing so would permit the original author to still satisfy the notice condition, triggering the original termination condition, through successive ownership transfers from the

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[131] *See supra* chart accompanying note 111.

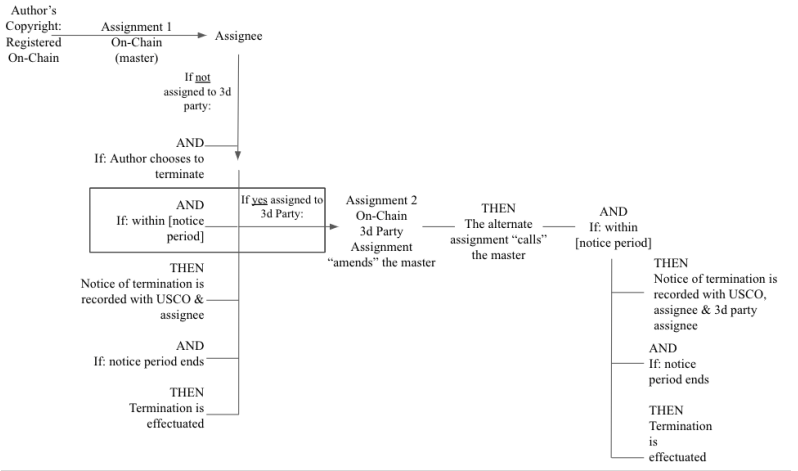
[132] Jeffrey D. Neuburger et al., *Smart Contracts*: *Best Practices*, *in* PRACTICAL L., Westlaw w-022-2968 (2022).

[133] *Id.*

[134] *Id.*

intervening thirty-five years. This amendment process is protected by the USCO's permissioned network, as only authorized nodes will digest the on-chain network data and the oracle's off-chain data to reach consensus as to the successive assignments.

Below is a simplified example of a smart contract decision tree [135] demonstrating the "if-then" conditions and subsequent assignments:



2. *ADDRESSING ARGUMENTS AGAINST SMART CONTRACT UTILITY*

Section III of this article raised several arguments against smart contract utility. After presenting the proposed solution, these arguments are easily countered. First, human error is already rampant in copyright terminations; however, using a permissioned network with simplified data fields eliminates current human error and makes future error less likely. Second, while amending smart contracts is usually difficult, using the same permissioned network that houses a master contract to call the master's data in subsequent assignments allows for open-ended transactions from the outset. Third, while transferring tangibles in blockchain transactions is not always effective, copyright rights are intellectual and thus, intangible property. Merely recording the assignments captures the rights, with no off-chain property transfers needed. Finally, copyright assignments and terminations are already objective, relatively simple "if-then" statements. Therefore, while some agreements may still be too complex to be moved on-chain,

[135] Created with the help of Prof. Bryce Suzuki (Nov. 23, 2021).

copyright assignments and terminations are practically begging for the shift.

3. *POLICY SUPPORT*

Protecting an author's right to terminate copyright assignments is supported by the policy behind termination. Copyright rights are an author's incentive to create for the benefit of the public.[136] Ensuring the termination process is accurate and efficient furthers this incentive without expanding an author's existing rights. Similarly, requiring the author to trigger the copyright termination right also closely mirrors the current process, without making termination an automatic right.

VIII. CONCLUSION

"Blockchain" promises innovation to come. While many debate its place in our economy, blockchain technology has quickly advanced beyond the realm of money. One such application is that of the smart contract. Meanwhile, United States copyright law has adapted to change much slower. Assignments of copyright rights are inconsistently recorded with the USCO, frustrating an author's inalienable right to terminate those assignments.

Implementing a permissioned blockchain network to record copyright registrations and mobilizing smart contracts for all copyright assignments essentially eliminates the issues that currently plague the USCO system. The USCO can easily contract-out the network design and incorporate it into its existing platform, using the already perfectly codable "if-then" statements within the termination statute and regulation. Adopting these changes allows copyright assignments and future copyright terminations to reap the benefits of the blockchain.

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[136] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

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THE INEVITABILITY OF MAJOR LEAGUE BASEBALL'S ANTITRUST EXEMPTION

EMILY PARKER*

CONTENTS

ABSTRACT

Major League Baseball has long enjoyed the benefit of a judicially created exemption from federal antitrust laws thanks to a string of singular Supreme Court cases stemming back to 1922. The antitrust exemption is considered an unpopular aberration, and many have called for its reversal either in the courts or the legislature. While the exemption has played a significant role in MLB's business operations over the past century, its enduring impact stems not from the exemption itself, but from its reformulation by the courts and legislatures. While the Supreme Court has expressed reluctance to

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reconsider the exemption's validity, its effects have been limited by lower court decisions and legislative enactments. Even if the exemption were eliminated, many of its core effects would remain intact as a result of legislative re-entrenchment over the past few decades. This Note argues that calling for the reversal of MLB's antitrust exemption is futile. Instead, critics should work to generate interest in legislatively alleviating some of the exemption's lingering negative effects. This Note begins by exploring the history of federal antitrust law and its intention, examines the antitrust exemption itself and its ongoing impacts on MLB, and ultimately proposes that advocates accept the exemption and construct creative piecemeal legislative solutions to alleviate any negative impacts.

INTRODUCTION

Major League Baseball's ("MLB") antitrust exemption is an unpopular aberration, solidified by almost a century of Supreme Court cases and judicial affirmation reaching back to 1922.[1] The antitrust exemption's impact has been re-entrenched over the past century through judicial affirmation and legislative re-entrenchment.[2] It is credited with facilitating the development of MLB's near-complete monopoly over professional baseball and has long been the subject of substantial ire and criticism.[3] The antitrust exemption's impact remains substantial in three notable areas: MLB's maintenance of territorial exclusivity amongst franchises, its relationship with Minor League Baseball ("MiLB"), and labor relations impacting minor league players.

While the exemption is not without its faults, this Note argues advocating for the exemption's repeal is futile in light of the Supreme Court's unwillingness to reconsider the issue and Congress's role in re-entrenching its most significant effects.[4] Some of the antitrust exemption's impacts have had a net positive impact on MLB's ability to maintain operational longevity.[5]

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[1] *See* Roger I. Abrams, *Before the Flood: The History of Baseball's Antitrust Exemption*, 9 MARQ. SPORTS L.J. 307, 311 (1999).

[2] *See generally* Jeremy Ulm, Comment, *Antitrust Changeup: How a Single Antitrust Reform Could Be a Home Run for Minor League Baseball Players*, 125 DICK. L. REV. 227, 238 (2020).

[3] *See generally* Nathaniel Grow, *In Defense of Baseball's Antitrust Exemption*, 29 AM. BUS. L.J. 211 (2012).

[4] *See* Joseph Citelli, Comment, *Baseball's Antitrust Exemption and the Rule of Reason*, 3 ARIZ. ST. SPORTS & ENT. L.J. 56, 105 (2014).

[5] *See generally* Grow, *supra* note 3.

Where the exemption has allowed anti-competitive processes to take hold, congressional and public pressure have pushed MLB to adopt pro-competitive processes, thereby limiting the negative impacts of the exemption.[6] In light of this history and recent developments—including increased public attention paid to the troubling labor plight of minor leaguers—advocates should focus solely on encouraging piecemeal reforms, both congressional and through MLB itself.[7]

Section II of this Note begins by exploring the history of U.S. antitrust laws, including their origin, and intended function. Next, it examines the advent of MLB's novel antitrust exemption and the long judicial history affirming it, even while denying similar protection to other professional sports leagues. Taken together, these histories demonstrate how antithetical the antitrust exemption is in light of the U.S.'s economic identity.

Section III looks at three key areas of MLB's operations in which the antitrust exemption wields substantial influence. First, this section explores MLB's territorial exclusivity scheme, under which franchise relocation and creation is significantly limited and broadcasting deals are structured anti-competitively. Next, Section III discusses the ways in which the antitrust exemption has allowed MLB to dominate MiLB's structure entirely, expanding its monopoly to include virtually all professional baseball domestically. Finally, the section concludes by discussing arguably the most troubling current impact of the antitrust exemption: the labor relations between MLB and minor league players.

Section IV concludes by discussing some of the piecemeal ways forward for advocates concerned about the negative effects of the antitrust exemption. Creative individual reforms are necessary to combat any anti-competitive business practices by MLB because of the antitrust exemption's seeming inevitability and Congress's recent re-entrenchment of some of the exemption's most dire impacts.

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[6] *See generally id.* at 237.

[7] *See* Jeff Passan, *Major League Baseball to Require Teams to Provide Housing for Minor League Players Starting in 2022*, ESPN (Oct. 17, 2021), https://www.espn.com/mlb/story/_/id/32419545/major-league-baseball-require-teams-provide-housing-minor-league-players-starting-2022-sources-say.

I. HISTORY OF ANTITRUST LAW IN THE UNITED STATES AND ITS RELATIONSHIP TO MAJOR LEAGUE BASEBALL

A. THE HISTORY OF U.S. ANTITRUST LAWS

Since the late 19th century, U.S. antitrust laws have defined not only interstate commerce, but America's broad economic approach to competition within markets.[8] Put simply, antitrust law is a set of policies designed to ensure competition amongst private economic actors.[9] Although this does not require interference with the particulars of a given industry such as pricing or other output-related decisions, it does give the government a framework by which to prevent private businesses with monopolies from taking advantage of their economic position to exploit consumers.[10] Traditional antitrust theory assumes that in the absence of monopolies, competition will flourish, leading to consumer welfare maximization.[11]

The general economic principles underlying antitrust laws value competition amongst economic players for the purposes of ensuring consumers receive competitive prices for a reasonable output of goods and services.[12] When one or more entities in a given market conspire to drive up prices or drive down output—thereby establishing a monopoly over that market—consumers may suffer through higher prices and unfairly distributed wealth.[13]

The Sherman Act of 1890 (the "Act") is the defining legislation of U.S. antitrust law.[14] The Act's passage was fundamentally premised on the notion that economic competition produces optimal outcomes for consumers, employees, and other actors in the market.[15] The Act aimed to protect both industry employees and consumers.[16] The cornerstone of consumer protection under the Act

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[8] *See* Animesh Ballabh, *Antitrust Law: An Overview*, 88 J. PAT. & TRADEMARK OFF. SOC'Y 877, 878 (2006).

[9] *Id.*

[10] *See id.*

[11] *Id.* at 906.

[12] *See* Roger D. Blair & Wenche Wang, *Rethinking Major League Baseball's Antitrust Exemption*, 30 J. LEGAL ASPECTS SPORT 18, 19 (2020).

[13] *Id.*

[14] *Id.* at 22; Ballabh, *supra* note 8, at 885.

[15] Ulm, *supra* note 2, at 230.

[16] *Id.* at 227.

was to "encourage free and open competition," thereby keeping market prices reasonable.[17]

The Act similarly forbids collusion among would-be competitors whose joint action could prevent others from participating in a given market.[18] The Act is fundamentally aimed at actions—unilateral or otherwise—designed to restrain interstate trade and commerce.[19] It accomplishes this by prohibiting anti-competitive agreements and undermining the development of monopolies.[20]

The Sherman Act does not actually establish a complete ban on monopolies, however. The Act's application has historically utilized a legal distinction between monopolies which operate "competitively" and those whose anti-competitive behavior necessarily harms the economy by undermining competition.[21] For example, § 1 of the Act explicitly prohibits any contract, combination of contracts, or "conspiracy in restraint of trade or commerce among several states."[22]

In determining whether an action violates § 1 of the Act, it must be shown that the restraint of trade was unreasonable, and it resulted from "two or more persons acting in concert."[23] Finding a violation of § 1 of the Sherman Act further requires application of the rule of reason analysis.[24] The rule of reason allows the Court to determine whether an anticompetitive business practice is, in fact, generally harmful or if it nets a benefit for the economy.[25] This entails a cost-

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[17] Robert P. Woods Jr., Comment, *The Development of Baseball's Antitrust Exemption*, 5 DUO. BUS. L.J. 61, 62 (2003).

[18] Blair & Wang, *supra* note 12, at 22.

[19] *Id.*

[20] Woods, *supra* note 17, at 62.

[21] Richard M. Steuer, *The Simplicity of Antitrust Law*, 14 U. PA. J. BUS. L. 543, 544 (2012).

[22] Woods, *supra* note 17, at 63.

[23] *Id.*

[24] *Id.*

[25] *Id.* Early application of the Rule of Reason test illustrates how it operates to selectively allow some monopolies to not only exist, but flourish, while others are found to violate the Sherman Act. In 1911, the Supreme Court found that John D. Rockefeller's economic giant Standard Oil company had violated the Sherman Antitrust Act in the course of developing a monopoly over the oil industry despite the presence of nominal competition. Ballabh, *supra* note 8, at 886. The Court ordered the division of Standard Oil into multiple, separate entities in order to break up the monopoly and foment competition in the oil industry. *Id.* Despite this holding, the Supreme Court also established the "rule of reason,"

benefit analysis to determine whether the costs of the anti-competitive business practices outweigh the general benefits.[26]

Courts may also apply a "per se illegal" analysis to determine whether a business practice violates § 1 of the Act.[27] Some business practices are so clearly harmful the court may find it to be a per se violation of the Act.[28] Under the per se illegal analysis, a business practice may be found in violation of the Act if it is "so blatantly anti-competitive" its benefits become irrelevant in the evaluation of its legality.[29] Where the court finds a per se violation has occurred, it will abstain from any discretionary determinations based upon the business's intention or market influence; the practice at issue will be found to violate the Act.[30]

Four kinds of anti-competitive business practices generally may be found to violate the Act under a per se illegal analysis;[31] these include price fixing, tying contracts, group boycott, and the horizontal division of a market.[32] The horizontal division of a market, whereby competitors agree to a set division of the market in a geographical area, may sound similar to MLB's territorial exclusivity requirements.[33]

Section 2 of the Act targets the intentional formation of monopolies.[34] Monopolies are fundamentally anticompetitive in that they are defined by the elimination of competition and takeover of a given market by a single entity.[35] In evaluating monopolistic business practices under the Act, the Supreme Court has adopted a

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which functionally distinguished "evil" monopolies from acceptable ones; harmful monopolies were those whose operations "damage[d] the economic environment of its competitors." *Id.* This seemingly created an opening by which large companies could avert prosecution under the Sherman Act by sufficiently operating like an acceptable monopoly. *See generally id.* The "rule of reason" exception seems to have borne fruit for large companies almost immediately. *See generally id.* Despite the Supreme Court ruling against the Standard Oil Company's industry monopoly in 1911, the United States Steel Corporation succeeded against an antitrust suit in 1920 despite significant lobbying efforts in favor of regulations that would reduce competition in their industry. *Id.*

[26] Woods, *supra* note 17, at 63.

[27] *Id.* at 64.

[28] Ulm, *supra* note 2, at 249.

[29] Woods, *supra* note 17, at 64.

[30] Ulm, *supra* note 2, at 249.

[31] Woods, *supra* note 17, at 64.

[32] *Id.*

[33] *See* Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990).

[34] Ulm, *supra* note 2, at 233.

[35] *Id.*

two-part test for determining whether a violation has occurred.[36] This analysis requires proving the existence of a monopoly in a given market, and then demonstrating the monopolist "took steps towards willful acquisition or maintenance of that power."[37]

Nevertheless, Antitrust laws themselves are not immune from criticism. In some ways, antitrust laws have fostered monopolies despite the Act's original intent to generate increased competition within industries.[38] The government itself has often granted legal privileges to companies or special interests within industries, thereby creating monopolies itself.[39] The creation of coercive monopolies allows the government to potentially prevent competition and extend legal privileges or even subsidies to a single entity, preventing meaningful competition within a given marketplace.[40]

Insofar as antitrust laws operate not to preclude coercive monopolies but rather to create and subsidize them, it is possible they serve to discourage more efficient business practices which might provide better services and products to consumers.[41] In some instances, monopolies created of their own volition through efficient business practices and beneficial participation in the marketplace may not only be innocuous, but rather be the highest manifestation of efficient economic engagement.[42] Entities which obtain a monopoly in this way, rather than by the government's grant, do not actually prevent other entities from entering the marketplace—they merely operate efficiently of their own accord.[43]

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[36] *Id.*

[37] *Id.*

[38] *See* Ballabh, *supra* note 8, at 903.

[39] *Id.* at 903-04.

[40] *Id.* at 908.

[41] *See id.*

[42] *See id.*

[43] *See id.* Furthermore, whatever economic benefits may be derived from antitrust laws may be limited by the process of having to successfully bring an antitrust suit in order to enforce them. A crucial precondition to a successful antitrust suit is an actual threat to competition. Steuer, *supra* note 21, at 550. In fact, courts may find that activities violate other laws but are not themselves grounds for antitrust liability. *Id.* In Spectrum Sports, Inc. v. McQuillan, the Supreme Court held that the "notion that proof of unfair or predatory conduct alone" was insufficient to demonstrate a threat to competition such as would give rise to antitrust liability. *Id.*

B. THE ADVENT OF MLB'S NOVEL ANTITRUST EXEMPTION

Federal antitrust laws wield substantial influence over how professional sports leagues operate off the field.[44] Domestic professional sports leagues are huge economies in and of themselves, netting a cumulative billions of dollars in revenue annually.[45] The Supreme Court has thus seen fit to subject these economic giants to federal antitrust laws, requiring they engage in competitive practices, at least nominally precluding the creation of all-powerful sports monopolies.[46] Federal antitrust laws have often been a vehicle for doing away with sports-business practices which constitute "unreasonable restraints of trade," thereby giving athletes a greater say in their own professional destinies.[47]

Professional sports leagues have been targets for antitrust litigation for decades, and the courts have consistently required they be subject to antitrust regulation.[48] For example, in *Los Angeles Memorial Coliseum Commission v. National Football League*, the Ninth Circuit Court of Appeals held, within the National Football League ("NFL"), each individual franchise constituted an independent legal entity, operating in competition with one another.[49] The court reasoned treating the NFL as a single entity for the purposes of analysis under U.S. antitrust laws would completely free the league's business activities from regulation under § 1 of the Act.[50]

Such an outcome would suggest competitors could simply form together in a loose collection of legally independent entities to avoid antitrust liability.[51] The court characterized the relationship between

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[44] *See* Ulm, *supra* note 2, at 231; PATRICK K. THORNTON, LEGAL DECISIONS THAT SHAPED MODERN BASEBALL 158 (2012).

[45] Christina Gough, *North American Sports Market Size*, STATISTA (Mar. 1, 2021), https://www.statista.com/statistics/214960/revenue-of-the-north-american-sports-market/.

[46] *Antitrust Labor Law Issues in Sports*, US LEGAL (Mar. 26, 2022), https://sportslaw.uslegal.com/antitrust-and-labor-law-issues-in-sports/#:~:text=Baseball%2C%20football%2C%20basketball%2C%20and,Baseball%20Club%20of%20Baltimore%2C%20Inc.

[47] THORNTON, *supra* note 44, at 158.

[48] *Antitrust Labor Law Issues in Sports*, *supra* note 46. In evaluating these antitrust suits, the Supreme Court has stated that the rule of reason analysis, rather than per se illegal analysis, will generally apply. Woods, *supra* note 17, at 64. The Court has expressed a willingness to apply a per se illegal analysis only when the business practice at issue "is a naked restraint of trade with no purpose except stifling of competition." *Id.*

[49] Ulm, *supra* note 2, at 231.

[50] *Id.*

[51] *Id.* at 231-32.

the NFL and its member teams as a collection of independent competitors who "engage in the very types of economic competition that the antitrust laws exist to preserve."[52]

The Supreme Court reframed the question around professional sports leagues and antitrust laws entirely in *American Needle, Incorporated v. National Football League*.[53] The Court held the key inquiry requires determining whether the NFL and similar leagues are groups of "separate economic actors pursuing separate economic interests."[54] In other words, while professional sports leagues are free to join together in forming an overarching league identity, the leagues' member teams and business practices will be subject to scrutiny under antitrust laws.[55] Agreements and business practices engaged in by member teams of a given league will then be subject to scrutiny under the Rule of Reason, wherein the courts may determine whether those practices are acceptable.[56]

While other major professional sports leagues have been subjected to the Act's requirements, MLB has long enjoyed a singular exemption from federal antitrust laws.[57] The Supreme Court's infamous initial decision on the matter reasoned that MLB was not "commerce," but merely "entertainment," thereby did not warrant adherence to the Act.[58] On its face, this characterization seems incongruous; MLB gross revenues exceed $3.5 billion annually, with the World Series alone continuing to draw millions of viewers each year.[59] Despite growing into a substantial industry in its own right, MLB remains exempt from federal antitrust laws. This section will begin by examining the history of MLB's antitrust exemption and the reason for its enduring impact.

One of the defining historical emblems of baseball's antitrust exemption (and a source of significant controversy) was MLB's long-standing reserve clause system. Developed in the 1870s by National League founder William Hulbert, the intent of the reserve clause was to allow owners to maintain lower player salaries by retaining control over each player on a given team's roster.[60] The

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[52] *Id.* at 232.

[53] Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 195 (2010).

[54] *Id.*

[55] Ulm, *supra* note 2, at 232-33.

[56] *Id.*

[57] Bruce Fein, *Baseball's Privileged Antitrust Exemption*, 20 WASH. LAW. 37, 37 (2005).

[58] *Id.*

[59] *Id.* at 40.

[60] Woods, *supra* note 17, at 67-68.

reserve system gave each team exclusive rights over their players ' professional careers for many seasons, prohibiting that player from either negotiating with another team while under the reserve clause contract or even objecting to a trade or contract reassignment.[61]

Team owners recognized allowing competition amongst teams for players would necessarily increase players' salaries, thereby decreasing club ownership profits.[62] Although the reserve system was effectuated through reserve clauses inserted into individual player contracts, the system was not piecemeal or scattered; it was a widespread practice.[63] The practice was so ubiquitous it had the general effect of requiring that players acquiesce to its inclusion in their contracts at the risk of losing the opportunity to play professional baseball at all.[64]

The reserve clause was a key point of contention in the 20th and early 21st century's antitrust and labor disputes between MLB and its players.[65] The reserve clause functionally precluded players from freely moving between contracts and teams.[66] Under the reserve system, players could be traded or reassigned between teams and levels of play without their consent.[67] The reserve system further quashed competition between teams when it came to signing players because the reserve clause bound players to their teams for a designated length of years.[68] This amounted to a version of horizontal price fixing in what would otherwise be a violation of the Act.[69] The restrictions placed on players 'ability to compete in the marketplace for higher salaries made the reserve clause system a prime target for antitrust litigation in the 20th century.

1. *FEDERAL BASEBALL CLUB OF BALTIMORE, INC. V. NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS (1922)*

The antitrust exemption's origins stem from the Supreme Court's 1922 decision in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.[70] The early

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[61] *Id.* at 68.
[62] *Id.*
[63] *Id.*
[64] *See generally id.*
[65] *See generally* Thomas J. Ostertag, *Baseball's Antitrust Exemption: Its History and Continuing Importance*, 4 VA. SPORTS & ENT. L.J. 54, 56 (2004).
[66] *Id.*
[67] *Id.* at 60.
[68] *See* THORNTON, *supra* note 44, at 158-59.
[69] *Id.* at 159.
[70] Grow, *supra* note 3, at 213.

years of professional baseball were fraught with inter-league competition both on and off the field.[71]

The Federal Baseball League arose in 1914 to compete against the well-established American and National Leagues.[72] The Federal League originally functioned as a series of minor league clubs in a handful of cities until expressing its intention to expand and compete directly with the American and National Leagues.[73] This "third major league" failed to successfully manifest and was ultimately dissolved by settling with the other two leagues in 1915.[74]

The leagues settled for millions of dollars, leaving only the American and National Leagues in operation and, crucially, rendering them responsible for distributing settlement funds amongst former Federal League clubs.[75] The settlement funds were unevenly distributed based upon the American and National Leagues' perceived interests.[76] Owners of former Federal League clubs in cities with American and National League teams were bought out, while others were offered pittances.[77]

Ned Hanlon, owner of the former Baltimore Terrapins, was offered a mere $50,000 as compensation for losing his franchise.[78] Hanlon rejected his proposed settlement offer and brought an antitrust suit against the leagues and owners who had benefited from the settlement funds' distribution.[79] Hanlon argued the unfair division of funds amongst former Federal League team owners constituted a "collusive arrangement" between the Federal League and American and National Leagues, stemming from a "combination and conspiracy in restraint of trade" which ultimately harmed shareholders and consumers.[80] While Hanlon won damages from the jury at the trial court level, the suit was appealed up to the Supreme Court in what is now known as the infamous *Federal Baseball* decision.[81]

In *Federal Baseball*, the Supreme Court held professional baseball was not subject to the federal antitrust laws which made this kind of collusion unlawful, arguing any interstate travel

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[71] *See generally* Abrams, *supra* note 1, at 307.
[72] *Id.* at 307-08.
[73] Woods, *supra* note 17, at 70-71.
[74] *Id.* at 71.
[75] Abrams, *supra* note 1, at 308.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*

involved in baseball was not a defining characteristic of MLB's operations, but rather "a mere incident" of the game itself.[82] Being neither fundamentally interstate nor commerce, putting on baseball games could not be subjected to antitrust scrutiny under the Sherman Act.[83]

2. *TOOLSON V. NEW YORK YANKEES (1953)*

Over 30 years later, the Court revisited the question of the baseball antitrust exemption in the 1953 case *Toolson v. New York Yankees*.[84] In *Toolson*, a minor league baseball player brought an antitrust suit over baseball's restrictive reserve clause.[85] The *Toolson* Court was asked to determine whether the reserve clause requiring Toolson accept reassignment to a new minor-league program violated the Sherman Act.[86] The Supreme Court reaffirmed their *Federal Baseball* decision (and MLB's exemption from antitrust laws) in a brief per curiam opinion, relying both on the doctrine of *stare decisis* and the notion that baseball had spent three decades developing on the assumption it was exempt from antitrust laws.[87] The Court indicated, if any change were to be made on this question, it would have to come from the legislature.[88]

3. *FLOOD V. KHUN (1972)*

About 20 years after Toolson, the Court weighed in for what would be the final time to date in the 1972 case *Flood v. Kuhn*.[89] The case arose when the St. Louis Cardinals's center fielder Curt Flood refused to accept a forced trade to the Philadelphia Phillies following the 1969 season.[90] Flood unsuccessfully requested the Commissioner of baseball release him from his contract and, upon

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[82] *Id.* at 309.

