Root, Root, Root for the Home Team: Is the FANS Act of 2001 Really Good for Baseball Fans?

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Imagine for a minute that the American Association of Cell Phone Manufacturers met in Chicago last week, and at the meeting thirty of the largest manufacturers got together for cocktails to identify which of them they could buy out and close down in order to reduce the output of their product and maximize the profitability of the remaining manufacturers. Good idea, right?

But of course we all know that eventually their strategy would fail. It would fail because, first of all, their conspiracy would very likely be in violation of the Sherman Antitrust Act, and in an act of fairness to all entrepreneurial Americans, the government would remedy the situation, right? Or maybe if the government failed to remedy the situation, energetic young entrepreneurs would start up new manufacturing companies, through increased competition, driving prices down and choices for cell phones up.

That is the way it works here in America, right? Except for baseball.

—Minnesota Governor Jesse Ventura

On November 6, 2001, two days after the completion of what was one of the greatest World Series in history, Major League Baseball’s...
Commissioner Allan H. "Bud" Selig announced a plan by the owners of the thirty major league franchises to "contract" the league by eliminating two teams before the start of the 2002 season. The owners of the league's thirty franchises overwhelmingly approved the plan in order to alleviate some of the league's economic struggles. In order to accomplish this proposal, the Commissioner's Office and franchise owners relied on an exemption to federal antitrust laws that Major League Baseball has enjoyed since the 1922 United States Supreme Court decision in Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs. Congress quickly responded on November 14, 2001, when late United States Senator Paul Wellstone and United States Representative John Conyers introduced the "Fairness in Antitrust in National Sports (FANS) Act of 2001" to attempt to halt the threat of contraction statutorily. This legislation proposes to make federal antitrust legislation applicable to the elimination or relocation of Major League Baseball franchises.

In drafting the FANS Act, Senator Wellstone and Representative Conyers modeled the Curt Flood Act of 1998. The Curt Flood Act was meticulously crafted by Congress in collaboration with Major League Baseball and the Major League Baseball Players Association (MLBPA) so that it would place a specific limitation on professional baseball's federal antitrust exemption and not unintentionally affect the application of the exemption to other areas of the game. The current wording of the FANS Act, however, significantly diverges from that of the Curt Flood Act. The

4. Id. Major League Baseball argues that under current economic conditions, many teams are unable to produce enough local revenue to ever achieve long-term competitive and financial stability. See Hearing, supra note 1 (statement of Bud Selig, Commissioner, Major League Baseball). It claims that as a result the teams collectively lose hundreds of millions of dollars each year, such that the league is in debt for over $3 billion. Id. It argues that in order for the league to survive at least two teams need to be eliminated, as the local revenue generated in those markets is "simply insufficient to justify [the] continued investment in [them]." Id.
7. Id.
ramifications of the divergence could significantly affect many more aspects of professional baseball than the elimination or relocation of franchises. Therefore, Congress should not pass the FANS Act of 2001 as it is currently written, and alternative solutions should be explored to protect fans and cities from the contraction of Major League Baseball teams. Ultimately, the best solution is to revise the FANS Act, constructing it so that its scope more closely emulates that of the Curt Flood Act of 1998. This would avoid the unintended consequences that the FANS Act currently presents.

The first step in a thorough analysis of the FANS Act requires a study of the evolution of Major League Baseball's exemption to federal antitrust laws, the effects of that exemption, and all remedies to the problems created by the exemption. Part I of this analysis will provide a general overview of federal antitrust legislation. Part II will analyze the history of baseball's exempt status through numerous court decisions and legislative action. Part III will then look at the effects that this exempt status has on various aspects of the game, specifically on free agency, the minor league system, and the contraction or relocation of franchises. Part IV will explore the effects that the proposed act would have on the issues created by professional baseball's exemption to antitrust legislation. This part will also explore the effects of alternative measures such as a judicial overruling of the original creation of the exemption, or a revision of the current wording of the FANS Act. Finally, the conclusion will assert that, in order to best protect baseball fans from the danger of contraction without unintentionally upsetting other aspects of the game, Congress must revise the FANS Act so that it more closely emulates the carefully worded Curt Flood Act of 1998.

I. GENERAL OVERVIEW OF FEDERAL ANTITRUST LEGISLATION

The driving force behind America's free enterprise system of economics is competition. The struggle between competitors for business creates an environment of efficiency where many parties must supply consumers with quality goods and services at reasonable prices or risk being driven from the market. The environment of the late nineteenth century, however, did not conform to this desired model. During that time, American businesses thrived, showing enormous gains in both size and

11. Id.
strength. As a result of this period of immense prosperity, some businesses acted shrewdly to overpower competitors and began to dominate their markets creating monopolies or "trusts," particularly in the oil, steel, sugar, and tobacco industries.

Recognizing the increasing monopolization of the American economy, President Benjamin Harrison in 1889 called for legislation to control "dangerous conspiracies against the public good." This call to action resulted in the passage in 1890 of the Sherman Antitrust Act, which today remains at the core of antitrust legislative policy. Section 1 of the Sherman Act detailed a sweeping proscription of "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states." For this section to apply, there must be at least two parties joining to restrain interstate commerce. Section 2 of the Sherman Act similarly prohibits monopolization and conspiracies to monopolize any part of interstate commerce.

Courts found it difficult to enforce the Sherman Act in its early years, however. Legislators observed two deficiencies in the Sherman Act: (1) it did not address threats to competition in their incipiency, and (2) it was excessively general in that it did not include a prohibition of specific practices with anti-competitive effects. As a result, Congress passed the Clayton Act in 1914. This Act prohibits a detailed list of practices that "may be substantially to lessen competition, or to tend to create a monopoly in any line of commerce." Thus, the Clayton Act expands the prohibitions of the Sherman Act in regulating activity which may not constitute a trade restraint but may develop into one in the future. These two acts provided the basis on which the courts would apply antitrust legislation to all industries in the future, except for professional baseball.

