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William Basil Tsimpris

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## A Question of (Anti)trust: *Flood v. Kuhn* and the Viability of Major League Baseball's Antitrust Exemption

*William Basil Tsimpris*<sup>1</sup>

### Introduction

Jacques Barzun once commented that “[w]hoever wants to know the heart and mind of America had better learn baseball.”<sup>2</sup> Taken literally, this assertion is short-sighted,<sup>3</sup> and in today’s society “the national pastime” has long ceded its status as America’s dominant team sport.<sup>4</sup> In one area, though, baseball still holds a distinction other sports cannot claim: Throughout much of its history, Major League Baseball (hereinafter “MLB”) has enjoyed a judicially-created exemption from federal antitrust laws, an exemption not afforded to other sports.<sup>5</sup>

This casenote will examine the history and strength of the MLB antitrust exemption from the perspective of *Flood v. Kuhn*, in which the United States Supreme Court upheld MLB’s reserve system by classifying baseball’s status as an “exception” under federal antitrust laws.<sup>6</sup> In addition, this casenote will examine the effect on MLB, its players, its member cities, its prospective member cities, its fans, and the public at large, created by the passage of the Curt Flood Act of 1998, which dissolved the exemption only as far as it inhibited the employment rights of players under federal antitrust law.<sup>7</sup>

### *Flood v. Kuhn*: The Court Takes Strike Three

Curtis Charles Flood entered the major leagues in 1956 with the Cincinnati Reds. Within two years, after being traded to the St. Louis Cardinals, Flood became a fixture in the Cardinals’ lineup and represented the team in three All-Star games.<sup>8</sup> Flood played

<sup>1</sup> J.D. University of Richmond T.C. Williams School of Law 2004.

<sup>2</sup> Jules Tygiel, *Introduction* to JULES TYGIEL, *PAST TIME: BASEBALL AS HISTORY*, at ix (2000).

<sup>3</sup> *See id.* Tygiel comments that “people with a total ignorance of baseball have written many fine books on American society and culture.”

<sup>4</sup> *See, e.g.*, Sports Fans of America, *Sports Popularity: Football is King!*, at <http://www.sportsfansofamerica.com/Interactive/Editorials/Fans/Popularity.htm> (last visited Feb. 10, 2003) (noting that football out polls baseball 44% to 17% as the most popular team sport, with the Super Bowl, beating the World Series by a margin of 41% to 19%).

<sup>5</sup> *Cf.* *Radovich v. Nat’l Football League*, 352 U.S. 445 (1957) (limiting the exemption specifically to the business of organized baseball). *See generally* *Haywood v. Nat’l Basketball Ass’n.*, 401 U.S. 1204 (1971) (professional basketball); *United States v. Int’l Boxing Club*, 348 U.S. 236 (1955) (professional boxing); *Deesen v. Prof’l Golfers’ Ass’n.*, 358 F.2d 165 (9th Cir. 1966) (professional golf); *Peto v. Madison Square Garden Corp.*, 1958 Trade Cas. (CCH) ¶ 69, 106 (S.D.N.Y. 1958) (professional hockey).

<sup>6</sup> *Flood v. Kuhn*, 407 U.S. 258, 281 (1972).

<sup>7</sup> 15 U.S.C. § 27(b) (2003).

<sup>8</sup> *See* TOTAL BASEBALL 863 (John Thorn et al., eds., 6th ed. 1999); *see also* BILL JAMES, THE NEW BILL JAMES, HISTORICAL BASEBALL ABSTRACT 747 (2001) (noted baseball historian and statistician Bill James rates Flood the thirty-sixth best centerfielder of all time).

under a set of labor rules formed during the 1903 “peace treaty” between the warring American and National Leagues, most notable for a “reserve clause” that adhered a player to the team holding his contract and prohibited him from working for the employer of his choice.<sup>9</sup> Under the reserve system, organized baseball created a single-employer-dominated “monopsony,” in which a player was his club’s property for as long as he played baseball or until his employer assigned his contract to another club or “released” the player from his services.<sup>10</sup> Despite playing in a league that demanded conformity to the reserve system, Flood was a fiercely independent thinker, and he told teammates that he would refuse to go to another team if the Cardinals traded him and that he would quit baseball before he left St. Louis.<sup>11</sup>

The Cardinals traded Flood to Philadelphia in October of 1969, after Flood had a sub-par season.<sup>12</sup> Flood desired not to move his family and leave his business interests in St. Louis, and he certainly did not want to finish his career playing before Philadelphia crowds that earned a reputation among ballplayers for being harsh to African-American players.<sup>13</sup> Thus, a month after the trade, Flood informed Marvin Miller, director of the burgeoning MLB Players’ Association, that he intended to challenge the reserve system in court.<sup>14</sup> On Christmas Eve 1969, Flood mailed a letter to MLB Commissioner Bowie Kuhn, in which Flood announced:

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 the several states. . . .

... I, therefore, request that you make known to all the major league clubs my feelings in this matter, and advise them of my availability for the 1970 season.<sup>15</sup>

### *District Court Proceedings*

Flood brought suit in the Southern District of New York against Kuhn, the MLB clubs, and various league executives, seeking a preliminary injunction enjoining each

<sup>9</sup> See generally ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* 45, 64-69 (Temple University Press 1998).

<sup>10</sup> *Id.* at 46-47 (identifying employers as member clubs of a private cartel attempting to suppress player salaries to protect team profitability). Team owners enforced the reserve system by interpreting Section 10A of the Uniform Players Contract to grant the clubs perpetual one-year option rights, thus never allowing a player to relinquish himself from contractual obligation. See generally JOHN HELYAR, *LORDS OF THE REALM* 35-36 (1994). The National League’s use of the reserve clause predates the 1903 truce. See *Metro. Exhibition Co. v. Ewing*, 42 F. 198 (S.D.N.Y. 1890) (affirming the necessity of the reserve clause and its collusive impact).

<sup>11</sup> HELYAR, *supra* note 10, at 107.

<sup>12</sup> *Id.* at 108.

<sup>13</sup> ABRAMS, *supra* note 9, at 65.

<sup>14</sup> HELYAR, *supra* note 10, at 108.