[83] Grow, *supra* note 3, at 213; *see also* Fed. Baseball Club of Baltimore v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200 (1922).

[84] Grow, *supra* note 3, at 213.

[85] *See* Abrams, *supra* note 1, at 309-10.

[86] Woods, *supra* note 17, at 73.

[87] Abrams, *supra* note 1, at 310; Woods, *supra* note 17, at 73.

[88] Woods, *supra* note 17, at 73.

[89] Grow, *supra* note 3, at 213.

[90] THORNTON, *supra* note 44, at 159.

denial, filed suit against MLB.[91] Flood's suit alleged violations of state and federal antitrust and civil rights laws.[92]

The Supreme Court refused to change course, once again affirming their self-admittedly flawed line of cases stemming from *Federal Baseball*. The Supreme Court's decision in Flood, while acknowledging organized baseball did constitute interstate commerce, ultimately reaffirmed *Federal Baseball* and *Toolson*.[93] The Court reasoned Congress's failure to legislatively repeal baseball's antitrust exemption "implied a continued approval" of it. [94] Despite disagreeing with *Federal Baseball*'s original designation that organized baseball did not constitute interstate commerce, the Court again relied on the doctrine of *stare decisis* in holding that baseball's antitrust exemption would remain intact.[95]

The Court's majority opinion overtly conceded that *Federal Baseball* was incorrectly decided.[96] According to Justice Blackmun, MLB's antitrust exemption constituted an "established aberration," defaulting yet again to Congress's failure to unilaterally reverse course as defense of his rigid adherence to a flawed line of cases.[97] He stated without further articulation that baseball's "unique characteristics and needs" justified leaving the aberrant exemption in place and placing the onus on Congress to right any wrongs

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[91] *Id.* Upon learning of his impending trade to Philadelphia, Flood promptly announced his retirement from baseball. *Id.* at 163. Despite a lucrative contract offer from the Phillies, Flood was unwilling to suffer even two years of playing baseball in Philadelphia. *Id.* Flood penned a moving request to then-Commissioner of baseball Bowie Kuhn in December of 1969, expressing his desire to be released from his restrictive contract with the Cardinals and allowed to pursue a career with a club other than the Phillies. *Id.* at 165. Perhaps expressing his broader sense of the injustices that he faced as a black man in baseball in the mid-20th century, Flood wrote: "After 12 years in the major leagues, I do not feel that I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system that produces that result violates my basic rights as a citizen and is inconsistent with the laws of the United States and of the several states." *Id.* Commissioner Kuhn denied Flood's request and, shortly thereafter, his lawsuit commenced. *Id.* at 166.

[92] Abrams, *supra* note 1, at 311.

[93] *See id.*

[94] THORNTON, *supra* note 44, at 173.

[95] *Id.*

[96] Abrams, *supra* note 1, at 312.

[97] *Id.* at 311.

resulting therefrom.[98] This decision seemingly shut the door on any judicial changes to MLB's antitrust exemption, once again relegating the issue to the legislative sphere.[99]

II. THE ANTITRUST EXEMPTION'S ONGOING INFLUENCE

Today, the antitrust exemption remains in effect and maintains a fundamentally negative perception in the public eye.[100] In addition to the negative connotations generally associated with economic monopolies, the antitrust exemption is seen as a catch-all source of MLB's operational ills and its seemingly magnanimous influence over professional baseball domestically.[101] Favorable perceptions of the exemption seem to be the exception, rather than the rule, amongst academic and professional critics.[102]

In reality, however, the exemption's influence may be less monumental than generally assumed.[103] While *Federal Baseball*, *Toolson,* and *Flood* collectively form the historical through-line of jurisprudence on the question of baseball's antitrust exemption, more recent cases have begun to limit the reach of the exemption itself, even while leaving it firmly in place.[104] Some lower federal courts have attempted to limit the scope of the antitrust exemption in some instances, despite acknowledging they could not overturn it entirely.[105]

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[98] *Id.* Despite being subjected to antitrust laws, professional leagues like the National Basketball Association and the NFL have both grown into successful behemoths of their respective sports without the unique exemption MLB has historically enjoyed. Fein, *supra* note 57, at 39.

[99] *See* Ulm, *supra* note 2, at 237.

[100] *See generally* Grow, *supra* note 3.

[101] *Id.*

[102] *Id.*

[103] *See id.* at 273.

[104] Woods, *supra* note 17, at 76-77.

[105] *Id.* at 77-78. In 1993, the federal court for the Eastern District of Pennsylvania held in Piazza v. Major League Baseball that organized baseball's antitrust exemption ought to be "narrowly construed," based on that court's reading of Flood v. Kuhn. *Id.* at 77. In that case, the court held that the antitrust exemption did not extend to issues around the purchase and relocation of existing teams. *Id.* In 1994, another court—the Supreme Court of Florida—again attempted to limit the antitrust exemption's application to issues involving the reserve system only in Butterworth v. National League of Professional Baseball Clubs. *Id.* at 78. Here, a justice writing for the majority argued that it would "defy legal logic and common sense" to find that baseball was intended to enjoy a sweeping exemption from U.S. antitrust law. *Id.*

The actual effects of the antitrust exemption have been further limited and diluted as a result of piecemeal legislative reforms.[106] The Curt Flood Act and Sports Broadcasting Act, for example, respectively limit and entrench key aspects of the antitrust exemption legislatively.[107] In the context of MLB's labor relations with respect to players and its broadcasting rights, the antitrust exemption is now largely obsolete; were it to be judicially reversed, MLB's operations would remain unchanged in these areas due to relevant legislative advancements.[108]

Additionally, major league players formed their own formal union in the late 1960s in an effort to lobby on their own behalf with MLB leadership and owners.[109] The union sought to circumvent MLB's antitrust exemption insofar as it created unsavory working and labor conditions for major league players themselves, establishing "a private regime prohibiting the same collusive conduct by the owners" would be prohibited by antitrust laws.[110] Between lower court decisions, legislative action, and player unionization, the antitrust exemption's actual influence has become increasingly limited over time.

Given the judicial limitations effect on the exemption, legislative re-entrenchment of it, and other influences on MLB's business operations, calls to repeal the exemption may be misplaced. In addition to the antitrust exemption's lessened influence, it could be argued the exemption has fostered some meaningful operational benefits for MLB—benefits which may now be crucial to the league's operation. Exploring some of MLB's unique influences may explain both the extent of the antitrust exemption's actual ongoing influence and whether that influence is inherently problematic.

A. TERRITORIAL EXCLUSIVITY AND CONTROL: MLB'S FRANCHISE RELOCATION POLICIES & BROADCASTING STRUCTURE

1. *FRANCHISE RELOCATION AND THE CREATION OF NEW TEAMS*

MLB exercises substantial influence over the geographic distribution of baseball teams.[111] The league's territorial exclusivity

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[106] *See* Blair & Wang, *supra* note 12, at 18-19.
[107] *See generally id.*
[108] *Id.*
[109] Abrams, *supra* note 1, at 312.
[110] *Id.*
[111] *See generally* Fein, *supra* note 57, at 40.

scheme makes establishing a new franchise or relocating an existing team to a new city or market extremely challenging.[112] The league's requisite procedural restrictions have made team creation or relocation a rare occasion in MLB history.[113] The restrictions are designed to ensure established franchises will not have to compete with other teams within their geographic market.[114] This creates a functional "monopoly" over a given area for each team and ensuring that even teams who share a single media market may both remain successful.[115] This is accomplished not only by restrictive league procedures, but also by business practices which appear, on their face, to be fundamentally anti-competitive in nature and, therefore, potential sites for antitrust claims.

The challenges facing the creation of the Washington Nationals baseball team illustrates some of the challenges and controversies surrounding baseball's territorial exclusivity scheme.[116] Baltimore Orioles owner Peter Angelos worked tirelessly to prevent the creation of a MLB team in Washington, D.C. in hopes of protecting the Orioles from the inevitable interstate competition—and potential deflation of the Orioles's value—which another nearby MLB team would threaten. [117] Although Washington, D.C. ultimately got their team, Angelos secured "monopolistic control" over the Nationals's television rights with the silent consent of MLB. [118] MLB ultimately awarded Washington, D.C. their franchise, but simultaneously required the team "become a fringe minority partner in a new regional sports network," controlled by Angelos himself.[119]

This functionally maintained Angelos's control over broadcasting rights for not only his team, but for the new Nationals franchise as well.[120] The significant annual revenue generated by television rights is second only to ticket sales; Angelos has thereby successfully deprived an entirely separate team of crucial potential revenue, which could have significant implications for the Nationals's ability to compete on the field (and, by extension, the team's financial health and sustainability). [121] This plainly anti-competitive arrangement, whereby a single team's ownership can

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[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *See id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*

maintain a functional monopoly over an entire geographic area, would likely ring antitrust alarm bells in any other industry.[122]

MLB's influence over team relocation efforts stands alone among major professional sports leagues.[123] While antitrust rulings have curbed the other professional sports leagues' ability to closely regulate team relocation efforts, MLB retains unique influence over this particular aspect of franchise activity.[124] MLB rules require three-quarters of all MLB clubs approve any potential franchise relocation.[125] Although this kind of hurdle is common amongst the other major professional sports leagues, MLB's antitrust exemption does ultimately allow it to exert greater influence over relocation efforts than its counterparts in other sports.[126] This is because other professional sports leagues, such as the NFL and NBA, are subject to various other antitrust holdings which have limited their ability to restrict and even prevent franchise relocation on various occasions.[127]

In the context of franchise relocation, the Ninth Circuit has held on multiple separate occasions the rejection of a franchise's request to relocate would be subject to a rule of reason analysis, allowing the court to evaluate myriad factors in determining whether the rejection is fundamentally anticompetitive.[128] The leagues remain free to establish reasonable, legitimate restraints on team relocation, thereby retaining some discretion in such determinations.[129] Taken together, however, these judicial antitrust rulings constrain arbitrary restrictions on franchise relocation requests in the other leagues—constraints to which MLB is notably exempt.[130]

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[122] *See generally id.*

[123] Grow, *supra* note 3, at 232-33.

[124] *Id.* at 233.

[125] *Id.*

[126] *Id.* at 234.

[127] *Id.* at 234-35.

[128] *Id.*

[129] *Id.* at 235.

[130] *Id.* at 234-35. In *Los Angeles Memorial Coliseum Commission v. Nat'l Football League*, the Ninth Circuit found that there could be legitimate reasons for a sports league to restrict franchise relocation, such as protecting fan loyalties in a given city, preserving rivalries, preserving municipalities 'financial interests, and maintaining a team in a major media market, among others. Los Angeles Memorial Coliseum Commission v. Nat'l Football League, 791 F.2d 1356 (9th Cir. 1986). Similarly, the court in *Nat'l Basketball Ass'n v. SDC Basketball Club* held that the practice of rejecting a particular relocation request would be a "question of fact to be judged under the rule of reason." Nat'l Basketball Ass'n v. SDC Basketball Club, 815 F.2d 562 (9th Cir. 1986).

The Oakland Athletics sought approval from MLB to move the team to San Jose, despite the fact San Jose fell within the San Francisco Giants's "exclusive territory."[131] In order to move into that geographic area, the Athletics had to secure the approval of at least 75% of MLB franchises.[132] After the potential move had languished in a MLB committee created to analyze its likely impacts for four years, the City of San Jose filed suit alleging violation of antitrust laws.[133]

The Ninth Circuit reaffirmed the now long-standing antitrust exemption, stating the Supreme Court had fully intended to exempt the business of baseball from antitrust laws.[134] The Ninth Circuit articulated the two consistent, lasting themes informing judicial opinions on MLB's antitrust exemption: first, the principle of *stare decisis*, and second, the fact Congress had functionally accepted the Court's decisions by failing to overrule them legislatively.[135]

Despite appearing on their face as would-be antitrust law violations, the practical ease of MLB's relocation restrictions are notable points in favor of the antitrust exemption.[136] While the MLB's business restrictions with respect to relocation may seem overly restrictive, they may prevent unfavorable alternatives like cities or ownership groups engaging in disruptive and dramatic bidding wars, or teams "hold[ing] cities hostage" in an effort to extort a new stadium or favorable lease deal out of the city or taxpayers.[137] The possibility remains that repealing the antitrust exemption, rather than attempting to legislate specific restrictions where necessary, could lead to more frequent relocations and the resulting economic instability, to say nothing of franchise chaos within MLB itself.[138]

One benefit of the antitrust exemption in the context of franchise relocation is the longstanding, league-wide stability with respect to team location that MLB enjoys to the greatest extent of all professional leagues.[139] This stability is more than a shallow or nominal benefit, however. Frequent franchise relocation means increased negative impact on communities who lose out on the

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[131] Blair & Wang, *supra* note 12, at 30.
[132] *Id.*
[133] *Id.* at 31.
[134] *Id.*
[135] *Id.*
[136] *See* Citelli, *supra* note 4, at 295.
[137] *Id.* at 295-96.
[138] *Id.* at 296.
[139] Grow, *supra* note 3, at 236 ("[O]nly a single MLB franchise has relocated since 1972—the 2005 move of the struggling Montreal Expos franchise to Washington, D.C.").

relocating franchise.[140] In addition to the intangible harms associated with losing a major professional sports team, the loss can result in negative financial effects for the former host city.[141]

Loss of a professional sports franchise can have the effect of rendering a city incapable of paying back unpaid debts on facilities like stadiums in addition to potential future losses from sports-related tourism and tax revenues cities may depend on.[142] Even receipt of a replacement franchise may fail to meaningfully make up for the loss of a former team.[143] And while MLB's structure does allow for team continuity and overarching league stability, Congress retains the ability to place pressure on MLB in the event the league arbitrarily rejects a proposed relocation or franchise expansion.[144] For example, Congress may intervene to ensure the MLB grants the "rejected suitor" city a franchise in place of the failed relocation request.[145]

Additionally, requiring MLB to approve any individual franchise relocation may actually have the benefit of decreasing the likelihood a given team will attempt (potentially successfully) to demand things like public stadium subsidies from potential host cities.[146] Because cities know MLB must approve any potential franchise relocation, it may give cities the necessary leverage to avoid such extortionate demands.[147]

Territorial exclusivity and the related restraints on franchise creation and relocation are significant sources of conflict over the antitrust exemption.[148] Insofar as MLB's territorial exclusivity scheme foments anti-competitive arrangements which actually cause harm to individual franchises, the legislature could threaten—or, as needed, establish—restrictions designed to encourage competition. For example, the legislature could formulate operational guidelines which require MLB to bring their related business practices into compliance with § 1 of the Act.[149]

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[140] *Id.*

[141] *Id.* at 236-37.

[142] *Id.* at 237.

[143] *Id.* The intangible losses are not to be discounted as trivial; they may involve loss of civic identity or local pride for a city or state's residents as well as loss of "national visibility" for a given city.

[144] *Id.* at 238.

[145] *Id.*

[146] *Id.* at 223.

[147] *Id.* at 222-23.

[148] *See* Michael H. Juárez, *Baseball's Antitrust Exemption*, 17 HASTINGS COMM. & ENT. L. J. 737, 759 (1995).

[149] *Id.* at 759-60.

As with any other potentially anti-competitive business practice under the Act, MLB's restrictions on franchise creation and relocation could be legislatively subjected to the Act's requirements and, by extension, the Rule of Reason test.[150] Under such a structure, MLB would be required to justify its business practices in the context of its economic benefits, thereby ensuring that practices which are in fact beneficial if not crucial to MLB's operation would remain uninhibited by the Act's regulation.[151]

2. *DISTRIBUTION OF BROADCASTING RIGHTS*

Providing fans access to view a given team's games is an essential element of that team's brand management, facilitating brand awareness and loyalty.[152] In general, sports leagues utilize a business model wherein national media rights to view the league's games are sold on behalf of all of the teams within the league.[153]

By contrast, teams sell local media rights within their home territories, largely without competition.[154] This model facilitates game blackouts, wherein out-of-market media providers black out the local team's games.[155] This forces consumers to purchase both the media package which will allow them to watch out-of-market games as well as a subscription to their local or regional sports networks.[156] As a result, teams generate substantial revenue by selling the rights to broadcast their games to local or regional sports networks.[157] MLB's national television contracts bring in more than $1.5 billion annually.[158] That revenue is then split evenly between each MLB team, a system designed to promote an economically competitive balance amongst the teams.[159]

These broadcast rights arrangements have been anticompetitive and challenged on antitrust grounds in prior suits.[160] Because antitrust laws are designed to promote competition within a given marketplace, the unavailability of options for consumers looking to watch all of their team's games strongly suggests, in the absence of MLB's antitrust exemption, these business practices could be

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[150] *Id.* at 760.
[151] *Id.*
[152] John A. Fortunato, *Sports Leagues' Game Exposure Policies: Economic and Legal Complexities*, 3 J. GLOBAL SPORT MGMT. 1, 2 (2018).
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.* at 3.
[159] *Id.* at 4.
[160] *Id.* at 2.

challenged under the U.S.'s antitrust laws.[161] In response, teams have argued restrictive media practices "are necessary to protect individual team broadcast revenue, ensure competitive balance, and the overall quality of the league."[162]

Competition requires consumers to have the option of choosing between two or more products which can be "acceptable substitutes for each other."[163] Sports leagues' anticompetitive broadcasting practices are protected by the Sports Broadcasting Act of 1961 which granted sports leagues an exemption from antitrust laws, allowing them to collectively sell their national broadcasting rights to the highest bidder.[164] Local broadcasting rights, however, revert back to the individual teams to sell and distribute within their own territory.[165] These local broadcasting rights can be a substantial source of revenue for teams on an individual basis.[166] In MLB, for example, the Los Angeles Dodgers bring in approximately $320 million per year from their regional sports broadcasting network, SportsNet LA.[167]

The ability to exclusively distribute local broadcasting rights is an anticompetitive practice in two significant ways. First, because most geographic areas have only one local MLB team (with exceptions in New York and Northern California), regional sports networks are beholden to the potentially exorbitant prices MLB teams are able to charge for their broadcasting rights.[168] This price may be passed on to consumers who only have one regional broadcast option for viewing their local MLB team and may be charged a monthly subscription price for access to that network.[169]

Additionally, MLB precludes out-of-market teams from competing with a given region's local team for broadcasting opportunities.[170] This means the New York Yankees may not sell the rights to broadcast their games in another team's home region, such as Boston or Washington D.C.[171] This model prevents teams

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[161] *See id.*
[162] *Id.* at 10.
[163] *Id.* at 4.
[164] *Id.* at 6-7.
[165] *Id.* at 7.
[166] *Id.*
[167] *Id.*
[168] *See id.* at 7-8.
[169] *See id.* at 7.
[170] *Id.*
[171] *See id.*

from competing against one another for broadcast rights within a given territory.[172]

Despite being anticompetitive on their face, these broadcast rights restrictions may be not only beneficial but necessary to MLB's continued existence and vitality as a sports league.[173] Absent territorial exclusivity arrangements, MLB teams could infringe on other teams 'broadcast opportunities by seeking broadcast relationships within that team's territory, thereby potentially interfering with viewership for the local team.[174]

Local broadcasting deals already generate uneven levels of revenue for their local MLB teams. For example, while the Los Angeles Dodgers bring in approximately $320 million annually, the San Diego Padres local broadcast arrangement only brings in about $60 million per year.[175] It is reasonable to suspect by allowing teams to cross into one another's territories with respect to distribution of broadcasting rights would exacerbate existing revenue-related inequalities amongst MLB teams.[176]

Digital media distribution offers MLB fans the opportunity to watch out-of-market games that fans could not view in their home territories.[177] A fan who intended to watch every game available in a given season could do so by purchasing a subscription for a digital media distributor (like DirecTV or MLB.TV), cable to view the national broadcasts, and a regional sports network.[178] Notably, the content and cost of digital media distribution (both satellite and internet-based) are determined by MLB.[179] Fans 'ability to watch games using digital media is limited by the league's goal of maximizing league revenue through national distribution and protecting each team's ability to generate local revenue through regional network arrangements.[180]

B. THE RELATIONSHIP BETWEEN MLB & MILB: HISTORY AND REALIGNMENT

The unique relationship between major and minor league baseball has reached an historic and unprecedented turning point. In 2020, the most recent Professional Baseball Agreement ("PBA") expired, which has historically governed relations between MLB

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[172] *Id.*
[173] *See id.*
[174] *See id.*
[175] *Id.*
[176] *See generally id.* at 6-8.
[177] *Id.* at 9.
[178] *Id.*
[179] *Id.*
[180] *Id.*

and MiLB. The negotiations were fraught, but the historic division of financial responsibility between the two leagues meant MLB had the benefit of wielding almost exclusive leverage in the discussions.[181]

The development of MiLB & growth of MLB "have been inextricably linked as far back as the late 19th century."[182] Early fiscal difficulties led to the creation of Player Development Plans ("PDP") wherein MLB executives took financial control over MiLB teams. [183] This facilitated the formal recognition of multiple hierarchized classifications of the minor leagues depending upon player skill level and requiring each MLB team take on many MiLB affiliates.[184]

These relationships were further formalized through Player Development Contracts ("PDCs") between individual MLB teams and their minor league affiliate programs.[185] Under the PDCs, MLB teams agreed to fund baseball operations for their affiliated MiLB teams, including paying salaries for everyone from players and coaches to scouts to medical staff.[186]

The division of financial costs and responsibilities between MLB and MiLB programs have remained consistent over the last several decades, with MLB organizations continuing to fund salaries for managers, coaches, and players.[187] They also retain responsibility for player development decision-making.[188] This financial relationship remains beneficial to MiLB organizations, whose values have consistently risen; some MiLB teams "are now valued as high as $49 million."[189]

These fraught negotiations came to an unsuccessful conclusion on September 30, 2020, when the prior PBA expired without the

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[181] *See Why MLB's Minor Leagues as You Know Them Will End Sept. 30*, ESPN (Sept. 3, 2020), https://www.espn.com/mlb/story/_/id/29795127/why-mlb-minor-leagues-know-end-sept-30 [hereinafter *MLB's End*].

[182] Theodore McDowell, *Changing the Game: Remedying the Deficiencies of Baseball's Antitrust Exemption in the Minor Leagues*, 9 HARV. J. SPORTS & ENT. L. 1, 4 (2018).

[183] *Id.* at 5.

[184] *Id.*

[185] *Id.*

[186] *Id.* at 5-6.

[187] *Id.* at 6.