12. Id. at 8.
18. Id. § 2.
20. Id.
21. Id. §§ 12–27a.
22. Id. For example, Section 2 of the Clayton Act prohibits price discrimination between different purchasers of the same grade and quality of commodity. Id. § 13. Section 3 prohibits certain exclusive dealing or tying agreements. Id. § 14. Finally, Section 7 prohibits certain types of acquisitions of businesses by another business that would tend to create a monopoly. Id. § 18.
II. HISTORICAL DEVELOPMENT OF MAJOR LEAGUE BASEBALL’S ANTITRUST EXEMPTION

A. Top of the First: Lead-off Home Run in the Establishment of the Exemption

Baseball’s long history of exempt status from federal antitrust regulation began with the 1922 Supreme Court decision in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs.* In that case, a member club of the fledgling Federal League of Professional Baseball Players sued the American and National Leagues of Professional Baseball Clubs for damages resulting from the destruction of the Federal League. The Federal Club of Baltimore claimed that the American and National Leagues violated the antitrust laws of the Sherman Act and created a monopoly of the “baseball business” either by inducing Federal League member clubs to leave the Federal League or by simply purchasing them. The Court rejected this argument, however. Justice Holmes’ majority opinion reasoned that the “business is giving exhibitions of base ball [sic], which are purely state affairs.” He then concluded that, although the Leagues “must induce free persons to cross state lines and must arrange and pay for their doing so” in order to give those exhibitions, the character of the business did not change. Justice Holmes supported his position by stating that the transport was “mere incident, not the essential thing.” According to the Court’s ruling, the leagues were not guilty of violating antitrust regulation because the business of providing public baseball games for profit was not considered to be an element of interstate commerce and, thus, was not subject to the Sherman Act. With this ruling, professional baseball’s exemption to federal antitrust legislation was created.

B. Top of the Third: Major League Baseball Scores Again with Toolson

In 1953, the United States Supreme Court again confronted the applicability of federal antitrust laws to professional baseball in

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25. These two leagues are still in existence today as the two Leagues that comprise Major League Baseball.
27. *Id.*
28. *Id.* at 208, 42 S. Ct. at 466.
29. *Id.* at 208–09, 42 S. Ct. at 466.
30. *Id.* at 209, 42 S. Ct. at 466.
31. *Id.*
Toolson v. New York Yankees, Inc.\textsuperscript{32} Here, the Court affirmed the decision of Federal Baseball and ruled that if the resulting exemption was improper, Congress would have enacted prospective legislation to address the issue in the thirty years after Federal Baseball.\textsuperscript{33} In its majority opinion, the Court noted that "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation."\textsuperscript{34} This simple statement created a strong barrier that would protect professional baseball's antitrust exemption from future judicial attacks.

In a passionate dissent, Justice Burton, joined by Justice Reed, presented the argument that developments in the "business" of organized baseball since the ruling in Federal Baseball meant that Major League Baseball was now, in fact, engaged in interstate commerce.\textsuperscript{35} Therefore, he argued that Federal Baseball should be overturned and that professional baseball should be subject to federal antitrust legislation.\textsuperscript{36} To support his position, Justice Burton enumerated developments such as the expenses involved in conducting interstate competitions between teams, numerous purchases of materials in interstate commerce, and the interstate travel of fans to attend games.\textsuperscript{37} Justice Burton also recognized the impact that radio and television would have on the "business" of baseball, as well as the amount of money spent on interstate advertising.\textsuperscript{38} Nevertheless, the majority affirmed Federal Baseball, and the exemption survived.

In the meantime, the Supreme Court declined to grant such an exemption to other professional sports leagues, including the National Football League and the National Basketball Association. In Radovich v. National Football League,\textsuperscript{39} the Court ruled that the volume of interstate business involved in professional football placed it within the provisions of the Sherman Act.\textsuperscript{40} The Court also ruled that the exemption created in the holdings of Federal Baseball and Toolson was specifically limited to professional baseball and not to be extended to other fields of business.\textsuperscript{41} Similarly, in Haywood v. National Basketball Association,\textsuperscript{42} the Court flatly stated that

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  \item \textsuperscript{32} 346 U.S. 356, 74 S. Ct. 78 (1953).
  \item \textsuperscript{33} \textit{Id.} at 357, 74 S. Ct. at 78–79.
  \item \textsuperscript{34} \textit{Id.}, 74 S. Ct. at 79.
  \item \textsuperscript{35} \textit{Id.} at 364–65, 74 S. Ct. at 83.
  \item \textsuperscript{36} \textit{Id.}
  \item \textsuperscript{37} \textit{Id.} at 357–58, 74 S. Ct. at 79.
  \item \textsuperscript{38} \textit{Id.}
  \item \textsuperscript{39} 352 U.S. 445, 77 S. Ct. 390 (1957).
  \item \textsuperscript{40} \textit{Id.} at 452, 77 S. Ct. at 394.
  \item \textsuperscript{41} \textit{Id.} at 451, 77 S. Ct. at 394.
  \item \textsuperscript{42} 401 U.S. 1204, 91 S. Ct. 672 (1971).
\end{itemize}
professional basketball did not enjoy an exemption from antitrust laws,\textsuperscript{43} thus preserving the unique nature of professional baseball's immunity from federal antitrust legislation.