<sup>15</sup> *Id.* at 108-09.

baseball club from refusing to offer him employment as a player.<sup>16</sup> He also sought treble damages in addition to injunctive relief.<sup>17</sup> District Court Judge Cooper denied the preliminary injunction, concluding: “Baseball’s status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody’s business. . . . The game is on higher ground; it behooves every one to keep it there.”<sup>18</sup> Such nostalgic reference to the national pastime foreshadowed a significant theme in the Supreme Court’s majority opinion in *Flood*.<sup>19</sup>

At trial, held in May-June 1970, Flood brought four causes of action. The first cause of action alleged that the reserve system constituted a conspiracy among the defendants to boycott and prevent him from playing baseball other than for the Philadelphia club in violation of the Sherman and Clayton Anti-Trust Acts.<sup>20</sup> The second and third causes of action were state law claims against eleven of the twenty-four clubs with jurisdiction based on diversity of citizenship; specifically, the second contended that the reserve system violated the antitrust laws of New York, California and the other states where major league baseball is played and also violated state civil rights statutes, while the third contended that by the reserve system MLB had restrained Flood’s “free exercise of playing professional baseball in New York, California, and the several states” in which MLB staged baseball games, in violation of the common law.<sup>21</sup> The fourth cause of action asserted that the reserve system was a form of peonage and involuntary servitude in violation of the anti-peonage statutes and the Thirteenth Amendment to the United States Constitution, and that it deprived him of “freedom of labor” in violation of the Norris LaGuardia Act.<sup>22</sup> Judge Cooper focused primarily on the first cause of action.<sup>23</sup>

The court ruled against Flood on two primary bases. First, Judge Cooper found that “the preponderance of credible proof d[id] not favor elimination of the reserve clause.”<sup>24</sup> Whereas Judge Cooper anticipated testimony that the reserve clause had been abused and should be abolished, he was struck by the fact that testimony at trial failed to support that criticism, to the point that Flood’s own witnesses did not consider the system wholly undesirable.<sup>25</sup> Second, Judge Cooper held that *Federal Baseball Club of*

<sup>16</sup> *Flood v. Kuhn*, 309 F. Supp. 793, 795 (S.D.N.Y. 1970).

<sup>17</sup> *Id.* at 795 n.1.

<sup>18</sup> *Id.* at 797.

<sup>19</sup> See ABRAMS, *supra* note 9, at 66. The first section of the Court’s opinion in *Flood*, entitled “The Game,” pays homage to the pastime by referring to at least 100 celebrated names from the game’s history, as well as baseball poems such as “Casey at the Bat” and “Tinker to Evers to Chance.” *Flood*, 407 U.S. at 260-64.

<sup>20</sup> *Flood v. Kuhn*, 316 F. Supp. 271, 272 (1970).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* Flood’s post-trial brief removed contentions of peonage conditions or Norris-LaGuardia Act violations. See *id.* at 280 n.15. Judge Cooper considered the contentions nevertheless and concluded them to be inapplicable.

<sup>23</sup> *Id.* at 280 (stating that the reserve system was not a matter appropriate for a diversity of treatment, and that state and local laws may not unduly burden interstate commerce).

<sup>24</sup> *Id.* at 276.

<sup>25</sup> *Id.* (baseball legend and pioneer Jackie Robinson testified that he favored “modifications” of the system, but did not favor its destruction).

*Baltimore, Inc. v. National League of Professional Baseball Clubs*<sup>26</sup> and *Toolson v. New York Yankees, Inc.*<sup>27</sup> were controlling.<sup>28</sup> Judge Cooper concluded that “the reserve clause can be fashioned so as to find acceptance by player and club.”<sup>29</sup>

### *The Second Circuit’s Decision*

On appeal, the Second Circuit held fast to the *Federal Baseball-Toolson* legacy and felt “compelled to affirm.”<sup>30</sup>

*Federal Baseball* arose from the demise of the rival Federal League, which began in 1913 as a minor league and announced near the end of the season that it would challenge the American and National Leagues as a third major league.<sup>31</sup> The Federal League obtained the backing of several wealthy businessmen and offered contracts to MLB stars.<sup>32</sup> The competition created in the baseball marketplace by the Federal League proved a godsend for players and a headache for MLB owners, who suddenly needed to escalate salaries and add other benefits in order to keep their marquee players from jumping ship.<sup>33</sup> MLB teams threatened that any defectors would be blacklisted, but the Federal League still attracted eighty-one major leaguers during its two seasons, several of whom defected to the Federal League and then returned to MLB and increased their salaries with each change.<sup>34</sup> Despite the inroads it achieved, the Federal League members decided to sue MLB in federal court, claiming the established structure of the American-National League framework was both a conspiracy and monopoly in violation of federal antitrust laws.<sup>35</sup>

<sup>26</sup> 259 U.S. 200 (1922) (hereinafter *Federal Baseball*) (holding that baseball competitions were not commerce and thus baseball was purely a state affair, because although competitions between clubs required extensive and frequent travel of players and umpires across state lines, such travel was merely incidental to the baseball competitions).

<sup>27</sup> 346 U.S. 356 (1953) (hereinafter *Toolson*) (holding that MLB had been left for thirty years to develop after *Federal Baseball*, on the understanding that it was not subject to existing antitrust legislation, and “if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation”).

<sup>28</sup> *Flood*, 316 F. Supp. at 276-78.

<sup>29</sup> *Id.* at 284.

<sup>30</sup> *Flood v. Kuhn*, 443 F.2d 264, 265 (1971).

<sup>31</sup> See generally ABRAMS, *supra* note 9, at 53-57. The Federal League intended to place franchises in Buffalo, Baltimore, Brooklyn, Chicago, St. Louis, Pittsburgh, Indianapolis, and Cincinnati, beginning in 1914. *Id.* at 53.

<sup>32</sup> *Id.*

<sup>33</sup> HELYAR, *supra* note 10, at 4. Helyar reports that the average salary doubled between the years 1913-15. For example, Ty Cobb received a salary over double the league average, and Tris Speaker received an unheard-of two-year contract. *Id.*

<sup>34</sup> ABRAMS, *supra* note 9, at 54-55.

<sup>35</sup> *Id.* at 55.

The presiding district court judge, Kenesaw Mountain Landis, who had developed a reputation as a “trustbuster,”<sup>36</sup> appeared on the surface to be amenable to the Federal League’s claims; however, Judge Landis was also a staunch baseball devotee.<sup>37</sup> After the trial ended, Judge Landis withheld his opinion, hoping the parties would settle out of court.<sup>38</sup> Judge Landis never produced the opinion, and as the Federal League suffered financial decline in its second year of existence, it settled for a modest cash settlement and quickly went out of business.<sup>39</sup>

While some Federal League owners fared well in the settlement, the Baltimore club did not, and it then brought an antitrust suit in federal court in the District of Columbia against MLB owners and three of the Federal League owners.<sup>40</sup> The Baltimore club alleged violations of the Sherman and Clayton Acts, won an \$80,000 verdict, and received treble damages from the trial court.<sup>41</sup> However, the Court of Appeals for the District of Columbia reversed the trial court, determining baseball to be outside the scope of the antitrust laws.<sup>42</sup> The Baltimore club appealed to the Supreme Court.

The Court affirmed the Second Circuit determination, as “*Federal Baseball* was not one of Mr. Justice Holmes’ happiest days.”<sup>43</sup> Speaking for a unanimous Court, Justice Holmes wrote:

The business is giving exhibitions of baseball, which are purely state affairs. . . . But the fact that in order to give exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. . . . [T]he transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. . . . To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauquial lecture bureau

<sup>36</sup> *Id.* Landis had first earned renown in 1907, when he found Standard Oil guilty of violating the Sherman Antitrust Act and fined the company \$29.2 million. See HELYAR, *supra* note 10, at 5.

