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ANATOMY OF AN ABERRATION: AN EXAMINATION OF THE ATTEMPTS TO APPLY ANTITRUST LAW TO MAJOR LEAGUE BASEBALL THROUGH FLOOD V. KUHN (1972)

David L. Snyder*

I. INTRODUCTION

The notion that baseball has always been exempt from antitrust laws is a commonly accepted postulate in sports law. This historical overview traces the attempts to apply antitrust law to professional baseball from the development of antitrust law and the reserve system in baseball in the late 1800s, through the lineage of cases in the Twentieth Century, ending with Flood v. Kuhn in 1972.1 A thorough examination of the case history suggests that baseball’s so-called antitrust “exemption” actually arose from a complete misreading of the Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs (1922)2 decision by the United States Supreme Court in Toolson v. New York Yankees, Inc. (1953).3

The primary restriction upon player movement in professional baseball has been the reserve system, so at the outset, it is important to trace the origins of this practice to understand how and why it evolved.

II. EVOLUTION OF THE RESERVE SYSTEM

The earliest forms of player restraints in professional team sports originated in baseball. The origins of professional baseball in the

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United States can be traced to the early to mid-1800s.\textsuperscript{4} After the Civil War, the sport experienced a period of dynamic growth, and as the game developed into a business, professional players began to appear and competitor leagues arose.\textsuperscript{5} Owners began to competitively bid against each other in an effort to attract the best players to their clubs.\textsuperscript{6} One of the more established professional leagues at the time was the National Association of Base Ball Players (NABBP).\textsuperscript{7}

In 1869, the Cincinnati Red Stockings of the NABBP announced that they would be fielding an entire team of paid professionals, thus becoming the first “admittedly” all-professional club.\textsuperscript{8} That season, Cincinnati went undefeated.\textsuperscript{9} The success of teams like the Red Stockings inspired other teams to use the lure of money to induce the best players to join their clubs.

In 1876, the NABBP became the National League of Professional Baseball Clubs.\textsuperscript{10} Apprehensive that bidding wars for the best players would continue to erupt among the teams in the league, the National League owners developed a system in 1879 to restrict player movement, which is colloquially referred to today as the “reserve system.”\textsuperscript{11} The reserve system enabled each National League owner to secure the exclusive rights to five players by placing their names on a reserve list at the beginning of the season. The numbers were eventually increased to include the entire roster.\textsuperscript{12} This had a chilling impact on player salaries, at least within the National League. Eventually, the reserve system became embodied in the “option clause” of the National League’s Standard Player Contract. The option clause essentially stated that when a player’s contract expired, the team owner had the right or option to bring the player back for another year under certain stated terms.\textsuperscript{13}


\textsuperscript{5} Voigt, \textit{supra} note 4, at 10; Duquette, \textit{supra} note 4, at 2.


\textsuperscript{7} Goldstein, \textit{supra} note 6, at 44-45; Voigt, \textit{supra}, at 8; Duquette, \textit{supra} note 4, at 2-3.

\textsuperscript{8} Roger I. Abrams, \textit{Legal Bases: Baseball and the Law} 14 (1998); Goldstein, \textit{supra} note 6, at 103; Voigt, \textit{supra} note 4, at 8-9; Duquette, \textit{supra} note 4, at 3.

\textsuperscript{9} Abrams, \textit{supra} note 8, at 14; Voigt, \textit{supra} note 4, at 9.

\textsuperscript{10} Abrams, \textit{supra} note 8, at 10; Goldstein, \textit{supra} note 6, at 5; Duquette, \textit{supra} note 4, at 4.

\textsuperscript{11} Abrams, \textit{supra} note 8, at 15; Goldstein, \textit{supra} note 6, at 149-150; Duquette, \textit{supra} note 4, at 5.

\textsuperscript{12} Gary D. Hailey, \textit{Baseball and the Law}, in \textit{Total Baseball} 638, 638 (John Thorn & Pete Palmer eds. with David Reuther, 2d ed. 1991); Abrams, \textit{supra} note 8, at 15; Duquette, \textit{supra} note 4, at 5.

\textsuperscript{13} Hailey, \textit{supra} note 12, at 638-639; Abrams, \textit{supra} note 8, at 46-47.
The National League established itself as one of the most stable professional baseball leagues in the late 1800s, although it was under pressure from several competitor leagues, including the American Association, the Union Association, the Brotherhood of Professional Base Ball Players, the Western League, and the Players League, among others. At the turn of the century, the Western League, the National League's chief rival, changed its name to the American League. The struggle between these two dominant leagues ended in 1903 when the National and American Leagues merged with the signing of the National Agreement, creating the foundation for Major League Baseball. Among other things, the National Agreement provided for an annual "World Series" between the top team from each league, and required that all the teams in the newly formed league agree to abide by the reserve system.

III. ANTITRUST LAW

Contemporaneous to these events occurring in baseball, there was a movement within American jurisprudence to loosen the economic stranglehold applied by large corporate trusts through the enactment of laws designed to prohibit certain monopolistic practices. Antitrust law, which arose during the late Nineteenth Century, sought to strike a balance between the maintenance of the free market and monopolistic practices that might serve to impair the market's performance. While seeking to preserve a capitalist economy, antitrust laws prohibit price-fixing, cartels, output restrictions, blacklisting, and other monopolistic practices, which operate to the detriment of consumers. In essence, these laws define the extent to which the branches of state and federal government should intervene in the free market.