[188] *Id.*

[189] *Id.*

sides coming to an agreement on a new one.[190] MLB continues to stand by its proposal to drastically overhaul MiLB, largely to the latter's chagrin.[191] The organizational restructuring led to a reduction in minor league teams affiliated with MLB franchises from 162 to 120.[192]

To call these "negotiations" may be stretching that term's definition to its breaking point, however. MLB retains "all the leverage" in negotiations with MiLB, largely because of the financial divisions that have historically defined their PBAs in the past.[193] Among MLB's alleged justifications for MiLB team contraction is their desire to increase minor league players' salaries and improve players' work conditions, an endeavor which would be even cheaper and would result in fewer players on MiLB payrolls.[194]

MLB's alleged interest in improving working conditions for minor leaguers spurred MLB to announce impending facility upgrade requirements. Shortly after the PBA expired, MiLB owners and executives received MLB's proposed facility standards.[195] What many feared would be an extensive list of expensive changes has turned out to be a relatively benign list of improvements.[196] MiLB ownership has largely balked at the idea of facility improvements, while MLB executives have touted it as a driving motivator behind renegotiating the now-expired PBA.[197]

To the surprise of some MiLB owners, however, the list of required upgrades for most facilities proved not only unsurprising, but a relief; many of the proposed changes are of the kind likely to be paid for by municipalities, rather than MiLB organizations themselves.[198] The changes include sizing requirements for team clubhouses, improved food-prep and dining areas, better field

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[190] Eric Fisher, *MiLB, MLB Continuing to Negotiate Absent Agreement*, SPORTBUSINESS (Oct. 2, 2020), https://www.sportbusiness.com/news/milb-continuing-to-negotiate-with-mlb-absent-agreement/.

[191] *See id.*

[192] Passan, *supra* note 7.

[193] *Id.*; Patrick OKennedy, *MLB Takeover of Minor League Baseball Is Almost Complete*, SBNATION (Nov. 4, 2020), https://www.blessyouboys.com/2020/11/4/21546362/mlb-takeover-of-minor-league-baseball-is-almost-complete.

[194] Passan, *supra* note 7.

[195] Kevin Reichard, *MiLB Facility Guidelines Released; Owners Sanguine*, BALLPARK DIGEST (Nov. 2, 2020), https://ballparkdigest.com/2020/11/02/milb-facility-guidelines-released-owners-sanguine/.

[196] *Id.*

[197] *Id.*

[198] *Id.*

lighting, overall improved training facilities for players, and separate facilities for female employees where necessary.[199] Not only do many newer MiLB facilities already meet these requirements, but the improvements that will be necessary in the wake of these new standards will likely be funded by municipalities.[200]

The structural relationship between MLB and MiLB could, in the absence of the exemption, possibly be subject to scrutiny under § 2 of the Act.[201] Vertical integration, a practice by which a monopolist "performs multiple stages of production" rather than contracting with external, competing entities.[202] This process has the potential to create a secondary monopoly whereby the monopolist suppresses prices in the production of its necessary goods in order to maximize their own profit margins.[203] Similarly, MLB's control over the business and baseball practices of MiLB represents a potential example of vertical integration which, in the absence of the exemption, could be found by courts to violate Section 2 of the Act.[204]

Although the relationship between MLB and MiLB would arguably violate federal antitrust laws in the absence of the exemption, the effect of that relationship has not been entirely negative.[205] Despite the shock of watching MLB eliminate 40 teams from MiLB affiliation, the minor leagues enjoyed a relatively successful 2021 season.[206] The contraction and overall restructuring of MiLB led to higher wages for minor leaguers, facility improvements, and improved travel conditions.[207] Salaries

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[199] *Id.*

[200] *See id.* (noting that municipalities generally bear the financial responsibility for "permanent physical improvements," while teams pay for temporary ones only).

[201] Ulm, *supra* note 2, at 234.

[202] *Id.* at 233-34.

[203] *Id.* at 234.

[204] *Id.*

[205] *See generally* Chelsea Janes, *What a Restructured Minor League System Could Mean for Teams Lost in the Shuffle*, WASH. POST (Feb. 27, 2021), https://www.washingtonpost.com/sports/2021/02/27/minor-league-baseball-restructuring/.

[206] *See generally* Mark Feinsand, *Revamped Minor Leagues Enjoy Historic 2021*, MLB.COM (Sept. 23, 2021), https://www.mlb.com/news/minor-league-baseball-has-successful-2021-season.

[207] *Id.*

increased by between 38 and 72%, and greater increases are apparently coming in the future as well.[208]

The reduction in MiLB teams with formal MLB affiliation will allow MLB to regulate things more efficiently like team travel; MLB's restructuring will prevent MiLB teams from having to travel as frequently and as far as they have had to travel for games in the past.[209] MLB's control over MiLB will also mean improved facilities for players going forward, requiring MiLB teams to provide meals for players while they are at work, and potentially future salary increases as well.[210]

C. THE PLIGHT OF MINOR LEAGUERS: MLB'S LABOR POLICIES

While the casual fan may associate professional baseball with the lavish, multi-million dollar contracts make the headlines, the financial status of most minor leaguers could scarcely be more dire.[211] Although the cultural "sanctity" of baseball has long concealed MLB's problematic labor relations with minor leaguers, the veil of secrecy has begun to lift ever so slightly in recent years.[212] MiLB is a large organization employing approximately 6,000 players—but the majority earn less than $10,000 a year for what's often 50-70 hours of labor during each week of MiLB's five-month-long regular season.[213] For most MiLB players, annual net income from playing baseball is between $3,000 and $7,000—figures well below the federal poverty line.[214]

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[208] *Id.*

[209] Janes, *supra* note 205.

[210] *Id.*

[211] *See* McDowell, *supra* note 182, at 3.

[212] *See* Garrett R. Broshuis, *Touching Baseball's Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players*, 4 HARV. J. SPORTS & ENT. L. 51, 57 (2013).

[213] McDowell, *supra* note 182, at 2.

[214] *Id.* The complaint in *Senne v. Office of the Commissioner of Baseball* describes the pay structure at issue which the lawsuit claims violates the FLSA's minimum wage requirements. Nathaniel Grow, *The Save America's Pastime Act: Special-Interest Legislation Epitomized*, 90 U. COLORADO L. REV. 1013, 1017 (2018) (citing Complaint, Senne v. Off. of the Comm'r of Baseball, No. 3:14-cv-00608-JCS (N.D. Cal. 2014), 2014 WL 1028967 [hereinafter Senne Complaint]. According to the complaint, first-year minor league players are paid a monthly salary of only $1,100, to be paid only during MiLB's regular season. *Id.* For subsequent seasons, minor leaguers are compensated based on a "recommended salary scale," in which the competitive level of play determines a player's available salary range. *Id.* This scale dictates that players at the lowest

In 1962, MLB and MiLB agreed to a Player Development Plan which established MLB teams would fund its MiLB teams and operations, including providing salaries for all players and personnel.[215] While some costs have shifted to minor league team owners since the original Player Development Plan, MLB teams have continued to not only pay all of the salaries for players and personnel, but to make player development decisions.[216] This financial arrangement helps to explain the appallingly low wages paid to minor league players: MLB players have long footed the bill for minor leaguers' salaries without immediately reaping the competitive benefits of retaining those players.[217]

The first Collective Bargaining Agreement (CBA) between MLBPA and MLB came to fruition in 1968 and was the first of its kind in the history of professional sports.[218] The CBA cemented minimum salaries, pension plans, grievance procedures, and other positive benefits for players—all while explicitly limiting the scope of its beneficiaries to *major league* players, specifically.[219] The agreement explicitly stipulated "in making this Agreement the Association represents that it contracts for and on behalf of the

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competitive level continue to receive only $1,100 a month, and players at the more advanced levels have the opportunity to receive up to $2,700 a month. *Id.* No matter how many years a player has been with MiLB, however, they are still only paid for the five-month regular season. *Id.* This caps the salary for a minor leaguer playing at the highest competitive levels of MiLB at about $16,000 annually. *Id. Senne* further alleges that these pay practices violate the FLSA's overtime pay standards. *Id.* During the season, players may work up to seventy-hour weeks in addition to mandatory (but unpaid) off-season requirements. *Id.* This pay structure means that most MiLB players earn well below the federal minimum wage of $7.25. *Id.* at 1017-18. In response to the plaintiffs' claims that MLB's pay practices violate the FLSA's pay provisions, MLB argued that pre-existing exemptions provided by the FLSA meant that minor leaguers were, in fact, not protected by the law at all. *Id.* at 1019 (citing Answer at 71-77, *Senne*, No. 3:14-cv-00608-JCS, 2014 WL 1028967. These exemptions pertained to "seasonal, amusement or recreational establishments" and workers "employed in a 'bona fide professional capacity.'" *Id.*

[215] Broshuis, *supra* note 212, at 61.

[216] *Id.* at 62.

[217] *See id.* at 62-63.

[218] *Id.* at 70 (citing Jeffrey S. Moorad, *Major League Baseball's Labor Turmoil: The Failure of the Counter-Revolution*, 4 VILL. SPORTS & ENT. L.J. 53, 63 (1997)).

[219] *Id.* at 73.

major league baseball players and individuals who may become major league baseball players during the term of this Agreement."[220]

When a player signs with a minor league team or is drafted by a MLB franchise, they sign a Uniform Player Contract ("UPC").[221] These contracts have the effect of not only reducing minor leaguers' bargaining power, but are arguably fundamentally anticompetitive.[222] These agreements represent the independent yet parallel actions of each MLB franchise to manipulate the market for players, creating a system by which MLB ownership continues to benefit. [223] This seemingly straightforward arrangement for professional baseball's organizational entities has created a complicated and frustrating situation for players on the ground. Requiring MLB to pay player salaries has "created a perverse business incentive" wherein MLB organizations are incentivized to pay MiLB players poverty wages in an effort to keep operation costs down.[224]

MLB's industry-wide pay scale for minor leaguers would undoubtedly violate the Act were it not for their novel antitrust exemption.[225] The exemption allows MLB to functionally collude in depressing salaries for MiLB players.[226] MLB owners set a minimum salary for all MiLB players, which must be the same across all first-year players in the minor leagues, per the Major League Rules ("MLRs").[227] MLB also establishes a cap on signing bonuses for minor leaguers; teams who exceed the cap established by the "Signing Bonus Pool" suffer penalties, such as being assessed additional taxes or losing draft picks.[228]

The Supreme Court remains unwilling to revisit the question of MLB's antitrust exemption, even in the face of would-be antitrust

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[220] *Id.* at 73-74. Both the MLBPA and the courts have narrowly interpreted the phrase "individuals who may become major league baseball players," thereby perpetuating minor leaguers' exclusion from the MLBPA's protections. *Id.* The result of including this language is the exclusion of minor leaguers from MLBPA's representation and the CBA's protections. *Id.*

[221] Ulm, *supra* note 2, at 230.

[222] *Id.*

[223] *Id.*

[224] McDowell, *supra* note 182, at 7.

[225] *See, e.g.*, Grow, *supra* note 214, at 1018.

[226] McDowell, *supra* note 182, at 10.

[227] *Id.*; *The Official Professional Baseball Rules Book*, MAJOR LEAGUE BASEBALL, Rule 3(c)(2)(B), https://registration.mlbpa.org/pdf/MajorLeagueRules.pdf (last visited April 2, 2022).

[228] *Id.* at Rule 4(A)-(B).

suits brought by minor league players alleging serious labor-related problems. The Supreme Court's recent decision to deny certiorari in *Miranda v. Selig* is illustrative on this question.[229] A group of minor league baseball players sued MLB in 2017, alleging MLB's labor policies with regard to minor league players constituted collusion in violation of § 1 of the Act.[230] The suit was dismissed by the district court and its dismissal affirmed by the Ninth Circuit, citing the Supreme Court's long-held precedent granting MLB an antitrust law exemption.[231] The plaintiffs filed a petition for certiorari to the Supreme Court, attempting to broach not only the issue of baseball's antitrust exemption, but further inquiring into the Curt Flood Act's constitutionality under the equal protection clause.[232]

The Supreme Court denied certiorari, refusing to address any questions proposed by the suit and leaving the antitrust exemption in full effect.[233] It has been argued not even the doctrine of *stare decisis* should continue to protect this plainly egregious exemption.[234] The Supreme Court has subjected industries to the Act despite arguments those industries had developed wholly absent antitrust regulations, and yet refuses to do so for MLB specifically.[235]

Although the courts have proven unwilling to budge on baseball's antitrust exemption, a recent lawsuit took aim at MLB's labor practices without requiring an antitrust reversal. The case, *Senne v. Office of the Commissioner of Baseball*, was filed by former minor league pitcher Garret Broshuis.[236] Broshuis represents current and former minor leaguers in a class action suit alleging

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[229] *See generally* Blair & Wang, *supra* note 13, at 33 (citing Miranda v. Selig, 138 S. Ct. 507 (2017)).

[230] *Id.* at 32-33 (citing Miranda v. Selig, 860 F.3d 1237 (9th Cir. 2017)).

[231] *Id.* at 33.

[232] *Id.* The Curt Flood Act's purpose is to "make the antitrust laws applicable to the MLB in its dealings with MLB players." *Id.* at 29. However, the Act excludes minor league players. *Id.* at 30.

[233] *Id.* at 33 (citing Miranda v. Selig, 138 S. Ct. 507 (2017)).

[234] Fein, *supra* note 57, at 39.

[235] *Id.* Not only has the Supreme Court frequently reversed precedent when circumstances warranted, but MLB's "interstate imprint" has grown substantially and now yields significant negative effects for the league and its players. *See id.*

[236] Grow, *supra* note 214, at 1014-15; *see also* Senne Complaint, *supra* note 214.

MLB's practices with regard to MiLB violated both the FLSA's federal minimum wage and overtime pay requirements.[237]

Senne was an unprecedented legal challenge to MLB's labor practice with respect to minor leaguers, charging MLB had violated various provisions of the FLSA.[238] These violations included MLB's failure to abide by federal minimum wage and overtime pay rules with regard to minor leaguers.[239] They also included failure to pay minor leaguers for their participation in "off-season" activities, such as spring training, instructional leagues, and other mandatory workout programs—all of which take place outside of MiLB's championship season.[240]

All told, the *Senne* lawsuit was seen by many in MLB and MiLB as a looming threat to "the future of minor league baseball."[241] *Senne* sparked concerns MLB could reduce the financial subsidies provided by teams to their MiLB affiliates in an effort to compensate for increased player payroll costs.[242] MiLB feared a decrease in subsidies could "potentially result in some minor league teams being driven out of business."[243] Crucially, *Senne* remains an active suit, with the Supreme Court recently declining to dismiss the class certification.[244]

The treatment of minor league players would likely violate federal antitrust law in the absence of the exemption.[245] The structure of MiLB player contracts means a single franchise may exert control over a player's career trajectory, pay, and working conditions for several years, denying that player the opportunity to "sell his skills on the open market."[246] It has been argued allowing minor leaguers to compete in an open market for players would allow them to compete for higher wage—a practice currently precluded by MLB's current relationship with MiLB.[247] If MLB

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[237] Grow, *supra* note 214, at 1015.

[238] *Id.* at 1017.

[239] *Id.*

[240] *Id.*

[241] *Id.* at 1023-24.

[242] *Id.* at 1024 (citing Stanley M. Brand & Andrew J. Giorgione, *The Effect of Baseball's Antitrust Exemption and Contraction on Its Minor League Baseball System: A Case Study of the Harrisburg Senators*, 10 VILL. SPORTS & ENT. L.J. 49, 50 (2003)).

[243] *Id.* at 1024-25 (citing Brand & Giorgione, *supra* note 242).

[244] Passan, *supra* note 7.

[245] Ulm, *supra* note 2, at 246.

[246] *Id.* at 244.

[247] *Id.* at 247 (citing Complaint at 27-28, Miranda v. Selig, No. 14-cv-05349-HSG (N.D. Cal. Sept. 14, 2015), 2015 WL 5357854 [hereinafter Miranda Complaint]).

was precluded from engaging in the kind of anticompetitive practices which operate to suppress minor leaguers' wages, it is possible an open market for players could develop, ultimately resulting in higher wages at the minor league level.[248]

III. PIECEMEAL REFORMS: THE ONLY WAY FORWARD

The very notion of exempting a multi-billion-dollar industry from federal antitrust laws contradicts much about American economic identity.[249] However, in light of legislative developments, lower court decisions, and independent actions taken by MLB in response to public pressure, the antitrust exemption itself no longer can be said to independently influence MLB's business operations.

Some of the antitrust exemption's impacts, such as the ability to maintain stability amongst franchises, have a positive impact on MLB's operations. Other impacts, such as its broadcasting structures, have been solidified by legislation and would endure in the face of the exemption's repeal. The worst of its impacts—including the labor conditions experienced by minor leaguers—can and should be reformed through a combination of piecemeal legislative reform and public pressure on MLB's decisionmakers.

It is worth noting some of the concerns generally surrounding industry monopolies have not come to fruition despite MLB's functional monopoly over professional baseball. While manipulation of output and prices are some of the dominant concerns around monopolies, MLB does not, on its face, appear to be taking advantage of either of these aspects of their business, despite possessing a functional monopoly over professional baseball domestically.[250]

In terms of output, MLB already produces significantly more "product" for consumers than the other sports leagues; MLB teams

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[248] *See id.* at 240 (citing Miranda Complaint, *supra* note 247). In applying a rule of reason analysis, the court will engage in an in-depth market analysis in determining whether a given practice or agreement is anticompetitive. *See id.* at 250. Given the discretionary nature of the analysis, it is difficult to gauge whether or not the treatment of minor leaguers would be a violation of the Sherman Act under a rule of reason analysis. *See id.* at 251.

[249] *See* Abbot Lipsky, *Protecting Consumers by Promoting Competition,* FED. TRADE COMM'N (Mar. 6, 2017) ("Competition is the fuel that drives America's free-market system."), https://www.ftc.gov/enforcement/competition-matters/2017/03/protecting-consumers-promoting-competition.

[250] *See* Grow, *supra* note 3, at 217.

play nearly double the games that NBA and NHL teams play annually, and the season extends for as long as is practical for weather purposes.[251] It does not appear baseball's singular antitrust exemption has resulted in artificially depleted output in relation to the other professional sports leagues.[252] MLB ticket prices do not appear to reflect monopolistic manipulation, either.[253] The average ticket price for attendance at one of MLB's 162 games is less than half the price charged for attendance at one of the other professional leagues' games.[254]

The cases over the last 20 years seem to indicate, while some courts and Congress may remain open to limiting the scope of the antitrust exemption under particular circumstances, its reversal remains unlikely.[255] Lower courts' unwillingness to break from baseball's long-standing antitrust exemption to any significant degree further cements the notion Congress can change the extent to which baseball may be subject to antitrust scrutiny.[256]

Congressional willingness to interfere in baseball's operational affairs has grown more prevalent in recent years.[257] Congress frequently wields the threat of legislatively repealing the antitrust exemption in order to influence MLB's actions and operations.[258] The limited nature of prior Congressional action with regard to MLB's antitrust exemption suggests Congress may remain unwilling to legislatively repeal the exemption in its entirety. Congress has been relatively selective in determining which issues warranted legislative protection.[259]

Repealing the exemption may actually have a very limited effect on baseball's operations; despite being technically subject to federal antitrust laws, most professional sports leagues engage in similarly anticompetitive conduct under the piecemeal protection of other legal precedents.[260] Additionally, Congress has wielded increasing influence over baseball by threatening revocation of the

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[251] *Id.* at 218.
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *See generally* Citelli, *supra* note 4, at 105.
[256] Ulm, *supra* note 2, at 247.
[257] Citelli, *supra* note 4, at 102.
[258] *Id.*
[259] *Id.* Congress opted to limit the Curt Flood Act of 1998 to issues involving labor protections for major league players, excluding other issues relating to minor leaguers, relocation restrictions, and other practices potentially implicated by antitrust laws. *See* Citelli, *supra* note 4, at 104.
[260] Grow, *supra* note 3, at 215.

antitrust exemption over the years.[261] This has allowed Congress to place legislative pressure on MLB to "extract various pro-competitive concessions," some of which would have been impractical to obtain through the kind of antitrust lawsuits which the exemption's repeal might otherwise make room for.[262] Merely subjecting MLB to federal antitrust law may not have yielded such significant benefits.[263]

Advocates concerned about the negative impacts of MLB's antitrust exemption—especially with respect to minor leaguers ' labor conditions—should focus instead on the enactment of creative, piecemeal legislative improvements. Congress has, at times, taken legislative action to lift the antitrust exemption's hold on certain aspects of MLB's operations.[264] Notably, these piecemeal policy changes have not "wreak[ed] havoc amongst the teams, owners, or players," but rather fostered new, innovative approaches to baseball operations without any significant interruption to the league at large.[265]

While members of Congress proposed and debated various potential revisions to baseball's antitrust exemption—and even extending comparable exemptions to other professional sports leagues—most efforts failed.[266] There has rarely (if ever) been any semblance of broad Congressional support for repealing baseball's antitrust exemption. [267] Some individual representatives have expressed dissatisfaction with baseball's policies or decisions by threatening repeal or limitation, but such threats have never come to fruition.[268]

Despite the Court's repeated appeals to Congress to limit baseball's antitrust exemption insofar as they were willing to, the first legislative action on this question did not arise until 1998.[269] In 1998, Congress passed the Curt Flood Act which not only eliminated the reserve system, but allowed major league baseball players to receive protection under U.S. antitrust laws, even in the face of the league's broader judicial exemption.[270] The Curt Flood

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[261] *Id.*

[262] *Id.*

[263] *Id.* at 217.

[264] *See* Fein, *supra* note 57, at 39.

[265] *Id.*

[266] *See generally* J. Gordon Hylton, *Why Baseball's Antitrust Exemption Still Survives*, 9 MARQ. SPORTS L. J. 391, 400-02 (1999).

[267] *Id.* at 402.

[268] *See id.*

[269] Ostertag, *supra* note 65, at 65.

[270] Woods, *supra* note 17, at 78.

Act specifically brought major league baseball within the ambit of federal labor legislation by amending the Clayton Act to apply to MLB players.[271]

Although appearing to finally address concerns arising out of the ongoing antitrust exemption, the Curt Flood Act ultimately had only limited scope of influence.[272] It only subjected MLB to antitrust scrutiny with respect to the employment of major league baseball players.[273] This language not only implicitly excludes minor league baseball players by specifying its application to major leaguers only, but goes on to qualify itself as only subjecting MLB to antitrust scrutiny insofar as other professional sports leagues are subject to it.[274]

The Curt Flood Act also gives sole authority to bring suit against MLB for an antitrust violation to major league players themselves, rather than allowing the government or another injured actor to do the same.[275] The Act's limited scope ultimately precludes suits from being brought with respect to agreements involving umpires, franchise expansion or relocation, and minor league baseball operations.[276] Taken together, this means labor relations with respect to minor league baseball players and their contracts, as well as agreements regulating territorial exclusivity within MLB, remain exempt from antitrust scrutiny.[277]

One reason for congressional inaction on MLB's antitrust exemption is MLB's lobbying capabilities.[278] MLB's wealthiest beneficiaries of the antitrust exemption—club owners, for example—have significant resources to allocate to lobbying efforts in their favor; this stands in stark contrast to the few resources available to lobby in favor of minor league players' interests.[279] Minor league players lack both the vast, organized numbers and the political and financial connections allowing MLB ownership to successfully lobby in their own favor with Congress.[280]

MLB and MiLB have a history of effective and aggressive collective lobbying efforts. MiLB has significant reach, with over 160 teams across forty-two states, giving the organization the capacity to "exert influence over a large and geographically diverse

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[271] Ulm, *supra* note 2, at 237.
[272] *Id.* at 238.
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] *See generally id.* at 238-39.
[278] *See* Blair & Wang, *supra* note 12, at 38.
[279] *Id.*
[280] *Id.*

group of congressional representatives."[281] The most recent (and damaging) manifestation of these collective lobbying efforts led to the passage of the Save America's Pastime Act (*SAPA*) as part of Congress's 2018 omnibus spending bill.[282]

SAPA first took shape in 2016, when MLB and MiLB successfully lobbied two members of Congress, Representatives Brett Guthrie (R-KY) and Cheri Bustos (D-IL), to introduce the bill in the U.S. House of Representatives.[283] *SAPA* intended to explicitly exempt minor leaguers from the FLSA's pay protections, including minimum-wage and overtime requirements.[284] The original *SAPA* never made it out of the House of Representatives, but its proponents had only to wait a couple of years to see its key elements codified in federal legislation.[285]

Congress's 2018 omnibus spending bill ultimately included a modified, abbreviated version of the *SAPA*.[286] The new *SAPA* included narrower exclusions from the FLSA.[287] Now, players who made "a weekly salary greater than the weekly equivalent of the current minimum wage for a forty-hour work week" during MiLB's regular season would be exempted from the FLSA's pay protections.[288] This meant "as long as players were paid at least $290 per week" for the duration of the five-month season, they received no additional FLSA protections, regardless of the hours worked each week.[289]

While appearing to be a "modest improvement" on the original *SAPA*, this ultimately meant "little more than an additional $60 per month for players at the lowest levels of the minor leagues," while still withholding any compensation for any hours worked over forty each week, along with additional work performed outside of MiLB's regular season.[290]

When MLB sought to get *SAPA* passed, they enlisted minor league owners themselves to participate in the endeavor.[291] One minor league owner expressed an understanding that passing *SAPA*

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[281] *Id.* at 1025.
[282] Save America's Pastime Act, H.R. 5580, 114th Cong. (2015).
[283] Grow, *supra* note 214, at 1025.
[284] *Id.*
[285] *Id.* at 1028.
[286] *Id.*
[287] *Id.* at 1029.
[288] *Id.*
[289] *Id.*
[290] *Id.*
[291] *MLB's End*, *supra* note 181.

could potentially help stave off the looming threats of contraction.[292] Minor league owners did their part to lobby representatives on behalf of MLB, despite knowing that MiLB players' exemption from federal labor laws would only be further solidified by its passage.[293] *SAPA* passed, and with just a few short paragraphs on page 1,967 of Congress's 2018 $1.3 trillion spending bill, minor leaguers' exemption from federal wage protections was legislatively solidified. [294] Some MiLB owners and their congressional representatives expressed feelings of betrayal when they learned two years later the MiLB contraction would move forward regardless, cutting the MiLB teams from 160 to 120.[295]

Although some congressional representatives—formerly home to some of the 40 MiLB teams eliminated in 2021—had supported the labor restrictions codified by SAPA based on their understanding *SAPA* would save MiLB from contraction, the circumstances have now changed substantially. [296] Some lawmakers, including those who had formerly supported *SAPA* when MLB lobbied for its passage, have expressed concern over MLB's use of the antitrust exemption to shield itself from legal scrutiny, especially in light of the recent MiLB contraction. [297] Given this significant change in circumstances, a pathway toward greater Congressional support for limiting the reach of MLB's antitrust exemption may be opening—even if Congress remains largely unwilling to repeal the exemption entirely.[298]

Congress should commit to a course of action which involves narrow, piecemeal involvement in MLB's business practices. First, Congress should pass legislation amending the Curt Flood Act to bring minor league players within the protections of federal antitrust laws. Doing so would allow minor league players to bring suit with respect to suppressed wages and poor working conditions without requiring courts to abide by the antitrust exemption's restrictions.[299] Minor leaguers' suits have languished and died in the lower courts over the years, unable to be decided on the merits because of the antitrust exemption.[300]

While such legislation would not guarantee the courts would find an antitrust violation had occurred with respect to minor

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[292] *Id.*
[293] *See id.*
[294] *Id.*
[295] *Id.*
[296] *See generally id.*
[297] *See id.*
[298] *See id.*
[299] *See* Ulm, *supra* note 2, at 247.
[300] *See, e.g.*, *id.*

leaguers 'contracts, it would give them an opportunity to be heard in court which has long been denied to them as a result of the exemption.[301] At the very least, it would give courts the opportunity to meaningfully analyze whether baseball's business practices with respect to minor league players are anticompetitive for the first time in MLB's long history.[302]

Now is the crucial time for Congress to act. With the conclusion of MLB and MiLB's formal business partnership in recent months and MLB's expanding relationships with the Independent Leagues, Congress should act now to establish new labor norms. Once the dust settles between MLB and its new partnership leagues (including the stripped-down minor league franchises who have not been eliminated), it may become increasingly difficult for MLB to adapt to significant operational changes.

