

MAJOR LEAGUE BASEBALL'S ANTITRUST EXEMPTION:
FAIR OR FOUL?

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INTRODUCTION

“Whoever wants to know the heart and mind of America had better learn baseball....”

Historian Jacques Barzun penned these oft cited words in one of his many books on American culture.¹ Since its inception, baseball has been a driving force in shaping and creating American culture. Its many sayings and phrases have permeated our society. When someone proclaims that they have “hit a home run” or alternatively have “struck out”, immediately you are aware of their experience. Baseball has survived through world wars, labor stoppages, the segregation and eventual integration of races. In fact, some have suggested that when Major League Baseball (“Baseball”) broke the color barrier in 1947 with the beginning of Jackie Robinson’s career, integration became “the powerful cultural event that it turned out to be.”²

One need only turn to recent events following September 11 to realize the cultural impact Baseball has on America. In the days following the attack, the nation’s eyes turned to all sports, but most notably Baseball, to see if the World Series would be rescheduled by moving back regular season games. Ultimately, the commissioner’s office determined that Baseball should grieve with its country. When, however, it was time to signify that our country was ready to return to our daily lives what did we do? As most of us watched with mixed emotions of anxiety and hope, the President threw out the first pitch of Game 3 of one of the greatest World Series to date.³

¹ See JACQUES BARZUN, *GOD’S COUNTRY AND MINE; A DECLARATION OF LOVE SPICED WITH A FEW HARSH WORDS* XX (Brown Little 1954).

² See Gerald Early, *Birdland: Two Observations on the Cultural Significance of Baseball*. AMERICAN POETRY REVIEW July/August 1996, at 9-10, available at <http://www.english.upenn.edu/~afilreis/50s/baseball.html>. See also Paul Finkelman, *Baseball and the Rule of Law*, 46 CLEV. ST. L. REV. 239, 248 (stating that the integration of baseball “helped alter the landscape of American culture and law.”)

³ See Phil Mushnick, *Prez Gave Us a Scare*, N.Y. POST, Nov. 2, 2001, at p. 100. Mushnick eloquently describes the thoughts of many Americans that night. Mushnick explains it was a night of overwhelming nervousness as the

Baseball is America's game. This is evident even in the legal world. The United States Supreme Court has whittled out an exception, for Baseball, to the broad antitrust rules regulating commerce.⁴ This small exception has received much criticism and has paved the way for numerous labor disputes, lawsuits, work stoppages and disdain for the management of Baseball.

This paper will examine the history of both Major League Baseball and federal antitrust law. Part I will explain in detail how professional baseball became an institution in America. In part II, a brief overview of the policy and law regarding antitrust will be espoused. Part III will discuss the significant intersections between Baseball and both the courts and the legislature. Finally, in part IV, an argument for the complete abolition of Baseball's antitrust exemption will be advanced.

I. HISTORY AND ORIGIN OF ORGANIZED BASEBALL

Organized baseball initially began as both a social and athletic activity. The game filled Americans' needs to form associations. Historian Benjamin Rader described the origins of Baseball as deriving from the "peculiarly American penchant for forming voluntary associations."⁵ Typically, the clubs were comprised of local residents who made their living in the banks, factories and government offices.⁶ Baseball historian Warren Goldstein indicates that the clubs resembled the culture of the city they represented.⁷ Goldstein described the Brooklyn

country looked with trepidation to its leader for guidance. It should also be noted that Pres. Bush threw a perfect strike.

⁴ See *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922).

⁵ RADER, BENJAMIN G., *BASEBALL: A HISTORY OF AMERICA'S GAME 2* (University of Illinois Press 1992).

⁶ See JEROLD J. DUQUETTE, *REGULATING THE NATIONAL PASTIME: BASEBALL AND ANTITRUST 2* (Praeger 1999).

⁷ See GOLDSTEIN, WARREN, *PLAYING FOR KEEPS: AN EARLY HISTORY OF BASEBALL 24* (Cornell University Press 1989).

club as a group of factory workers and the Manhattan club as a team comprised of bankers.⁸

Organized baseball began in the major cities-most notably Detroit, Philadelphia, New York, and Washington, DC-but it's popularity soon spread throughout the country.