The first primary source of antitrust law was the Sherman Antitrust Act passed by Congress in 1890. The Sherman Act's legislative history from the late 1880s reveals that the statute arose from the perceived need to control the massive corporate trusts that existed at that time. The purposes of the Sherman Act were to preclude any single entity from controlling the production, transportation and sale of the necessities of life, and to prevent the autocratic dominance of trade by those with the power to prevent competition or to fix the price of any commodity. The legislative history of the Sherman Act makes no

15. Voigt, supra note 4, at 16; Duquette, supra note 4, at 7.
16. Voigt, supra note 4, at 16-17; Duquette, supra note 4, at 8.
17. Abrams, supra note 8, at 48-49; Duquette, supra note 4, at 10-14.
mention of professional baseball, or other professional sports. Rather, the Sherman Act was the product of Congressional concerns regarding the sugar, tobacco, railroad, and oil trusts that existed in the late 1880s.19

Section 1 of the Sherman Act states that, “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”20

Not all restraints of trade are unlawful under the Sherman Act. An individual or single entity that achieves a full-fledged monopoly in a particular trade or business without acting in concert with competitors does not violate the law. In addition, monopolistic practices involving purely intrastate trade are not illegal under the Sherman Act. Also, while Section 1 of the Sherman Act indicates it applies to “every” contract, combination and conspiracy, in application that was not the case. In Standard Oil Co. of New Jersey v. United States (1911),21 the Supreme Court held that Section 1 of the Sherman Act only bars those relationships that “unreasonably” restrain trade. This ruling laid the foundation for what would later develop into the Rule of Reason analysis. Under the Rule of Reason, conspirators in a trust can avoid antitrust sanctions by demonstrating the reasonableness of their relationship or activity.

IV. American League Baseball Club of Chicago v. Chase (1914)22

As baseball began to expand its business activities, questions regarding the applicability of antitrust law to professional baseball arose. In 1914, Hal Chase 23 gave written notice to his team, the Chi-

19. Abrams, supra note 8, at 48-49; Duquette, supra note 4, at 10-14.
23. Chase, or as he was known, “Prince Hal,” was one of the more colorful characters in baseball lore. In Sports and the Law, Weiler and Roberts write: “The court refers to Hal Chase as a ‘special, unique, and extraordinary baseball player.’ How extraordinary the judge simply did not realize. In his definitive history of baseball, Harold Seymour characterizes Chase as a ‘malignant genius.’ While only Lou Gehrig and George Sisler were comparable first basemen on the field, Chase was the ‘archetype of all crooked ballplayers . . . a full-fledged fixer and gambler.’ Indeed, at the end of the 1918 baseball season, Chase was charged by his manager, Hall of Famer Christy Mathewson, with having tried to persuade his teammates to lose games on which Chase had bets riding. Though three players on his team testified to this effect in a hearing before the National League President, the President absolved Chase by saying that the players had misunderstood the superstar’s joking comments. Chase returned to play for the Giants the next season and to serve as the intermediary between the gamblers and the White Sox who were
cago White Sox, that he was canceling his contract with them so he could play for Buffalo in the Federal League. This was one of the first examples of a "league jumping" case. Chase filed suit in the Supreme Court in Erie County in New York. The issue in the Chase case was whether the terms of the National Agreement between the National and American Leagues violated the Sherman Act. As Judge Bissell characterized it,

"The system created by 'organized baseball' in recent years presents the question of the establishment of a scheme by which the personal freedom, the right to contract for their labor wherever they will, of 10,000 skilled laborers, is placed under the dominion of a benevolent despotism through the operation of the monopoly established by the National Agreement."24

In his decision, Judge Bissell declared,

"The analysis of the National Agreement and the Rules of the Commission, controlling the services of these skilled laborers, and providing for their purchase, sale, exchange, draft, reduction, discharge, and blacklisting, would seem to establish a species of quasi peonage unlawfully controlling and interfering with the personal freedom of the men employed. It appears that there is only one league of any importance operating independently of the National Commission, and that is the newly organized Federal League which comprises eight clubs in eight cities. 'Organized baseball' is now as complete a monopoly of the baseball business for profit as any monopoly can be made. It is in contravention of the common law, in that it invades the right to labor as a property right, in that it invades the right to contract as a property right, and in that it is a combination to restrain and control the exercise of a profession or calling."25

However, although he found a monopoly to exist, Bissell determined that it was not in violation of the Sherman Act. "It is apparent from the analysis already set forth of the agreement and rules forming the combination of the baseball business, referred to as 'organized baseball,' that a monopoly of baseball as a business has been ingeniously devised and created in so far as a monopoly can be created among free men;" he stated, "but I cannot agree to the proposition that the business of baseball for profit is interstate trade or commerce, and therefore subject to the provisions of the Sherman Act."26


25. Id. at 17.
26. Id. at 16.
So while the court in *Chase* determined that a cartel existed, it decided that this monopolistic practice did not fall within the purview of the Sherman Act because it was not a part of interstate commerce, it was not on a large scale, and it did not involve commodities. In *Chase*, "commerce" was narrowly defined as the "interchange of goods; merchandise or property of any kind; trade; traffic; used more especially of trade on a large scale ..." The *Chase* court defined "commodity" as "[t]hat which is useful; anything that is useful or serviceable; particularly an article of merchandise; anything moveable that is a subject of trade or of acquisition." Bissell continued,

"We are not dealing with the bodies of the players as commodities or articles of merchandise, but with their services as retained or transferred by the contract. The foundation of the National Agreement is the game of baseball conducted as a profitable business, and if this game were a commodity or an article of merchandise and transported from state to state, then the argument of defendant's counsel might be applicable." *Chase* offered a very narrow, literal definition of commerce, goods, production and trade.

The *Chase* court also stated, "Baseball is an amusement, a sport, a game that comes clearly within the civil and criminal law of the state, and it is not a commodity or an article of merchandise subject to the regulation of Congress on the theory that it is interstate commerce." *Chase* reflects a certain judicial aversion to treating this "game" as commerce, thereby making application of the Sherman Act to a baseball player improper.

Hal Chase eventually won his case and was freed from his contract, but he prevailed under New York contract law, not under the Sherman Act. The next time the application of antitrust law to baseball would be tested would be before the Supreme Court of the United States.