C. Bottom of the Fifth: Major League Baseball Strikes Out the Side with Salerno and Flood

In 1970, the Second Circuit confronted the issue of professional baseball's antitrust exemption. In \textit{Salerno v. American League of Professional Baseball Clubs},\textsuperscript{44} a group of former umpires brought an antitrust action against the American League, claiming that they were discharged because they attempted to organize for the purpose of collective bargaining.\textsuperscript{45} The appellate court dismissed the complaint, ruling that the Supreme Court should "retain the exclusive privilege of overruling its own decisions," even though \textit{Federal Baseball} was "not one of Mr. Justice Holmes' happiest days" and the rationale of \textit{Toolson} was "extremely dubious."\textsuperscript{46} Thus, again a court reluctantly affirmed professional baseball's antitrust exemption on grounds of \textit{stare decisis}.\textsuperscript{47}

The United States Supreme Court did not address the issue again until 1972 in \textit{Flood v. Kuhn} where St. Louis Cardinals center-fielder Curt Flood sued the Commissioner's office contending that Major League Baseball's reserve system\textsuperscript{49} violated federal antitrust laws.\textsuperscript{50} Once again, the Court affirmed the exemption of professional baseball from antitrust laws, this time conceding it to be "an established [aberration]."\textsuperscript{51} Nonetheless, the Court concluded that \textit{Toolson} was entitled to the benefit of \textit{stare decisis} for four reasons: (1) congressional awareness of the ruling in \textit{Federal Baseball}, coupled with congressional inaction, (2) the development of baseball since that ruling with the understanding that it was not subject to existing antitrust laws, (3) a reluctance to overrule \textit{Federal Baseball}, producing retroactive effect,\textsuperscript{52} and (4) the Court's professed desire in \textit{Toolson} that any remedy

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\item Id. at 1205, 91 S. Ct. at 673.
\item 429 F.2d 1003 (2d Cir. 1970).
\item Id. at 1004.
\item Id. at 1005.
\item The doctrine of \textit{stare decisis} states that once a court has ruled on an issue, all lower courts are bound by that decision.
\item 407 U.S. 258, 92 S. Ct. 2099 (1972).
\item Id. at 289, 92 S. Ct. at 2115. Under the reserve system, a player was essentially bound to the club with which he first signed a contract for the entirety of his playing days.
\item Id. at 258, 92 S. Ct. at 2100.
\item Id. at 282, 92 S. Ct. at 2112.
\item Generally, a judicial overruling of a prior Court decision has retroactive effect, since it is deemed that the original ruling was in error, and thus was never the
\end{enumerate}
should be provided for by legislation rather than court decree.\textsuperscript{53} Essentially, the Court decided that overruling \textit{Federal Baseball} and \textit{Toolson} would be more harmful to professional baseball than the value of settling an inconsistency in the law.\textsuperscript{54} Justice Blackmun reasoned that "there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency."\textsuperscript{55}

\textbf{D. Seventh Inning Stretch}

Since the decision in \textit{Flood v. Kuhn}, the issue of the application of antitrust legislation to professional baseball has not again reached the Supreme Court. As noted by MLBPA Chief Donald Fehr in his prepared statement to the House Judiciary Committee, the Court is not likely to clarify the issue.\textsuperscript{56} Recent history suggests that at any point in litigation where the continued validity of the antitrust exemption is in question, Major League Baseball will quickly settle the case.\textsuperscript{57} One recent example was the case of \textit{Piazza v. Major League Baseball}.\textsuperscript{58} In \textit{Piazza}, the parties quickly reached an undisclosed settlement after the United States District Court for the Eastern District of Pennsylvania denied Major League Baseball’s motion to dismiss an antitrust claim on grounds of its exemption.\textsuperscript{59}

\textbf{E. Ninth-Inning Comeback: The Curt Flood Act of 1998}

In 1998, Congress enacted the Curt Flood Act, which is the only legislation that has limited Major League Baseball’s exemption to federal antitrust regulation.\textsuperscript{60} The Act applies federal antitrust law to actions "directly relating to or affecting employment of major league baseball players to play baseball at the major league level."\textsuperscript{61} The Act then lists a strict limitation to the scope of its application so that it will not affect aspects of professional baseball such as the minor league law. Legislation, on the other hand, is deemed to be a change in the law, and as such is prospective. In his dissent, however, Justice Marshall notes that in rare circumstances the Court may give its ruling with prospective effect only. \textit{Id.} at 293, 92 S. Ct. 2117.

\textsuperscript{53} \textit{Id.} at 273–74, 92 S. Ct. at 2107–08.
\textsuperscript{54} \textit{Id.} at 284, 92 S. Ct. at 2112–13.
\textsuperscript{55} \textit{Id.}, 92 S. Ct. at 2113.
\textsuperscript{56} \textit{Hearing, supra} note 1, at 27 n.5 (prepared statement of Donald M. Fehr, Executive Director, Major League Baseball Players Association).
\textsuperscript{57} \textit{Id.}
\textsuperscript{59} \textit{Hearing, supra} note 1, at 27 n.5 (prepared statement of Donald M. Fehr, Executive Director, Major League Baseball Players Association).
\textsuperscript{61} \textit{Id.}
structure, the amateur draft, franchise expansion, relocation, or other ownership issues, conduct protected by the Sports Broadcasting Act of 1961, the relationship between baseball and umpires, or "any conduct . . . not in the business of organized professional major league baseball." This strict limitation was meticulously constructed by Congress in collaboration with Major League Baseball and the MLBPA so that the Act would not result in any unintended consequences and would only affect the application of antitrust laws to the employment of major league players.

Although the Curt Flood Act is the only legislatively expressed limitation on professional baseball’s antitrust exemption, it has been criticized as practically ineffective. Major League Baseball players negotiated an end to the monopolistic reserve system of employment by means of collective bargaining more than twenty years prior to the Act. That negotiation has since become a permanent fixture in subsequent labor agreements. Nevertheless, the Act closed the door on the possibility for owners to restrict the employment of Major League Baseball players under an exemption to federal antitrust laws. More significantly, the Act was the first indication that Congress was ready to reexamine the appropriateness of professional baseball’s antitrust exemption.

F. Extra Innings?: Developments Since the Announcement of Contraction

The issue of baseball’s antitrust exemption did not come into the spotlight again until shortly after the 2001 World Series. Major

62. Id. Presumably, the possibility of contraction had not yet been contemplated at the time the Curt Flood Act was drafted and passed. Thus, it was not specifically included as one of the protected ownership issues.

63. Id. §§ 1291–1295. The Sports Broadcasting Act of 1961 states:

The antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league’s member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.

Id. § 1291.


66. These negotiations led to the modern concept of “free agency” by which a player who is not under contract with a Major League team may freely enter into contract negotiations with any other club. See id.