<sup>37</sup> HELYAR, *supra* note 10, at 6 (noting that Landis interrupted during the trial to declare, “Both sides must understand that any blows at the thing called baseball would be regarded by this court as a blow to the national institution.”).

<sup>38</sup> *Id.* at 6.

<sup>39</sup> *Id.* Landis became reacquainted with MLB five years later, when he became its commissioner.

<sup>40</sup> See ABRAMS, *supra* note 9, at 56.

<sup>41</sup> William C. Dunning, Note, *Antitrust Law: Baseball*, 10 SETON HALL J. SPORTS L. 167, 173 (2000).

<sup>42</sup> *Id.*

<sup>43</sup> Salerno v. American League of Prof’l Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971); *cf.* Flood, 407 U.S. at 282 (stating that “[p]rofessional baseball is a business and it is engaged in interstate commerce”); HELYAR, *supra* note 10, at 8 (characterizing Justice Holmes’ reasoning as based on “a piece of fiction, one that would grow sillier with each passing year”). *But cf.* Flood, 407 U.S. at 286 (Douglas, J., dissenting) (noting that in 1922, when *Federal Baseball* was decided, “the Court had a narrow, parochial view of commerce”).

sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.<sup>44</sup>

Thus, because organized professional baseball did not involve interstate commerce, the *Federal Baseball* court held that MLB was not subject to federal antitrust laws and the Baltimore club had no basis for recovery.<sup>45</sup>

*Toolson* involved much less elaboration by the Court; in fact, the per curiam opinion took only one paragraph to dispose of the appeal in MLB's favor. The New York Yankees had reassigned Toolson from its minor league affiliate in Newark to another club, but Toolson refused to report and filed suit under the antitrust laws.<sup>46</sup> Based on the precedent set by *Federal League*, the lower courts found in MLB's favor.<sup>47</sup> These decisions did not consider the many changes the game had undergone since 1922, including

its radio and television activities which expand[ed] its game audiences beyond state lines, its sponsorship of interstate advertising, and its highly organized "farm system" of minor league baseball clubs, coupled with restrictive contracts and understandings between individuals and among clubs or leagues playing for profit throughout the United States, and even in Canada, Mexico and Cuba.<sup>48</sup>

Nevertheless, because Congress had taken no action to correct the *Federal League* decision in the intervening three decades, the Court concluded that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."<sup>49</sup>

Based on the force of the *Federal Baseball* and *Toolson* holdings, the Second Circuit surmised that there was "no likelihood" that the Supreme Court would overrule those decisions and reiterated the *Toolson* theme that "[b]aseball's welfare and future should not be for politically insulated interpreters of technical antitrust statutes but rather should be for the voters through their elected representatives."<sup>50</sup>

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<sup>44</sup> *Federal Baseball*, 259 U.S. at 208-09.

<sup>45</sup> See, e.g., Morgen A. Sullivan, Note, "A Derelict in the Stream of the Law": Overruling Baseball's Antitrust Exemption, 48 DUKE L.J. 1265, 1270-71 (1999). Congress, in 1890, enacted the Sherman Antitrust Act, prohibiting "any contract, combination or conspiracy in restraint of trade." The Sherman Act enabled the federal government to prohibit such collusion, and in 1914, Congress passed the Clayton Antitrust Act, which enabled private parties to recover for damages caused by anti-competitive conduct. See generally, ABRAMS, *supra* note 9, at 48-50.

<sup>46</sup> See generally ABRAMS, *supra* note 9, at 60-61.

<sup>47</sup> *Id.* at 60.

<sup>48</sup> *Toolson*, 346 U.S. at 357-58 (Burton, J., dissenting).

<sup>49</sup> *Id.* at 356-57.

<sup>50</sup> *Flood*, 443 F.2d at 272 (Moore, J., concurring).

### *The United States Supreme Court's Decision*

The *Flood* court made eight specific findings, most of which appeared favorable to Flood.<sup>51</sup> However, Justice Blackmun's majority opinion also noted that even if the baseball exemption was an aberration, it was "an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court's expanding concept of interstate commerce."<sup>52</sup> After a thorough review of the *Federal Baseball-Toolson* holdings, as well as an analysis of antitrust decisions involving other sports<sup>53</sup> and legislative proposals introduced relative to the applicability of antitrust laws to baseball that had failed in Congress since *Toolson*, Justice Blackmun concluded that "any inconsistency or illogic . . . is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court."<sup>54</sup> On the basis of Congress's "positive inaction," the Court upheld baseball's judicially-created federal antitrust exemption.<sup>55</sup>

The usage of the positive inaction doctrine was not fully persuasive, even among all Court members voting in the majority.<sup>56</sup> Indeed, prior to *Toolson*, the Court had expressed skepticism of basing its decision on congressional inaction.<sup>57</sup> For instance, in *Helvering v. Hallock*<sup>58</sup> the Court discussed *stare decisis* with regard to statutory interpretation:

It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities. . . . This Court . . . has from the beginning rejected a doctrine of disability at self-correction.<sup>59</sup>

As the *Hallock* court recognized, congressional inaction on an erroneous decision should not influence the judiciary's ability to reexamine its own precedent, as legislators often communicate more than mere unawareness or acquiescence when they fail to act on

<sup>51</sup> For instance, the Court found that baseball is a business engaged in interstate commerce, the exemption MLB enjoyed was an anomaly, other professional sports operating interstate enjoy no exemption, and the advent of radio and television have only increased interstate coverage. *Flood*, 407 U.S. at 282-84.

<sup>52</sup> *Id.* at 283.

<sup>53</sup> See cases cited *supra* note 5.

<sup>54</sup> *Flood*, 407 U.S. at 284.

<sup>55</sup> *Id.* at 283-84 (stating that Congress, "far beyond mere inference and implication, has clearly evinced a desire not to disapprove" of the exemption legislatively).

<sup>56</sup> *Id.* at 286 (Burger, C.J., concurring) (stating that congressional inaction was not a solid basis for the Court's holding, "but the least undesirable course now is to let the matter rest with Congress" to solve the problem).

<sup>57</sup> Sullivan, *supra* note 45, at 1276.

<sup>58</sup> 309 U.S. 106 (1940).

<sup>59</sup> *Id.* at 119-121 (footnotes omitted). *But cf.* *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940) (commenting, in a case not regarding baseball's antitrust exemption, that the "long time failure of Congress to alter the [Sherman] Act after it had been judicially construed . . . is persuasive evidence of legislative recognition that the judicial construction is the correct one").



a court's holding; for example, parliamentary tactics and strategy may undergird congressional silence based on political procedural considerations rather than the acceptance of a court decision.<sup>60</sup> In addition, another factor that may influence congressional action or inaction is lobbying, and by 1950, MLB had assembled an impressive lobbying force on Capitol Hill.<sup>61</sup> The "Danny Gardella scare"<sup>62</sup> demonstrates the ambiguity involved in congressional inaction.