Congress should intervene now, when years of momentum on the issue of minor leaguers' pay provides adequate support for such action and professional baseball is in a state of significant flux. Congress could ensure MLB does not continue to take advantage of its antitrust exemption to entrench more problematic labor practices in their relationships with MiLB and the Independent Leagues. While this single legislative action may address only a narrow subset of potential issues stemming from the antitrust exemption, it would also signal to MLB they remain beholden to Congressional pressures and may not exercise complete control over professional baseball absent regulation.

Although Congress retains the ability to influence MLB's business operations through piecemeal legislative reforms, other sources of external pressure may be equally if not more likely to yield positive results for minor leaguers. One reason for MiLB players exclusion from Congressional action has been the lack of representation in negotiations.[303] For example, without a union to represent players, the Curt Flood Act's protections were negotiated

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[301] Ulm, *supra* note 2, at 248.

[302] *Id.* Contrary to the notion that increasing player salaries is somehow impractical, requiring that each MLB franchise pay each of their signed minor league players a salary of $40,000 annually would lead to less than a 5% increase in each team's annual payroll expenses. *Id.* at 245. In fact, some teams have stepped up to the plate in terms of improving minor league player salaries and working conditions. *Id.* In 2019, the Toronto Blue Jays announced a prospective 50% increase in minor leagues' salaries. *Id.*

[303] Jeremy Venook, *Minor Leagues, Minimum Wages*, THE ATLANTIC (Sept. 21, 2016), https://www.theatlantic.com/business/archive/2016/09/minor-leagues-minimum-wage-lawsuit/500216/.

solely between MLB, MLBPA, and the Minor League Owners Association.[304] Not only do minor leaguers lack their own union through which to negotiate on their own behalf, but they cannot count on representation by MLBPA or MiLB itself.[305]

When it comes to minor leaguers, the MLBPA is caught in the crosshairs of conflicting incentives.[306] On the one hand, MiLB's players are potential future MLB players; on the other, without a spot on the 40-man roster, a minor leaguer cannot claim membership in the union.[307] It is entirely possible going to bat for minor leaguers 'interests could potentially conflict with the MLBPA's duty to represent its members 'best interests.[308]

Minor leaguers, on the other hand, have no formal union.[309] It has been argued unionizing could give minor league players significant leverage in their efforts to improve not only their salaries, but other labor issues such as medical care, players' food and meals, and related working conditions.[310] Although there are no formal external barriers to unionization, MiLB players have failed to unionize in part because MiLB players fear rocking the boat in a way which could "jeopardize the chance of reaching the majors and a big payday."[311]

There are also some structural barriers to unionization built into MiLB itself, including the fact most minor leaguers don't know each other and lack a formal avenue to develop relationships with one another around the league.[312] Because minor league franchises are spread out across the country and players frequently change location, organizing is difficult.[313] Another challenge lies in the sheer diversity of minor leaguers' experiences; some are drafted, some are signed with clubs, some will have a short tenure with MiLB and some will spend their entire professional careers there.[314] Logistical issues pertaining to movement between the majors and the minors contribute to the overall challenge of establishing a union

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[304] *Id.*

[305] *Id.*; *see also* Grow, *supra* note 214, at 1023-24.

[306] *See* Venook, *supra* note 303.

[307] *Id.*

[308] *See id.*

[309] James Wagner, *Minor Leaguers Lack a Safety Net. A New Group Wants to Create One*, NY TIMES (Mar. 20, 2020), https://www.nytimes.com/2020/03/20/sports/baseball/minor-league-advocates.html?action=click&module=RelatedLinks&pgtype=Article.

[310] Grow, *supra* note 214, at 1040-41.

[311] McDowell, *supra* note 182, at 18; Wagner, *supra* note 309.

[312] *See* Venook, *supra* note 303.

[313] *See generally id.*

[314] *See id.*

for minor leaguers and, as a result, none has ever successfully emerged.

MLB has recently proven they are not immune to public pressure. In response to "mounting pressure from players and advocacy groups," MLB recently announced a policy requiring teams provide housing for minor leaguers beginning in 2022.[315]

Public outcry over minor leaguers' working conditions has swelled in recent years as advocacy organizations like Advocates for Minor Leaguers and More Than Baseball have worked to bring minor leaguers 'stories into the public eye.[316] These organizations have helped mobilize a larger discourse in part through social media use, demonstrating more organized efforts at advocacy amongst minor leaguers than has occurred previously.[317] Some have hinted this could signal a move toward minor league players unionization at some point in the future.[318]

IV. CONCLUSION

Baseball's antitrust exemption, solidified over 50 years' worth of Supreme Court decisions, remains a lasting, unpopular aberration in sports law. While the exemption is not without its faults, its impacts may be overblown in some respects, even if its impact is not entirely positive. In some respects, the exemption is merely the earliest version of a status quo developed legislatively over several decades. The impact of the exemption for MLB's operations has arguably resulted in some benefits as well, including greater stability within the league and amongst franchises.

The exemption wields significant influence with respect to MLB's business operations, but its enduring impact stems in large part from legislative re-entrenchment. Congress can and should take a more active role in adopting piecemeal legislation designed to remedy the individual problems which do arise from the exemption. Some of them—such as low wages for minor league players—require urgent attention. At a minimum, Congressional pressure could motivate MLB to pursue pro-competitive practices and policies. Given the recently restructured relationship between MLB and MiLB and some positive developments intended to benefit minor leaguers, now is the time for Congress to adopt legislation. This will not only benefit the players, but also signal to MLB that

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[315] Passan, *supra* note 7.
[316] *Id.*
[317] *Id.*
[318] *Id.*

while it may retain a formal exemption from federal antitrust laws, MLB is not immune to regulation.

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GENE DOPING IN ATHLETICS: THE CURRENT PRACTICES AND SUGGESTIONS FOR THE FUTURE

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CONTENTS

INTRODUCTION

Most Americans are familiar with scandals involving high profile athletes using banned drugs, or even blood doping in an effort to enhance athletic performance. However, few are familiar with a little-known technology that could become even more

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dangerous and more difficult to detect: gene doping. With this emerging technology, it is now possible to introduce a gene into an athlete's DNA that could enhance their athletic performance and leave little trace of its existence.

Gene doping use has been banned from use in the Olympic Games and in National Collegiate Athletic Association (NCAA) competitions.[1] Despite worldwide recognition of the inequity that gene doping could create in athletics, major professional athletic associations in the United States have failed to prohibit it.

Not only is gene doping currently allowed in professional athletics, it is also largely unregulated within the organizations that forbid it.[2] The potential of gene doping and genetic technology is virtually endless as it has the potential to change nearly any gene in the human body to enhance performance.[3] Because there are endless possibilities with the gene that could be altered, there is no mechanism to monitor for all gene doping forms.[4] Currently, the proposed method for monitoring alterations to the genetic makeup is to take a genetic sample from an athlete to create a "gene passport." This passport would create a reference which could be used to track any genetic changes, thus signaling that an athlete has been gene doping.

Professional associations should attempt to begin negotiating to ban gene doping. The WADA, and the NCAA should implement systems to begin testing for gene doping. Negotiations with payers' unions could take several decades, so introducing the idea of banning gene doping should happen as soon as possible. If these establishments do not ban the practice, players will be at risk for injuries and may burn out faster, while trade systems may crumble.

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[1] *Athlete Guide to the 2020 Prohibited List*, U.S. ANTI-DOPING AGENCY, https://www.usada.org/athletes/substances/prohibited-list/athlete-guide-to-the-2020-prohibited-list/ (last visited Dec. 30, 2020); *2020-21 NCAA Banned Substances*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/sport-science-institute/topics/2020-21-ncaa-banned-substances (last visited Dec. 24, 2020).

[2] *See Frequently Asked Questions About Drug Testing*, NCAA, https://www.ncaa.org/sports/2014/3/25/frequently-asked-questions-about-drug-testing.aspx (last visited Feb. 15, 2020) [hereinafter *Frequently Asked Questions*]. The NCAA and WADA both ban gene doping, but the NCAA does not test for gene doping, and WADA only tests for gene doping with regard to increased levels of EPO. *Id.*

[3] *See* Lucy Battery et al., *Gene Doping: Olympic Genes for Olympic Dreams*, J. ROYAL SOC'Y MED. (Dec. 2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3241516/.

[4] *See id.*

Part II discusses the current regulations and testing those athletes comply with across different organizations, as well as the legal mechanism requiring athlete compliance. Part III explains the science behind gene doping and the expansive possibilities gene doping could have on the body. Part IV covers the suggestions regarding whether professional athletic organizations should adopt a ban on gene doping and how that could take place. This section also addresses the possible means by which gene doping could be further regulated and tested to ensure compliance with each organization's current testing provisions.

I. ATHLETIC ASSOCIATIONS: HOW DO THEY BAN DIFFERENT PRACTICES, WHY DO THEY BAN THEM, AND WHAT DO THEY BAN?

Doping and drug use have been banned within athletic associations for decades.[5] There are legal mechanisms in place to ensure athletes consent to drug testing and adhere to the banned practice guidelines among the different associations.[6] However, the basis of allowing the testing and monitoring for doping and drug use lies in contract law.[7] Additionally, there are distinctive policy considerations for banning different practices. These policies could factor heavily into the particular associations' decisions that have already banned gene doping, and those that may consider banning gene doping in the future.

The following section explains the differences in rationales for various bans, the legal framework for banning different practices, precisely what is banned in those organizations, and current testing practices.

A. THE OLYMPIC CHARTER

Athletes participating in the Olympics must participate in drug and doping tests in compliance with the Olympic Charter, an agreement that countries and athletes agree to when they participate

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[5] *See* Claudia L. Reardon & Shane Creado, *Drug Abuse in Athletes*, SUBSTANCE ABUSE & REHAB. (Aug. 14, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4140700/.

[6] *See, e.g.*, *Drugs and Testing*, USLEGAL, https://sportslaw.uslegal.com/drugs-and-testing/ (last visited Feb. 8, 2022).

[7] *See* Matthew Hard, Note, *Caught in the Net: Athletes' Rights and the World Anti-Doping Agency*, 19 S. CAL. INTERDISC. L.J. 533, 535-36 (2010), https://gould.usc.edu/why/students/orgs/ilj/assets/docs/19-3%20Hard.pdf.

in the Olympic Games.[8] The Olympic Charter explains the Olympic Movement goals, which includes the International Olympic Committee (IOC) and National Olympic Committees (NOCs).[9] The Olympic Charter requires complete compliance with the World Anti-Doping Agency and for athletes follow the World Anti-Doping Code.[10]

In 2009, WADA implemented the Athlete Biological Passport, which stores individual athletes' hematological information.[11] This biological passport began monitoring for steroid use in 2014, but current guidelines do not include monitoring for gene doping.[12] Current guidelines provide that athletes who are expected to participate in the Olympics allow for WADA to be tested at any place and at any time.[13] Failure to comply with testing when a WADA official approaches an athlete for a sample, results in disqualification from participating in future games for a specified time.[14]

WADA can test athletes because countries agree to adhere to the testing and anti-doping guidelines by participating in the Olympics.[15] Athletes also comply with testing requirements because they agree to the relevant terms when they compete, and because the punishment for non-compliance is a ban from competition.[16] Courts in the United States have found that these contractual provisions are constitutional because participation in

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[8] *See generally* Int'l Olympic Comm., *Olympic Charter* (Aug. 8, 2021), https://stillmedab.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf#_ga=2.248398082.400855338.1605428713-849736782.1605428713.

[9] *Id.* at 15.

[10] *See id.* at 81-82.

[11] WORLD ANTI-DOPING AGENCY, ATHLETE BIOLOGICAL PASSPORT OPERATING GUIDELINES 4 (2019), https://www.wada-ama.org/sites/default/files/resources/files/guidelines_abp_v71.pdf [hereinafter ATHLETE BIOLOGICAL PASSPORT].

[12] *See generally id.*

[13] *See id.* at 10.

[14] *See* Adam Kilgore, *World Champion Sprinter Christian Coleman is Banned from Tokyo Olympics for Missed Drug Tests*, WASH. POST (Oct. 27, 2020), https://www.washingtonpost.com/sports/2020/10/27/world-champion-sprinter-christian-coleman-is-banned-tokyo-olympics-missed-drug-tests/.

[15] *See World Anti-Doping Code*, WORLD ANTI-DOPING AGENCY, https://www.wada-ama.org/en/what-we-do/world-anti-doping-code (last visited Feb. 10, 2022).

[16] *See id.*

athletics is a privilege not a right, and therefore the requirements for participation act as the consideration within an agreement.[17]

For example, Chinese Olympic swimmer Sun Yang received an eight-year ban from participating in the Olympics for refusing to participate in a doping test without being notified beforehand.[18] The three-time Olympian was met by three WADA officials in his hometown in 2018.[19] After a vial of his blood was taken, Yang ordered his personal security guard to smash the blood vial.[20] Yang also refused to produce a urine sample.[21] The swimmer had long been fighting to maintain his Olympic eligibility, but a panel unanimously decided in 2020 that Yang's actions warranted his eight-year ban, and will likely be career-ending.[22]

Additionally, the United States Anti-Doping Agency (USADA) monitors American athletes. Congress created and funded the USADA in 2004.[23] The USADA monitors drug use and doping within competitions organized by the US Olympic Committee, including events that qualify American athletes to compete in the Olympics.[24] Also, American athletes are subject to blood testing at any time without advance notice by USADA, and failure to comply results in a ban from competition for a specified time.[25] Moreover, blood and urine samples taken from athletes can be preserved and saved for up to ten years for testing in later years.[26]

The Olympic Committee attempts to promote fairness and sportsmanship within the Games. Drug use and blood doping have

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[17] *See, e.g.*, Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 659 (Cal. 1994).

[18] *Chinese Swimmer Sun Yang Banned Again, to Miss Tokyo Olympics,* ESPN (June 22, 2021), https://www.espn.com/olympics/swimming/story/_/id/31686617/chinese-swimmer-sun-yang-banned-again-miss-tokyo-olympics.

[19] Brakkton Booker, *Champion Chinese Swimmer Sun Yang Gets 8-Year Ban for Doping Violation*, NPR (Feb 28, 2020, 12:47 PM), https://www.npr.org/2020/02/28/810331548/champion-chinese-swimmer-sun-yang-gets-8-year-ban-for-doping.

[20] Braden Keith*, Vial of Sun Yang's Blood Allegedly Smashed with Hammer in Drug Test Altercation*, SWIM SWAM (Jan. 27, 2019), https://swimswam.com/vial-of-sun-yangs-blood-allegedly-smashed-in-drug-test-altercation/.

[21] *See* Booker, *supra* note 19.

[22] *Id.*

[23] *See* 21 U.S.C. § 2001.

[24] *See* USADA, *Testing*, U.S. ANTI-DOPING AGENCY (July 15, 2021), https://www.usada.org/athletes/testing/.

[25] *Id.*

[26] *Id.*

long been banned within the Olympics to prevent unfair competition between world-class athletes, allowing an athlete's hard work and talent to prevail over unnatural enhancement.[27] These policies allow athletes from all backgrounds and countries to compete with each other without the fear another athlete has an advantage because of their county or circumstances.[28]

When the gene doping issue became apparent, WADA quickly banned the practice.[29] The Olympic Charter requires athlete compliance with the World Anti-Doping Code, which prohibits drug use, and blood and gene doping.[30] The ban on gene doping was originally instated in 2003 and has been in place since.

B. NCAA AND CONSENT TO TESTING FORMS

Like in the Olympics, the National Collegiate Athletic Association (NCAA), the organization that oversees Division 1 collegiate athletics, aims to promote fair competition.[31] Policies preventing students from participating in certain unfair practices help even the playing field amongst students at different universities.[32] Unlike the goals embodied in the Olympic Charter, the NCAA is concerned with athlete safety.[33] Bans on different substances and practices are in place to protect students from the consequences of non-medicinal use of pharmaceuticals, burnout, and substance abuse.

The NCAA may regulate athletes' actions and test for drugs and doping through a consent form which athletes are required to sign before they can participate in collegiate athletics.[34] Signing the consent form includes submitting to tests and complying with the NCAA policies prohibiting the certain drug use, prescription

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[27] *See WADA Ethics Panel: Guiding Values in Sport and Anti-Doping*, WORLD ANTI-DOPING AGENCY (Oct. 2017), https://www.wada-ama.org/sites/default/files/resources/files/wada_ethicspanel_setofnorms_oct2017_en.pdf.

[28] *See id.*

[29] *See Gene Doping,* WORLD ANTI-DOPING AGENCY, https://www.wada-ama.org/en/gene-doping (last visited Aug. 15, 2020).

[30] *See World Anti-Doping Code*, *supra* note 15.

[31] NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA DRUG-TESTING PROGRAM 2021-22 (LaGwyn Durden ed., 2021), https://ncaaorg.s3.amazonaws.com/ssi/substance/2021-22/2021-22SSI_DrugTestingProgram.pdf.

[32] *See id.*

[33] *See id.*

[34] Sarah Polcz & Anna Lewis, *Welcoming Prometheus: Experimental Support for Deregulating Gene Doping*, SSRN ELECTRONIC J. 8 (Jan. 2018), https://www-cdn.law.stanford.edu/wp-content/uploads/2017/07/Welcoming-Prometheus-SSRN-id2971558.pdf.

medications, blood doping, and gene doping.[35] The NCAA is a private organization with the bargaining power to subject athletes to test for banned substances.[36]

Courts have determined that athletes' participation in collegiate athletics is a privilege, not a legal right.[37] Thus, the NCAA can require athletes adhere to certain rules and policies, including the drug testing policies in place. [38] Additionally, courts have held the agreements do not conflict with state or federal rights to privacy.[39] As a private organization, the NCAA does not infringe on an individual's right to privacy if an athlete's expectation of privacy is upheld by the organization.[40] By signing a consent form to submit to drug and doping testing, athletes lower their privacy expectation and acknowledge the typical privacy they could expect, concerning their medical history and genetic information, does not apply.[41]

Drug testing within the NCAA is coordinated and executed by Drug-Free Sport International (DFSI).[42] If athletes test positive for performance-enhancing drugs (PEDs), they are automatically withheld from competition for one full year.[43] The athlete also loses a full year of athletic eligibility from participating in their sport in the NCAA.[44] If the athlete tests positive a second time, they lose all remaining eligibility.[45]

If an athlete is selected for testing for banned substances, they are subject to the same consequences as if the test were positive.[46] Athletes can be subject to urinalysis testing with no notice and can be tested in their off-season from their sport.[47]Although there are

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[35] Consent Form 20-1b, NCAA, NCAA Division I Drug-Testing Consent (2020-21), https://ncaaorg.s3.amazonaws.com/compliance/d1/2020-21D1Comp_Form20-1b-DrugTestingConsentBannedList.pdf.

[36] ADAM EPSTEIN, SPORTS LAW 179 (Cengage Learning, 1st ed., 2002).

[37] *See, e.g.*, Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 659 (Cal. 1994).

[38] *Id.* at 703.

[39] *Id.* at 658.

[40] *See id.*

[41] *See* Epstein*, supra* note 36, at 164.

[42] NAT'L COLLEGIATE ATHLETIC ASS'N, 2019-2020 NCAA YEAR-ROUND DRUG-TESTING SITE COORDINATOR MANUAL 3 (2019), https://ncaaorg.s3.amazonaws.com/ssi/substance/2019-20SSI_YearRoundSiteCoordinatorDrugTestManual.pdf.

[43] *Frequently Asked Questions*, *supra* note 2.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

serious consequences for testing positive for banned substances, and gene doping is prohibited by the NCAA, the NCAA does not currently test for the use of gene doping.[48]

In 2014, only a few years after the Olympic Committee and WADA banned gene doping use, the NCAA banned the practice as well.[49] The NCAA consent form required to participate in sports mandates compliance with the NCAA drug and doping policies.[50] These policies include submitting to tests and prohibiting certain drug use, prescription medications, blood doping, and gene doping.[51]

C. PROFESSIONAL LEAGUES AND COLLECTIVE BARGAINING AGREEMENTS

Professional athletic associations ban many of the same substances as WADA and the NCAA, but generally ban the substances several years later than other organizations.[52] Most professional athletic associations legally enforce these bans through collective bargaining agreements (CBAs).[53] CBAs are encompassing contracts that are binding on teams and players.[54] Players agree to the CBA when they participate in the league.[55] CBAs may require continued monitoring of athletes during pre-season, in the regular season, and sometimes in the off-season.[56]

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[48] *See id.*

[49] Polcz & Lewis, *supra* note 34, at 8.

[50] *See, e.g.*, Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 640 (Cal. 1994); *Frequently Asked Questions*, *supra* note 2. Notably, the Supreme Court of California acknowledged that the consent forms that agree to drug testing policies are valid on the students, even though the NCAA is a monopoly with far greater bargaining power than any one student. *Hill*, 865 P.2d at 640.

[51] *NCAA Banned Substances*, NCAA (July 6, 2021), https://www.ncaa.org/2015-16-ncaa-banned-drugs.

[52] *See, e.g.*, Len Pasquarelli, *NFL Adds Amphetamines to Banned Substances List*, ESPN (June 27, 2006), https://www.espn.com/nfl/news/story?id=2501680.

[53] *See id.*

[54] *See, e.g.*, Mark M. Rabuano, Comment, *An Examination of Drug-Testing as a Mandatory Subject of Collective Bargaining in Major League Baseball*, 4 U. PA. J. LAB. & EMP. L. 439, 440 (2002).

[55] David M. Washutka, *Collective Bargaining Agreements in Professional Sports: The Proper Forum for Establishing Performance-Enhancing Drug Testing Policies*, 8 PEPP. DISP. RESOL. L. J. 147, 147-48 (2007).

[56] *See* Joshua Winneker, *It's Time to Blow the Whistle on Performance Enhancing Drugs*, 20 LEWIS & CLARK L. REV. 55, 67 (2016).