67. Id.
League Baseball's Commissioner Allan H. "Bud" Selig announced that he planned to "contract" the league by eliminating two unnamed franchises before the start of the 2002 season in order to remedy the league's economic woes. This announcement prompted a flurry of legal debate in Florida and Minnesota, the homes of three leading candidates for contraction.

In the state of Florida, State Attorney General Robert Butterworth issued Civil Investigative Demands relating to the proposed contraction, pursuant to state antitrust law. In Major League Baseball v. Butterworth, Major League Baseball sued for injunctive relief from these investigative demands. Major League Baseball claimed that contraction was part of the "business of baseball" and therefore exempt from antitrust law. The United States District Court for the Northern District of Florida unequivocally rejected the Florida Attorney General's claim that the antitrust exemption enjoyed by baseball applied only to reserve clause issues. District Judge Hinkle stated that "[i]t is difficult to conceive of a decision more integral to the business of major league baseball than the number of clubs that will be allowed to compete." Therefore, the Florida court concluded that contraction, too, was included in the "business of baseball," and was thus exempt from both federal and state antitrust legislation.

The announcement of the planned contraction of the Major Leagues also led to the proposal of the "Fairness in Antitrust in National Sports (FANS) Act of 2001" by the late United States Senator Paul Wellstone and United States Representative John Conyers on November 14, 2001. The wording of this proposed

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68. Press Release, supra note 3.
69. At the time of the announcement, the Florida Marlins, Tampa Bay Devil Rays, and Minnesota Twins were three of the lowest revenue-producing franchises in the Major Leagues. As a result, these teams were widely speculated to be possible candidates for contraction, even though no formal announcement was made by the Commissioner's Office of the teams that were in danger of being eliminated. See Jim Street, Legislators Debate Baseball's Antitrust Exemption, Major League Baseball News, Nov. 11, 2001, at http://www.mlb.com/NASApp/mlb/mlb/news/mlb_news_story_archive.jsp?article_id=archive_contraction&team_id=mlb (last visited Jan. 26, 2005).
70. 181 F. Supp. 2d 1316 (N.D. Fla. 2001).
71. Id. at 1318.
72. Id.
73. Id. at 1323. District Judge Hinkle analyzed the applicability of the exemption in "excruciating detail" over a nine-page, five-part examination. Id. at 1323–35. The Florida Attorney General relied on the ruling of the United States District Court for the Eastern District of Pennsylvania in Piazza, 831 F. Supp. 420, 438 (E.D. Pa. 1993) for his argument. Id. at 1322.
74. Id.
75. Id. at 1322, 1333–34.
legislation very closely tracks the Curt Flood Act of 1998. The FANS Act proposes to amend the Clayton Act such that federal antitrust legislation would apply to the elimination or relocation of Major League Baseball franchises. This legislation was the subject of a hearing before the House Judiciary Committee on December 6, 2001, and has yet to be scheduled for a vote in the House of Representatives. The proposed act was a result of immediate public outcry following Commissioner Selig’s announcement. It obviously was intended to put an immediate halt to the threat of the elimination of at least two Major League Baseball teams, particularly the Minnesota Twins of Senator Wellstone’s home state. Cleverly, the sponsors named the proposed act such that its acronym would reflect those people whom it was intended to protect—the fans.

Fortunately, the Minnesota Court of Appeals halted the immediate threat of contraction for the 2002 season with its decision in Metropolitan Sports Facilities Commission v. Minnesota Twins Partnership. In Metropolitan Sports, the Facilities Commission (Commission) sued for a temporary injunction to force the Minnesota Twins to play its home games for the 2002 season in the Metrodome pursuant to the use agreement signed between the team and the Commission. Judge Harry S. Crump of the District Court for Hennepin County granted the injunction, and upon review, the Minnesota Court of Appeals held that Judge Crump did not abuse his discretion in granting the temporary injunction, thus affirming the ruling. On February 4, 2002, the Minnesota Supreme Court denied a review of the case, and subsequently Commissioner Selig announced that the plans of contraction would be postponed until after the 2002 season. Later, on August 30, 2002, the Major League Baseball owners and the MLBPA reached a collective bargaining agreement that stipulated that the owners would forgo plans of contraction during the life of the agreement which lasts until December 17, 2006.

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78. Hearing, supra note 1, at 17 (statement by Jesse Ventura, Governor, State of Minnesota).
79. 638 N.W.2d 214 (Minn. Ct. App. 2002).
80. Id. at 218.
81. Id. at 214, 229–230.
III. EFFECTS OF THE EXEMPTION TO FEDERAL ANTITRUST LEGISLATION

Collective bargaining and the recent Curt Flood Act have resolved the effects of the antitrust exemption with regards to the employment of ballplayers. However, the exemption to antitrust legislation also has effects on many other aspects of the industry of professional baseball. Most notably, the exemption allows for the organization of baseball's unique and highly organized minor league system of development, it permits the league to prohibit a team from relocating from one city to another, and it allows for the possibility that the league could unilaterally decide to eliminate teams from the Major Leagues.

First, professional baseball's exemption from antitrust laws allows for the existence of an elaborate structure of leagues for the development of players bound together by the Agreement of the National Association of Professional Baseball Leagues. Under this agreement, more than one hundred teams in many leagues agree to follow common rules to insure the economic viability of them all. These rules include concepts of league classifications, salary caps, and restricted rights for minor league players.

This organized system of player development is unique to baseball among all professional sports. Its entrenchment is one of the main reasons why professional baseball continues to enjoy an exemption to federal antitrust laws, while other professional sports that do not have such a system, such as football and basketball, are denied an exemption. As noted by one commentator, this system immediately raises serious antitrust problems, because it relies on rules "granting teams exclusive territorial rights and restricting the freedom of players to sell their services on the open market." On the other hand, the structure of player development in professional baseball has been allowed to develop under the long-standing exemption to antitrust laws and is accepted by both the American and the sporting public. Actually, "most fans, and probably most

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84. Hylton, supra note 67, at 391.
85. Under this system, each Major League club affiliates a number of Minor League clubs of various classifications. When a team drafts or signs a player, he is placed in this system, whereby the organization can monitor his progress, provide him with instruction, and develop the player as it best sees fit.
86. Hylton, supra note 67, at 392-93.
87. Id. at 393.
88. Id.
89. Id. at 400-01.
90. Id. at 393.
91. Id. at 394.
players, have accepted the conventional wisdom that the stability of professional baseball has been possible only because of these very restrictions.  