V. **Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs** (1922)

The merger between the American and National Leagues did not put an end to the development of rival leagues, and in 1913, the Federal League was born. Founded and funded by a number of wealthy

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27. *Id.* at 16.
28. *Id.* at 16.
29. *Id.* at 16.
30. *Id.* at 17.
businessmen, the Federal League began to compete with the Major Leagues for the best professional players. The Federal League was moderately successful, but could not sustain itself against the combined weight of the American and National Leagues. In 1914, the Federal League sought a merger, but their request was not granted. In 1915, the Federal League filed suit under the Sherman Act to have the National Agreement between the National and American Leagues declared invalid and to have all Standard Player Contracts of Major League Baseball declared null and void.32

The case was tried in the U.S. District Court for the Northern District of Illinois before Judge Kennesaw Mountain Landis, who later became baseball's first Commissioner. The Federal League needed a quick decision because their operating funds were rapidly dwindling. However, Landis delayed in making his determination for the entire length of the 1915 baseball season until finally, the financially strapped Federal League was forced into settling the case.33 Under the terms of the settlement, certain Federal League owners were permitted to purchase interests in existing clubs while others were bought out, and players from the Federal League were allowed to rejoin professional baseball without being blacklisted. Ultimately, Landis never ruled on the case.34

However, the matter was not completely resolved because one of the Federal League teams, the Baltimore Terrapins, declined to join the settlement agreement. The Terrapins had wanted to purchase the St. Louis Cardinals and move them to Baltimore, but their proposal was rejected. In March 1919, shortly after the peace agreement between the competing leagues was finalized, the Terrapins filed their own lawsuit. It is this suit that has become commonly referred to as the Federal Baseball case.35

In 1919, the case went to trial in Federal District Court. At the trial court level, Judge Stafford instructed the jury,

"(a) That appellants were engaged in interstate commerce; (b) that they attempted to monopolize, and did monopolize, a part of that commerce, principally through what is called the 'reserve clause' and ineligible list features of certain agreements; but (c) left it to the jury to say whether the appellants had conspired together to destroy, and did destroy, the Federal League, to the end that they might perfect their monopoly of professional baseball, and whether,

32. Hailey, supra note 12, 640; Abrams, supra note 8, at 53-55.
33. Hailey, supra note 12, 640; Abrams, supra note 8, at 55.
34. Hailey, supra note 12, 640; Abrams, supra note 8, at 55-56. 
35. Hailey, supra note 12, 640; Abrams, supra note 8, at 56.
if they did so conspire with the effect stated, their act resulted in injury to the appellee.”36

The jury awarded the Terrapins $80,000 trebled to $240,000, with costs and attorneys' fees, on the grounds that the American and National Leagues violated the Sherman Act.37

Citing with approval of the *Chase* case,38 the D.C. Circuit Court of Appeals reversed using a *Chase*-type analysis. Listing numerous definitions of “trade” and “commerce” from various sources, the court noted, “Through these definitions runs the idea that trade and commerce require the transfer of something, whether it be persons, commodities, or intelligence, from one place to another.”39 The court held that

“The business in which the appellants were engaged, as we have seen, was the giving of exhibitions of baseball. A game of baseball is not susceptible of being transferred. The players, it is true, travel from place to place in interstate commerce, but they are not the game... Nothing is transferred in the process to those who patronize it.”40

The Circuit Court also found that professional baseball was not interstate commerce declaring that, “It is local in its beginning and in its end.”41 The court took a narrow view of commerce consistent with other early judicial interpretations.

In 1922, eight years after *Chase*, the *Federal Baseball* case finally came before the Supreme Court. In a nine to zero decision (9-0), the United States Supreme Court held that, “The business is giving exhibitions of base ball, which are purely state affairs.”42 The decision does not state, as many experts erroneously cite, that baseball is exempt from the antitrust law. Indeed, the words “exempt” and “exemption” never appear in *Federal Baseball,* nor does any similar terminology. Rather, the Supreme Court, with the eminent Oliver Wendell Holmes writing the decision, found that baseball is a purely

37. Id. at 682.
38. Id. at 686.
39. Id. at 684. It is interesting to note that the court allowed something intangible (i.e. intelligence) to be included in its definition of commerce, thus arguably slightly broadening the previous definitions of commerce that limited the concept to tangible goods only.
40. Id. at 684-85.
41. Id. at 685.
state affair. Therefore, since baseball was intrastate only, it was not subject to the Sherman Act.\textsuperscript{43}

Although teams travel across state lines to play games, Justice Holmes reasoned, “It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the 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.”\textsuperscript{44} Therefore, the majority found interstate activity to be merely incidental to professional baseball, and not the essential purpose of the league itself.

In rendering its decision, the Supreme Court greatly relied upon its previous holding in \textit{Hooper v. California} (1895),\textsuperscript{45} in which the court found that the sale of insurance policies between states was not sufficient to constitute interstate commerce.

Echoing the sentiments of the court in \textit{Chase}, the U.S. Supreme Court in \textit{Federal Baseball} also found that baseball was not “trade” or “commerce,” as the terms were defined at the time. Holmes explained,

“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. As it is put by the defendants, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place.”\textsuperscript{46}

In that respect, the Supreme Court’s ruling in \textit{Federal Baseball} represents a rather typical turn of the century analysis of the applicability of antitrust law to professional baseball.

In \textit{Federal Baseball}, the Supreme Court never suggested that professional baseball is exempt from antitrust law. Rather, they found that professional baseball was not an interstate activity and it was not “trade” or “commerce” as the terms were defined at that time, and consequently, they held that baseball was not subject to antitrust legislation by definition.\textsuperscript{47}

\textsuperscript{43} Justice Holmes considered the Sherman Act as a folly based on ignorance and he did not believe the Act expressed the will of the people. He felt that capitalism operated best without artificial legislative intervention.

\textsuperscript{44} \textit{Fed. Baseball}, 259 U.S. 200, 208-209 (1922).