Following the end of World War II, the newly-formed Mexican League attempted to lure established major leaguers, just as the Federal League had done thirty years earlier; the new competition, "albeit remote and fleeting," irritated the MLB establishment, which was already negotiating a pension fund with the Players' Guild, the predecessor to the Players' Association.<sup>63</sup> In June 1946, Happy Chandler, Landis' successor as MLB commissioner, announced a "five-year ban on all U.S. players who jumped to the Mexican League."<sup>64</sup> Gardella jumped from the New York Giants to the Mexican League for \$8,000 a year, plus a \$5,000 signing bonus that matched his base salary in New York, but he soon found the playing conditions in Mexico intolerable and attempted to return to MLB.<sup>65</sup> Gardella was blacklisted and sued MLB for \$300,000, but the district court found for MLB on the strength of *Federal Baseball*.<sup>66</sup>

On appeal, the Second Circuit acknowledged a valid argument existed that the Supreme Court's recent decisions<sup>67</sup> had "completely destroyed the vitality" of *Federal Baseball* and had left "that case but an impotent zombie[e]."<sup>68</sup> It chose not to disregard *Federal Baseball*, though, but to distinguish it from Gardella's appeal, which arose in a vastly different factual context.<sup>69</sup> For instance, the Second Circuit found a "distinction necessary" in that, in *Federal Baseball*,

<sup>60</sup> See Sullivan, *supra* note 45, at 1276-77 (citing *Hallock*, 309 U.S. at 121).

<sup>61</sup> According to Representative Emanuel Cellars, Chairman of the House Subcommittee on the Study of Monopoly Power, following 1951 hearings before his subcommittee: "I want to say . . . that I have never known, in my 35 years of experience, of as great a lobby that descended upon the House than the organized baseball lobby. . . . They came upon Washington like locusts." See, e.g., ABRAMS, *supra* note 9, at 61.

<sup>62</sup> See generally ANDREW ZIMBALIST, *BASEBALL AND BILLIONS* 12-15 (2d ed. 1994).

<sup>63</sup> *Id.* at 12. The Players' Guild did not galvanize vast player support other than in Pittsburgh, but it did, among other gains, negotiate the pension fund, secure an increased minimum salary, and establish a maximum pay cut.

<sup>64</sup> *Id.* at 12-13.

<sup>65</sup> *Id.* at 13.

<sup>66</sup> *Id.*

<sup>67</sup> See, e.g., *United States v. Frankfurt Distilleries, Inc.*, 324 U.S. 293, 298 (1945) (stating that, "with reference to commercial trade restraints . . . Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied"); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558-59 (1944) (explaining that "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . . so far as Congress could [ensure] under our dual system, a competitive business economy"); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 435 (1932) (indicating that, with an exception as to labor unions, Congress in the Sherman Act intended to use all the power conferred on it by the Commerce Clause of the United States Constitution).

<sup>68</sup> *Gardella v. Chandler*, 172 F.2d 402, 408-09 (1949) (Frank, J., concurring).

<sup>69</sup> *Id.* at 411.

Persons in other states received, via the telegraph, mere accounts of the games as told by others, while here we have the very substantially different fact of instant and direct interstate transmission, via television, of the games as they are being played, so that audiences in other states have the experience of being virtually present at these games.<sup>70</sup>

Such a vast difference in degree, the court reasoned, constituted a difference in kind sufficient to distinguish the *Federal Baseball* decision.<sup>71</sup> Further, if the players labored under conditions that rendered them “quasi-peons, it is of no moment that they are well paid; only the totalitarian-minded will believe that high pay excuses virtual slavery.”<sup>72</sup> The Second Circuit made no finding on the necessity of the reserve clause, instead concluding that “the public’s pleasure does not authorize the courts to condone illegality, and . . . no court should strive ingeniously to legalize a private (even if benevolent) dictatorship.”<sup>73</sup>

Despite the adverse ruling, MLB decided not to petition the Supreme Court for *Gardella’s* appeal. Instead, Chandler granted amnesty to the Mexican League jumpers and settled out of court with Gardella.<sup>74</sup> MLB then focused its efforts on the House Subcommittee on the Study of Monopoly Power, seeking a legislative stamp of approval of its exemption.<sup>75</sup> As in Flood’s litigation twenty years later, former players “testified that the reserve clause was necessary to preserve competitive balance.”<sup>76</sup> National League president Ford Frick likened the reserve clause to the loyalty exhibited in Milton Berle’s thirty-year movie studio contract.<sup>77</sup> The hearings concluded without the adoption

<sup>70</sup> *Id.* at 412.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 410. Player salaries have been deemed excessive since the first time bat impacted with ball.

Albert Spalding supplied the first recorded owner’s complaint over salaries in 1881: “Professional baseball is on the wane. Salaries must come down or the interest of the public must be increased in some way. If one or the other does not happen, bankruptcy stares every team in the face.” HELYAR, *supra* note 10, at 2-3.

<sup>73</sup> *Gardella*, 172 F.2d at 415.

<sup>74</sup> ZIMBALIST, *supra* note 62, at 13. Interestingly, despite being awarded \$300,000 by the Second Circuit, Gardella settled with MLB for \$60,000, splitting that amount with his attorney.

<sup>75</sup> *Id.* When the hearings began, “eight antitrust cases were pending against MLB, as well as three bills that would have legislated the antitrust exemption to baseball and other sports.” *Id.*

<sup>76</sup> *Id.* at 13-14. Zimbalist, a prominent sports economist, finds it “remarkable that, given the prevalence of player sales throughout the years, the reserve clause/competitive balance myth was so tenacious.” *Id.* at 14. According to Zimbalist, economist Simon Rottenberg in 1956 demonstrated that “as long as player sales were allowed, baseball talent would be distributed according to the various teams’ ability and willingness to pay,” regardless of a reserve clause. *Id.* Cf. BILL JAMES, *A History of Being a Kansas City Baseball Fan*, in THE BILL JAMES BASEBALL ABSTRACT 1986 at 39, 40-41 (1986) (noting that since Kansas City Athletics owner Arnold Johnson was a close friend of Yankees co-owner Del Webb, the fact that the Athletics sold to New York many of the mainstays of the 1950s and 60s Yankee dynasty, such as Roger Maris, was not surprising).