In the 1850's baseball had already been tagged as America's game.⁹ By 1857 the first organized league of clubs was formed when sixteen New York area teams banded together.¹⁰ This league, named the National Association of Base Ball Players (NABBP) expanded to include clubs from Detroit, Philadelphia and other markets around the country.¹¹ The NABBP established rules and sponsored competition between its member teams.¹² The NABBP, however, was largely confined to the northeastern part of the country; thereby limiting the popularity of the sport throughout the rest of the country.

Surprisingly, the Civil War is often credited with expanding the popularity of baseball to the southern regions of the United States.¹³ During these transitional years, baseball, and in particular the clubs of the NABBP, became increasingly "less interested in leisure and more interested in competition."¹⁴ This heightened priority placed on the competition of the game, rather than on the social aspects of baseball, increased the potential of baseball as a money making product. Accordingly, clubs began to charge admission to spectators and in certain

⁸ *See id.*

⁹ *See supra* n. 6.

¹⁰ *See id.*

¹¹ *See id.*

¹² *See id.*

¹³ *See id.*

¹⁴ *Id.*

instances split the profits with the players.¹⁵ The practice of luring the best players to a team in an effort to gain competitive advantage was rampant.¹⁶ In fact, the NABBP enacted numerous rules in an attempt to not only limit players from switching teams on a whim, but also to outlaw playing for any type of compensation.¹⁷ Despite this effort by the NABBP, teams routinely paid their players.¹⁸ Ultimately, the slowly evaporating amateur foundations vanished and the NABBP was forced to disband in 1870,¹⁹ paving the way for professional, salaried baseball.

The Cincinnati Red Stockings are largely credited as the first all salaried baseball team, having formed in 1869.²⁰ The Red Stockings, although unable to post a profit during their initial years, were immensely popular due to their superior ability over the other non-salaried teams.²¹ This popularity led to an increased interest by other cities in forming professional baseball teams, and ultimately to the formation of a new professional league coined the National Association of Professional Base Ball Players (NAPBBP).²² This league was essentially formed to protect and advance the individual player's rights.²³ The players had broad powers of contract and

¹⁵ See VOIGT, DAVID Q., AMERICAN BASEBALL: FROM GENTLEMAN'S SPORT TO THE COMMISSIONER SYSTEM 17 Volume 1 (University of Oklahoma Press 1966).

¹⁶ See *id.* at 20.

¹⁷ See *supra* n. 6 at 3.

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.* The Red Stockings have evolved into the Cincinnati Reds of today's Major League Baseball. The team's first game was played on June 1, 1869. See VOIGT, DAVID Q., AMERICA'S GAME: A BRIEF HISTORY OF BASEBALL, *printed in* THE BASEBALL ENCYCLOPEDIA 3 (MacMillan 1990).

²¹ See VOIGT, DAVID Q., AMERICA'S GAME: A BRIEF HISTORY OF BASEBALL, *printed in* THE BASEBALL ENCYCLOPEDIA 3 (MacMillan 1990).

²² See *id.*

²³ See *id.*

respectable salaries.²⁴ The NAPBBP, however, suffered from serious management and organizational problems resulting in the association only governing for five years.²⁵ One significant problem the NAPBBP faced was teams essentially raiding other teams rosters.²⁶ The teams with the most amount of working capital were able to easily lure players from other poorer teams, resulting in a diminished amount of competitive balance among the league.²⁷ In fact, Voigt notes that the Boston Red Stockings won four of the NAPBBP's five championships.²⁸ This lack of parity, coupled with the serious disorganization of the association led to the demise of the NAPBBP.²⁹

The downfall of both the NABBP and the NAPBBP led the owners of clubs and prominent city businessmen to contemplate forming a league that would be governed by and consist of professional teams that were created solely for profit.³⁰ In 1876, Chicago businessman William A. Hulbert formed what is known today as the National League.³¹ The league was formed with the intention of creating baseball teams in the major cities across the country, who would all abide by regulations that would benefit all teams involved financially.³² The National League had two essential goals: (1) to create the most profit possible for clubs and (2) to bring

²⁴ *See id.*

²⁵ *See id.*

²⁶ *See id.* at 4.

²⁷ *See id.* Voigt notes that this problem would continue to plague Baseball not only in its humble beginnings but also into today's Major Leagues.

²⁸ *See id.* This fact could easily be compared to today's situation involving the New York Yankees, who have won four of the last six World Series.