Subsequently, in the Curt Flood Act, Congress included an explicit provision—one emulated in the proposed FANS Act—declaring that the new legislation would not affect the application of antitrust laws to the agreement between Major League Baseball teams and the teams of the National Association of Professional Baseball Leagues. The impact that the exemption has on this aspect of professional baseball, manifested in today's minor league system, presents the strongest argument for why the exemption has been perpetuated, even though its inception presents a glaring inconsistency with the modern view of "interstate commerce" in relation to professional sports and the jurisprudence in Toolson and its progeny offers dubious explanations for its persistence.

Second, the existence of the exemption to federal antitrust regulation allows Major League Baseball to act as a governing body to regulate the relocation of franchises. As a result of this power, Major League Baseball has been the most stable of all major professional sports. Not a single baseball team has relocated from one city to another since 1971 when the Washington Senators moved to Arlington, Texas, to become the Texas Rangers. As recently as 1993, Major League Baseball blocked the attempted relocation of the San Francisco Giants from California to St. Petersburg, Florida, as a result of its exemption from federal antitrust laws. Without the benefit of the exemption, San Francisco fans might have never seen Barry Bonds' record setting campaign in 2001 or his equally impressive performance in 2002, when he led the Giants to the National League Wild Card and eventually to the World Series.

92. id.
93. id. at 395.
94. id. at 402.
96. id. at 546.
97. id.
98. Hearing, supra note 1, at 61 (statement of Bud Selig, Commissioner, Major League Baseball).
99. The San Francisco Giants defeated the Atlanta Braves in the best-of-five National League Divisional Series three games to two. The Giants then went on to defeat the St. Louis Cardinals four games to one in the National League Championship Series, sending them to the World Series, where they were defeated by the Anaheim Angels four games to three. See The Official Site of the San Francisco Giants, at http://sanfrancisco.giants.mlb.com/NASApp/mlb/history/postseason_results.jsp (last visited Dec. 28, 2004).
In contrast to the stability of Major League Baseball, the National Football League has witnessed numerous relocations in the same time period: the Oakland Raiders to Los Angeles, the Baltimore Colts to Indianapolis, the St. Louis Cardinals to Phoenix, the Los Angeles Rams to St. Louis, the Raiders from Los Angeles back to Oakland, the Cleveland Browns to Baltimore, and the Houston Oilers to Memphis, then to Nashville. Similarly, the National Basketball Association witnessed the Vancouver Grizzlies move to Memphis, Tennessee in 2001 and the Charlotte Hornets move to New Orleans, Louisiana in 2002. These two leagues do not have the benefit of the federal antitrust exemption enjoyed by Major League Baseball, nor does the National Hockey League, which has also seen numerous franchise relocations over the last thirty years.

Third, the exemption to federal antitrust legislation allows Major League Baseball franchise owners to buy out one of the other member owners and subsequently to eliminate a team from the Major Leagues as proposed by Commissioner Selig on November 6, 2001. As a result, Major League Baseball is able to control the supply of its product and its price, all without accountability to the government or the public. The absurdity of such a situation is clearly demonstrated by the hypothetical presented by Minnesota Governor Jesse Ventura above. These latter two effects of the federal antitrust exemption have sparked the most discussion as to whether the FANS Act should be passed.

IV. EFFECTS OF PROPOSED LEGISLATION AND OTHER POSSIBLE SOLUTIONS

One can suggest several possible methods to resolve the situation surrounding Major League Baseball’s contraction controversy. First, the Supreme Court could overrule Federal Baseball and its progeny, which would repeal professional baseball’s exemption to federal antitrust legislation entirely. Second, Congress could pass the FANS Act and eliminate the issues of contraction and franchise relocation from baseball’s antitrust exemption. Third, Major League Baseball owners and the MLBPA could negotiate a collective bargaining agreement that would temporarily prohibit the owners from

101. Day, supra note 95, at 546.
102. Hearing, supra note 1, at 17 (statement of Jesse Ventura, Governor, State of Minnesota).
103. Id.
contracting the league for the duration of the agreement, which they did in the current collective bargaining agreement.

Ultimately, the best method for a permanent solution would be for Congress to pass a revised version of the FANS Act, one that would limit professional baseball’s antitrust exemption as it relates to contraction and relocation without affecting other aspects of the game. Such a revision would eliminate the threat of contraction and promote competition in the market for major league franchises without otherwise affecting the state of the game. Additionally, this revised legislation would have the permanency that a collective bargaining agreement lacks. Therefore, Congress should take action and pass a revised version of the FANS Act that more closely emulates the scope of the Curt Flood Act. This would subject professional baseball to federal antitrust legislation as it relates to contraction and relocation without producing any unintended consequences.

A. Strike One: Complete Reversal of Federal Baseball and Toolson

First, Congress could pass a bill that would signify a complete overruling of the decisions in Federal Baseball and Toolson. Such action is strongly supported by Governor Ventura and the MLBPA.104 The principal argument behind this viewpoint is that the rationale behind the rulings in Federal Baseball and Toolson—that professional baseball is not involved in interstate commerce—is antiquated and improper given today’s realities.105 Supporters also argue that the exemption created by these rulings is not necessary for professional baseball to prosper, comparing baseball to all other industries and sports that do not enjoy exempt status.106 Removing the exemption would put all professional sports on a level playing field.