<sup>77</sup> ZIMBALIST, *supra* note 62, at 14. Frick neglected to mention that Berle was able to choose among competing offers and had long-term employment stability. Cf. Joe Sheehan, *The Daily Prospectus: Loyalty*, Baseball Prospectus Publishing Group, at

of any legislation.<sup>78</sup> Likewise, none of the 1950's bills challenging baseball's exemption ever made it out of committee in either chamber.<sup>79</sup>

Against this background, Justices Douglas and Marshall composed dissenting opinions in *Flood*, both joined by Justice Brennan. Justice Douglas, a member of the majority in *Toolson*, commented that *Federal Baseball* was "a derelict in the stream of the law that we, its creator, should remove."<sup>80</sup> He cited the "demise of the old landmarks" of interstate commerce jurisprudence<sup>81</sup> for the proposition that the Court's concept of commerce had evolved since *Federal Baseball*, then he noted that baseball had become a "big business that is packaged with beer, with broadcasting, and with other industries."<sup>82</sup> Largely disregarding the majority's reliance upon congressional inaction, Justice Douglas reminded the Court that the only professional sports antitrust statutory exemption granted by Congress was limited to broadcasting rights,<sup>83</sup> and he concluded that the Court should not "ascribe a broader exemption through inaction than Congress has seen fit to grant explicitly."<sup>84</sup>

Justice Marshall considered *Flood* a difficult case because it forced the Court to weigh the principle of *stare decisis* with the knowledge that the *Federal Baseball* and *Toolson* decisions were "totally at odds with more recent and better reasoned cases."<sup>85</sup> However, he noted that Kuhn himself admitted that MLB engaged in interstate commerce, thus leaving *Federal Baseball-Toolson* completely at odds with the *Radovich-International Boxing* line of opinions applying antitrust laws to other professional sports. Justice Marshall wrote:

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. . . . Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe

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<http://www.baseballprospectus.com/news/20010731daily.html> (last visited Feb. 10, 2003). Sheehan responds to the axiom that today's players, by exercising their free agency rights, lack the loyalty of their predecessors, by asserting that "[s]taying with one team for a long period of time [did not] reflect loyalty: it reflected the reserve clause." In addition, Sheehan notes that teams were not loyal "any longer than they needed to be," as even legends such as Babe Ruth and Ty Cobb were jettisoned by their teams once their skills waned.

<sup>78</sup> ZIMBALIST, *supra* note 62, at 14. Zimbalist notes that according to the congressional testimony of a players' attorney during the 1981 baseball strike, Representative Celler's subcommittee believed that *Gardella* had superseded *Federal Baseball*, and that if no legislation were adopted, the sport would be subject to federal antitrust law.

<sup>79</sup> *Id.*

<sup>80</sup> *Flood*, 407 U.S. at 286 (Douglas, J., dissenting).

<sup>81</sup> *See, e.g., Hammer v. Dagenhart*, 247 U.S. 251 (1918).

<sup>82</sup> *Flood*, 407 U.S. at 286-87.

<sup>83</sup> *See* 15 U.S.C. §§ 1291-1295 (2000).

<sup>84</sup> *Flood*, 407 U.S. at 288.

<sup>85</sup> *Id.* at 290 (Marshall, J., dissenting).

that such foreclosure might promote greater competition in a more important sector of the economy.<sup>86</sup>

Justice Marshall regarded the protections under antitrust laws as just as important to baseball players as they were to football players, or any other citizen; thus, ballplayers should not “be denied the benefits of competition merely because club owners view other economic interests as being more important, unless Congress says so.”<sup>87</sup> He reasoned that congressional action would have been a significant factor to consider only if the Court had been consistent and treated all sports in the same way baseball was treated, but the Court’s correction starting with *Radovich* and *International Boxing* signified to Congress that baseball’s exemption required the Court’s action.<sup>88</sup>

Nevertheless, Justice Blackmun’s majority opinion ended Flood’s litigation against MLB. The Court had boxed itself in after *Federal Baseball*, taking pains to distinguish baseball from other matters,<sup>89</sup> and the Court refused to start anew with Flood. As it turned out, Flood never played a game for the Philadelphia Phillies. After the 1970 season, the Phillies sold Flood’s rights to the Washington Senators.<sup>90</sup> Flood agreed to terms with Washington for the 1971 season, played thirteen games, and then retired.<sup>91</sup> His position on the reserve clause is associated not only with the game of baseball but also with the broader progressive era in which he lived.<sup>92</sup>

### Post-Flood: What’s the Score?

A misperception exists that Curt Flood’s case led directly to free agency. In reality, it gave baseball players certain knowledge that the antitrust door would not open.<sup>93</sup> Instead, as a result of a petition filed by American League umpires, the National Labor Relations Board in “what must be considered one of the greatest upsets in the history of baseball and the legal process,” voted four-to-one to take jurisdiction over MLB, and “spurned the *Federal Baseball* precedent as an aged artifact.”<sup>94</sup> On December

<sup>86</sup> *Id.* at 291-92 (quoting *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 610 (1972)).

<sup>87</sup> *Id.* at 292.

<sup>88</sup> *See id.* Note, though, that Marshall did not speculate whether Flood “would necessarily prevail,” as MLB argued that the appointment of Players’ Association as the representative for all major league players as a mandatory subject of the collective bargaining agreement dictated that federal labor statutes, not federal antitrust laws, were applicable. The lower courts solely considered the case on the basis of the antitrust exemption. *Id.* at 294.

<sup>89</sup> *See* ABRAMS, *supra* note 9, at 68-69.

<sup>90</sup> *Flood*, 407 U.S. at 266.

<sup>91</sup> *See* TOTAL BASEBALL, *supra* note 8, at 863.

<sup>92</sup> *See, e.g.*, A. Asadullah Samad, *Curt Flood: Baseball’s Great Emancipator*, at [http://afgen.com/curt\\_flood.html](http://afgen.com/curt_flood.html) (last visited Feb. 14, 2003). According to Samad, “the message Curt Flood left wasn’t about playing baseball, which he loved to do. It was about maintaining his humanity, which he had to do. . . . [P]rofessional sports may have killed the career of the messenger, but they couldn’t kill his message: A man is not a slave to a game, nor is he chattel.”

<sup>93</sup> *See* JAMES, *supra* note 8, at 748.

<sup>94</sup> ABRAMS, *supra* note 9, at 77.

13, 1974, federal arbitrator Peter Seitz, acting on a dispute between Oakland owner Charles Finley and pitcher Jim “Catfish” Hunter over Finley’s failure to pay on an insurance policy as dictated in Hunter’s contract, ruled that Hunter’s “contract for service to be performed during the 1975 season no longer binds him and he is a free agent.”<sup>95</sup> One year later, in “the most important single act in the history of the business and law of baseball,” Seitz granted Los Angeles Dodgers pitcher Andy Messersmith’s grievance and ruled that he was free of the reserve system.<sup>96</sup> Player upon player served out his option year and entered the open market.<sup>97</sup> This occurred although the Supreme Court has never again considered baseball’s exemption.