To make changes to the CBA, the party controlling the agreement must first determine if the change is for a mandatory or permissive subject.[57] Mandatory subjects must be bargained with by the union that represents players, and permissive subjects can be inserted into the CBA without bargaining.[58] For permissive subjects, the athletic association may still choose to bargain with players and the union.[59] Mandatory subjects typically have a direct impact on the association's relationship with the player, while permissive subjects have a more nuanced effect on the player-association relationship.[60] Clauses requiring drug testing and procedures for such are typically mandatory for bargaining with labor unions under the National Labor Relations Act.[61] Legal scholars predict changes to drug testing and other bans for practices are likely also mandatory subjects.[62]

Because bans on different substances and practices are probably mandatory subjects for creating a new CBA for athletic associations, players must agree to the changes for them to apply.[63] Historically, players and their unions have been hesitant to budge in bargaining with associations about drug testing policies because athletes want to avoid potential scandals if they are caught.[64] When negotiating, drug testing policies have been a major point of contention, and a bargaining chip players' unions hang on to, often conceding on other important provisions to prevent drug and substance testing from occurring.[65]

Fan support is a major reason why unions cave when negotiating and allow provisions implementing bans of more stringent testing policies.[66] When fans do not think games are fair and speculate about drug use with no testing schemes in place, viewership and support dwindle.[67] Fans find it difficult to support

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[57] Rabuano, *supra* note 54, at 440.

[58] *Id.* at 446.

[59] *Id.*

[60] *Id.* at 447.

[61] *See id.* at 441.

[62] *Id.* at 449-51.

[63] *Id.* at 446.

[64] *Id.* at 442.

[65] Wolfgang S. Weber, Comment, *Preserving Baseball's Integrity Through Proper Drug Testing: Time for the Major League Baseball Players Association to Let Go of Its Collective Bargaining Reins*, 85 U. COLO. L. REV. 267, 269 (2014), http://lawreview.colorado.edu/wp-content/uploads/2014/01/13.-85.1-Weber_Final-edited.pdf.

[66] *Id.* at 285-86.

[67] *See id.*

their favorite teams and players if they think games are not fairly won. As fans lose faith in the integrity of the sport, unions are more likely to allow testing policies.[68] Further, as fans speculate about drug use and game fairness, unions are more likely to allow some changes to drug policies.[69]

Additionally, it may take bargaining in several subsequent CBAs for associations to convince players' unions to agree to changes.[70] Sometimes, drug testing policy changes are withheld to be used as bargaining chips for negotiating future CBAs, being used in the future as concessions to prevent other objectionable provisions from being included.[71] Players' unions usually allow small changes in testing policies in return for additional player benefits, such as salary increases or performance-based player incentives.[72]

While CBAs are typically the governing document for banned substances and actions, player contracts may also influence whether players must comply with different CBA provisions.[73] If a player's contract includes not having to undergo random drug testing, a later-changed CBA could not force compliance with random testing requirements.[74]

In the mid-2000s, the MLB attempted to implement random testing for performance-enhancing drugs after pushback from players who opposed including testing in the CBA.[75] The MLB required players to consent to random testing with a provision in a standard annual form apart from the CBA.[76] The players' union for MLB players filed a grievance, arguing the CBA was the singular

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[68] *See id.*

[69] *Id.* at 286.

[70] *See generally* Rabuano, *supra* note 54, at 278-79. A prominent example of this has been the MLB's attempts to prohibit PED drug use. While PED's are now banned in the MLB, the change came after decades of the MLB pushing the topic in negotiations for Collective Bargaining Agreements, even attempting to circumvent the CBA at times. *See* Zachary D. Rymer, *Full Timeline of MLB's Failed Attempts to Rid the Game of PEDs,* BLEACHER REPORT (June 10, 2013), https://bleacherreport.com/articles/1667581-full-timeline-of-mlbs-failed-attempts-to-rid-the-game-of-peds.

[71] *See* Weber, *supra* note 65, at 265.

[72] *Id.*

[73] *Id.* at 280.

[74] *Id.*

[75] *Id.* at 273-74.

[76] Rabuano, *supra* note 54, at 454-55.

document that could impose requirements on players.[77] The arbitrator who heard the grievance agreed implementing random testing for PED use was a mandatory subject for which the MLB was required to bargain with the player's union to include in the CBA.[78]

While the Olympic Committee and the NCAA are focused on promoting fairness within competition, professional athletic associations additionally focus on professional athletes' health and well-being.[79] For example, the NFL's ban on substances aims to promote fairness in competition and also focuses on substance abuse treatment to encourage athletes' well-being.[80] Professional associations also ban substances because of the harmful side effects on the human body when used for enhancement, rather than therapeutic, purposes.[81]

The World Anti-Doping Agency and NCAA banned the use of gene doping quickly after the concept became a potential issue, but American professional athletic associations have not prohibited the use of gene doping. Altering an athlete's genetic material and enhancing performance through gene doping is permitted in the NFL, NBA, MLB, NHL, and MLS associations. Below is an analysis of different athletic associations, which practices are banned, testing policies, and potential repercussions if athletes violate a ban.

1. *NATIONAL FOOTBALL LEAGUE*

The NFL prohibits using anabolic agents, anti-estrogen agents, masking agents, and stimulants.[82] Additionally, players may not use some naturally occurring substance in the human body, such as human growth hormone (HGH), erythropoietin (EPO), and insulin growth factor (IFG-1).[83] Every player is tested at least once between the beginning of training camp and the first full week of preseason

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[77] Major League Baseball Player Relations Comm. v. Major League Baseball Players' Ass'n, Decision No. 69, Gr. Mo. 86-1 at 9 (July 30, 1986).

[78] Rabuano, *supra* note 54, at 450.

[79] *See, e.g.*, NAT'L FOOTBALL LEAGUE, POLICY ON PERFORMANCE-ENHANCING SUBSTANCES 1 (2018), https://nflcommunications.com/Documents/2018%20Policies/2018%20Policy%20on%20Performance-Enhancing%20Substances%20-%20EXTERNAL.pdf [hereinafter NFL POLICY].

[80] *Id.*

[81] *Id.* at 1-2.

[82] *Id.* at 18-22.

[83] *Id.*

games.[84] Players may also be tested up to six times in the off-season.[85] The NFL may take blood or urine samples, or both, from players in the course of testing.[86]

In the NFL, players can be fined heavily or suspended from the league if they test positive for any prohibited drugs or are caught doping.[87] Suspensions prevent widespread use of PEDs, as teams could lose a large number of valuable players if they are caught encouraging PED use.[88] This inhibits a team's performance in games, which could anger both fans who pay to watch the game, as well as investors.[89] The NFL's CBA also prevents players from bargaining with a team to prevent any salary forfeiture in the case of a positive PED test.[90] The CBA requires a player to forfeit a portion of their salary for any games the player is suspended for PED use.[91] However, NFL teams may not terminate a player for PED use.[92]

There are also penalties for refusing to submit to a drug test. The first time a player refuses to submit to testing a find penalty of up to $25,000 under his player contract is imposed, assessed and the player will be placed into the reasonable cause testing program.[93] The second failure to submit to testing results in an additional fine

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[84] Memorandum from John A. Lumbardo, Indep. Adm'r of the NFL Policy on Performance-Enhancing Substances on Annual Test for Performance-Enhancing Substances (July 2017), https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/Annual%20Test%20Memo_2017.pdf.

[85] Memorandum from John A. Lumbardo, Indep. Adm'r of the NFL Policy on Performance-Enhancing Substances on Off Season Testing for Performance-Enhancing Substances (Jan. 2021), https://nflpaweb.blob.core.windows.net/website/Departments/Player-Affairs/Wellness/30_2021-NFL-Off-Season-Testing-Memo-PES-Policy.pdf.

[86] *Id.*

[87] *See* NFL POLICY, *supra* note 79, at 9, 16; *see also* Michael Schottey, *Breaking Down How the NFL Substance Abuse Policy Works*, BLEACHER REPORT (Dec. 4, 2013), https://bleacherreport.com/articles/1875478-breaking-down-how-the-nfl-substance-abuse-policy-works.

[88] NFL POLICY, *supra* note 79, at 17.

[89] *See* Weber, *supra* note 65, at 286.

[90] Nat'l Football League & Nat'l Football League Players Ass'n, Collective Bargaining Agreement 14 (2020), https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf.

[91] *Id*.

[92] *Id.* at 251.

[93] Wesley Keefer, *What is the NFL's PED Policy?*, SPORTSKEEDA (July 18, 2021), https://www.sportskeeda.com/nfl/what-nfl-s-ped-policy.

of two weeks' pay, and the third violation will cost the player a two-game suspension.[94]

2. *MAJOR LEAGUE BASEBALL*

The current CBA baseball players have with the MLB only prevents players from using steroids, stimulants, diuretics, masking agents, and "drugs of abuse." [95] Drugs of abuse include cannabinoids, cocaine, LSD, opiates, MDMA, GHB, phencyclidine, and any other drug included in Schedules I and II of the Code of Federal Regulations' Schedule of Controlled Substances. [96] Performance-enhancing substances, like HGH, IGF-1, testosterone, and anti-estrogens, are included in the steroid category and are also prohibited.[97]

Each player is tested for steroids when they arrive to spring training. [98] Additionally, players may be tested for steroid use throughout the season and during championships. [99] The MLB collects urine samples from their players for these tests.[100] Players are not randomly or routinely tested for drugs of abuse; instead, players are tested if there is reasonable cause to test for them.[101]

If players do test positive for performance-enhancing drugs, their first offence will result in an 80-game suspension without pay, and a second offence will result in a 162-game suspension without pay.[102] A third offence will result in a lifetime ban from the MLB.[103] However, players may apply for reinstatement to the league after one year and may earn reinstatement after 2 years.[104] Only one player has ever been permanently banned from the MLB for steroid use.[105]

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[94] *Id.*

[95] MAJOR LEAGUE BASEBALL AND MAJOR LEAGUE BASEBALL PLAYERS ASS'N, MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM 8 (2015), http://mlb.mlb.com/pa/pdf/prohibited-substances.pdf [hereinafter MLB POLICY].

[96] *Id.* at 8-9.

[97] *Id.* at 9-10.

[98] *Id.* at 15.

[99] *See id.*

[100] *Id.*

[101] *Id*. at 18-19.

[102] *Id.* at 37.

[103] *Id.* at 38.

[104] *Id.*

[105] *See* Adam Rubin, *Jenrry Mejia First Player to Get Permanent Ban for 3rd Positive PED Test*, ESPN (Feb. 12, 2016),

The MLB mandates a slightly different approach when a player tests positive for stimulant use, first focusing on clinical treatment, and additional testing to ensure compliance with the clinical treatment.[106] Only after a second positive test will a player receive a 50-game suspension without pay.[107] A third positive test will result in a 100-game suspension without pay, and the fourth will earn a player a lifetime ban.[108]

3. *NATIONAL BASKETBALL ASSOCIATION*

The NBA has also banned substances such as HGH, steroid and performance-enhancing drugs, testosterone, and diuretics.[109] The NBA also prohibits marijuana use and other drugs of abuse, including cocaine, MDMA, phencyclidine, ketamine, methamphetamine, LSD, and opiates.[110]

Within the NBA, players may be tested up to four times in a season, and up to two times during the off-season.[111] However, only 1,525 tests total may be run according to the CBA, which does average around three to four tests per player.[112]

The first positive test for PED's will result in a 25-game suspension, and a second positive test may result in a suspension up to 55 additional games.[113] The third positive result for PED use will result in immediate dismissal from the NBA.[114] Players may apply for eligibility to return after clinical treatment and zero positive tests for six months for rookies, and twelve months for veterans.[115] Notably, refusing a test within the NBA is treated the same as a positive test.[116]

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https://www.espn.com/mlb/story/_/id/14768114/jenrry-mejia-new-york-mets-suspended-permanently-mlb-third-positive-ped-test.

[106] MLB POLICY, *supra* note 95, at 38.

[107] *Id.* at 38, 45.

[108] *Id.*

[109] Nat'l Basketball Ass'n & Nat'l Basketball Players Ass'n, Collective Bargaining Agreement I-2-3 to -6 (July 1, 2017), https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf [hereinafter NBA CBA].

[110] *Id.* at I-2-2.

[111] *Id.* at 433.

[112] *See* Warren Chu, Note, *WADA Time to Choose a Side: Reforming the Anti-Doping Policies in U.S. Sports Leagues While Preserving Players' Right to Collectively Bargain*, 44 COLUM. J. L. & ARTS 209, 217 (2021) (citing NBA CBA, *supra* note 109, at 433).

[113] NBA CBA, s*upra* note 109, at 441-42.

[114] *Id.* at 442.

[115] *Id.* at 446-47.

[116] *Id.* at 429.

However, the NBA has stricter penalties for drugs of abuse. If a first-year player tests positive for a drug of abuse, they are banned from the NBA for a one-year term.[117] Veteran players who test positive for drugs of abuse have their contracts canceled and will be immediately dismissed from their team.[118] The NBA has instituted a moratorium on its random testing policies for marijuana use, which it has extend through the 2021-2022 season.[119]

4. *NATIONAL HOCKEY LEAGUE*

The NHL and players' unions generally defer to the substances that are banned by WADA when compiling their banned substances list.[120] Performance-enhancing drugs WADA bans are typically banned by the NHL soon thereafter.[121] Performance-enhancing substances banned by WADA include anabolic agents, diuretics, masking agents, beta-2 agonists, peptide hormones, growth factors, and hormone modulators.[122] The NFL also tests for drugs of abuse, but athletes are not penalized for a positive test.[123] Instead, if a league doctor determines drug levels are too high, the player is referred to substance abuse treatment (herein "treatment").[124]

Hockey teams as a whole are subject to no-notice testing at least once during training camp, and at least once during the regular season.[125] Individual players are also tested on a randomized, no-notice basis during the regular season and playoffs.[126] During the off-season, players may be subject to more random, no-notice tests,

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[117] *Id.* at 434.

[118] *Id.* at 435.

[119] Tim Reynolds, *NBA Will Not Randomly Test Players for Marijuana Again This Season*, NBA (Oct. 6, 2021), https://www.nba.com/news/nba-will-not-randomly-test-players-for-marijuana-again-this-season.

[120] Nat'l Hockey League & Nat'l Hockey League Players' Ass'n, Collective Bargaining Agreement 188 (Feb. 15, 2013), https://www.nhlpa.com/the-pa/cba [hereinafter NHL CBA].

[121] *See, e.g.*, *Meldonium Added to NHL's List of Banned Substances*, ESPN (Aug. 31, 2016), https://www.espn.com/nhl/story/_/id/17430015/nhl-adds-meldonium-banned-substances-list.

[122] WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE INTERNATIONAL STANDARD PROHIBITED LIST 2021 5-12 (2021), https://www.wada-ama.org/sites/default/files/resources/file/2021list_en.pdf.

[123] NHL CBA*, supra* note 120, at 189.

[124] *Id.*

[125] *Id.* at 190.

[126] *Id.*

but there is a total league-wide maximum of 60 off-season tests.[127] Refusal to comply with testing is considered a positive test.[128]

The first positive test results in a 20-game suspension without pay, and automatic referral to the NHL's substance abuse and mental health program.[129] Referral to that program may result in mandatory substance abuse treatment.[130] A second positive test results in a 60-game suspension without pay, and additional referral to the substance abuse program.[131] A third positive test would result in "permanent" suspension, but players may apply for readmission to the league after two years being banned.[132]

II. GENE DOPING: WHAT IS IT, HOW DO WE KNOW WHEN IT HAPPENS, AND WHY DO WE CARE?

Gene doping is the use of gene-editing technology for purposes outside of medical treatment. With the help of the CRISPR-Cas-9 system, extra genes in the human genome may be inserted into cells. These genes code for substances that are already present in the body, and help the body produce higher than typical amounts of these substances, resulting in enhancements to the typical human ability. Gene doping may increase oxygen delivery to muscles, increase muscle mass or bone density, and more; the possibilities are nearly endless. With these enhancements come extreme risks to athletes that may participate in gene doping.

While most athletic associations prohibit certain drugs and blood doping, as they artificially enhance athletic performance, many associations have not addressed gene doping as they do with other enhancements. When gene doping emerged as a potential issue after the successful use of genetic manipulation, WADA added the manipulation of genetic material and cells to the list of prohibited practices for athlete eligibility in the 2003 Olympics.[133] This ban came before gene doping in humans was widely used.[134]

Since the 2003 ban, scientists have become better equipped to predict the potential outcomes and consequences of gene doping. The following section will discuss the scientific framework for gene doping and some potential targets for doping. Additionally, this

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[127] *Id.*

[128] *Id.* at 191.

[129] *Id.* at 191-92.

[130] *Id.*

[131] *Id.* at 192.

[132] *Id.*

[133] Kara Rogers, *Gene Doping*, BRITTANICA (Aug. 19, 2010), https://www.britannica.com/science/gene-doping.

[134] Polcz & Lewis, *supra* note 34, at 8.

section will cover how doping in different circumstances may affect athletes, and potentially their children in the future. This section will then explain the current methods of testing for gene doping and the potential gene doping consequences.

A. CRISPR-CAS9

WADA defines gene doping as "the non-therapeutic use of genes and genetic elements or cells, or both that have the capacity to enhance athletic performance."[135] There is a long history of blood doping and drug use in both professional and international athletics, but gene doping is newer and the potential complications and threat of unfairness in competition is much larger compared to blood doping and drug use.[136]

As life-science technology improves, new therapies have also been discovered for treating medical conditions relating to genetic defects.[137] However, when these therapies are used in people without the medical condition that the gene would treat, the gene enhances, rather than treats the individual.[138]

The molecular basis of gene doping is similar to gene therapy.[139] In both, a gene the person does not possess naturally within their genome is introduced to a somatic cell to cause the production of a protein.[140] In gene therapy, this protein is the "normal" variant the patient does not possess.[141] In gene doping, this could cause the athlete to either produce more of a protein than they already produce or produce a better protein than the protein their DNA is already coded to produce.[142]

While there are other methods to introduce genes into a genome, the CRISPR-Cas9 system is the main mechanism used in gene doping and the same mechanism used in gene therapy.[143] The system's components enter into cells via a viral capsid.[144] Cas9 is a protein naturally found in bacteria and was originally discovered in

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[135] *See* Battery et al., *supra* note 3.
[136] *See id.*
[137] *See id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] JOEL FAINTUCH & SALAMAO FAINTUCH, PRECISION MEDICINE FOR INVESTIGATORS, PRACTITIONERS AND PROVIDERS 59 (1st ed., Academic Press 2019).
[144] *See, e.g.*, Christine L. Xu et al., *Viral Delivery Systems for CRISPR*, 11 VIRUSES 5 (Jan. 4, 2019).

E. Coli.[145] This protein's components are able to separate double-stranded DNA, and then break the links between the nucleotides in each chain forming DNA.[146] Cas9 is led to the correct portion of DNA by a sequence of RNA complementary to one of the strands of DNA.[147]

In gene therapy and gene doping, scientists create the RNA sequence that leads Cas9 to break the correct DNA once the targeted gene is known.[148] Once Cas9 knows where to cut and separate the DNA, the RNA binds to the DNA and Cas9 will add in the additional DNA sequence that is connected to the RNA sequence.[149] This new DNA being inserted into the cell's genome, codes the gene the patient or athlete is adding to their genome.[150] After this new DNA is introduced, it is still bound to the RNA and the cell recognizes damage has occurred to the cell's DNA and begins to repair the damage.

When the cell thinks it is correcting its own DNA, it will add the complementary nucleotides to the new DNA to create a double-stranded sequence and connects the ends of the DNA that Cas9 split apart to the newly added DNA.[151] The cell now has a newly added gene so the cell can target and use to create proteins to help the body perform a targeted function.[152]

In addition to the gene for EPO, there are over 200 known "fitness genes" to help improve athletic performance.[153] Some of these genes have become frontrunners to improve performance and are therefore used in gene doping.[154] These genes can increase an athlete's muscle mass, skeletal size and density, endurance, or decrease pain sensitivity that might limit performance.[155] There is even the possibility to target the growth of a specific type of muscle fiber to tailor performance.[156] As genetic research progresses, there

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[145] Yoshizumi Ishino, *History of CRISPR-Cas from Encounter with a Mysterious Repeated Sequence to Genome Editing Technology*, 200 J. MICROBIOLOGY 1, 1 (2018).

[146] FAINTUCH & FAINTUCH, *supra* note 143, at 60.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *See id.*

[151] *See id.*

[152] *Id.*

[153] *See* Battery et al., *supra* note 3.

[154] *Id.*

[155] *See* David Gould, *Gene Doping: Gene Delivery for Olympic Victory*, 62 BRITISH J. CLINICAL PHARMACOLOGY 292, 294 (2012).

[156] *See* Battery et al., *supra* note 3.

will be more possibilities in what can be altered to tailor performance for a specific sport or type of activity.

Currently, one of the most popular genes that is a target for doping encodes the gene leading to the production of erythropoietin (EPO).[157] EPO is a hormone mostly produced in the kidneys, but helps regulate the red blood cell production.[158] Red blood cells carry oxygen from the lungs to other tissues in the body.[159] Synthetic Recombinant EPO (rEPO) has been used therapeutically in patients with kidney failure who do not naturally produce enough EPO to help bring their EPO levels back to a normal range.[160]

When rEPO is used in athletes who already have normal levels, the athlete is able to deliver more oxygen to their tissues, and therefore perform better for longer.[161] This is especially useful for endurance athletes who participate in sports where oxygen delivery is a major limitation on performance.[162] Estimations show that between 3-7% of the best athletes in endurance sports may be doping with rEPO.[163]

Other likely targets for gene doping are genes that code for anabolic factors helping increase muscle mass.[164] For example, insulin-like growth factor (IGF-1) is important in regulating skeletal muscle mass, thus increasing quantities of IGF-1 could increase an athlete's strength.[165] Another potential target to increase strength and muscle mass is human growth hormone (HGH).[166]

Genetic enhancement through gene doping is used in somatic cells that do not make more cells down the line that continue to replicate the gene long-term.[167] However, with technology constantly improving, it may soon be easier to alter stem cells or

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[157] E. Brzeziańska et al., *Gene Doping in Sport – Perspectives and Risks*, 31 BIOLOGY SPORT 251, 252 (2014).

[158] *See* Gould, *supra* note 155, at 294.

[159] *See* Battery et al., *supra* note 3.

[160] *Id.*

[161] *Id.*

[162] *See* Gould, *supra* note 155, at 252.

[163] Randal L. Wilber, *Detection of DNA-Recombinant Human Epoetin-alfa as a Pharmacological Ergogenic Aid*, 32 SPORTS MED. 125, 125 (2002).

[164] *See* Battery et al., *supra* note 3.

[165] Ronald J. Trent & Bing Yu, *The Future of Genetic Research in Exercise Science and Sports Medicine*, 59 MED. SPORT SCI. 189 (2009).

[166] A. Fallahi et al., *Genetic Doping and Health Damages*, 40 IRAN J. PUB. HEALTH 1, 6 (Feb. 7, 2011).

[167] *See* Battery et al., *supra* note 3.

germline cells in athletes.[168] Altering stem cells would cause a long-term change in the genome, and cause the expression of the inserted gene for all the cells that the stem cell creates.[169] Germline editing would not cause a big change in the gene expression of the person receiving the gene alteration, but could affect their future children and give the next generation an athletic advantage.[170]

B. HOW CAN WE DETECT GENE DOPING?

For the Olympics, testing for gene doping is new.[171] For the 2016 Rio Olympics, WADA tested blood samples for evidence of gene doping for the EPO gene after the games ended.[172] The motivation for testing for EPO is partially because it is the most common genetic alteration used by athletes, and also because it is currently the only addition for which there is a known test.[173]

The natural gene coding the EPO protein contains four introns, which are DNA segments that do not contribute to the protein.[174] Artificial EPO genes are not likely to include introns in the gene, so segments of DNA coding for EPO and do not contain introns are likely a result of gene doping.[175] A comprehensive test for all gene doping is not currently known, but scientists are working to find new tests for commonly targeted genes.[176]

In 2009, WADA implemented ABP to combat the threat of gene doping.[177] An athlete's ABP includes blood samples to help test for alterations to biological material.[178] The ABP system is currently used to test for blood doping and other doping methods that could enhance performance.[179]

With the ABP, WADA aimed to achieve two goals. First, to create a way to test later for biological alterations when the

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[168] *See* Sebastian Schleidgen et al., *Human Germline Editing in the Era of CRISPR-Cas: Risk and Uncertainty, Inter-Generational Responsibility, Therapeutic Legitimacy*, 21 BMC MED. ETHICS 2 (Sept. 11, 2020).

[169] *See id.* at 3.