Professional baseball is unlike any other professional sport, however, due to its minor league structure of player development. A complete removal of the exemption could severely impact the structure of the minor leagues. Currently, minor league teams that have major league affiliates do not pay the salaries of their players. Rather, the respective major league clubs pay the players’ salaries. The minor league franchises obviously benefit from this arrangement

104. Id. at 76 (testimony of Jesse Ventura, Governor, State of Minnesota); Id. (testimony of Stephen A. Fehr, Representative, Major League Baseball Players Association).
105. Id. at 17 (testimony of Jesse Ventura, Governor, State of Minnesota).
106. Id. at 23 (testimony of Stephen A. Fehr, Representative, Major League Baseball Players Association).
since they typically do not produce the amount of revenues necessary to support a team.\textsuperscript{107} In return for assuming this expense, the major league clubs retain the right to assign players to the clubs of various classifications at any time.\textsuperscript{108} Also, the major league teams benefit from low fixed salaries of minor league players and exclusive rights to their services.\textsuperscript{109} The effect of a total reversal of the decisions in \textit{Federal Baseball} and \textit{Toolson} would be the complete destruction of this widely accepted staple of professional baseball. Teams would have to negotiate individually with each player in the minor leagues and would be at risk of losing players in whom they have spent a great amount of time and money developing.

If the issue concerning the judicial creation of an exemption to federal antitrust laws for Major League Baseball had first been presented today, the Court would undoubtedly reject it. However, a different set of circumstances surrounds this issue. Major League Baseball has developed a unique system in reliance on the exemption that has been perpetuated over the last eighty years. Therefore, some form of the exemption created in 1922 must remain. Overturning \textit{Federal Baseball} and its progeny would be unwise, even though the foundation they have created on which the exemption rests is weak.

\textbf{B. Foul Ball, Strike Two: The FANS Act of 2001}

The proposed FANS Act of 2001 presents a different set of problems. As proposed, the FANS Act states that its purpose is to subject the elimination and relocation of Major League Baseball franchises to federal antitrust laws.\textsuperscript{110} The Act also stipulates that "[a]ny person . . . injured by a violation of subsection (a), shall have standing to bring action under such subsection based on such violation."\textsuperscript{111} The consequence of this legislation would be to thwart Major League Baseball's proposal for the contraction of two teams, as this plan would then be subject to the provisions of the Sherman

\begin{itemize}
  \item \textsuperscript{107} Hylton, \textit{supra} note 67, at 393.
  \item \textsuperscript{108} \textit{Id.}
  \item \textsuperscript{109} \textit{Id.} at 393–94.
  \item \textsuperscript{110} S. 1704, 107th Cong. (2001); H.R. 3288, 107th Cong. (2001). Specifically, Section 3 of the FANS Act amends the Clayton Act such that the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting the elimination or relocation of a major league baseball franchise are subject to the antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce.
  \item \textsuperscript{111} \textit{Id.}
\end{itemize}
Act as a conspiracy in restraint of trade among the several states. Should Major League Baseball proceed with plans for contraction, any person injured by the violation would have legal recourse against Major League Baseball.

Proponents of the bill cite the potential dangers involved if owners are allowed to eliminate teams unilaterally. As exemplified in Governor Ventura's hypothetical, the elimination of teams from Major League Baseball would provide the other owners with a financial windfall, as they would then have a greater share of common revenues, such as those derived from merchandising and television. Also, they would benefit from decreased competition in the market. Such ulterior motives would make the contraction of the league through the elimination of teams a very lucrative and enticing opportunity for owners to generate enormous amounts of income. Proponents of the FANS Act also raise similar arguments to those discussed above of fairness and resolution of inconsistencies in the law. They see the Act as another opportunity to put baseball on an equal position as professional football, basketball, and hockey.

Major League Baseball's most compelling argument against passage of the FANS Act is that the antitrust exemption allows the league to be the most stable of all professional sports in terms of franchise relocation. Should this legislation be passed, Major League Baseball argues that it would lose its ability to block teams from relocating to other cities without league consent. The league believes that without the unilateral power to control franchise relocation, the stability that the league has preserved for thirty years would be in great jeopardy. The fear is that teams would be free to relocate at will from one city to the greener pastures of another, similar to what has been seen in the recent history of the National Football League. In such a situation, communities would be placed

113. *Id. at* 17.
114. *Id.*
115. *Id.*
116. *Id.*
117. S. 1704, 107th Cong. (2001); H.R. 3288, 107th Cong. (2001). The language of the FANS Act itself states that the conduct of Major League Baseball should be subject to antitrust laws "to the same extent . . . if engaged in by persons in any other professional sports business affecting interstate commerce." *Id.*
118. *Hearing, supra* note 1, at 64–65 (statement of Martin T. Meehan, Member, Committee of the Judiciary); Day, *supra* note 95, at 544–46.
119. *Hearing, supra* note 1, at 8 (statement of Bud Selig, Commissioner, Major League Baseball); Day, *supra* note 95, at 544–46.
120. *Hearing, supra* note 1, at 64–65 (statement of Martin T. Meehan, Member, Committee of the Judiciary); Day, *supra* note 95, at 544–46.
at a great risk of being held hostage by teams that demand new stadiums and other concessions in exchange for their continued presence in their cities. If the teams' desires are not satisfied, they would be free to relocate at any time where a more lucrative deal in a more attractive market arises, and the league could do little to stop them.\footnote{121}

Major League Baseball argues that if this bill is passed, a city would face a risk of losing a team to a now legislatively protected relocation—a scenario that is much more likely than losing a team through contraction.\footnote{122} In recent history, Major League Baseball has a strong record of promoting stability by rejecting attempts to relocate and encouraging sales of franchises to local investors or groups who pledge not to move the team to another city.\footnote{123} The passage of the FANS Act would greatly impair the League from doing this in the future.

The arguments on each side of this issue result in a difficult conundrum. While passage of the FANS Act would prevent the league from unilaterally eliminating teams without facing the risk of liability, it would also damage the stability of the league by granting owners legislative protection to relocate to the best market. Conversely, the rejection of the proposed legislation would promote stability in the league by allowing the league to retain the power to reject relocation bids, yet allow it to retain the unilateral power to decide to eliminate teams from the major leagues. Either way, struggling small market cities, such as those home to the Minnesota Twins and Montreal Expos, face grave danger of losing their teams.