\textsuperscript{47} Much has been made about the vote in this case being unanimous. It is very likely that Justice Holmes' tremendous influence had a great deal to do with swaying certain judges to join
VI. DEVELOPMENTS AFTER FEDERAL BASEBALL

Antitrust law underwent some major revisions in the two decades following the Supreme Court’s decision in Federal Baseball. In response to the economic crisis that led to The Great Depression, President Franklin Roosevelt conceived of the “The New Deal,” which consisted of a series of government initiatives designed to revitalize the American economy. 48 Many of Roosevelt’s early initiatives were invalidated by the Supreme Court because of its narrow, restrictive interpretation and application of the Commerce Clause of the United States Constitution. 49 When Roosevelt threatened to pack the Supreme Court if the justices did not cooperate with his initiatives, the high court tempered its stance. 50 Consequently, broader definitions of interstate commerce, and the terms “trade” and “commerce,” began to emerge in the 1930s and 1940s. 51

As a result of these changes, in 1944, the Hooper (1895) case that the Supreme Court relied heavily upon in Federal Baseball was overturned in U.S. v. South-Eastern Underwriters Ass’n (1944). 52 When Hooper was first decided, the Court found that insurance companies were not engaged in interstate commerce, even if they cross state lines to sell policies, because transportation across state lines was merely incidental to the practice of selling insurance policies. However, in South-Eastern Underwriters, the Supreme Court reversed its prior holding in Hooper and held that the sale of insurance policies in more than one jurisdiction did constitute interstate commerce.

Meanwhile, radio was transforming the sport and the way it was experienced by spectators. In 1921, the first major league game was broadcast from Pittsburgh on KDKA radio, 53 and by 1939, all major league teams were broadcasting their games over the radio. 54 In the process, this new technology had turned the National Pastime into a

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49. Id. at 201.
54. Id. at 654-55.
game that clearly crossed state boundaries. In addition, there were new revenue streams generated from radio broadcasts of games. More and more, professional baseball was becoming a business enterprise.

By the 1940s, the definitions of “interstate commerce” and “trade” had expanded; radio broadcasts of baseball games had increased dramatically; baseball had expanded as a business; and the *Hooper* case, which figured so prominently in the decision in *Federal Baseball*, had been overturned. The time seemed ripe to renew the argument that antitrust law could be applied to professional baseball, and the person who brought forth that issue was Danny Gardella.

VII. *Gardella v. Chandler* (1949)55

Since the demise of the Federal League in 1916, baseball did not have to contend with challenges from rival leagues until 1946, when several players left the Major Leagues to play in a professional baseball league in Mexico after being enticed by lucrative offers from Mexican League president, executive chairman, and commissioner, Jorge Pasquel.56 Gardella was one of approximately two-dozen players,57 which included Max Lanier, Vern Stephens, and Sal Maglie, among others,58 known as the “Mexican Jumping Beans.”59 After the Mexican League collapsed, Gardella and the others tried to return to the Major Leagues, but the Commissioner of Baseball, A. B. “Happy” Chandler, banned the players from Major League Baseball for five years.60

Gardella filed an antitrust suit under the Sherman Act. Attorney Frederic A. Johnson, a former classmate of Chandler’s, who had written the first scholarly article on baseball and the law in 1939, represented Gardella.61 At the Federal District Court level, Judge Goddard dismissed the suit on the pleadings based on *Federal Base-

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55. *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949).
59. Phillips, *supra* note 56, at 13 (discussing how Gardella was another colorful character. He left for Mexico after getting into a dispute with Giants owners, for whom he played, over the wearing of a necktie. The team required one, but he didn’t want to wear it).
61. Phillips, *supra* note 56, at 66 (discussing that Johnson was a former classmate of Happy Chandler at Harvard. Some accounts claim they were good friends and possibly colluded on the settlement, while others say they were bitter rivals).
In a 2-1 decision, the Second Circuit Court of Appeals over-turned Goddard’s holding, with judicial heavyweights Learned Hand and Jerome Frank in the majority.

In arriving at its decision, the Circuit Court stressed the changes that had occurred since Federal Baseball. In no uncertain terms, Judge Frank stated in his opinion, “No one can treat as frivolous the argument that the Supreme Court’s recent decisions have completely destroyed the vitality of Federal Baseball Club v. National League . . . decided twenty-seven years ago, and have left that case but an impotent zombi.”63 Judge Frank found that the changes that had occurred involving radio and television broadcasts of games had clearly transformed professional baseball into an interstate activity. Frank said,

"In that earlier case (i.e. Federal Baseball), the Court held that the traveling across state lines was but an incidental means of enabling games to be played locally – i.e., within particular states – and therefore insufficient to constitute interstate commerce. Here, although the playing of the games is essential to both defendants' intra-state and interstate activities, the interstate communication by radio and television is in no way a means, incidental or otherwise, of performing the intra-state activities (the local playings of the games).”64

Learned Hand also emphasized the significance of broadcasting the games on radio and television in terms of interstate commerce, noting, "... the situation appears to me the same as that which would exist at a "ball-park" where a state line ran between the diamond and the grandstand."65

In reference to Judge Bissell’s earlier remark in the Chase case that professional baseball had established a system of “quasi-peonage,” Baseball Commissioner Chandler scoffed that it was hard to see how players making so much money could be regarded as peons. Frank forcefully addressed this remark in his opinion in Gardella stating, “I may add that, if the players be regarded as quasi-peons, it is of no moment that they are well paid; only the totalitarian-minded will believe that high pay excuses virtual slavery.”66

Again using some very strong words, Judge Frank concluded,

64. Id. at 410-11.
65. Id. at 407. In fact, there is a minor league team for the Baltimore Orioles in Bluefield, West Virginia in which a state line literally runs through the ball park. Part of the park is in the State of Virginia and part is in West Virginia.
66. Id. at 410.
“Defendants suggest that ‘organized baseball,’ which supplies millions of Americans with desirable diversion, will be unable to exist without the ‘reserve clause.’ Whether that is true, no court can predict. In any event, the answer is that the public’s pleasure does not authorize the courts to condone illegality, and that no court should strive ingeniously to legalize a private (even if benevolent) dictatorship.”