### *MLB Finances*

After federal arbitrators determined that, in three successive off-seasons, the owners had colluded in order to create “no vestige of a free market,”<sup>98</sup> the Antitrust Subcommittee of the Senate Judiciary Committee held hearings in December 1992 concerning baseball’s antitrust exemption. Smith College economist Andrew Zimbalist provided the subcommittee with his written testimony.<sup>99</sup> Zimbalist articulated and attempted to refute justifications for the exemption asserted by ownership; several of the justifications are still of interest to the public over ten years later, as they are corrupted by either fallacy or deception. For instance, MLB owners have defended the antitrust exemption on the ground that MLB is not profitable and is thus not a typical business.<sup>100</sup> The owners claim that if they do not make a profit, then it cannot be argued that they are abusing the monopoly the exception confers.<sup>101</sup> Moreover, this unprofitability is often framed in terms of “passing the loss” on to the fans.<sup>102</sup> It does not take a cynical mind to notice that such claims of unprofitability engender calls from the media for a salary cap,

<sup>95</sup> HELYAR, *supra* note 10, at 148-49.

<sup>96</sup> ABRAMS, *supra* note 9, at 126. Not surprisingly, MLB owners fired Seitz as the permanent contract arbitrator five minutes after receiving notice of his decision. *Id.* at 127.

<sup>97</sup> MLB initially attempted to interpret Seitz’s Messersmith decision as only applying to Messersmith. Oakland owner Charles Finley, on the other hand, spoke out as the lone management voice advocating total free agency, so as to flood the market and drive salaries down. The players and owners eventually agreed to keep the reserve clause intact in limited form, allowing free agent rights after six years of MLB service. *See* HELYAR, *supra* note 10, at 182-83.

<sup>98</sup> *See generally* ABRAMS, *supra* note 9, at 137-50. The owners violated Article 18 of the collective bargaining agreement, which read: “Players shall not act in concert with other Players and Clubs shall not act in concert with other Clubs.” Interestingly, the clause was inserted in the CBA at management request. *Id.* at 138. The parties settled damages at \$280 million, but if antitrust principles had applied, the Players’ Association would have been entitled to triple the damages. The 1990 and subsequent CBAs have included this provision, so it is now a non-issue in terms of the Sherman Act. *See* ZIMBALIST, *supra* note 10, at 179.

<sup>99</sup> *See generally* Andrew Zimbalist, *Congressional Hearing: Baseball Economics and Antitrust Immunity*, 4 SETON HALL J. SPORT L. 287 (1994) (providing an edited and expanded transcript of his testimony).

<sup>100</sup> *Id.* at 296.

<sup>101</sup> *Id.*

<sup>102</sup> *See, e.g.*, Richard C. Levin et al., *The Report of the Independent Members of the Commissioner’s Blue Ribbon Panel on Baseball Economics* 1 (2000), at [http://www.mlb.com/mlb/downloads/blue\\_ribbon.pdf](http://www.mlb.com/mlb/downloads/blue_ribbon.pdf) (identifying the committee as “representing the interests of baseball fans” and reporting that “the costs of the clubs trying to be competitive is causing escalation of ticket and concession prices, jeopardizing MLB’s traditional position as the affordable family spectator sport”).

which the owners have not won in bargaining with the Players' Association, in accord with those imposed in other professional team sports.<sup>103</sup>

Historically, owners' claims of unprofitability have been largely overstated or unsubstantiated.<sup>104</sup> For example, in 1985 then-MLB commissioner Peter Ueberroth, in a bargaining gesture designed to demonstrate to the players the extent of the owners' red ink, opened the teams' books to Stanford University economist Roger Noll.<sup>105</sup> As Ueberroth presented the finances to Noll, twenty-one of twenty-six teams had lost money in 1984.<sup>106</sup> However, Noll found bookkeeping tricks at every turn, and he reframed a purported combined operating loss of \$41 million as a \$25 million operating profit.<sup>107</sup>

Dubious numbers jumped out at Noll. For instance, Noll discovered that Ted Turner's Atlanta Braves were paid only \$1 million for television rights by Turner's WTBS Superstation, whereas a reasonable valuation would have given the Braves at least the league average of \$2.7 million.<sup>108</sup> The Cardinals, despite being owned by beer magnate Anheuser-Busch, reported no revenue from concessions and parking, but another Anheuser-Busch subsidiary collected \$2.5 million in revenue for these goods and services.<sup>109</sup> The New York Yankees' \$9 million loss included owner George Steinbrenner's real estate investments in Tampa and \$500,000 in charity contributions.<sup>110</sup> The Oakland A's spent \$4.2 million in marketing expenses, the highest such figure in the majors, for just \$7.5 million in gate receipts.<sup>111</sup> The Los Angeles Dodgers' front-office

<sup>103</sup> See, e.g., BOB COSTAS, FAIR BALL: A FAN'S CASE FOR BASEBALL 53 (2000) (stating that under the National Basketball Association's model, which includes a salary cap, fans of every team have reason to believe they have a chance to win, and this is "accomplished without a single sighting of an NBA player holding a tin cup on a street corner"). A simple look at the NBA's standings at the end of each season renders Costas' claim as somewhat dubious. Poor NBA teams routinely win less than twenty-five percent of their games. See, e.g., *Basketball Reference*, at <http://www.basketballreference.com/leagues> (last accessed July 26, 2004). On the other hand, the last MLB team to win only twenty-five percent of its games was the comically poor 1962 New York Mets. See, e.g., *Baseball Almanac*, at <http://baseball-almanac.com/teams/mets.shtml> (last accessed July 26, 2004). Furthermore, a team that "achieves" MLB's benchmark for a terrible season (100 losses) still wins thirty-eight percent of its games. See, e.g., Drew Olson, *Questions and Answers*, J. SENTINEL ONLINE (Sept. 2002), at <http://www.jsonline.com/sports/brew/sep02/71329.asp>. Costas may be conflating the NBA's salary cap with the NBA's eight additional playoff slots, which naturally gives more marginal teams hope for the postseason.

<sup>104</sup> See generally David Grabiner, *Frequently Asked Questions About the Baseball Labor Negotiations*, at <http://remarque.org/~grabiner/laborfaq.html> (last modified Aug. 28, 2002). Costas believes that while owners' claims of "the sky is falling" in the past may have lacked credibility, the economic reality now matches the rhetoric. COSTAS, *supra* note 103, at 87.

<sup>105</sup> See HELYAR, *supra* note 10, at 346-47. It should be noted that the Players' Association hired Noll to evaluate the books. ZIMBALIST, *supra* note 62, at 64.