Should the Act be passed, however, those parties affected by the elimination of teams would have recourse against Major League Baseball by virtue of the antitrust laws. Moreover, applying antitrust laws to the relocation of franchises supports free market competition for the benefits of having a Major League Baseball franchise. By restricting franchise relocation from cities having difficulty supporting its team, Major League Baseball ignores the pleas of other viable regions across the country that are actively lobbying for a major league franchise, such as Washington D.C. and Northern Virginia.

\footnote{121}{Hearing, supra note 1, at 8 (statement of Bud Selig, Commissioner, Major League Baseball); Day, supra note 97, at 544–546. See Los Angeles Memorial Coliseum v. National Football League, 791 F.2d 1356 (9th Cir. 1986) (ruling that the NFL violated the Clayton Act by restraining an attempt by the Oakland Raiders to move to Los Angeles and awarding treble damages).}

\footnote{122}{In actuality, many of the bill's supporters appeared to favor the bill for this reason, thus making it easier for a team to relocate into the Washington D.C. area—a move which Major League Baseball has tried to resist.}

\footnote{123}{Hearing, supra note 1, at 56 (statement of Bud Selig, Commissioner, Major League Baseball).}
Major League Baseball repeatedly insists that the exemption is absolutely necessary to protect small markets from losing their franchises. That assertion is not exactly true, though. Even with the application of antitrust laws to franchise relocation, if Major League Baseball feels that a proposed move would be detrimental to the best interests of the game, it could still have the power to block that relocation—even with the application of antitrust legislation. As noted by MLBPA Chief Donald Fehr in his prepared statement to the House Judiciary Committee, “the courts have never held that the leagues have no control over relocations, just that they must have reasonable rules in deciding when to permit a relocation.” The National Basketball Association (NBA) recently employed such a system of reasonable guidelines. The NBA required the city of New Orleans to endure an arduous period of evaluation that spanned several months before it would approve the relocation of the Charlotte Hornets to New Orleans. The NBA required the team owners and the city to meet several criteria regarding ticket sales, sponsorship, and television rights and undertook a thorough evaluation of the viability of the market before finally voting in June 2002 to allow the move. In fact, the league successfully blocked an attempt by the Minnesota Timberwolves to relocate to New Orleans in the early 1990s. The league was able to do this even without the benefit of an antitrust exemption such as the one enjoyed by Major League Baseball.

Nonetheless, Congress should reject the FANS Act because its scope creates too much doubt about its applicability towards other aspects of professional baseball. Although the FANS Act was drafted to mirror the Curt Flood Act in its scope of application, it diverges from that language significantly. This divergence could seriously affect other areas of the game not contemplated by the drafters. When the Curt Flood Act was drafted, Congress collaborated with representatives from Major League Baseball and the MLBPA to ensure that the limitation on baseball’s antitrust exemption that it created would be very narrowly drawn so as to minimize its consequences. The FANS Act, however, by failing to incorporate much of the meticulously crafted scope, would cause confusion as to the applicability of antitrust laws to the movement of minor league franchises, the amateur draft, the employment of minor league players, expansion of the major leagues, and the relationship between professional baseball and umpires. These consequences are obviously

124. Id.
125. Id. at 28 (prepared statement of Donald M. Fehr, Executive Director, Major League Baseball Players Association).
126. Id. at 8 (statement of Bud Selig, Commissioner, Major League Baseball).
outside the intended purpose of applying antitrust laws to the elimination and relocation of Major League Baseball franchises.\textsuperscript{127} Therefore, Congress should not pass the FANS Act as it is currently written.


A third option would be to reject the current legislation and to allow the dispute over contraction to be resolved through the process of collective bargaining between the Major League owners and the Major League Baseball Players Association. Such a strategy proved effective in the aftermath of \textit{Flood v. Kuhn}, where the Court's refusal to overturn \textit{Toolson} led to the subsequent creation of the system of free agency by means of collective bargaining.\textsuperscript{128} That bargaining agreement governed baseball since its inception in 1975 until 1998, when the Curt Flood Act was passed.\textsuperscript{129} Today, the issue of player free agency is still governed according to collective bargaining, even though the Curt Flood Act grants players additional protections than those which they enjoy through their agreement with the owners.\textsuperscript{130}

Similarly, the Major League Baseball Players Association has the power to negotiate an agreement with ownership through collective bargaining without the aid of legislation that would make any contraction of the league impossible. Through such an agreement, as opposed to a repeal of this facet of the exemption, the stability of the league could still be maintained. The league would then have the continued ability to restrict the relocation of franchises pursuant to the exemption. Such a strategy was employed in the most recent collective bargaining agreement reached on August 30, 2002.\textsuperscript{131}

\textsuperscript{127} S. 1704, 107th Cong. (2001); H.R. 3288, 107th Cong. (2001). Section 2 of the FANS Act states:

\begin{quote}
It is the purpose of this Act to state that the elimination or relocation of major league baseball franchises are covered under the antitrust laws, and to make clear that the enactment of this Act does not change the application of the antitrust laws in any other context or with respect to any other person or entity.
\end{quote}

\textit{Id.}

\textsuperscript{128} Hylton, \textit{supra} note 67, at 391.

\textsuperscript{129} \textit{Id.}

\textsuperscript{130} \textit{Id.}

According to the terms of the agreement, the owners agreed to forgo discussions of contraction during the life of the agreement until it ends on December 17, 2006.¹³²

The new agreement has two problems, however. First, the concession by the owners to “table” the possibility of contraction is only a temporary one.¹³³ Second, in order to get that concession, the Players Union agreed that it would not interfere if the owners decide to downsize at the termination of the agreement.¹³⁴ Therefore, the issues and controversies surrounding contraction could resurface in four short years. Most likely, the owners will again use the possibility of contraction as a bargaining chip in the next set of labor discussions. Therefore, a more permanent solution is desirable.