The case was remanded to Judge Goddard for trial. After the decision of the Second Circuit, a few other “Mexican Jumping Beans,” including players Fred Martin and Max Lanier, hired their own attorneys and joined the suit. Fearful of an unfavorable outcome that could result in the establishment of an adverse precedent, Major League Baseball reinstated the players on June 6, 1949, and settled the case with Gardella on October 7 of that same year. On the reinstatement, Gardella’s attorney commented, “Baseball has seen the handwriting on the wall. That is the reason for the reinstatement of these players.”

The real significance of Gardella was that it suggested that antitrust might be applied to professional baseball if the issue made it back to the U. S. Supreme Court. The opportunity arose in 1953 with the Toolson case.

VIII. Toolson v. New York Yankees (1953)

George H. Toolson was a minor leaguer in the Yankees’ system during the early 1950s when the Yankees were packed with star players. Organizationally, the member clubs in professional baseball had a system of horizontal stratification that prohibited players from moving from one team to another, which was embodied in the reserve system. But the structure of Major League Baseball was also vertically stratified through the minor league system. Branch Rickey developed the modern farm system in 1936. Through it, each club had a fully de-

67. Id. at 415.
68. Miller, supra note 58, at 179; Phillips, supra note 56, at 67-68 (stating that in April of 1949 following the Circuit Court’s decision, baseball mogul Branch Rickey told a congressional panel that Gardella and other players who opposed baseball’s reserve system “lean toward communism”).
69. Hailey, supra note 12, at 641 (explaining that in a published interview, Gardella later said that he settled for $60,000 and the opportunity to return to Major League Baseball); Phillips, supra note 56, at 68-69, 71 (explaining that later in life, Gardella reflected about the lawsuit saying, “I feel I let the whole world know that the reserve clause was unfair. It had the odor of peonage, even slavery”).
70. Phillips, supra note 56, at 68.
veloped minor league system for the development of players with teams in various cities, and the parent clubs controlled the players in their minor league system.\footnote{Id. at 646.}

The Yankees had directed Toolson to report from their minor league club in Newark to their farm team in Binghamton, but he refused to go. Toolson's position was that although he was a talented ball player, and because the Yankees were overloaded with talent at that time, he was never going to have an opportunity to make the big leagues. As a result of his refusal to report to Binghamton, Toolson was placed on the ineligible list and barred from playing elsewhere.\footnote{Hailey, supra note 12, at 642.} Upon being notified of his ineligibility, he filed an antitrust suit in federal court.

His case was dismissed without a trial by District Court Judge Harrison. Judge Harrison stated, "To me, the simple issue of this case is whether the game of baseball is 'trade or commerce' within the meaning of the Anti-Trust Acts, and whether the structure known as 'Organized Baseball' is engaged in such trade or commerce."\footnote{Toolson v. New York Yankees, 101 F. Supp. 93, 95 (S.D. Cal. 1951), aff'd, 200 F.2d 198 (9th Cir. (Cal.) Dec. 12, 1952), cert. granted, 345 U.S. 963 (1953), aff'd, 346 U.S. 356 (1953).} However, Judge Harrison refrained from adjudicating the matter, commenting that, "If Federal Baseball is, as Judge Frank intimates, 'an impotent zombi,' I feel that it is not my duty to so find but that the Supreme Court should so declare."\footnote{Id. at 95.} Implying that perhaps the matter should be left for Congress to resolve, Judge Harrison observed, "It is a matter of common knowledge that the status of organized baseball is the subject of a congressional hearing and it (i.e. Congress) may pass legislation that will be determinative of the issue before this court. I believe it is my clear duty to endeavor to be a judge and should not assume the function of a pseudo legislator."\footnote{Id.} The Court of Appeals affirmed on the same grounds and for the same reasons.\footnote{Id. at 95.}

The case went up to the U.S. Supreme Court in 1953. The Supreme Court, in a one-paragraph, \textit{per curiam} opinion, upheld \textit{Federal Baseball} by a 7-2 vote and affirmed the decisions of the two lower courts finding that:

\textit{In Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U. S. 200 (1922), this Court held that the business of providing public baseball games for profit between clubs}
of professional baseball players was not within the scope of the federal antitrust laws. Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it is not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without re-examination of the underlying issues, the judgments below are affirmed on the authority of Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, supra, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.80

While it is not as well recognized as Federal Baseball, the “Mexican Jumping Beans” case, or the Flood case, a compelling claim could be made that Toolson is the pivotal case in the baseball and antitrust lineage. For the first time in this entire line of cases, there is language that could be interpreted as suggesting that baseball is exempt from antitrust laws. As Justice Harold Burton noted in his dissent, joined by Justice Reed, the portion of the last line of the majority’s decision in Toolson, in which the Court found that Congress “had no intention of including the business of baseball within the scope of the federal antitrust laws,”81 is simply incorrect. Neither the Sherman Act, nor the legislative history of the statute, supports this assertion.82 Justice Burton remarked, “In the Federal Baseball Club case the Court did not state that even if the activities of organized baseball amounted to interstate trade or commerce those activities were exempt from the Sherman Act.”83 Burton continued, “Congress, however, has enacted no express exemption of organized baseball from the Sherman Act, and no court has demonstrated the existence of an implied exemption from that Act of any sport that is so highly organized as to amount to an

79. There were a number of cases challenging baseball’s reserve clause that were consolidated.
81. Id. at 357.
82. Abrams, supra note 8, at 59 (noting that “The legislative history of the antitrust laws – the Sherman Act in 1890 and the Clayton Antitrust Act in 1914 – is thin. Congress was concerned with the growing power of monopolies, particularly those that eliminated competition in industrial America. There is no evidence that any member of Congress even thought about the baseball enterprise. If there was a special antitrust exemption for baseball, it was one the Supreme Court would have to divine from the words of the statutes, because Congress never considered the question.”).
83. Toolson, 346 U.S. at 356.
interstate monopoly or which restrains interstate trade or commerce.\textsuperscript{84}