²⁹ *See id.*

³⁰ *See id.*

³¹ *See id.* At that time, the league was called the National League of Professional Base Ball Clubs.

³² *See id.* Hulbert required that the city have at least a population of 75,000.

respectability to the game of baseball.³³ The league did this by controlling players salaries and imposing a strict moral code.³⁴ Also, the National League granted significant luxuries to its member clubs. Most notably, the League allowed each team to have a geographical monopoly; thereby assuring a certain population from which the team could profit.³⁵

The National League also asserted significant control over its players. Besides the strict moral code, the League imposed a reserve clause in all players contracts by 1883.³⁶ This provision, initially considered a privilege by players, became a significant impediment in players' ability to contract.³⁷ This clause, in one form or another, would create numerous tensions between players and owners through the late 1970's.³⁸

Through the end of the nineteenth century the National League dominated the professional baseball landscape.³⁹ In 1901, however, Byron "Ban" Johnson renamed his Western League the American League and waged a publicity war on the National League's status as the only major league.⁴⁰ Johnson's American League was able to lure away numerous National League stars, which led to many disputes and to an eventual agreement between both

³³ *See supra* n. 6 at 4.

³⁴ *See id.*

³⁵ *See supra* n. 21.

³⁶ *See id.*

³⁷ *See id.*

³⁸ *See id.* at 10-11.

³⁹ *See supra* n. 6 at 7.

⁴⁰ *See id.* Ban Johnson has been credited with being one of baseball's greatest executives. He was trained as a lawyer at the University of Cincinnati. *See* <http://www.enel.net/beisbol/history/people/executive/johnb101/johnb101.html>.

the National and American League.⁴¹ The agreement, signed in January 1903, formed what we know today as Major League Baseball.⁴²

Since that agreement, Major League Baseball has received peculiar treatment with regard to its internal management. There have been myriad lawsuits, legislation and political maneuvers that have surrounded Baseball since its inception in 1903.⁴³

II. FEDERAL ANTITRUST POLICY

Professor Stephen Ross has summed up antitrust policy as being “concerned with the extent to which private individuals should be able to acquire and maintain economic power, and the extent to which society, through the courts, should do anything about it.”⁴⁴ Among the key economic concerns of antitrust policy-makers are the monopoly and price fixing.⁴⁵ Other scholars have posited that antitrust legislation and jurisprudence attempt to enhance consumer welfare.⁴⁶ Regardless of the actual purpose of the policy behind antitrust law, the Sherman Act and judicial interpretation of the Act define the scope of antitrust regulation.

Section One of the Sherman Act states that “every contract, combination in the form of trust or otherwise, or conspiracy, in the restraint of trade or commerce among the several states...is declared to be illegal.”⁴⁷ Thus, the Act proscribes an agreement between two or more

⁴¹ *See supra* n. 6 at 8.

⁴² *See id.*

⁴³ These developments will be further reviewed in Section 3 of this paper.

⁴⁴ ROSS, STEPHEN F., *PRINCIPLES OF ANTITRUST LAW 1* (The Foundation Press 1993).

⁴⁵ POSNER, RICHARD A., *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 3* (University of Chicago Press 1976).

⁴⁶ *See* Myron C. Grauer, *Recognition of the National Football League as a Single Entity under Section One of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1, 12 (1983).

⁴⁷ 15 U.S.C. § 1 (1994).

entities that unreasonably restrains trade and affects interstate or foreign commerce.⁴⁸ On its face, this statement seems to be fairly unambiguous. The proposition, however, has been interpreted over the years with lenses obscured by divergent political factions.⁴⁹

Posner has argued that the main concern of federal antitrust policy is “with the price and output consequences of monopolies and cartels....”⁵⁰ In effectuating this policy, the Supreme Court has stated that a “per se” violation of the Sherman Act occurs when a “combination is formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce.”⁵¹ Not all violations are as clear cut so as to fall within the aforementioned definition. Those instances have required the Court to apply the “Rule of Reason” test formed in *Addyston Pipe*.⁵² This test, although never explicitly adopted by the Supreme Court has been modified and created a clear black letter rule in *Chicago Board of Trade*.⁵³ The rule gleaned from *Chicago Board of Trade* requires analysis of “whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”⁵⁴

⁴⁸ See *Standard Oil Co. v. United States*, 221 U.S. 1, 60-70 (1911).