[170] *Id.*

[171] *See* Sarah Everts, *New Tests to Identify Gene Tampering in Olympic Athletes*, AMERICAN CHEMISTRY SOCIETY: IN CHEMISTRY (Oct. 10, 2016).

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *See* Battery et al., *supra* note 3.

[177] *See* ATHLETE BIOLOGICAL PASSPORT, *supra* note 11, at 4.

[178] *Id.* at 9.

[179] *Id.*

technology to test for those changes did not yet exist. Second, to generally deter gene doping.[180] Using an athlete's former sample submissions to the ABP system, labs can test for differences in biological data attributed to gene doping.[181]

Another potential method to test for gene doping is to take an athlete's tissue biopsy and compare the proteins in the muscle to the athlete's baseline version.[182] The tissue can also be surveyed for evidence of virus-like cells entering the human cells, which could show gene doping evidence because of the delivery system for CRISPR-Cas9.[183] Taking a tissue biopsy from an athlete is much more invasive than a blood draw, and is not a popular solution to test for evidence of gene doping.[184] This method is not currently being practiced.[185]

C. CONSEQUENCES OF GENE DOPING

One of the main reasons professional athletic associations have banned blood doping and unnecessary pharmaceutical use is the danger to athletes.[186] Administering unnecessary treatment to anyone can cause extreme complications, and gene doping is no exception.[187] Experimental genetic treatments in medical patients have previously caused cancer, and increased expression of certain proteins can cause structural damage to the body.[188] Different enhancements are likely to cause a wide variety of unknown complications, but known complications of excess substances in the body are also likely to occur.

For example, excess levels of the EPO can cause increased blood viscosity, which prevents blood flow and can result in lower oxygenation levels to vital organs.[189] Other complications of high blood viscosity include abnormal bleeding from impaired blood platelet function and severe immune responses.[190]

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[180] *Id.* at 12.
[181] *See id.* at 57-58.
[182] *See* Battery et al., *supra* note 3.
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *See, e.g.*, NFL POLICY, *supra* note 79, at 1.
[187] *See* Battery et al., *supra* note 3.
[188] *See* Fallahi et al., *supra* note 166.
[189] See *id.*; *see also* ALIX PEREZ ROGERS & MOLLY ESTES, HYPERVISCOSITY SYNDROME, STATPEARLS (database updated July 21, 2021).
[190] *See* Fallahi et al., *supra* note 166; *see also* ROGERS & ESTES, *supra* note 189.

Potential HGH or IGF-1 complications range from inconvenient to severe.[191] Some milder side-effects of these enhancements are headache, nausea, vomiting, and visual changes.[192] More severe consequences include insulin resistance, diabetes, elevated intracranial blood pressure, enlargement of the heart, and cancer.[193] Each complication comes with their own risk.

While the presence of cancer in gene doping instances is currently speculation, scientists predict cancer is a likely outcome of gene doping because it is a medicinal gene editing consequence.[194] In a gene therapy clinical trial for treating a deficiency for SCID-X1, a heritable disease that causes immune deficiencies, several children developed leukemia.[195] As mentioned above when discussing HGH and IGF-1, cancer is a common consequence of excess substances in the body.[196] With gene editing's unpredictability, athletes who participate in gene doping could develop different types of cancer.

III. SHOULD PROFESSIONAL ASSOCIATIONS WORK TO BAN GENE DOPING, AND WHAT ARE THE CONSEQUENCES IF GENE DOPING IS NOT BANNED?

Gene doping creates issues for both international and professional athletics. First, professional associations do not currently ban gene doping. With athlete safety goals in mind, these major athletic associations need to work with collective bargaining units to ban gene doping. Second, even where gene doping is banned, there is not enough regulation and testing to determine if gene doping is being used and competition is actually fair. To ensure competition is fair and athletes remain safe, gene passports and further regulation should be used to test for doping as new tests arrive.

If unsuccessful, professional athletic associations could face many consequences. Athletes may face medical complications from unnecessary changes to their DNA. Additionally, gene doping can cause additional injuries leading to shorter careers. Finally, the trade systems professional associations currently rely on may crumble because teams will be hesitant to take on athletes who may have

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[191] *See* Fallahi et al., *supra* note 166.
[192] *Id.*
[193] *See id.*
[194] *See generally* Fallahi et al., *supra* note 166.
[195] Battery et al., *supra* note 3.
[196] *See* Fallahi et al, *supra* note 166.

shorter careers, or reluctant to trade athletes in whom they invest doping resources.

A. WHAT SHOULD PROFESSIONAL ASSOCIATIONS DO?

While WADA and the NCAA ban doping to ensure fair competition, athletic associations' main goal is to keep athletes safe and prevent harmful activity to gain a competitive advantage.[197] Both the WADA/NCAA objective and the professional association goals support banning gene doping. Although protecting athletes supports a doping ban, gene doping is not currently prohibited in the NFL, NBA, MLB, or NHL.[198]

The professional athletic associations mentioned above should attempt to place bans on gene doping. First, the gene for EPO is currently the most common target for gene doping.[199] As previously shown, EPO is banned by many professional associations through their CBAs.[200] Additionally, IGF-1 and HGH are also banned by most professional associations and are common targets for gene doping.[201] Artificial enhancement of these naturally occurring substances is already banned, showing that professional associations acknowledge the risk posed to athletes.

While gene doping does not directly insert more of the banned substance into the athlete, gene doping does similarly artificially inflate a given substance's quantities. Since common doping targets are already banned, professional associations should attempt to ban inflating levels of the substances by other means.

To ban gene doping, professional associations would need to include the bans in the CBAs that are negotiated with players' unions. Like drug use, gene doping is likely a mandatory subject for bargaining. Because banning gene doping would probably be mandatory, players and the players' unions must agree to the bans. Only when the players agree will a ban on gene doping be implemented and therefore binding on the players. Players would

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[197] Sarah Everts, *supra* note 171.

[198] NFL POLICY, *supra* note 79, at 1; NBA CBA, s*upra* note 109, at 441-42; MLB POLICY, *supra* note 95, at 3; NHL CBA, *supra* note 120, at 189.

[199] E. Brzeziańska et al., *supra* note 157, at 253.

[200] NFL POLICY, *supra* note 79, at 23; NBA CBA, s*upra* note 109, at I-2-5; MLB POLICY, *supra* note 95, at 11; NHL CBA*, supra* note 120, at 189.

[201] NFL POLICY, *supra* note 79, at 22-23; NBA CBA, s*upra* note 109, at I-2-3; MLB POLICY, *supra* note 95, at 10-11. *See* E. Brzeziańska et al., *supra* note 157, at 253.

also have to agree to testing procedures and penalties if an athlete did produce a positive test.

Professional associations should immediately begin introducing bans on gene doping in negotiations for upcoming CBA updates. Naturally, players will be hesitant to agree to these terms, but potentially less so than typical bans on PEDs. Because societal knowledge of gene doping is less prevalent than PEDs and drugs of abuse, a scandal is less likely if an athlete tests positive for gene doping.

Professional associations are currently in the unique position to contract for a problem that is probably not yet widespread. As such, athletes will likely be less worried about testing positive for gene doping because gene doping is not yet a common practice; therefore, the athletes would be more likely to agree to restrictions or bans on gene doping than those pertaining to drug use of the PED and drugs of abuse variety.

Although athletes are less likely to push back on gene doping bans, successfully implementing such a ban would still require significant bargaining and resources. There are several strategies associations could take to persuade athletes to agree with a ban. First, the associations could offer better player benefits as an incentive they would "give up," and the players would accommodate a gene doping ban in return.

Second, if associations were especially motivated, they could campaign with fans to garner support for a ban. While this may be a fear-mongering tactic showing the potential for unfair competition in games, educating the public on the potential and gene doping risks could put pressure on athletes to agree with the ban. If more fans knew about the potential for gene doping and competing teams gaining an advantage over their home team, viewership may drop and players would be dissuaded from gene doping, increasing the chance unions agreeing to a ban.

As previously mentioned, testing options for gene doping are currently minimal. To compensate, professional associations could also attempt to bargain for programs like the biological passport currently used for WADA.[202] Information could be stored, and data compared to previous samples to potentially show the presence of gene doping. This method could soften the blow of introducing a ban because tests producing a positive result may not occur for many years, while also discouraging the practice before it becomes prevalent.

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[202] *See* ATHLETE BIOLOGICAL PASSPORT, *supra* note 11, at 4.

B. WHAT COULD HAPPEN IF GENE DOPING IS NOT BANNED? INCENTIVES TO BAN GENE DOPING.

One reason gene doping should be banned within professional associations is, if allowed, players may be forced to participate in gene doping to remain competitive. If one player begins to gene dope and other players cannot keep up, other players will follow suit to remain competitive. Eventually, we could see games where all teams and players are participating in gene doping, and no players are depending on natural talents and hard work to win. This would probably not be popular with fans, and associations should be afraid of declining fan support, and therefore declining profits, if this does occur. This additionally justifies any potential incentives associations may need to offer players' unions to pass a gene doping ban.

It is important for players to understand the potential gene doping risks, and how they are greater than the risks associated with PED, stimulant, or illegal drug use. If gene doping becomes prevalent and necessary to remain competitive, players would put their bodies at extreme risk, including cancer. Players would likely object to these risks, and band together to prevent themselves, their teammates, and future athlete generations from gene doping to become or remain competitive.

With this gene doping snowball effect, player burnout rates may increase, possibly resulting in even fewer players with long, successful careers. As previously shown, gene doping may cause complications and the excess use of the body's resources for non-necessary functions. Increased amounts of substances like EPO, IGF-1, and HGH can have significant consequences on athletes' bodies. [203] With the complications from unnecessary medical treatments comes more stress on the body and shorter careers. As career lengths shorten and turnover rates increase, more athletes will be drafted into the league. With fewer veteran athletes who have honed their skill in professional athletics, and more rookies thrust into positions, teams may be less cohesive. Again, fans would likely have decreased interest in less competitive teams, which could lead to a vicious cycle resulting in even more gene doping.

A decline in current trading systems is another potential change to professional sports, should gene doping not be banned. While this would only take place far in the future, if gene doping is not banned, players may be encouraged to try gene doping to become faster and stronger, and to have more endurance. Teams could eventually be

[203] *See* Fallahi et al., *supra* note 166.

motivated to offer gene doping to their athletes if the practice is not regulated. While unlikely, if teams with deep pockets begin to offer doping to their athletes, they may also begin to invest in research or license a gene patent that could enhance their athletes. With more investment in athletes, and fear other teams accessing the technology used by others, trades between teams would become less likely, and contracts between teams and players may be for longer time periods.

Overall, gene doping has the potential to harm athletes and the professional athletics industry. Associations have several motivations to ban gene doping due to the potential consequences with gene doping.

C. How Can Different Associations Implement Testing for Gene Doping?

The WADA currently only tests for EPO doping in Olympic athletes, and the NCAA does not actually test whether athletes are participating in any gene doping, even though gene doping is prohibited. [204]As previously stated, EPO is currently the only gene doping mechanism tested for, despite the availability of nearly endless ways to edit the human genome to enhance performance.[205] At a minimum, the NCAA should implement the same testing and recording system used by WADA in the Olympics. This could easily occur because the NCAA's ability to change consent to test forms and testing procedures. However, professional associations would have to implement these systems through their collective bargaining systems.

Despite current limitations on the ability to test for gene doping, scientists will eventually be able to trace different gene additions as we can with EPO. In the meantime, one step to help detect gene doping in the future is to keep records of players' genetic information that exists prior to gene doping. New studies have shown whole-genome sequencing prior to gene doping may help identify doping, even when a target transgene for the doping sis unknown. [206] This would not immediately show past doping evidence but will help detect future doping by comparing genome information over time may show changes that have occurred due to gene doping.[207]

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[204] Sarah Everts, *supra* note 171.

[205] *Id.*

[206] Teruaki Tozaki et al., *Detection of Non-Targeted Transgenes by Whole-Genome Resequencing for Gene-Doping Control*, 28 Gene Therapy 199, 199-205 (2021).

[207] *See id.*

While preemptively sequencing athletes' DNA is not an approved method for testing for gene doping in humans, it would be useful and would help detection in the future. While it would be a drastic measure, implementing a genome sequencing database for athletes could be effective to detect genetic manipulation without looking for a specific doping target. This method would be more all-encompassing for gene doping targets than other current testing methods.

However, storing athletes' genomic data raises additional privacy considerations. WADA already stores and tracks hematological data for athletes competing in the Olympics.[208] Implementing a system storing genome data would be more controversial, but possible. As noted above, athletes must agree to their hematological data storage as part of their contractual consideration, gaining eligibility to compete in the Olympics. If a genome tracking system was implemented, it would also be a requirement for Olympic eligibility. This could be feasible for the NCAA to implement this kind of system as well.

The NCAA may change the requirements for collegiate eligibility in their banned practices and testing policies without athletes agreeing to the specific terms. If genome tracking was a requirement included in its policies, students would have to agree to participate. To combat some backlash for tracking athlete genome information, WADA and the NCAA could agree to keep athletes' personal information and sample identities anonymous until a positive result occurred, thus also keeping their genome information confidential.

Professional associations, on the other hand, would have a much more difficult time in implementing a system tracking genomic data. As with implementing a ban on gene doping in the first place, this would likely be a mandatory subject for bargaining the athletes would have to agree to. Because athletes are able to object to testing protocols before they are implemented, a system like this would probably not be passed or included in a CBA. Most professional athletic association CBAs already include confidentiality clauses surrounding drug testing, so including confidentiality provisions protecting genomic data from being shared could increase the likelihood a genomic data tracking system would be included in a future CBA.

Looking to the current banned substances and testing policies by professional associations, similar policies and penalties should be implemented for positive results for gene doping. Testing

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[208] *See* ATHLETE BIOLOGICAL PASSPORT, *supra* note 11.

policies for the major professional athletic associations include testing at the beginning of a season, throughout the season, and sometimes even testing in the off-season.

If a genome tracking system is implemented, DNA samples should similarly be routinely taken. This is especially important because like how drug use evidence will eventually leave a player's system, gene doping evidence will disappear when an altered cell dies. Only gene doping evidence in stem cells would be present indefinitely, and not all doping would likely occur in stem cells.

Additionally, similar, if not harsher, penalties should be implemented if athletes are caught gene doping. Professional associations often treat different classes of substances differently when doling out penalties. Considerations for the punishment severity include how destructive the substance is to the athlete and how likely the substance is to give the athlete an unfair advantage. As gene doping is both inherently dangerous and has the potential to result in extremely unfair advantages, the penalties for gene doping should be severe. These penalties should also take into consideration how long the effects of gene doping may enhance the athlete.

IV. CONCLUSION

Not only should professional associations be working to ban gene doping just as they have drug use and blood doping, but these associations, the WADA, and NCAA should also implement more drastic measures to prevent the use of, and encourage the testing for, gene doping. If further regulations and testing are not implemented, there is the possibility the current systems that athletic organizations rely on will fundamentally change.

WADA and the NCAA currently ban gene doping, but professional associations do not. WADA and the NCAA mostly ban substances and practices when they give athletes an unfair advantage. Professional associations also consider fairness when banning substances, but also focus on athlete safety. WADA is able to ban substances because athletes agree to terms to be eligible for Olympic participation, and the NCAA similarly requires athletes to sign consent to test forms for eligibility. However, professional associations operate under a collective bargaining agreement. While WADA and the NCAA can change policies and ban practices without prior athlete approval, professional associations must get players' unions to agree to bans and testing policies for them to be enforceable and implemented.

Professional associations should undoubtedly implement bans and testing practices for gene doping. To do so, the associations

should immediately begin introducing bans in CBA negotiations and offer incentives to pass these bans. If bans on gene doping do not occur, the associations could see unfair competition and higher burnout rates for players earlier in their careers. Further, WADA, the NCAA, and professional associations should all implement, or attempt to implement stricter testing policies to ensure no doping is taking place.

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KIDS CAN GAMBLE TOO: LOOT BOXES AND PREDATORY VIDEO GAME PRACTICES

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CONTENTS

INTRODUCTION

Loot boxes are either gambling, or something so close that the difference is insignificant. A loot box is an in-video game purchase mechanic that awards the purchaser with a chance at a desirable in-game item such as an avatar skin, weapon, and in-game boost. The price per loot box can vary from a dollar or two, to over $100. The chance of obtaining a desirable item from a loot box is often five

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percent or less. The video game industry is moving toward nearly all games containing loot boxes and it is currently a multi-billion-dollar business.

Paid loot boxes in video games can simulate slot machines with sounds, animations, and encouragement to play more. These loot boxes are being heavily marketed toward children, essentially fueling gambling addiction among minors, conjuring the mental image of a 12-year-old at a casino, pulling the lever on a slot machine.

Whether or not loot boxes fit the strict legal definition of gambling, they should be regulated as if they do. Several European countries have outlawed loot boxes, and more countries will soon follow suit. The United States government should implement restrictions on which games can contain loot boxes and, working with the Electronic Ratings Service Board ("ERSB"), update ratings on games to better inform parents of the dangers associated with children's gambling.

I. MICROTRANSACTIONS AND LOOT BOXES

In-game payments, or "microtransactions," are becoming increasingly popular in video games.[1] Many games have had the ability to purchase items for in-game use with real money for years.[2] Loot boxes take the microtransaction idea to a new, more lucrative, and possibly more dangerous level.

What is a loot box and why does it matter? For the purposes of this article, all in-game purchase mechanisms with a random element can be whittled down into the moniker, "loot box." These can include but are not limited to; loot boxes, loot crates, card packs, booster packs, battle packs, and lock boxes.[3] Loot box mechanics in video games started in Japanese gaming and made their way to US video game mainstream in the last ten to fifteen years.[4]

Loot box mechanics entail paying money to have a chance at earning an in-game item. Loot boxes can be found in most mobile

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[1] *See The Rise of Microtransactions*, WEPC, https://www.wepc.com/statistics/microtransactions-survey-uk/ (last visited Apr. 7, 2022).

[2] Steven T. Wright, *The Evolution of Loot Boxes*, PCGAMER (Dec. 8, 2017), https://www.pcgamer.com/the-evolution-of-loot-boxes/; *see also Gacha Game*, WIKIPEDIA, https://en.wikipedia.org/wiki/Gacha_game (last visited Apr. 7, 2022).

[3] *Loot Box*, WIKIPEDIA, https://en.wikipedia.org/wiki/Loot_box (last visited Apr. 7, 2022).

[4] Wright, *supra* note 2.

games today, with many on the top grossing games list.[5] Loot boxes also appear in most modern console and PC games.[6] These are not to be confused with all in-game purchase mechanics. Some games allow a player to purchase in-game items or cosmetics, with no random element involved.

A. THE EMERGENCE OF LOOT BOXES

The concept of loot boxes is not a new one. Trading cards have had a random element for over 150 years, initially being offered as cards in packs of cigarettes.[7] Consumers would receive a random card depicting a horse, politician, or other object.[8] The cigarette companies encouraged the collection of these cards, and some offered rewards for completing sets.[9] With the rising popularity of baseball, cigarette companies started making cards depicting baseball players.[10]

In the 1950's, Topps, a well-known trading card company, created its first baseball cards and included the cards in packs of bubblegum.[11] Recognizing that the cards were more popular than the gum, Topps started selling the packs of cards by themselves.[12] One could buy a single pack and be lucky enough to pull Pittsburg Pirates pitcher Honus Wagner, or buy 30 packs and never lay eyes on him.[13] The trading card market boomed for a while, with other sports like Football and Hockey gaining player cards as well.[14] In the 1990's, Pokémon cards became extremely popular, with over 30

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[5] *Leader Board of Top Selling Mobile Games*, SIMILARWEB (Apr. 4, 2022), https://www.similarweb.com/apps/top/google/store-rank/us/games/top-grossing/.

[6] Wright, *supra* note 2.

[7] Ben Johnson, *Cigarette Cards and Cartophily,* HISTORIC UK https://www.historic-uk.com/CultureUK/Cigarette-Cards-Cartophily/ (last visited Nov. 7, 2020).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *The Cardboard Connection*, WAYBACK MACH., https://web.archive.org/web/20120901074445/http://www.cardboardconnection.com/baseball/baseball-card/ (last visited Nov. 7, 2020).

[12] *Id.*

[13] The Honus Wagner card last sold at auction for over $3 million. Ryan Cracknell, *World Record $3.12 Million for T206 Honus Wagner Baseball Card,* BECKETT, https://www.beckett.com/news/world-record-price-for-t206-honus-wagner-baseball-card-3-million-and-counting/ (last visited Nov. 7, 2020)

[14] *Id.*

billion cards sold to-date.[15] While the idea is not new, integrating the concept of trading card packs into video games using virtual items is new enough that little regulation addresses it.[16]

B. ENVISIONING THE LOOT BOX EFFECT

To paint the image of a loot box, step into the shoes of a twelve-year-old pre-teen. It is Saturday, his favorite day of the week, and a weather advisory limits weekend activity to the indoors. Booting up the Xbox, he settles in to play his favorite video game, the latest edition of Madden NFL. He navigates to his game-mode of choice, Madden Ultimate Team, which allows him to play with real professional football players in the form of virtual cards and create his own super team of his favorites. Each player has a rating—the higher the rating, the better the virtual player performs in-game.[17]

Players in Ultimate Team mode gain these player cards by advancing through the game and by obtaining card packs.[18] Card packs contain mostly lower-rated players, with a small chance at pulling a really good player.[19] Today, there are new, limited-time card packs in the in-game store.

This hypothetical pre-teen buys these packs for an increased chance of pulling his favorite player, legendary quarterback Brett Favre. He buys some of these card packs with his parent's credit card. Ten dollars are converted into Xbox Points which are then used to purchase one pack for 1,000 points. A colorful, flashy animation shows ten virtual cards flying out of the pack, each one turning over to reveal the players. Each card is a disappointment, showing either players he already possesses on his Ultimate Team, or players rated too low to be desirable. A social media post shows his best friend just pulled Brett Favre.

Jealous, but not wanting to spend more money on another pack, he plays a few friendly games against online opponents with his virtual Ultimate Team. After a streak of good strategy and luck, he wins enough games to get a free card pack. The same, colorful animation rolls and the cards are revealed. A highly rated Drew

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[15] *Pokémon in Figures*, POKÉMON CO., https://corporate.pokemon.co.jp/en/aboutus/figures/ (last visited Apr. 11, 2022).

[16] *Loot Boxes*, MIRAHEZE: CRAPPY GAMES WIKI, https://crappygames.miraheze.org/wiki/Loot_Boxes (last visited Apr. 11, 2022).

[17] *See Madden Ultimate Team Pack Probability*, MADDEN 21, https://www.ea.com/games/madden-nfl/madden-nfl-21/news/madden-ultimate-team-21-pack-probability (last visited Apr. 10, 2022) [hereinafter *Madden*].

[18] *Id.*

[19] *Madden*, *supra* note 17.

Brees card is included, a lucky draw to be sure, though it is not Brett Favre. Capitalizing on this new lucky streak, he buys more card packs. Several minutes and opened card packs later, no more highly rated players have been pulled. Brett Favre will not be joining his Ultimate Team today. Maybe next time, he will have more luck.

Meanwhile, this 12-year-old gamer's parents receive an alert that their credit card has been charged for $120, and he is about to be grounded. He tries to explain that if he had pulled Brett Favre out of the card packs, it would have been worth it. He shows them his Ultimate Team and explains how he could better compete against online opponents and possibly win tournaments worth hundreds of thousands of dollars in prize money if only he had that one player.[20] He does not tell them that better player cards are released every week or that even with a better overall team, he really is not good enough at Madden NFL to compete in tournaments.

Now imagine a 27-year-old adult at a casino who spots a video slot machine modeled after his favorite movie, The Fast and the Furious 12. He decides to play one dollar, the reels spin with colorful animations of the characters from the movie and they settle on a losing line. He decides to play one more dollar. The reels spin and this time an animated explosion and flashing lights indicate he has won $100! Capitalizing on his good fortune, he plays several more rounds, until he has lost not only the $100 he won, but $20 more. In both scenarios, the result was a $120 loss playing a game. While there are several differences between the two hypothetical scenarios, the similarities are shocking and concerning.

One of these hypothetical activities is clearly labeled and regulated as gambling. The risks are known and assumed by an adult deemed to be of an age to assume those risks.[21] The activity undertaken by the twelve-year-old with the video game is similar to the adult in the casino, yet the activities are not governed by similar laws. Before traveling down the rabbit hole of gambling law and what may or may not govern, it is important to recognize why this could be a problem.

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[20] Christopher Yee, *This West Covina Man Is Known as the Greatest Madden Video Game Player of All Time,* SAN GABRIEL VALLEY TRIB. (Sept. 5, 2016), https://www.sgvtribune.com/2016/09/05/this-west-covina-man-is-known-as-the-greatest-madden-video-game-player-of-all-time/?utm_source=dlvr.it&utm_medium=twitter.