In holding that professional baseball was not within the scope of antitrust law, the Supreme Court in \textit{Toolson} completely misapplied the precedent of \textit{Federal Baseball}, which only stood for the proposition that antitrust law did not apply to baseball because the activity involved was not interstate commerce, and because baseball as it existed at that time could not be considered “trade” or “commerce.” In his dissenting opinion, Justice Burton gave considerable attention to the dramatic increase in radio and television revenues in professional baseball since the time of \textit{Federal Baseball}, thereby justifying from his perspective, the applicability of antitrust laws to baseball.\textsuperscript{85}

The Supreme Court’s rationale that because professional baseball was allowed to develop for thirty years without the scrutiny of antitrust legislation provides little justification not to apply antitrust law to baseball in 1953, especially given the changes that had occurred since \textit{Federal Baseball}. By contrast, although the insurance industry had not been subject to antitrust law for nearly fifty years following the Supreme Court’s original decision in \textit{Hooper} (1895),\textsuperscript{86} that did not prevent the Court from reversing its decision and subjecting the interstate sale of insurance to antitrust scrutiny in \textit{South-Eastern Underwriters} (1944).\textsuperscript{87}

The Supreme Court in \textit{Toolson} seemed content to leave the issue of the applicability of antitrust law to professional baseball to Congress, and it refused to re-examine \textit{Federal Baseball}. Paradoxically, in 1954, the same Supreme Court that decided \textit{Toolson} also decided \textit{Brown v. Board of Education},\textsuperscript{88} instantly reversing over fifty years of precedent.\textsuperscript{89}

As distinguished jurist Henry J. Friendly diplomatically put it years later, “We freely acknowledge our belief that \textit{Federal Baseball} was not one of Mr. Justice Holmes’ happiest days, that the rationale of \textit{Toolson} is extremely dubious and that, to use the Supreme Court’s own adjectives, the distinction between baseball and other professional sports is ‘unrealistic,’ ‘inconsistent’ and ‘illogical.’”\textsuperscript{90} Nevertheless,

\textsuperscript{84}. \textit{Id.} at 364.
\textsuperscript{85}. \textit{Id.} at 359.
\textsuperscript{86}. \textit{Hooper v. California}, 155 U.S. 648 (1895).
\textsuperscript{89}. \textit{See Plessy v. Ferguson}, 163 U.S. 537 (1896); \textit{see also Dred Scott v. Sandford}, 60 U.S. 393 (1856).
\textsuperscript{90}. \textit{Salerno v. Am. League of Prof'l Baseball Clubs}, 429 F.2d. 1003, 1005 (2d Cir. 1970).
while antitrust law was deemed to apply to other professional sports, with regard to baseball, *stare decisis* was the prevailing rule.91

The next legal challenge to baseball's reserve system would come about twenty years later, on the heels of a decade of great social turbulence and transition, with the *Flood* (1972) case.

IX. *Flood v. Kuhn* (1972)92

Curt Flood was a twelve-year veteran centerfielder for the St. Louis Cardinals. He was a superb fielder, earning seven straight Gold Gloves during the 1960s. He also was an excellent hitter, especially considering the majority of his career was played during the 1960s, an era in which the rules heavily favored pitchers. Flood helped the Cardinals to three pennants and two world championships during his tenure in St. Louis.93

In October of 1969, after the New York Mets won the World Series, Flood received a call that he had been traded to the Philadelphia Phillies. An embittered Flood later reflected on the incident, "If I had been a foot-shuffling porter, they might have at least given me a pocket watch. But all I got was a call from a middle-echelon coffee drinker in the front office."94

In his autobiography, Flood described his predicament, as he viewed it. "A salesman reluctant to transfer from one office to another may choose to seek employment on the sales force of a different firm. A plumber can reject the dictates of his boss without relinquishing his right to plumb elsewhere. At the expiration of one contract, an actor shops among producers for the best arrangement he can find. But the baseball monopoly offers no such option to the athlete. If he elects not to work for the corporation that 'owns' his service, baseball forbids him to ply his trade at all. In the hierarchy of living things, he ranks with poultry."95

Flood refused to accept his trade from St. Louis to Philadelphia and he decided to file an antitrust suit challenging baseball's reserve system. He sent a letter to Commissioner Bowie Kuhn stating, "After

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91. Ironically, the case was argued in August of 1953, the same time the Yankees were in the process of winning their 5th consecutive World Series, which tended to support Toolson's claim that he had no hope of making the club.


95. *Id.* at 15.
twelve years in the major leagues, I do not feel that I am a piece of property to be bought and sold irrespective of my wishes." Coming from an African American at the height of the Civil Rights movement, a defiant statement such as this carried tremendous social resonance.

Kuhn believed his role, as the patriarch of baseball, was to preserve the best interests of the game, which he felt meant preserving the reserve system at all costs. Yet, as reflected in his response to Flood, Kuhn seemed to be completely oblivious to the dynamic social currents and internal turmoil that surrounded him. Kuhn wrote back, "I certainly agree with you that you, as a human being, are not a piece of property to be bought and sold. That is fundamental in our society and I think obvious. However, I cannot see its applicability to the situation at hand." Even years later when he reflected in his memoirs on his years as Commissioner, Kuhn seemingly failed to grasp the complex factors that ultimately and inevitably led to the establishment of free agency in baseball.

Marvin Miller, the Executive Director for the Baseball Players’ Association at the time, warned Flood of the consequences of his actions. Miller later wrote,

"I had a lot of respect for Curt as a ballplayer, but I didn’t know how well he knew the owners. ‘In some ways,’ I told him, ‘you know those guys better than I do, but on the other hand I’ve learned a lot in dealing with them over the last three years, and if you don’t know it, I can tell you I’ve learned that they are a mean, vindictive bunch. If they think you’re endangering their monopoly, they’ll do anything they can to destroy you in baseball. I’m not calling them racists – not all of them, anyway – but being black isn’t going to help you with them. If you win, you might be too old to come back, and if you lose, you’ll certainly be blacklisted. Let me put it to you the simplest way possible: The way I see it, the moment you file that suit, you’re probably through in baseball.’"