⁴⁹ See *supra* n. 44 at 1. Ross indicates that “scholars, judges and public officials do not differ about the proper direction of antitrust policy in this country because some are right and some are wrong about economic theory...[rather] Their differences are primarily political, rather than economic.”

⁵⁰ *Supra* n. 45 at 23.

⁵¹ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 (1940).

⁵² See *Addyston Pipe & Steel Co. v. United States*, 85 Fed. 271 (6th Cir. 1888), *aff'd*, 175 U.S. 211 (1899). Judge William Howard Taft penned this oft cited opinion that lambasted a cartel for submitting phony bids along with one real bid for pipe fitting jobs.

⁵³ See *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

⁵⁴ *Chicago Bd. of Trade*, 246 U.S. at 238.

The Court, in fact, has applied this reasoning in the sports arena to hold that forming a league is not by itself a violation of the antitrust rules.⁵⁵ The Court, however, did hold that too much regulation may violate the *Chicago Board of Trade* rule.⁵⁶ This pragmatic approach, unfortunately, has not permeated the jurisprudence surrounding Major League Baseball.

III. BASEBALL'S INTERSECTION WITH THE LAW

1. Judge made law and Major League Baseball

Perhaps the most famous case ever penned regarding Baseball is *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.⁵⁷ *Federal Baseball* has chiseled Baseball's exception from the mountain of antitrust law. The case has been criticized numerous times by legal scholars, judges, reporters, and all associated with Baseball. The exception announced, however, has stood in some form through the present.

The facts in *Federal Baseball* play out like a hypothetical on an antitrust law school exam. The Federal League was formed by eight teams, including plaintiff, to compete as a major league. The defendant, seeking to preserve its stronghold on organized baseball, purchased some of the Federal League clubs. Following these purchases, the defendant convinced the newly acquired teams to switch to the National League. Knowing full well that its livelihood was in peril, the Baltimore club brought suit claiming that the National League was restraining trade

⁵⁵ See *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

⁵⁶ See *NCAA*, 468 U.S. at 100-105.

⁵⁷ 259 U.S. 200 (1922). Justice Oliver Wendell Holmes wrote for the majority and has been heavily criticized for his opinion, as will be discussed later in the paper. One critic, in regards to Holmes' infamous opinion, has proclaimed "Some days even hall of famers screw up. Bob Lemon walked ten batters in one game... Reggie Jackson struck out five times in one game... As in baseball, so in law. One of America's greatest jurists... had one of the all-time worst days in Supreme Court history...." Bruce Johnson, *Why Baseball's Antitrust Exemption Must Go*, in *STEE-RIKE FOUR! WHAT'S WRONG WITH THE BUSINESS OF BASEBALL?* 135 (Daniel R. Marburger ed., 1997).

impermissibly.⁵⁸ Plaintiff relied on various legal theories that essentially argued that the business of baseball was interstate commerce and that the National League was attempting to monopolize that business.⁵⁹

Justice Holmes' opinion for a unanimous court held that the business of baseball is purely an industry concerned with intrastate purposes.⁶⁰ Holmes reasoned that since Baseball only concerned state affairs, it was not subject to the Sherman act or its interpretations because Baseball did not constitute interstate commerce.⁶¹ This decision, although routinely and heavily criticized, is still the foundation on which Baseball's antitrust exemption rests.

On two separate occasions, the Supreme Court has affirmed this judicial made exception to the antitrust regulations. First, in *Toolson v. New York Yankees*⁶², the Court stated that Baseball's antitrust exemption was legitimate and that only an act of Congress would alter its status.⁶³ The Court, in its opinion, allowed stare decisis to control but indicated that it would abide by congressional action in the Baseball arena.⁶⁴ This position taken by the Court has a hint of irony, since it was the creator of the exception.

The most notable case in the *Federal Baseball* progeny is *Flood v. Kuhn*⁶⁵. Curt Flood was an all-star, veteran player for the St. Louis Cardinals when he was traded in 1969 to the

⁵⁸ See *Federal Baseball*, 259 U.S. at 200-06.

⁵⁹ See *id.* at 202-05.

⁶⁰ See *id.* at 208.

⁶¹ See *id.*

⁶² 346 U.S. 356 (1953).

⁶³ See *Toolson v. New York Yankees*, 346 U.S. 356, 357 (1953).

⁶⁴ See *Toolson*, 346 U.S. at 359.