D. Base Hit: Revised Legislation that Narrows the Scope of the FANS Act

As previously discussed, the motive behind the FANS Act is valid, but deficiencies in its scope make it over-reaching. While the Act would successfully eliminate the threat of contraction and promote free market competition in the struggle for Major League Baseball franchises, its scope is too broad and its risks affect other areas of the game such as the minor leagues, the amateur draft, and expansion. Similarly, the recently signed Collective Bargaining Agreement alleviates the problem of contraction, but it is only temporary. Moreover, the MLBPA has agreed not to contest contraction should the owners still feel it is necessary at the end of the current agreement.

The best solution is for Congress to revise the FANS Act, such that it more closely emulates the scope of the Curt Flood Act.¹³⁵ In

¹³² Singer, supra note 85.
¹³⁴ Id.
¹³⁵ Section (b) of the Curt Flood Act lists the limitations on its application:

No court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than those set forth in subsection (a) of this section. This section does not create, permit or imply a cause of action by which to challenge under the antitrust laws, or otherwise apply the antitrust laws to, any conduct, acts, practices, or agreements that do not directly relate to or affect employment of major league baseball players to play baseball at the major league level, including but not limited to (1) any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting employment to play baseball at the minor league level, any
doing so, Congress would provide a permanent solution to the threat of contraction and promote free market competition. Such legislation would also leave other areas of the game unaffected. The structure and normal practices of the minor leagues would remain intact, while the amateur draft, major league expansion, franchise ownership issues and the relationship between baseball and umpires would still be areas governed under the authority of the antitrust exemption as contemplated when the parties enacted the Curt Flood Act.

Specifically, there should be four changes in section 3(b) of the current FANS Act. First, the following re-designations of subsections should occur: subsection (1) should become subsection (2); subsection (2) should become subsection (3); subsection (3) should become subsection (4); and subsection (5) should become subsection (6). Second, immediately preceding the newly designated subsection (2), the following exception to the applicability of the Act should be added:

(1) any conduct, act, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting employment to play at the minor league level, any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players;
(2) the agreement between organized professional major league baseball teams and the teams of the National Association of Professional Baseball Leagues, commonly known as the “Professional Baseball Agreement”, the relationship between organized professional major league baseball and organized professional minor league baseball, or any other matter relating to organized professional baseball’s minor leagues;
(3) any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting franchise expansion, location or relocation, franchise ownership issues, including ownership transfers, the relationship between the Office of the Commissioner and franchise owners, the marketing or sales of the entertainment product of organized professional baseball and the licensing of intellectual property rights owned or held by organized professional baseball teams individually or collectively;
(4) any conduct, acts, practices, or agreements protected by Public Law 87-331 (15 U.S.C. 1291 et seq.) (commonly known as the “Sports Broadcasting Act of 1961”);
(5) the relationship between persons in the business of organized professional baseball and umpires or other individuals who are employed in the business of organized professional baseball by such persons; or
(6) any conduct, acts, practices, or agreements of persons not in the business of organized professional major league baseball.

professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players;

Third, the newly designated subsection (3) should be revised in part and should read as follows to except franchise issue from the applicability of the Act:

(3) any conduct, acts, practices, or agreements of persons engaging in, conducting or participating in the business of organized professional baseball relating to or affecting franchise expansion, franchise ownership issues, including ownership transfers, the relationship between the Office of the Commissioner and franchise owners, the marketing or sales of the entertainment product of organized professional baseball and the licensing of intellectual property rights owned or held by organized professional baseball teams individually or collectively; (revision italicized).

Finally, a new subsection (5), reading “the relationship between persons in the business of organized professional baseball and umpires or other individuals who are employed in the business or organized professional baseball by such persons; or,” should be inserted to also except the relationship between professional baseball and its umpires from the scope of the Act. By implementing these revisions, the FANS Act would more accurately reflect the collaborative effort of the Curt Flood Act and would have the narrow scope necessary to avoid any unintended consequences.

V. CONCLUSION

The unique and complex structure of the relationship among the various levels of professional baseball organizations makes some form of professional baseball’s federal antitrust exemption a necessary evil. A complete judicial overruling or complete legislative repeal of the exemption would have devastating effects on the structure and continuity of the institution of the minor leagues. Such a decision would have a comparatively small value by settling an inconsistency in the law regarding professional baseball’s role in interstate commerce. Therefore, since professional baseball has been allowed to develop under the protection of its exemption to federal antitrust laws for over eighty years, the Supreme Court should not revisit and overturn the decision in Federal Baseball and affirmed in Toolson, nor should Congress pass legislation that completely repeals the exemption.

Next, the application of federal antitrust laws to professional baseball with regards to elimination or relocation of teams pursuant
to the FANS Act creates a perplexing conundrum. While the Act would thwart the threat of contraction, Major League Baseball argues that the Act would damage the stability of the league by legislatively protecting the unregulated relocation of major league franchises. Although the league's argument is compelling, both of those effects of the Act successfully foster the public interest by promoting free market competition. Also, Major League Baseball could still implement a set of guidelines that a franchise must satisfy in order to relocate—similar to that seen in the NBA. Therefore, the premise behind the FANS Act serves a valuable purpose. Nevertheless, according to its current language, the FANS Act has too broad a scope and affects too many more aspects of the game than necessary or intended. Thus, the proposed FANS Act of 2001 should not be passed into law.

While the current collective bargaining agreement temporarily alleviates the problem, it is only temporary. Therefore, it also fails to provide sufficient protection to baseball fans and cities from the threat of contraction. The best solution to the situation created by Commissioner Selig's announced proposal to "contract" Major League Baseball is for Congress to revise the FANS Act, such that it mirrors the scope carefully implemented by the Curt Flood Act of 1998. This approach would permanently eliminate the threat of contraction, allow cities without teams to actively pursue a franchise, and still permit Major League Baseball to promote the stability of "the old ball game."

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