Despite Miller’s warnings, Flood did not waver in his convictions. "I hadn’t thought about it," Flood replied, "But if that’s the way it is, okay, I’ll live with that and deal with it somehow."
The case was filed in January of 1970. Flood chose former Supreme Court Justice and former U.S. Ambassador to the United Nations, Arthur Goldberg, to represent him.\footnote{101}

In March 1970, Judge Irving Ben Cooper denied Flood's motion for a preliminary injunction. "To put it mildly and with restraint," maintained Judge Cooper, "it would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and an escape from the ordinary to most inhabitants of this land, were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations. The game is on a higher ground; it behooves everyone to keep it there."\footnote{102} On the delicate issue of whether Major League Baseball was a business, Cooper opined, "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."\footnote{103}

The district court trial ran from May 19, 1970 to June 10, 1970, and was decided in August that same year. In the subsequent opinion, Judge Cooper noted that even the plaintiff's witnesses testified that the reserve system was not entirely undesirable, and in fact, much of it was necessary and beneficial.\footnote{104} Cooper stated his belief that "negotiations [i.e. collective bargaining] could produce an accommodation on the reserve system which would be eminently fair and equitable to all concerned,"\footnote{105} and that "the reserve clause can be fashioned so as to find acceptance by player and club."\footnote{106} Holding that Federal Baseball and Toolson were controlling, Cooper found that baseball was exempt from federal antitrust laws, and consequently, state antitrust laws must also be inapplicable to baseball by implication to avoid "diversity of treatment."\footnote{107}

In 1971, the Circuit Court affirmed the district court's decision. In his concurring opinion, Judge Moore, while lionizing the game of pro-

\footnote{101. Kuhn, supra note 96, at 82; Flood, supra note 94, 194; Miller, supra note 58, at 187-89.}
\footnote{103. Id.}
\footnote{104. Flood v. Kuhn, 316 F. Supp. 271, 275-76 (S.D.N.Y. 1970) (explaining that in his book Baseball's Reserve System: The Case and Trial of Curt Flood v. Major League Baseball (2006), author and attorney Neil Flynn suggests that the case that was presented for Flood was actually the union's case, and not Flood's case. Bowie Kuhn went even further in Hardball stating that, in his opinion, Miller used Flood for the union's purposes. Kuhn, supra note 96, at 80. While he feels Miller was as honest and candid with Flood as he could be about the potential outcome of his case, Flynn further speculates that perhaps the case may have had a different outcome had it been approached differently).}
\footnote{106. Id. at 284.}
\footnote{107. Id. at 280.}
fessional baseball, characterized it as essentially a benevolent oligarchy. He expressed his view that, “In short, organized baseball existed almost as an enclave or feudal barony throughout the years, managing its own affairs as best calculated to preserve the sport and maintaining its own officialdom for self-regulation purposes – and except for the brief scandal of the so-called Chicago Black Sox in 1919, apparently has handled its little kingdom and its subjects very well.” Moore summed up his assessment of the situation by concluding, “Therefore, without any reservations or doubts as to the soundness of Federal Baseball and Toolson, I would affirm the decision below on all four counts and would limit the participation of the courts in the conduct of baseball’s affairs to the throwing out by the Chief Justice (in the absence of the President) of the first ball of the baseball season.”

The Supreme Court chose to grant certiorari. Justice Harry Blackmun wrote the decision for the majority, calling Major League Baseball an established aberration. Perplexingly, the Court did not overturn Federal Baseball, even though it specifically found that “Professional baseball is a business and it is engaged in interstate commerce.”

In a book entitled The Brethren, authors Bob Woodward and Scott Armstrong describe the inner workings of the Supreme Court, as gleaned from interviews with the law clerks of the various Justices. The following account from The Brethren gives a detailed, behind-the-scenes account of the process the Court underwent in arriving at its decision in the Flood case. This passage has been included in its entirety because this excerpt vividly portrays the bizarre machinations that sometimes sway legal opinions, even at the highest level.

Earlier at the March 24 conference, Stewart had found himself the senior member of a majority for the first time in his career. The case (Flood v. Kuhn) concerned Curt Flood, a former star outfielder for the Cardinals who refused to be traded to the Philadelphia Phillies. He had filed an antitrust suit against professional baseball. Flood wanted to break the reserve clause that allowed teams to trade players without their consent. Oral argument had failed to clarify the issues. Former Justice Arthur Goldberg, in his first appearance before the Court since resigning in 1965, had offered such a poor presentation of Flood’s case, that his former colleagues were embarrassed.

109. Id. at 273.
111. Id. at 282.
Powell withdrew from the case, because he held stock in Anheuser-Busch, Inc., whose principle owner, August Busch, Jr., also owned the St. Louis Cardinals. The Chief, Douglas and Brennan voted for Flood, leaving Stewart to assign the opinion for a five-member majority.

Stewart thought that the opinion would be easy to write. The court had twice before decided that baseball was exempt from the anti-trust law. It was, Stewart said, "a case of 'stare decisis' double dipped." There seemed little chance of losing the majority as long as the two earlier precedents were followed. He assigned the opinion to Blackmun.

Blackmun was delighted. Apart from the abortion assignment, he felt that he had suffered under the Chief, receiving poor opinions to write, including more than his share of tax law and Indian cases. He thought that if antitrust laws were applied to baseball, its unique position as the national pastime would be undermined. A devote fan of the Chicago Cubs, and later the Minnesota Twins, he welcomed his chance to be one of the boys.

With his usual devotion to detail, Blackmun turned to the Baseball Encyclopedia, which he kept on the shelf behind his desk. He set minimum lifetime performance standards – numbers of games played, lifetime batting averages or earned-run averages. He picked out representative stars from each of the teams, positions, and decades of organized baseball. Then, closeted away in the Justices' library, Blackmun wrote an opening section that was an ode to baseball. In three extended paragraphs, he traced the history of professional baseball. He continued with a list of "the many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided timber for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in season and off season: Ty Cobb, Babe Ruth . . ." There were more than seventy names. "The list seems endless," Blackmun wrote. He paid homage to the verse "Casey at the Bat," and other baseball literature. When he had finished, Blackmun circulated his draft.