⁶⁵ 407 U.S. 258 (1972).

Philadelphia Phillies. Flood, unhappy with the decision, petitioned the commissioner's office stating that he felt he was being dealt like a piece of property irrespective of his basic rights as a citizen.⁶⁶ Flood sought to become a free agent, thereby allowing him to negotiate his services with all Major League teams.⁶⁷ The commissioner's office denied Flood's petition and he brought suit, challenging Baseball's antitrust exemption with respect to the reserve clause.

The *Flood* Court ultimately reiterated what it had said in *Toolson*; that is, stare decisis unless Congress says otherwise.⁶⁸ The *Flood* Court, however, did note that Baseball's exemption was an anomaly and that Baseball was in fact interstate commerce.⁶⁹ Moreover, the Court noted that the exemption is based on the unique characteristics of the relationship between America and Baseball.⁷⁰ Ultimately, the Court passed on the chance to correct an old, incorrect decision by lobbing the issue to Congress.

Baseball's exemption was further broadened and expanded in various cases involving antitrust issues. Most notably, the Seventh Circuit determined that Baseball's exemption applied to every aspect of the business.⁷¹ Although there have been other cases pointing to the contrary, this proposition is still good law.⁷²

⁶⁶ See *Flood v. Kuhn*, 407 U.S. 258, 264-65 (1972).

⁶⁷ See *Flood*, 407 U.S. at 265.

⁶⁸ See *id.* at 282-84.

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ See *Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978), *cert. den.*, 439 U.S. 876 (1978).

⁷² Other cases have suggested that the antitrust exemption applies only to the reserve clause. See *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993). The Supreme Court, however, has declined to pass on the issue raised in *Piazza*.

The case law involving Baseball, therefore, indicates that Baseball's antitrust exemption is broad. Moreover, the courts have acknowledged that although the legal reasoning used to carve out the exemption is flawed, it still is entitled to stare decisis. Thus, it seems that the only remedy for Baseball's antitrust exemption, if one is needed, must come from Congress.

2. *Legislation and Baseball-The Curt Flood Act*

The stalled negotiations and eventual strike in 1994, which resulted in the cancellation of the World Series, forced Congress' hand to some extent regarding legislation for Baseball. The residual effects of the strike were tangible when Congress began debate of the Curt Flood Act of 1998.

The Act is an amendment to the Clayton Act.⁷³ The act, however, does not abolish the exemption enjoyed by Baseball. Rather, the purpose of the Act is to bring Baseball players to the same level of those in other professional sports, all the while keeping in tact the luxuries enjoyed by the rest of the exemption.⁷⁴ That is, the Act does not revoke the exemption for franchise relocation or location, television agreements, minor leagues, umpires and other employees not associated with Baseball, and intellectual property rights.⁷⁵ The Act, therefore, is more of a protection regarding labor bargaining rights than an actual remedy to the antitrust issue.

Thus, the Act gave players the same rights as their professional sports counterparts, but it also ignited the debate regarding the complete repeal of Baseball's exemption. In fact, former Hall of Fame pitcher, Senator Jim Bunning (R-KY) argued that the exemption was contrary to

⁷³ See 15 U.S.C. 12 (2001).

⁷⁴ See 15 U.S.C. 27(a)(2001).

⁷⁵ See *id.*

American values and should be completely repealed.⁷⁶ It appeared, at the time, that the Flood Act would be the fuel that would propel the eventual abolition of the antitrust exemption enjoyed by Baseball. Standing alone, however, this Act does not create the fervor required to abolish a precedent that has been protected by years of judicial deference.

IV. ANALYSIS

1. Legal Inadequacy of the Foundation for the Exemption

Federal Baseball, as discussed above, has come under immense criticism for its flawed legal reasoning. Specifically, many commentators have attacked Holmes' determination that Baseball was not interstate commerce.⁷⁷ Bruce Johnson, speaking frankly has described Holmes' decision as making "no sense in 1922" and regarding the current state of the game "the notion that baseball is not interstate commerce is ludicrous."⁷⁸ To be fair to Holmes, Baseball was not seen as such an enormous enterprise in 1922. Johnson, however, does make a strong point that in today's climate of Baseball the notion that the business is not engaged in interstate commerce is preposterous.