[21] *See Terms of Service,* CAESARS ENT., (Mar. 1, 2018), https://www.caesars.com/corporate/terms-of-service.

C. DANGERS OF LOOT BOXES IN GAMING

To begin, some facts provide perspective on the issue. More than 240 million people in the United States play an hour or more of video games each week.[22] 70% of minors under the age of eighteen play video games, with 20% of all video game players falling into that same demographic.[23] In the three month span from April to June of 2020, Americans spent $11.6 billion on video games.[24] While that number is greater than the year before, likely due to families spending more time at home during the COVID-19 pandemic, it is a staggering figure.

1. *GAMING BUSINESSES CAPITALIZING ON MICROTRANSACTIONS*

One of the biggest players in that market, *Electronic Arts* ("EA"), reported in July of 2020 that their in-game revenue was over three times that of selling the games themselves.[25] EA is responsible for some of the most popular and highest grossing games today. Readers might recognize titles like Madden NFL, FIFA, UFC, and the Battlefield franchise, amongst others.[26] Out of the $60.4 billion U.S. consumers spent on gaming in 2021, EA games are responsible for $6.5 billion.[27] EA is not the only business profiting off in-game purchases. Owner of the wildly popular Fortnite, Epic Games offers Fortnite for free, with all revenue coming from in-game microtransactions. Epic launched Fortnite for

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[22] *2020 Essential Facts About the Video Game Industry,* ENT. SOFTWARE ASS'N, https://www.theesa.com/esa-research/2020-essential-facts-about-the-video-game-industry/ (last visited Apr. 10, 2022).

[23] *Id.* (51.1 million total children).

[24] *Quarterly U.S. Consumer Spend on Video Game Products Reached the Highest Total in U.S. History in First Quarter of 2020,* NPD GROUP (May 15, 2020), https://www.npd.com/wps/portal/npd/us/news/press-releases/2020/quarterly-us-consumer-spend-on-video-game-products-reached-the--highest-total-in-us-history-in-first-quarter-of-2020/.

[25] *Electronic Arts Reports Strong Q1 FY21 Financial Results*, ELEC. ARTS (July 30, 2020), https://s22.q4cdn.com/894350492/files/doc_financials/2021/q1/Q1-FY21-Earnings-Release-Final.pdf ($359 million from game sales, $1.1 billion from "live" services).

[26] ELEC. ARTS, https://www.ea.com/games/library (last visited Apr. 10, 2022).

[27] *Q3 FY22 Financial Results*, ELEC. ARTS REPS. (Feb. 1, 2022), https://www.ea.com/news/electronic-arts-reports-q3-fy22-financial-results; Leah J. Williams, *US Games Spending Hit a Record US $60.4 Billion in 2021*, GAMES HUB (Jan. 21, 2022), https://www.gameshub.com/news/news/us-games-spending-record-2021-11492/.

Apple mobile devices in 2018 and raked in $2 million a day for a time, solely from sales on that platform.[28]

While Fortnite itself is described as "free-to-play," players are limited to a single game mode and few cosmetic options.[29] Players can purchase a "battle-pass" which allows access to other game modes and cosmetics.[30] Players can purchase the items outright, converting real money into "V-Bucks," which are then used to make in-game purchases.[31] Fortnite will often have special limited-time events, partnering with big-name brands like Marvel and allowing players to make their character look like a famous superhero.[32] One of the more popular elements available for purchase are "dances," which make the player's in-game avatar move and groove.[33] This feature is so popular that a lawsuit was brought against Epic Games over the trademark of Alfonso Ribeiro's dance, "The Carlton," featured on "Fresh Prince of Bel-Air."[34] Ribeiro later dropped the suit, along with a similar claim against the basketball game NBA2K for using the dance.[35]

Fortnite is not the only game that is free on its face but that costs to truly play. Like mentioned above, many of the top games in the mobile app stores contain loot box mechanics. These games, frequently called "freemium" or "pay-to-play," cost nothing to download or to access.[36] Most freemium games allow the player to access a limited section of the game, or tease premium features that

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[28] Akhilesh Ganti, *How Does Fortnite Make Money?*, INVESTOPEDIA (Sept. 10, 2020), https://www.investopedia.com/tech/how-does-fortnite-make-money/.

[29] *Id.*

[30] *Id.*

[31] *Id.*; *see also* Joseph Knoop, *Epic Games Settles Fortnite Loot Box Lawsuit with V-bucks*, PC GAMER (Feb. 22, 2021), https://www.pcgamer.com/uk/fortnite-lawsuit-loot-llama/.

[32] *Leader Board of Top Selling Mobile Games*, SIMILARWEB (Nov. 7, 2020), https://www.similarweb.com/apps/top/google/store-rank/us/games/top-grossing/.

[33] *Id.*

[34] Ribiero v. Take-Two Interactive Software, Inc., No. 2:18-cv-10417 (C.D. Cal. dismissed Dec. 17, 2018).

[35] *Alfonso Ribeiro Drops 'Carlton Dance' Suit Against 'Fortnite' Video Game Creators,* ASSOCIATED PRESS (Mar. 7, 2019), https://www.usatoday.com/story/life/people/2019/03/07/alfonso-ribeiro-drops-carlton-dance-suit-against-fortnite/3098433002/.

[36] Vanshika Dhyani, *The Psychology of Freemium Games*, UX PLANET (Jun. 8, 2020), https://uxplanet.org/the-psychology-of-freemium-games-69024d80273b.

require the collection of random items contained in loot boxes or outright purchases.[37]

This business model has been successful for the developers, as evidenced by the correlation between top grossing games in the app stores and their "free" price tag. One such game, Clash of Clans, has earned over $6.4 billion since its launch in 2014, despite being "free-to-play."[38] Mobile game users have often complained about this business strategy, stating that it is misleading and predatory.[39]

A distinct difference between different types of loot boxes must be mentioned here. Some loot boxes can be earned through game play or progression, or after completing certain objectives.[40] These are gifted by the game with no strings attached, a free reward just for playing.[41] Paid loot boxes are another animal altogether. These can only be unlocked via payment of some kind, whether in real dollars, or in-game currency.[42] Often, video game developers will increase the odds of pulling something desirable out of the paid loot boxes.[43] The most damage that the free, earned loot boxes can wreak is to lure the gamer in with colorful animations and flashing lights, convincing them to open another loot box; a paid one this time. Paid loot boxes are the focus of this article, which explores the dangers associated with companies getting too greedy, and the lack of regulatory oversight for paid loot boxes in video games.

2. *WHEN LOOT BOXES GO TOO FAR*

At one point, a handful of game manufacturers crossed a line with their random loot mechanics and outraged the video game community. In particular, EA's "Star Wars: Battlefront II" received criticism for its loot box system, a breaking point for many

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[37] *Id.*

[38] Sehaj Dhillon, *Clash of Clans Revenue and Usage Statistics (2022)*, BUS. APPS (Jan. 11, 2022), https://www.businessofapps.com/data/clash-of-clans-statistics/.

[39] *See* Harrison Jacobs, *Gaming Guru Explains Why 'Freemium' is Actually the Best Business Model for Multiplayer Video Games*, BUS. INSIDER (Mar. 19, 2015, 10:08 AM), https://www.businessinsider.com.

[40] *See* Andrew E. Freedman, *What Are Loot Boxes? Gaming's Big Controversy Explained*, TOM'S GUIDE (Aug. 9, 2019), https://www.tomsguide.com/us/what-are-loot-boxes-microtransactions,news-26161.html.

[41] *See generally id.*

[42] *Id.*

[43] *Id.*

players.[44] Battlefront II's loot box system allowed a player to either pay money for desired abilities, weapons, and avatars randomly assorted in its loot boxes, or required the player to put in several hours of grinding gameplay to earn the same items.[45] During a question and answer session on Reddit, an unsuspecting developer who had worked on the game was ambushed.[46] The developer was confronted with the math that in order to unlock all the content in the game, a player would either have to invest $2,100 or 4,528 hours of gameplay.[47] One Reddit user asked, "[t]hat's over twice the amount of working a full time, 40 hour-a-week job for a year, and very few people will play even a quarter of that. What are your plans to retain a player base with such a slow progression system?"[48] A representative of EA replied in another thread with, "[t]he intent is to provide players with a sense of pride and accomplishment for unlocking different heroes."[49] That comment is currently the most "downvoted" in Reddit history, with more than 668,000 users reacting negatively and expressing their frustration.[50] EA eventually removed the mechanic from the game and made several changes that, when the game was reintroduced, did not receive the same negative reaction.[51] The damage had been done however, and with

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[44] Tyler Wilde, *Star Wars Battlefront 2 Microtransactions Have Been Temporarily Removed*, PC GAMER (Nov. 16, 2017), https://www.pcgamer.com/star-wars-battlefront-2-microtransactions-have-been-temporarily-removed/.

[45] *See* Soeren Kamper, *It Will Take 4,528 Hours of Gameplay (or $2100) to Unlock All Base-Game Content in Star Wars: Battlefront 2*, STAR WARS GAMING (Nov. 14, 2017), https://swtorstrategies.com/2017/11/it-will-take-4528-hours-of-gameplay-or-2100-to-unlock-all-base-game-content.html.

[46] *See* u/thesomeot, Comment to *Star Wars Battlefront II DICE Developer AMA*, REDDIT (Nov. 15, 2017), https://www.reddit.com/r/StarWarsBattlefront/comments/7d4qft/star_wars_battlefront_ii_dice_developer_ama.

[47] *Id.*

[48] *Id.*

[49] u/EACommunityTeam, Comment to *Seriously? I Paid 80$ to Have Vader Locked?*, REDDIT (Nov. 12, 2017), https://www.reddit.com/r/StarWarsBattlefront/comments/7cff0b/seriously_i_paid_80_to_have_vader_locked/dppum98/?st=JA00J743&sh=b95da37c.

[50] *Id.*

[51] Wilde, *supra* note 44; *see also* Knoop, *supra* note 31.

more consumers aware of this blatant showing of corporate greed, the public demanded more regulation.[52]

At what point would consumer outrage overpower the money printing capabilities of loot boxes and microtransactions? The popularity of these games has not been as affected as gamers, angry with loot box mechanics, may want. If anything, the popularity of these games is growing each year. ESPN has recognized competitive gaming as "E-Sports" and will show tournaments on cable TV.[53] These E-Sports teams not only consider themselves athletes, but also have sponsors and endorsement deals for products from energy drinks to keyboards and cars.[54] E-Sports tournaments can be enormous, with the Madden NFL 21 championship winner coming away with $1.4 million in prize money.[55]

3. *CURRENT REGULATIONS*

There is a clear trend of video games moving away from simply being a "pay and play" commodity toward something much more complex. Once upon a time, a gamer could purchase a video game over the counter or from a digital storefront and have access to the entire game with no requests for further payment from the video game company. With the market shifting towards in-game purchases, so too must the regulations and laws shift to accommodate the new hurdles.

Before answering the questions of what should be done, it is essential to understand what is being done now. Video games released in the United States all have a rating attached.[56] Much like the rating system for films and television programming, games are rated according to a certain maturity level believed to be necessary for a user.[57]

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[52] Andy Chalk, *US Lawmaker Who Called out Star Wars Battlefront 2 Lays out Plans for Anti-Loot Box Law*, PC GAMER (Dec. 5, 2017), https://www.pcgamer.com/us-lawmaker-who-called-out-star-wars-battlefront-2-lays-out-plans-for-anti-loot-box-law/.

[53] *See generally* ESPN, https://www.espn.com/esports/ (last visited Apr.12, 2022).

[54] Jordan Ashley, *Top 10 Esports Sponsorships That Will Redefine the Industry*, ESPORTS.NET (Aug. 12, 2021), https://www.esports.net/news/top-10-esports-sponsorships/.

[55] Stacey Henley, *EA Announces Record Breaking Prize Pool for Madden 21 Championships*, LOADOUT (Aug. 26, 2020), https://www.theloadout.com/madden-nfl-21/madden-21-championships-prize-pool.

[56] ESRB, https://www.esrb.org (last visited Apr. 8, 2022).

[57] *Id.*

The ESRB has a ratings system dedicated to helping parents determine if a game is appropriate for their child.[58] An "E" rating means it is approved for "Everyone," which means the game has little or no objectionable material and should be suitable for even the youngest gamer.[59] An "E10+" rating indicates the game is suitable for children aged ten and older.[60] A "T" rating means the game is approved for teens, or minors under the age of seventeen, and may contain mild language and cartoon violence.[61] "M" is for "Mature," the most common game rating.[62] "M" indicates the game may include "intense violence, blood and gore, sexual content and/or strong language."[63] Popular games today like Call of Duty and Grand Theft Auto are rated M.[64] "AO 18+," or "Adults Only 18+," applies only to the rare game that may include, "prolonged scenes of intense violence, graphic sexual content and/or **gambling with real currency**."[65]

In April of 2020, after push back from parents and consumers, the ESRB added a warning on "T" rated games that included a loot box mechanic that read, "in-game purchases with random items."[66] Some users would say this is not enough. An "AO18+" rating on a game would mean less revenue and fewer overall sales, thus disincentivizing a studio to include gambling with real money. But if a game with loot boxes could be described as actual gambling, with real money, does it not deserve a rating higher than "T"? Should it not be truly regulated, like gambling is?

4. *WHAT IS THE DANGER?*

Hawaii Representative Chris Lee has been one of the first U.S. politicians to lead the charge against the practices in Battlefront II,

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[58] *Ratings Guide*, ENT. SOFTWARE RATING BD., https://www.esrb.org/ratings-guide/ (last visited Apr. 8, 2022).

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] Kyle Chivers, *2020 Video Game Ratings in Review, and What They Mean to Gamers*, NORTON (Jan. 14, 2021), https://us.norton.com /internetsecurity-kids-safety-video-game-ratings.html.

[63] *Id.*

[64] *See Grand Theft Auto V*, ENT. SOFTWARE RATING BD., https://www.esrb.org/ratings/33073/Grand+Theft+Auto+V/ (last visited Apr. 14, 2022); *see also Call of Duty®: Vanguard*, ENT. SOFTWARE RATING BD., https://www.esrb.org/ratings/38008/Call+of+Duty®%3A +Vanguard/ (last visited Apr. 14, 2022).

[65] *Ratings Guide*, *supra* note 58 (emphasis added).

[66] *Id.*

calling it "a *Star Wars*-themed online casino designed to lure kids into spending money."[67] Rep. Lee stated he was in contact with legislators with the intent to change laws in several states regarding microtransactions and loot box-type mechanics in video games, especially those marketed toward children.[68] Video game manufacturers seem to be on a never-ending quest to include more and more loot box mechanics and microtransactions in their games—constantly pushing the envelope to see what consumers will allow and how much money they will spend. Why is this a problem? We live in a capitalist economy and people can make their own choices, right?

The problem, hinted at several times already and plainly stated by Rep. Lee, is that the target audience for many of these games is children. Children are highly susceptible to all activities known to cause addiction, and gambling is no exception.[69] Adolescent gambling addiction recovery programs are already providing assistance to minors who have struggled with the gamblers high that many have described experiencing while opening loot boxes.[70]

Gambling may not have the same stigma it has carried in times past, with images of a dirty room behind a bar, men shouting at a TV, cheering and cursing at a football game, and money being passed around and clenched in sweaty fists long-gone. There are easier and more legitimate ways to lose money now. The internet has made it extraordinarily simple to play poker, blackjack, or pull slots.[71] One can also bet the over on a basketball game, or place a

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[67] Chris Lee, *Highlights of the Predatory Gaming Announcement,* YOUTUBE, (Nov. 21, 2017), https://www.youtube.com/watch?v=_akwfRuL4os&feature=emb_logo.

[68] *Id.* Rep. Lee has also been joined in this effort by Senator Hawley of Missouri, though Hawley wants to more aggressively ban social media and video game practices that target children. *Senator Hawley to Introduce Legislation Banning Manipulative Video Game Features Aimed at Children*, JOSH HAWLEY U.S. SENATOR FOR MO. (May 8, 2019), https://www.hawley.senate.gov/senator-hawley-introduce-legislation-banning-manipulative-video-game-features-aimed-children.

[69] Mark D. Griffiths, *Is the Buying of Loot Boxes in Video Games a Form of Gambling or Gaming?*, GAMING L. REV. (2018).

[70] Filipa Calado et al., *Prevalence of Adolescent Problem Gambling: A Systematic Review of Recent Research,* J. GAMBLING STUD. 397, 397-424 (2017); *see also* David Zendle et al., *Adolescents and Loot Boxes: Links with Problem Gambling and Motivations for Purchase*, 6 ROYAL SOC'Y PUBL'G 1 (June 19, 2019).

[71] *Our Overall Attitude Towards Gambling and Betting Has Changed*, EURO WEEKLY NEWS (Apr. 5, 2022, 10:36 AM), https://euroweeklynews.com/2022/04/05/our-overall-attitude-towards-gambling-and-betting-has-changed/.

bet on ferret bingo.[72] While modern technological advances have made it easier to bet on silly or childish things, gambling is not for minors. If paid loot boxes are really veiled gambling, they need to be kept away from children.

D. MODERN GAMBLING REGULATION

Gambling in the United States is a massive industry. According to one source the gambling industry in the U.S. is worth over $240 billion, with online gambling worth $102 billion.[73] Yearly revenues have exceeded $158 billion.[74] Under U.S. law, gambling is legal, though several states have enacted statutes banning either certain gambling practices or kiboshing it all together.[75] Only two states, Hawaii and Utah, have banned all gambling, including a state lottery.[76] From commercial casinos, Native American casinos, lotteries, and online gambling, there are many ways to gamble and many gambling activities that are regulated and taxed.

In 2006, congress passed the Unlawful Internet Gambling Enforcement Act ("UIGEA").[77] The UIGEA prohibits gambling businesses from "knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the Internet and that is unlawful under any federal or state law."[78] The act itself does not illegalize online gambling, but disallows businesses from processing online gambling money.[79] Under the UIGEA, would a video game company be violating the law by accepting payment from players purchasing loot boxes? The transaction is taking place over the internet, but in the example of

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[72] Samantha Beckett, *8 Bizarre Things You Can Actually Bet On*, CASINO.ORG (Mar. 17, 2017), https://www.casino.org/blog/8-bizarre-things-you-can-actually-bet-on/.

[73] *Online Gambling Market Worth $102.97 Billion by 2025*, CISION (Aug 27, 2019), https://www.prnewswire.com/news-releases/online-gambling-market-worth-102-97-billion-by-2025--cagr-11-5-grand-view-research-inc-300907362.html.

[74] S. Lock, *Total Revenue of the Gambling Market in the United States from 2004 to 2018,* STATISTA (May 29, 2020), https://www.statista.com/statistics/271583/casino-gaming-market-in-the-us/#:~:text=In%202018%2C%20the%20U.S.%20gambling,stakes%20gaming%20and%20tribal%20gaming.

[75] *State Gambling Laws*, FINDLAW, https://statelaws.findlaw.com/gambling-and-lotteries-laws/gambling.html (last visited Nov. 7, 2020).

[76] *Id.*

[77] Unlawful Internet Gambling Enforcement Act of 2006 Overview, 31 U.S.C. §§ 5361-5366 (2006).

[78] *Id.*

[79] *Id.*

the twelve-year-old playing Madden NFL Ultimate Team, his money is transferred into Xbox points, which are then used to buy the card packs. In that case, would Xbox, EA, or the user be the one violating the UIGEA? The act does not specify that "payments" means "dollars."[80] If paid loot boxes were determined to be gambling, certainly keeping them in-game would violate the UIGEA.

5. *CURRENT GAMBLING LAWS*

While the several states regulate gambling within their own borders, one common aspect is the minimum gambling age, usually 21, with no state lower than 18 years old.[81] In most states, it is illegal to enter a casino if one is under 21.[82] In New Jersey, an eighteen-year-old can purchase a lottery ticket but cannot set foot in a casino.[83] Some have pondered the reason for this seemingly arbitrary number.[84] Could it have something to do with the service of alcohol in casinos? Maybe the responsibility of assuming the risks associated with alcohol is seen as equivalent to the risks inherent in gambling? Perhaps studies about human brain development and the frontal lobe supposedly still growing until 21 have influenced this age bar.[85] Studies have linked adolescent gambling with anti-social behavior, depression, anxiety, future drug and alcohol abuse, and suicide.[86] Whatever the reason, no state has seen fit to lower the minimum gambling age, while the fact remains that many video game players and those who are able to purchase loot boxes are under that legal age.

E. MARKETING GAMBLING TO CHILDREN

Today, minors are essentially constantly plugged in to the internet. Playing games with friends and strangers is a popular

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[80] *Id.*

[81] I. NELSON ROSE, PATHOLOGICAL GAMBLING: A CRITICAL REVIEW (1979).

[82] *Id.*

[83] *Id.*

[84] *How Would Lowering the Legal Age of Gambling Impact the US?*, DAILY IOWAN, (Mar. 26, 2020) https://dailyiowan.com/2020/03/26/how-would-lowering-the-legal-age-of-gambling-impact-the-us/.

[85] Chris Foy, *RNGs and Loot Boxes: The Gambling Addiction of Gaming,* FHE HEALTH (Aug. 8, 2019), https://fherehab.com/learning/rng-lootboxes-gambling-in-gaming/.

[86] Katie Hansen, *Too Much Too Soon: The Consequences of Underage Gambling*, LANCER FEED (Feb. 3, 2016), https://lancerfeed.press/opinions/2016/02/03/too-much-too-soon-the-consequences-of-underage-gambling/.

pastime, especially on mobile devices.[87] Over 238 million people play mobile games in the U.S. and Canada.[88] Not only is playing games popular, but watching other people play the games is popular as well.[89] "Streamers" are those who play video games and stream it live on the internet.[90] They share their screen for all to see and often have a camera facing themselves. For those unfamiliar with streamers and the industry, it may sound silly. Who would watch someone else play a video game?

Not only do millions of people spend hours watching streamers, they often pay for the privilege.[91] Twitch.tv, the most popular platform for streamers, brought in $2.3 billion in revenue in 2020.[92] Most of that is believed to go to the streamers themselves, the most popular of which have endorsement deals and run advertisements on their Twitch channel.[93] The most popular streamer, "Ninja," brings in around $5 million a year from his more than 14.7 million followers.[94] The game that Ninja streams the most and the game that brought him fame and money is none other than the afore mentioned Fortnite.[95]

Why should we care that children are tuning in to watch other people play video games? Children are highly susceptible to media and advertising.[96] Video game companies will pay these streamers to play their games. Inevitably, those that stream games containing loot boxes will buy some and open them. Some viewers will even "donate" money to the streamer specifically for loot boxes. After opening, usually several, loot boxes, the streamer will pull a desirable item. This then convinces the viewers that they too can

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[87] *65% of Americans and Canadians Play Mobile Games*, NPD (Jan. 19, 2021), https://www.npd.com/wps/portal/npd/us/news/press-releases/2021/65-of-americans-and-canadians-play-mobile-games/.

[88] *Id.*

[89] Mansoor Iqbal, *Twitch Revenue and Usage Statistics (2022)*, BUS. APPS (Jan. 11, 2022), https://www.businessofapps.com/data/twitch-statistics/.

[90] *See id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*; *see also*, *How Much Do Twitch Streamers Make? 2022 Earning Statistics Revealed*, STREAM SCHEME, (Feb. 4, 2022), https://www.streamscheme.com/twitch-payout/.

[94] Iqbal, *supra* note 89.

[95] *Id.*

[96] Abraham Riesman & Jesse Singal, *This Is Your Brain on Advertising: Why Kids Are So Vulnerable to Marketing*, CUT (Nov. 3, 2015), https://www.thecut.com/2015/11/why-kids-are-so-vulnerable-to-advertising.html.

obtain these rare items. It is worth noting that several streamers have been accused of "streamer luck," a tongue-in-cheek way of accusing them of having increased chances at rare items granted by the video game company, a claim that has been denied by several streamers.[97]

While these streamers can afford to open dozens of loot boxes all at once, a feat that would cost a typical gamer hundreds of dollars, and are incentivized by most video games containing loot boxes that offer deals (the more loot boxes one buys, the cheaper each one is), the odds are that the streamer will pull a desirable item from a loot box. A casual gamer would possibly buy a loot box or two, not gain a rare item, and simply move on. With the "testimonial" of the streamer offering credibility, however, the gamer may be enticed to purchase more and more, until the desired item is pulled. This type of advertising is especially dangerous to those who are young and more susceptible.[98]

It could be said that it is impossible to show direct evidence that a company like EA markets games like Madden NFL directly to children. After all, football is an adult sport played by adults and enjoyed by people of every age demographic. However, on January 7th, 2021, EA's official Madden NFL Twitter account tweeted a teaser that said, "Are You Ready?" featuring the children's cartoon Spongebob Squarepants.[99] A few days later, uniforms, animations, stadiums, and more in-game items featuring the world's favorite sponge and his friends were added to the game.[100] If paid loot boxes are gambling, then advertising aimed at children for a game containing paid loot boxes would be wrong, right? What is the difference between cigarettes being marketed to children with Joe

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[97] *See* Gutfoxx, *My Best TOTW Packs All Year! Streamer Luck Was Activated!*, YOUTUBE (Jan. 12, 2021), https://www.youtube.com/watch?v=DjyxpCBNWU.