Brennan was surprised. He thought Blackmun had been in the library researching the abortion cases, not playing with baseball cards.

One of Rehnquist's clerks called Blackmun's chambers and joked that Camillo Pascual, a former Washington Senators pitcher, should have been included on the list of greats.

Blackmun's clerk phoned back the next day. "The Justice recalls seeing Pascual pitch and remembers his fantastic curve ball. But he pulled out his Encyclopedia and looked up his record. He decided Pascual's 174 wins were not enough. It is difficult to make these judgments of who to include but Justice Blackmun felt that Pascual is just not in the same category with Christy Matthewson's 373 wins. I hope you will understand."

Calling Blackmun's chambers to request that some favorite player be included became a new game for the clerks.
Stewart was embarrassed that he had assigned the opinion to Blackmun. He tried to nudge him into recognizing the inappropriateness of the opening section, jokingly telling him he would go along with the opinion if Blackmun would add a member of Stewart’s hometown team, the Cincinnati Reds.

Blackmun added a Red.

Marshall registered his protest. The list included no black baseball players. Blackmun explained that most of the players on his list antedated World War II. Blacks had been excluded from the major leagues until 1947.

That was the point exactly, Marshall replied.

Three black players were added – Jackie Robinson, Roy Campanella, and Satchel Paige.

Marshall decided to switch anyhow and write his own opinion in Flood’s favor. The Court was now split 4 to 4, and word circulated that White was considering following Marshall. That would give him a majority.

White owed a great deal to professional sports. His career in football had paid for a first-rate law school education. He remembered the years he had spent touring the country playing football. In those days, teams were real teams, brotherhoods of young men. It was different now. There were too many prima donnas, concerned only with their own statistics. White had difficulty feeling sorry for Curt Flood, who had turned down a $100,000 annual salary.

The antitrust issues were not easy in the case. White thought that if federal laws did not apply, state antitrust laws might. His clerks used his hesitation to negotiate small changes in the Marshall opinion. White would probably join if the changes were made, one clerk offered.

When Marshall balked at a change that seemed trivial, his clerk protested that it was necessary to get White’s vote.


A White clerk, he was told.

“He’ll never join,” Marshall responded.

Finally, White indicated he would stay with Blackmun’s opinion against Flood. But he flatly refused to join the section listing the baseball greats.

Blackmun ignored the insult. He still had four votes. If the tie stood, no opinion would be published.

At the end of May, Powell’s clerks made a last-ditch effort to get him back in the case. They know that he favored Flood’s position. Since he would be voting against the major leagues, he could not be accused of a conflict of interest, his clerks argued. He would only be hurting his own interests. It was in fact possible that he could be accused of a conflict if he did not vote.

No, Powell told them. He was out and he would stay out.

The Court was still deadlocked in the last half of May. After all his work, it seemed that Blackmun was to be deprived his opinion.

The Chief’s Saturday visit to Blackmun, and Blackmun’s subsequent withdrawal of the abortion opinion, had spawned vicious ru-
mors among the clerks of vote trading. Then, when the term drew to a close, Burger announced that he would switch to the Blackmun opinion in the Flood case, giving him the fifth vote. He too, however, initially declined to join the first section.

After the opinion had come down, a clerk asked Blackmun why he hadn't included Mel Ott, the famous New York Giants right fielder on his list of baseball greats. Blackmun had insisted that he had included Ott. The clerk said that the name was not in the printed opinion. Blackmun said he would never forgive himself.113

This account suggests that the Supreme Court had completely lost sight of the factual, legal and conceptual underpinnings of Federal Baseball. As author Roger Abrams observed, “Considered as a whole, Blackmun’s majority opinion may have confused the business of baseball with the glorious game of baseball, the national pastime wrapped in legend and myth that began with the Cooperstown saga.”114 Abrams also commented, “Marshall’s dissent skillfully dissected the majority opinion – admittedly, not a very difficult task.”115

The case was supposedly determined solely on the basis of stare decisis, yet as the highest court in the land, the Supreme Court is free to re-evaluate its prior decisions. In fact, just two years before Flood was decided, the same Supreme Court reviewed another antitrust case in which it quoted with approval Justice Felix Frankfurter who had written, “[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.”116 Even Oliver Wendell Holmes, the author of Federal Baseball, wrote of stare decisis, “It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and that rule simply persists from blind imitation of the past.”117

These examples to the contrary, the Court refused to interfere with the nation’s pastime. Free agency would come to baseball, although not through the Flood case. However, many commentators have credited Flood as serving as a catalyst for the major structural changes that occurred in professional baseball during the 1970s.

113. Id. at 189-192.
114. Abrams, supra note 8, at 67.
115. Id.
117. Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 469 (1887).
X. Conclusion

There have been a number of developments since Flood v. Kuhn. Free agency was achieved in baseball through arbitration\textsuperscript{118} and Congress limited the application of antitrust to the Major Leagues through the enactment of a statute named after the Cardinal’s centerfielder.\textsuperscript{119} Case law continues to define the parameters of the antitrust “exemption” in baseball.\textsuperscript{120} These subjects have proven to be ample sources of research of their own.

However, the cases reviewed in this article still have great significance and instructional value by helping to clarify prior misunderstandings surrounding the evolution of baseball’s purported antitrust “exemption,” and by bringing together some important background information that might help frame these cases within the context of their times.

\textsuperscript{118} Nat'l & Am. Leagues of Prof'l Baseball Clubs v. Major League Baseball Players Ass'n (John A. Messersmith & David A. McNally), Grievance Nos. 75-27 & 75-28, Decision No. 29 (Dec. 23, 1975, Opinion of the Impartial Chairman Peter Seitz).