<sup>106</sup> HELYAR, *supra* note 10, at 347.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *See id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

payroll was quadruple the league average and, Noll concluded, cut the Dodgers' profits by a third.<sup>112</sup>

Zimbalist reported that nearly two-thirds of MLB franchises had developed cross-ownership ties with broadcasting outlets since 1986, enabling them to utilize the same transfer-pricing schemes that the "Superstation teams" (i.e., the Braves and the Chicago Cubs) enjoyed.<sup>113</sup> While such accounting practices are legitimate,<sup>114</sup> the mischaracterizations of teams' profits can be used as ammunition in MLB's negotiations with its players, its cities, and the minor leagues, as well as Congress and the courts.<sup>115</sup> Furthermore, Zimbalist testified that owners have dishonestly manipulated or falsified their books by underreporting revenue or overstating costs,<sup>116</sup> and unlike other industries, MLB owners can assign fifty percent of their teams' purchase price to players and then depreciate this sum over five years.<sup>117</sup> Above all, Zimbalist inferred, "[i]f baseball teams were not yielding a positive economic return, it would defy all the laws of economics for franchise values . . . to have risen so rapidly over the past two decades."<sup>118</sup>

Evidence indicates that MLB owners' dubious financial claims are not a thing of the past. For instance, claims of a \$34 million loss in 1997 by former Florida Marlins' owner Wayne Huizenga, who owned both the team's station and its cable television network, yielded a more realistic assessment of a \$14 million profit.<sup>119</sup> More recently, MLB's December 2001 financial disclosures indicated a collective operating loss of \$232 million, while *Forbes Magazine's* annual survey of baseball economics concluded that MLB turned a collective operating profit of \$76.7 million in 2001.<sup>120</sup> In fact, one commentator indicated that the numbers cited in MLB's own Blue Ribbon Committee report did not add up.<sup>121</sup>

<sup>112</sup> *Id.*

<sup>113</sup> See Zimbalist, *supra* note 99, at 297. Zimbalist's testimony far predates Disney's purchase of the Angels, NewsCorp./FOX's purchase of the Dodgers, and the Yankees' creation of its own YES Network.

<sup>114</sup> *Id.* at 298.

<sup>115</sup> *Id.* at 297.

<sup>116</sup> *Id.* at 298 (noting that former Cincinnati Reds owner Marge Schott gave her car companies free advertising in Reds' media outlets and double charged the team on its five million dollar electronic scoreboard and its artificial turf).

<sup>117</sup> *Id.* at 298-99.

<sup>118</sup> *Id.* at 299.

<sup>119</sup> See generally Sean Forman, *Team Essay: Florida Marlins*, in DON MALCOLM ET AL., BIG BAD BASEBALL ANNUAL 1999, at <http://www.bigbadbaseball.com/plus192837/marlins.html> (last visited Oct. 15, 2003) (summarizing Andrew Zimbalist's research on the Florida franchise).

<sup>120</sup> See Doug Pappas, *Numbers Reveal Teams Not Nearing Bankruptcy*, at <http://espn.go.com/mlb/columns/misc/1388690.html> (last visited Feb. 14, 2003). Pappas is the chairman of the Business of Baseball Committee of the Society for American Baseball Research.

<sup>121</sup> See Doug Pappas, *Summer 2000: Report on the Blue Ribbon Panel Report*, at <http://roadsidephotos.com/baseball/blueribbon.htm> (last visited Oct. 15, 2003). Pappas noted that, by MLB's own figures, gross revenues increased by over \$1 billion between 1995-99, while player salaries rose by \$550 million. Yet, the Blue Ribbon Committee claimed that losses increased over this period, prompting Pappas to ask, "Where did the other \$450 million go?"

*Franchise Relocation and Stadium Construction*

In *Wisconsin v. Milwaukee Braves, Inc.*,<sup>122</sup> the Wisconsin Supreme Court upheld the baseball antitrust exemption's viability with regard to the franchise relocation of the Braves from Milwaukee to Atlanta.<sup>123</sup> The court held that baseball organizations' decisions concerning agreements and rules that provided for the structure of the organization, such as locations of league franchises, were exempt from antitrust statutes, but also noted:

We venture to guess that this exemption does not cover every type of business activity to which a baseball club or league might be a party and does not protect clubs or leagues from application of the federal acts to activities which are not incidental to the maintenance of the league structure.<sup>124</sup>

A professional sports league holds great bargaining power with current and potential league cities in part because only a select number of metropolitan areas can support a franchise. A franchise often benefits from this tight demand by securing a new, publicly-funded stadium upon the threat of moving for a better deal.<sup>125</sup> Aside from civic pride, municipalities build the franchises' new stadiums for four economic reasons.<sup>126</sup> First, cities seek to create construction jobs by building a facility.<sup>127</sup> Second, "people who attend games or work for the team generate new spending in the community, expanding local employment."<sup>128</sup> Third, "a team attracts tourists and companies to the host city, further increasing local spending and jobs."<sup>129</sup> Finally, local and state governments anticipate a "multiplier effect" as increased local income causes still more new spending and job creation."<sup>130</sup> Stadium-building advocates claim that new stadiums result in so much economic growth, through ticket-tax revenues, concession sales taxes, and increased property taxes, that they are self-financing.<sup>131</sup>

<sup>122</sup> 144 N.W.2d 1 (Wis. 1966).

<sup>123</sup> See generally Edmund P. Edmonds, Symposium, *The Curt Flood Act of 1998: A Hollow Gesture After All These Years?*, 9 MARQ. SPORTS L.J. 315, 319-23 (1999).

<sup>124</sup> 144 N.W.2d at 15.

<sup>125</sup> Cf. Andrew F. Hamm, *Future of Oakland A's May Hinge on New Stadium*, EAST BAY BUSINESS TIMES, Feb. 6, 2003, at <http://eastbay.bizjournals.com/eastbay/stories/2003/02/02/daily55.html> (last visited Feb. 14, 2003) (conveying MLB commissioner Bud Selig's opinion that Oakland's stadium is outmoded and building efforts are the responsibility of individual owners and their franchise cities).

<sup>126</sup> Roger G. Noll & Andrew Zimbalist, *Sports, Jobs & Taxes: Are New Stadiums Worth the Cost?*, 15 BROOKINGS REVIEW 35 (Summer 1997), available at <http://www.brook.edu/press/review/summer97/noll.htm> (last visited Oct. 15, 2003).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*



High expectations attach themselves to stadium plans. During the Giuliani administration, New York City commissioned a study on the prospect of a new ballpark for the Yankees on the West Side of Manhattan. The study estimated the new stadium would create \$100 million in annual income, but the Giuliani administration advertised it as creating ten times that amount.<sup>132</sup> However, the position that sports stadiums are such engines of economic development is dubious.<sup>133</sup> “Baltimore’s Oriole Park at Camden Yards, often cited as the most successful of the new stadiums, illustrates the point.”<sup>134</sup> Economists estimated that \$41 million in additional spending by out-of-towners at Camden Yards resulted in just 460 permanent jobs in the Baltimore metropolitan area.<sup>135</sup> “While higher attendance combined with higher ticket prices have generated \$16 million more a year for the Orioles, the stadium authority is losing \$9 million a year,” and the “incomes of Maryland residents would be \$11 million more a year if Camden Yards had not been built.”<sup>136</sup> “Courts have ruled that leagues must have ‘reasonable’ relocation rules that preclude anticompetitive denial of relocation.”<sup>137</sup> Baseball, because of its antitrust exemption, appears “freer to limit team movements than the other sports.”<sup>138</sup>

### *The Curt Flood Act of 1998*

Following 1994-95’s catastrophic baseball strike, Congress passed the Curt Flood Act of 1998, which said “challenges to league rules that restrict player movement or compensation would be subject to antitrust laws.”<sup>139</sup> The Curt Flood Act of 1998 states, in part:

<sup>132</sup> See Peter Passell, *Local Payoff on a Stadium is Uncertain*, N.Y. TIMES, Apr. 30, 1998, at D1.