Interstate commerce is a term that has been shaped and molded over decades of American jurisprudence. Initially, the Court noted that commerce was more than buying and selling.⁷⁹ In fact, Chief Justice Marshall stated "commerce undoubtedly is traffic, but it is something more: it

⁷⁶ See 144 Cong. Rec. H9945 (1998).

⁷⁷ See *Johnson, supra n. 57* at 138.

⁷⁸ *Id.*

⁷⁹ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824).

is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”⁸⁰

At the time *Federal Baseball* was decided in 1922, Baseball had developed to such a state that there were competitions between teams from different states.⁸¹ Moreover, the teams shared receipts from game sales, which on its face seems to constitute the intercourse Marshall described. It is undoubted that in today’s Baseball business, in which revenues reach into the billions and teams play a 162 game schedule throughout the country, Baseball would constitute an intersection worthy of being called commerce.

Additionally, the notion of commerce has been expanded following *Federal Baseball*. At the time Holmes’ opinion in *Federal Baseball* was published, the Court was controlled by conservative justices who were “strongly opposed to government economic regulations.”⁸² With Roosevelt’s New Deal came a change of the guard in the judiciary, resulting in a more liberal court that chipped away at the case law developed by the conservative early nineteenth century Court.⁸³ With this liberal court came an expansion of the breadth of what was considered commerce.⁸⁴ This broad expansion would likely cast its web to include Major League Baseball.

In fact, jurists have noted that the exemption is more based on the nature of Baseball as opposed to legal reasoning. Justice Blackmun, in his majority opinion in *Flood* explained the Baseball exemption “rests on a recognition and an acceptance of baseball’s unique characteristics

⁸⁰ Gibbons, 22 U.S. (9 Wheat) at 193.

⁸¹ See Section I above.

⁸² CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 178 (Aspen 1997).

⁸³ See *id.* at 186.

⁸⁴ See *id.*

and needs.”⁸⁵ Thus, even Justice Blackmun implies that the reasoning is faulty and that the Court is content with letting the exemption stand simply because Baseball is Baseball. The Court does this while refusing to apply an exemption to any other major sports league.⁸⁶

The Court, despite its explicit acknowledgement that Baseball does constitute interstate commerce and that the reasoning behind Baseball’s judge made exemption is flawed, refuses to rectify the problem. Rather, the Court points to Congress in an intentional walk of the antitrust issue.

Stare decisis provides a certain stability in our American judicial system. It comforts, in most cases, litigants to know that an issue if litigated before and similar enough in nature, will be decided consistently. Stare decisis, however, should be a living evolving mechanism. Put simply, the Court has failed in its repeated deference to stare decisis in a decision it has admitted is incorrect. As Dean Abrams noted “we depend not only on the stability of rules but also on the flexibility of principle to react to the dynamic conditions of modern life.”⁸⁷ The Court in *Toolson* and *Flood* failed at this goal. Abrams further argued, “precedent is reinterpreted, narrowed, or stretched to accommodate changing circumstances. At times, a precedent is recognized as ill conceived or unsound. In such cases, courts overrule decisions and set the law on the correct course.”⁸⁸ Simply, this is the exact opposite of the Court’s treatment of the flawed law created in *Federal Baseball*.

⁸⁵ Flood, 407 U.S. at 282-83.

⁸⁶ See Bumgardner, Larry G., *Baseball’s Antitrust Exemption: While the Lawyers Warmed Up in the Bullpen, the Game Was Called Due to the Reign of Compromise 88*, in *DIAMOND MINES: BASEBALL & LABOR* (Paul D. Staudohar ed. 2000).

⁸⁷ Roger I. Abrams, *LEGAL BASES: BASEBALL AND THE LAW* 64 (Temple University Press 1998).

⁸⁸ *Id.*

Moreover, the Court is essentially looking to Congress to clean up its mess. The Court could more efficiently handle the matter of rectifying the antitrust problem. Congress and its members are elected officials who have numerous constituents to consider. Thus, any action by Congress will be emotional and based on public opinion. The Courts, on the other hand, do not have the term limits or constituents to be concerned with. The Court, therefore, should step up to the plate and remedy the wrong that it created eighty years ago.

2. The Competitive Balance of Baseball is a Result of the Growing Economic Disparity

The policy behind antitrust laws is to prevent restraints on industry that result in the reduction of competitive balance. Baseball is the antithesis of competitive balance. Perhaps nowhere is there a clearer picture of the demarcation between the have and have nots than in Baseball. A simple glance at the numbers shows the inevitability of the financial woes of Baseball.