[98] *See* Committee on Communications, *Children, Adolescents, and Advertising,* PEDIATRICS: OFFICIAL J. AM. ACAD. PEDIATRICS, (Dec. 2006).

[99] @EAMaddenNFL, TWITTER (Jan. 5, 2021, 9:00AM), https://twitter.com/EAMaddenNFL/status/1346486827897810945?s=20.

[100] Richard Warren, *Madden NFL 21 SpongeBob Crossover Includes New Cosmetics, Challenges, and More*, GAMERANT (Jan. 8, 2021), https://gamerant.com/madden-nfl-21-spongebob-crossover-cosmetics-challenges/; *see also Nickelodeon X Madden NFL 21*, ELEC. ARTS, https://www.ea.com/games/madden-nfl/madden-nfl-21/seasons/nickelodeon (last visited Apr. 10, 2022).

Camel and gambling being marketed to children with Spongebob?[101]

II. ARE PAID LOOT BOXES GAMBLING?

Most people can agree that playing slot machines, blackjack, or a similar activity is gambling. But if we are to determine if paid loot boxes should be lumped in with those activities, gambling should be defined. Common law and Black's Law Dictionary break gambling into three elements: (1) consideration; (2) prize, and; (3) chance.[102] It is debated whether loot boxes satisfy these elements.[103] While some loot boxes that can be earned through game play may not fall under the common law definition of gambling, the paid loot boxes purchased with money certainly do.[104]

A. CONSIDERATION

Gaming in the gambling context requires players to give something of value to play the game, this consideration could be actual currency or some substitute like poker chips.[105] Real-world currency obviously satisfies this element, but in-game currency is a little less clear.[106] If we liken the exchange of Xbox Points to casino chips, there is a clear exchange of real currency for something that can also be exchanged for something of value. Chips at a casino can then be exchanged for currency or used as further consideration to continue gaming. The chips represent the value of the almighty dollar and are treated as such, though only in a limited context within the specific casino.

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[101] *See* John M. Broder, *FTC Charges Joe Camel Ad Illegally Takes Aim at Minors*, N.Y. TIMES (May 29, 1997), https://www.nytimes.com/1997/05/29/us/ftc-charges-joe-camel-ad-illegally-takes-aim-at-minors.html; *Joe Camel Advertising Campaign Violates Federal Law, FTC Says*, FTC (May 28, 1997), https://www.ftc.gov/news-events/press-releases/1997/05/joe-camel-advertising-campaign-violates-federal-law-ftc-says.

[102] *Gambling*, BLACK'S LAW DICTIONARY (9th ed. 2009). *See also* WALTER T. CHAMPION JR. & I. NELSON ROSE, GAMING LAW NUTSHELL 8 (1st ed. 2012).

[103] Alexandra M. Prati, *Video Games in the Twenty-First Century: Parallels Between Loot Boxes and Gambling Create an Urgent Need for Regulatory Action*, 22 VAND. J. ENT. & TECH. L. 215, 236-39 (2019).

[104] *See id.*

[105] *Id.*

[106] *See id.*

Xbox Points or other forms of in-game currency can only be exchanged back to real-world currency through some kind of grey market or a direct refund.[107] However, do the Xbox Points have any less value once converted from real-world currency? § 330.1(f) of the California Code (examined in greater detail later on) leads us to the idea that anything of value being exchanged for a chance at something else, like earning a free spin on a slot machine, meets the definition of proper consideration.[108]

Paid loot boxes should satisfy the consideration element. The loot boxes that are earned by in-game progression would not meet the requirements for the consideration prong unless one's time could be deemed proper consideration.[109] Perhaps in some cases, where the time invested clearly overshadows a potential prize's worth would meet the requirements[110], but it is unlikely that any loot box not purchased with real-world currency would satisfy this element. The resolution of current litigation may provide a more concrete, legal answer to this question.[111]

B. PRIZE

The hypothetical twelve-year-old from earlier loves the Ultimate Team mode in Madden NFL. Within this game-mode, there is an auction house feature that can be used to buy and sell cards to real people using an in-game currency called coins.[112] A card's worth is dependent on how rare they are and their overall rating. Cards can be posted in the auction house and other people can place coin bids, offering more and more coins until the auction expires and the person with the highest bid gets the card.[113] The player who put the card up for auction gets the coins, minus a 10%

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[107] *See Sell MUT Coins*, MR. MUT COIN, https://www.mrmutcoin.com/ (last visited Apr. 10, 2022) (selling coins in the grey market); *see also* ROCK BOTTOM, https://www.rock bottomcoins.com (last visited Apr. 10, 2022) (selling coins in the grey market).

[108] *See* CAL. PENAL CODE § 330.1 (Deering 2022).

[109] *See generally* CHAMPION & ROSE, *supra* note 102, at 9.

[110] *See supra* Section I.C.2.

[111] Ramirez v. Electronic Arts, Inc., 5:20cv5672, (N.D. Cal. filed Aug. 13, 2020)(This case has been moved to arbitration as of Mar. 5, 2021).

[112] *Madden Ultimate Team Grinder's Guide: Auction House*, EA SPORTS (Oct. 28, 2021, 4:40 PM), https://www.easports.com/madden-nfl/news/2014/mut-auction-house.

[113] *See id.*

auction tax.[114] Because of this, we can place approximate dollar values on card packs.[115]

For the prize element of common law gambling to be satisfied, the player must have an opportunity to obtain something of value.[116] Prizes include real currency, replays for games, or virtual items.[117] In *Kater v. Churchill Downs Inc.*, the court determined that virtual currency and in-game virtual items can satisfy the prize element of common law gambling.[118] However, in the same case, the court ruled that if an in-game currency could only be converted to real-world currency through a process that would violate the game's terms of service, it could not be considered a "prize". The ruling would seem to diminish the value of in-game currency that can only be exchanged into real-world currency via a black or grey market, which violates most, if not all game's terms of use.

This further clouds the waters around what may seem an easily satisfied element. The answer remains that while not everyone may see an in-game item or virtual currency as valuable, to some it can be just as valuable as real-world currency. To be sure, some courts would not consider the prize element met in money-exchange scenarios that violate a game's terms of service agreement.[119]

C. CHANCE

Chance is, on first look, the most easily-met element for common-law gambling.[120] Chance requires that the outcome of the

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[114] *Id.*

[115] How the auction house works: without getting complicated enough to require an economics degree, let us assume Brett Favre would be worth 1 million coins on the auction block. One could then risk up to just under the dollar equivalent of 1 million coins and "turn a profit." But "grey market" coin sellers have been popping up on the internet. *See* sources cited *supra* note 107. One can exchange real dollars for Madden coins, either through selling or buying. Let us assume 1 million coins are worth $200 in actual currency. So, if someone pays under $200 in card packs and pulls a Brett Favre, they would be able to turn a profit. Some online coin sellers will even sell you a particular card at the equivalent coin to dollar rate. With this information in hand, the argument could be made that one could put dollars in and get dollars out of loot boxes. *See also supra* note 112.

[116] *Gambling*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[117] *See* Kater v. Churchill Downs Inc., 886 F.3d 784, 787 (9th Cir. 2018).

[118] *Id.*

[119] *See* Mason v. Mach. Zone, Inc., 140 F. Supp. 3d 457, 465 (D. Md. 2015).

[120] *See Chance,* BLACK'S LAW DICTIONARY (11th ed. 2019).

game or activity be determined by luck rather than skill.[121] Loot boxes operate on a random number generator ("RNG") system and fit this element by definition.[122] One could open the same loot box 100 times and receive no rare or valuable items or receive 100 rare items.[123] Some gamers play this numbers game to attempt to turn a profit. Assuming a certain loot box has a five percent chance at a certain item, one should receive five of those items after opening 100 loot boxes. This is a fallacy however, as the player has a five percent chance at that item every time the loot box is opened.[124] The player could never see the rare item or obtain it in the first loot box.

While the loot boxes themselves are operated purely by chance and would satisfy this element handily, one court has seen fit to classify the game as a whole and not the mechanic itself.[125] In *Mason v. Mach. Zone, Inc*., the Maryland District Court determined that despite a purely chance-based in-game mechanic, if the game as a whole could be called a game of skill and not chance, all things in the game are of the same.[126] The plaintiff in *Mason* brought an action against a mobile game manufacturer, suing for money she claims was lost in an illegal casino within defendant's game.[127] The game in question contained an in-game casino feature in which the plaintiff stated they had lost over $100.[128] The plaintiff claimed that the in-game mechanic is an illegal slot machine under California Penal Code § 330b.[129]

The court concluded that the in-game casino function generally satisfied the elements of common law gambling and fit into the requirements set forth in § 330b.[130] The court then took a unique position and analogized the game to a pinball machine.[131] Noting

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[121] *See id.*

[122] Chris Foy, *RNGs and Loot Boxes: The Gambling Addiction of Gaming*, FHEHEALTH (Aug 8, 2019), https://fherehab.com/learning/rng-lootboxes-gambling-in-gaming/.

[123] *Id.*

[124] *Id.*; *see also* Daniel M. Oppenheimer & Benoit Monin, *The Retrospective Gambler's Fallacy: Unlikely Events, Constructing the Past, and Multiple Universes,* 4 JUDGMENT & DECISION MAKING (2009), http://journal.sjdm.org/9609/jdm9609.html.

[125] Mason v. Mach. Zone, Inc., 140 F. Supp. 3d 457, 463 (D. Md. 2015).

[126] *Id.* at 460.

[127] *Id.*

[128] *Id.*

[129] *Id.; see also* Cal. Penal Code § 330b.

[130] *Mason*, 140 F. Supp. at 463. (explaining the court's skepticism of the "machine or device" requirement of § 330b applied to a piece of software).

[131] *Id.*

that pinball machines, which are games of skill, sometimes award free replays to the player, an in-game random, chance-based mechanic therefore does not a game of chance make.[132] While this reasoning seems open to argument, the offending device at issue was not the game itself, but rather the casino mechanic within the game.[133]

The game developer-defendant in *Mason* argued that the game is one of skill and would be exempt from § 330b.[134] The Maryland court viewed the developer's argument with far greater weight than may have been warranted. The court refused to examine the gambling element of the game individually.[135] Instead, the court steadfastly looked at the game as a whole, not unlike viewing a casino as a den of random chance games rather than a den of skill-based games, like Texas Hold 'em Poker.[136] The court doubled down on its position with the proclamation, "[t]he game at issue here is not a "Casino."[137] The *Mason* court's position is certainly debatable, to say the least. By not examining the individual element of chance within the game, the court ignored what could potentially be a predatory practice, harmful to many.

The court's decision in *Mason* undermines the strength of the argument that loot boxes satisfy the chance element. Post-*Mason*, any game with loot boxes could be defined as a skill-based game. Madden NFL would easily be classified as a game of skill, despite containing chance-based elements. If the courts choose not to examine the loot box mechanic by itself and instead choose to look at the game only as a whole, loot boxes will escape proper definition or regulation, whether they are determined to be a gambling mechanic or not.

What is the difference between the aforementioned trading card packs and loot boxes? On the surface, these appear similar. Both have a random element, both have rare and desirable items, and both have the chance at pulling common items more often than rare or valuable items. Purchasing baseball cards is not considered gambling and one would be hard-pressed to find someone who thinks they are. What is the difference? Could it be the aspect of having a physical card in your hand, versus a digital one? Could it

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[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*; *see also* United States v. Hsieh, No. 11-00082, 2013 WL 1499520 (D. Guam Apr. 12, 2013) (holding that while poker is mainly a skill-based game, its elements of chance make it a game of chance).

[137] *Mason*, 140 F. Supp. at 463.

be that loot boxes are part of a greater video game universe, rather than just a card pack from the drug store? This author submits that the material difference between the two is that paid loot boxes are a part of a game that has already been bought and paid for. Purchasing a $60 video game and then immediately being faced with the prospect of spending more money for items in that game feels exploitative and devious, especially when game progression requires an item only acquirable through a loot box.

When purchasing a physical trading card pack, one purchases the pack and the chance at a desirable card. Other than collecting, or perhaps selling, rare cards, there is no other purpose, no endgame, no progression. It is a one-time sale; you buy a card pack, you get cards. You may be disappointed in the cards you receive, and you may want to buy another pack to test your luck. Perhaps the true difference between trading card packs and loot boxes is that the latter just feels wrong.

D. PENDING LEGAL ACTION

A recent class-action suit against EA ultimately should help answer some of the questions raised above. In a complaint filed in August of 2020, Kevin Ramirez claims EA's business practices are predatory by nature and violate California gambling statutes.[138] The assertion is that under § 330.1(f) of the California Code, the video game containing loot boxes is by law, a slot machine. The relevant part of the statute reads,

> A slot machine . . . is one that is, or may be, used or operated in such a way that, as a result of the insertion of any piece of money or coin or other object the machine or device is caused to . . . , mechanically, electrically, automatically, or manually, and by reason of any element of hazard or chance, the user may receive or become entitled to receive anything of value or any check, slug, token, or memorandum, whether of value or otherwise.[139]

Under this definition, the "device" would be a video game console along with the game itself, the "money or coin" would be

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[138] Complaint at ¶ 1, Ramirez v. Elec. Arts, Inc., No. 20-cv-05672-BLF (N.D. Cal. Mar. 5, 2021), 2021 WL 843184 [hereinafter "Complaint"].

[139] *See* Cal. Penal Code § 330.1(f) (West 2012); *see also* Cal. Penal Code § 330(b)(d) (West 2011).

points or virtual coins, which electronically is then exchanged for a chance for something of value (relative to the gamer).[140] This would certainly seem to fall under the definition of the statute and could be considered gambling. The complaint also likens EA's practices to a casino, designed to create and encourage addiction to playing the game and spending money.[141]

Due to recent legal action in Europe, EA began listing the chances at a desirable outcome for their card packs.[142] Most top tier cards, the only ones that if pulled, make the cost of the pack worth it or would allow the player to "break even", have a less than 5% chance of being pulled.[143] Most slot machines have a 0.1% of winning enough to break even or more.[144] Both the slot machine and the loot box mechanic in the game want the player to buy and spin more. If a player does win something, they feel lucky, like winners, and they want to keep their serotonin flowing. They hit the button or pull the lever again. They might lose, "but it's alright," they say, "you can't win every time." The feeling that eventually the luck will outweigh the misfortune is the very real phenomena that has earned casinos and video game makers a lot of money. Chasing this winning feeling has been compared to disease and hard drug addiction.[145]

Some of the "freemium" games mentioned earlier could be compared to a casino as well, where a player enters and gambles. Continuing the analogy, EA's games mentioned in the Ramirez complaint are like paying a cover charge at the door of the casino before being allowed to gamble. If the suit is successful for the plaintiffs, video game manufacturers may be required to eliminate or change their loot box practices or be subject to harsher regulation. There are several other suits pending against other game makers for loot boxes and predatory practices.[146] Other countries have

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[140] *See* Cal. Penal Code § 330.1(f) (West 2012); *see also* Cal. Penal Code § 330(b)(d) (West 2011).

[141] Complaint, *supra* note 138, at ¶ 68.

[142] *Id.* at ¶ 13.

[143] *Id.*

[144] Joey Richardson, *How to Beat Slot Machines*, GAMBLINGSITES.NET (Sep. 25, 2018), https://www.gamblingsites.net/blog/how-to-beat-slot-machines/.

[145] Bradley S. Fiorito, Comment, *Calling a Lemon a Lemon: Regulating Electronic Gambling Machines to Contain Pathological Gambling*, 100 NW. U. L. REV. 1325, 1336-37 (2006).

[146] Julie Steinberg, *Loot Box Lawsuits Liken Transactions to Slot Machine Gambling*, BLOOMBERG L. (Sept. 1, 2020),

addressed this issue. Belgian courts held that loot box mechanics are certainly gambling and are to be regulated as such. Canadian courts recently saw their own class action against EA for loot boxes in Madden NFL.[147] Scholars and Psychologists in the United Kingdom and Europe have proclaimed that loot boxes are gambling or "close enough not to matter."[148] The UK Gambling Commission would not classify loot boxes as gambling because "the in-game items have no real-life value outside of the game."[149] The Commission did relent that if the in-game items were exchanged for real-world currency, they would consider that particular loot box purchase to be gambling.[150]

III. POSSIBLE SOLUTIONS

Paid loot boxes need to be regulated as gambling. Whether justified by child safety or mental illness prevention or preventing a tax opportunity from going to waste, arguing for proper regulation against loot boxes is supported by worthy motives. The logistics are complicated as to how this could be accomplished. There are several possible solutions that could solve the problem and not disrupt a multi-billion-dollar industry in the process.

A. SELF-REGULATION

Allowing the industry to regulate itself could be the easiest way to accomplish what needs to be done without shutting down loot boxes entirely. No interference by the government with the free-market economy would be necessary. Self-regulation is currently successfully implemented across several industries such as

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https://news.bloomberglaw.com/product-liability-and-toxics-law/loot-box-lawsuits-liken-transactions-to-slot-machine-gambling.

[147] James Batchelor, *EA Facing Canadian Class Action Lawsuit Over Loot Boxes*, GAMESINDUSTRY.BIZ (Oct. 21, 2020), https://www.gamesindustry.biz/articles/2020-10-21-ea-facing-canadian-class-action-lawsuit-over-loot-boxes.

[148] Griffiths, *supra* note 69.

[149] *Id.*; *see also* Joseph Macey & Juho Hamari, *ESports, Skins and Loot Boxes: Participants, Practices and Problematic Behaviour Associated With Emergent Forms of Gambling*, 21 NEW MEDIA & SOC'Y 20 (2018) (professors in Finland examining loot boxes and other video game-related gambling); Enrique Echeburúa & Javier Fernández-Montalvo, *Psychological Treatment of Slot-Machine Pathological Gambling: New Perspectives*, 21 J. GAMBLING STUD. 21 (2005) (professors in Spain analyzing the brain's reaction to gambling, specifically with slot machines).

[150] Griffiths, *supra* note 69.

medicine, mining, fishing, and law.[151] Setting guidelines on loot box mechanics, like limiting who may be permitted to purchase them or how they are purchased, placing limitations on certain loot boxes, allowing parental controls, and providing marketing requirements are just some of the ways this can be accomplished.

Setting an age restriction on the purchase of each loot box would not stop minors from purchasing them entirely, but it could potentially deter children from gambling on loot boxes.[152] If nothing else, it would protect the video game companies. Changing how loot boxes are purchased could be as simple as requiring authorization on each purchase, or no longer converting dollars to in-game currency. More expensive loot boxes could have a purchase limit to stop the "gambler's high" and discourage further purchases.[153]

Parental controls would also be effective, allowing the parents to know and control what their children are purchasing if they so desire. Another solution would be to lock the ability to purchase loot boxes in games that are rated "E"-"T." Lastly, requiring marketing aimed at minors to have a disclaimer about the dangers of loot boxes and gambling or stop marketing to children altogether. These are just a few of the ways allowing the video game companies to self-regulate could work to minimize the exposure of children to dangerous gambling behaviors.

B. GOVERNMENT REGULATION

In a few European countries, like the Netherlands and Belgium, loot boxes have been ruled as gambling and violating local gambling laws.[154] The Netherlands has begun fining EA €500,000 weekly for their loot boxes in FIFA, the worldwide bestselling

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[151] Daniel Castro, *Benefits and Limitations of Industry Self-Regulation for Online Behavioral Advertising*, THE INFO. TECH. & INNOVATION FOUND. (Dec. 2011), https://itif.org/files/2011-self-regulation-online-behavioral-advertising.pdf.

[152] Rob Williams, *The Problem Continues: A Lot of Parents Ignore or Don't Care About ESRB Ratings*, TECHGAGE (Sept. 24, 2013, 8:30 AM), https://techgage.com/news/the-problem-continues-a-lot-of-parents-ignore-or-dont-care-about-esrb-ratings/.

[153] *See* Griffiths, *supra* note 69.

[154] Josh Coulson, *The Netherlands Has Banned Loot Boxes With A Maximum Fine Of €5 Million For Non-Compliance With New Terms*, THEGAMER (Oct 29, 2020), https://www.thegamer.com/netherlands-loot-box-ban/; *see also Gaming Loot Boxes: What Happened When Belgium Banned Them?*, BBC (Sept. 12, 2019), https://www.bbc.com/news/newsbeat-49674333.

soccer game.[155] The paltry sum has not deterred EA and they continue to sell and market their games containing loot boxes in the country. If the U.S. government were to get involved in paid loot box regulation, there are several possible options.

The federal government could fine the video game companies. While this has not had much effect on EA, perhaps fining them a higher amount could produce a more substantial effect. The government could fine the video game manufacturers based on every game they sell, or on a rolling basis, or progressively increase the fines with each "violation," fining a set amount for every loot box sold. This option seems very unlikely, especially with our current political climate in flux.

A government agency like the FTC or even the IRS could be handed the task of loot box regulation. After all, there is a lot of money involved and absolutely none of it is being taxed like gambling is.[156] The government could leap on this opportunity and tax each paid loot box dollar as gambling revenue. This could effectively kill two birds with one stone. The video game companies would either stop implementing paid loot boxes, or the government would have increased tax revenue. Again, considering the current political leanings of our various branches of government, this outcome is unlikely.

C. ESRB RATINGS

So far, the ESRB has done little to regulate or address paid loot boxes. If they were required by law to regulate loot boxes, the ESRB could create another rating between "Teen" and "Mature." A new rating would allow parents to make a proper, educated choice when allowing their children to play a game with paid gambling. Something like "'G' for Gambling" or "Teen Plus," perhaps. This could be the easiest and most likely outcome if paid loot boxes were legally viewed as gambling. It requires a minimal amount of work while preventing liability for the video game companies and the ESRB.

A new rating is nevertheless unlikely to happen without government action, as the ESRB does not view loot boxes as gambling. The ESRB has stated that it does not believe loot boxes are gambling because players are always rewarded with something,

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[155] *See* Coulson, *supra* note 154.

[156] *Topic No. 419 Gambling Income and Losses*, I.R.S., https://www.irs.gov/taxtopics/tc419 (last updated Jan. 21, 2022).

and there is no chance a player would pull zero virtual items.[157] This seems to be flawed logic as even some slot machines award the player with at least something for every pull and playing them is still indisputably gambling.[158]

If current litigation were to resolve in such a way that convinces the ESRB to change its view on paid loot boxes, this would be the ideal avenue toward loot box regulation. The ESRB is already an established organization, and parents already trust the ratings on the boxes for games appropriate for their children. While it is true that some parents may ignore the ratings altogether, regulations would seek to do the most they could for the greatest number of people. This option of regulation also disrupts the free-market economy the least, with the least amount of government oversight and interference. While some may argue this option does not go far enough to prevent children from gambling in video games, it is the most likely outcome, and surely something is better than nothing.

IV. CONCLUSION

Paid loot boxes in video games are either strictly gambling, or they come awfully close. Video games may not be inherently bad, and violent games do not necessarily lead to violent tendencies. Gambling may not be an unhealthy activity for mature adults with fully formed frontal lobes. When gambling becomes an addiction, however, it can turn dangerous. Even more dangerous is when the addiction afflicts a child. The mere existence of adolescent gambling addiction recovery programs indicates that minors are susceptible to the gamblers high that many have described experiencing while opening loot boxes.[159]

Paid loot box mechanics in modern games aimed at children are a predatory, greedy practice that demand heavy regulation, or should be stopped altogether. The fastest, most reasonably likely means of regulation requires the ESRB to step up and re-examine its stance on loot boxes, change its ratings, and give parents more information to make an educated decision on the games brought into their homes. Barring that, the government may need to get involved by fining the use of paid loot boxes, or eliminate paid loot boxes

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[157] Jason Schreier, *ESRB Says It Doesn't See 'Loot Boxes' As Gambling*, KOTAKU (Oct. 11, 2017), https://kotaku.com/esrb-says-it-doesnt-see-loot-boxes-as-gambling-1819363091.

[158] *See* Griffiths, *supra* note 69.

[159] *See generally* Calado et al., *supra* note 70; *see also* Zendle et al., *supra* note 70.

from video games altogether. Whatever does happen, regulatory change is coming soon and, like any good streamer's content, will be exciting to watch.