<sup>133</sup> See *id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* This loss must only be greater now. The retirement of Orioles’ legend Cal Ripken, combined with the team’s poor play over the past five years, have draw fewer and fewer people to Camden Yards. Attendance has dipped from nearly 46,000 spectators per home date in 1997 to just over 33,000—although the latter figure still ranked third out of fourteen American League teams—in 2002. See *Baltimore Orioles Attendance, Stadiums and Park Factors*, at <http://www.baseball-reference.com/teams/BAL/attend.shtml> (last visited Feb. 14, 2003).

<sup>137</sup> Noll & Zimbalist, *supra* note 126. For the most famous application of this rule, see *Los Angeles Memorial Coliseum Comm’n. v. Nat’l Football League*, 726 F.2d 1381 (9th Cir. 1984) (holding that the NFL’s rule requiring three-quarters approval by its members before a team could move into another member’s home territory did not withstand the rule of reason as applied to restraints of trade).

<sup>138</sup> Noll & Zimbalist, *supra* note 126. MLB rules require twenty-three of thirty owners to permit a franchise relocation. MLB officials also consider not only the scope of a franchise’s territorial rights, but the area encompassing its media market, which is broader. No MLB team has relocated to the Washington area since the Senators became the Texas Rangers following the 1971 season. Washington is again the subject of relocation, as Baltimore Orioles owner opposes relocating a struggling franchise to the District of Columbia or Northern Virginia. See generally Mark Asher, *Lawsuit Delaying Decision on Expos*, WASHINGTON POST, Sept. 14, 2002, at D1.

<sup>139</sup> See Darren Rovell, *Baseball’s Antitrust Exemption: Q & A*, at <http://espn.go.com/mlb/s/2001/1205/1290707.html> (last visited Feb. 14, 2003). The Supreme Court held two years earlier that unionized employees may not file antitrust suits; thus, in the 2002 round of labor negotiations, speculation existed that the players might decertify their union in order to sue under antitrust. *Id.*

(a) Subject to subsections (b) through (d), the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level 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.

(b) 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). 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, . . .<sup>140</sup>

In addition, the Curt Flood Act does not affect minor leaguers or those entering the amateur draft;<sup>141</sup> the relationship between MLB and the minor leagues;<sup>142</sup> franchise relocation or expansion or any other issue directly between the commissioner and the league owners; as well as MLB's marketing, sales, and intellectual property rights.<sup>143</sup> Also unaffected is any conduct covered by the Sports Broadcasting Act of 1961,<sup>144</sup> the league's umpires, and any other persons or conduct outside the framework of MLB.<sup>145</sup> Only a "major league player" as defined in the Act may have standing to sue under this section.<sup>146</sup>

The force of the Curt Flood Act is unclear. For instance, during the labor negotiations of 2001-02, MLB commissioner Bud Selig threatened to contract apparently unprofitable franchises.<sup>147</sup> A bill called the "Fairness in Antitrust in National Sports (FANS)" sponsored by representative John Conyers and senators Paul Wellstone and Mark Dayton threatened to strip the antitrust exemption as it applies to MLB's efforts to control relocation and contraction.<sup>148</sup> However, some legislators and antitrust experts say "an antitrust challenge might actually reveal that baseball is *not* protected in this area,

<sup>140</sup> 15 U.S.C. § 26(a)-(b) (1998).

<sup>141</sup> § 26(b)(1).

<sup>142</sup> § 26(b)(2).

<sup>143</sup> § 26(b)(3).

<sup>144</sup> § 26(b)(4).

<sup>145</sup> § 26(b)(5).

<sup>146</sup> § 26(c).

<sup>147</sup> See, e.g., Hamm, *supra* note 125.

<sup>148</sup> See, e.g., Rovell, *supra* note 139.

since it has never been explicitly challenged in court.”<sup>149</sup> For instance, the Senate Judiciary Committee chairman has commented that:

In the best-reasoned recent lower court opinion on this topic, Judge Padova of the Federal District Court for the Eastern District of Pennsylvania in *Piazza v. Major League Baseball*<sup>150</sup> concluded in 1993 that the judicially-created and unique antitrust exemption for major league baseball was limited to the reserve system. That case involved the possible relocation of a team, and the District Court held that no baseball antitrust exemption prevented it from applying the law. Similarly, in *Butterworth v. National League of Professional Baseball Clubs, Inc.*<sup>151</sup> involving a challenge to major league baseball's refusal to allow a group of investors to buy the San Francisco Giants and move the team to Tampa Bay, the Florida Supreme Court held in 1994 that no judicially-created federal antitrust exemption barred it from considering the proper application of federal law to protect competition and thereby consumers.

...

Between the narrowness of the way the Supreme Court had perpetuated baseball's antitrust exemption-- only as it applied to labor-management relations-- and our work in the Congress, in which we struck the last remaining remnant of the judicially-created exception to the applicability of the antitrust laws, it seems that there is no longer any basis to contend that a general, free-floating baseball antitrust exemption somehow continues to exist.

Nor has such a special antitrust exemption been justified. When the Committee was engaged in hearings in 1995 that led to passage of the Curt Flood Act, after the work stoppage in 1994 and the lamentable and historic canceling of the World Series, David Cone, an outstanding major league pitcher, testified and offered a trenchant question. He asked: If baseball were coming to Congress today to ask us to provide a statutory antitrust exemption, would we? That is the question I repeat today. What about major league baseball, as distinct from other professional sports and businesses, entitles it to special rules of law?<sup>152</sup>

To date, Senator Leahy's question in closing remains unanswered—as it has been since the days of Oliver Wendell Holmes.

<sup>149</sup> *Id.*

<sup>150</sup> 831 F. Supp. 420 (E.D. Pa. 1993).

<sup>151</sup> 644 So. 2d 1021 (Fla. 1994).

<sup>152</sup> Sen. Patrick Leahy, *Opening Statement of Senator Leahy on the Applicability of Federal Antitrust Laws to Major League Baseball*, at <http://leahy.senate.gov/press/200202/021302.html> (last visited Feb. 10, 2003).