In July 2000, the Commissioner of Baseball, Bud Selig, formed a “blue-ribbon” panel to investigate and create a report on the state of competition and economics of Baseball. The stated purpose of the panel was “to examine the question of whether Baseball’s current economic system has created a problem of competitive imbalance in the game.”⁸⁹ In an attempt to fully carry out this charge, the panel considered “all available economic data, indicators and variables, including those related to club profitability and franchise values.”⁹⁰ The results the panel discovered were predictable and profound.

⁸⁹ THE REPORT OF THE INDEPENDENT MEMBERS OF THE COMMISSIONER’S BLUE RIBBON PANEL ON BASEBALL ECONOMICS p. 53 (July 2000), available at www.mlb.com/mlb/downloads/blue-ribbon.pdf. The Commission included noted author and baseball historian George Will, current Yale University president Richard C. Levin, Senator George J. Mitchell, and noted businessman Paul A. Volcker. The commission also included representatives from 12 different Major League Clubs.

⁹⁰ *Id.*

In analyzing the years 1995-1999 the panel divided Baseball's clubs into four payroll quartiles.⁹¹ The quartiles were four equal sized groups determined by the amount each team paid its players during the season.⁹² The panel found that during the five year time period “*no club* from payroll Quartiles III or IV won a [Division Series] or [League Championship Series] game, and *no club* from payroll Quartiles II, III, or IV won a World Series game.”⁹³ Thus, according to the panel's findings, in order to be competitive at a championship level in Baseball a club *must* be willing to spend significant amounts of money on its players.

The independent panel determined the following four general principles from its study. First, there are significant and growing economic disparities that are causing competition problems in Baseball.⁹⁴ Second, the problems are getting worse and that if nothing is done to remedy them the disparity will remain severe.⁹⁵ Third, the revenue sharing and payroll tax approved by Baseball is simply not rectifying the economic disparity or the resultant competitive imbalance.⁹⁶ Finally, the cost of being competitive in Baseball is being passed on to the fans.⁹⁷

The panel was also charged with the responsibility of making recommendations to remedy the competitive imbalance and economic disparity facing Baseball. Its recommendations, however, sound all too similar to the other changes implemented prior to the formation of the panel. Mainly, the panel's suggestions include increased revenue sharing and

⁹¹ *See id.* at i.

⁹² *See id.*

⁹³ *Id.* Emphasis in original.

⁹⁴ *See id.* at 1.

⁹⁵ *See id.*

⁹⁶ *See id.*

⁹⁷ *See id.*

taxes, a competitive balance draft of players, and selective franchise relocations.⁹⁸ Put simply, these recommendations are merely more stringent versions of the old suggestions.

3. *Contraction and Recent Developments*

Two days following the 2001 World Series, in which the Arizona Diamondbacks beat the perennial favorite New York Yankees in thrilling fashion, Commissioner Bud Selig notified Baseball and the press that it intended to contract two Major League teams.⁹⁹ This announcement was met with significant public backlash; however, the owners voted on November 6, 2001, to eliminate two teams beginning with the 2002 season.¹⁰⁰ Ironically, this is something the independent panel referenced in the prior section stated that if its remedies were implemented “there should be no immediate need for contraction.”¹⁰¹

In an effort to combat this decision by the owners and the commissioner’s office, Senator Paul Wellstone (D-Minn.) and Representative John Conyers (D-Detroit) introduced the “Fairness in Antitrust in National Sports Act of 2001”.¹⁰² Referred to as the FANS act, the purpose is to amend the Clayton Act, thereby making the antitrust laws applicable to Baseball regarding the relocation and contraction of Baseball franchises.¹⁰³ Thus, the FANS act would leave the

⁹⁸ *See id.* at 8-10.

⁹⁹ *See* Rep. John Conyers, Editorial, *Removing Protection Levels Field to Prevent Further Damage to Fans*, DETROIT FREE PRESS, Dec. 23, 2001, at 17A. Congressman Conyers described the action as “a non-appealable death sentence to Minneapolis and a slap in the face to its loyal fans.” Conyers was referring to the rumor that the most likely two teams to be contracted would be the Minnesota Twins and Montreal Expos.

¹⁰⁰ *See* Associated Press, *Selig says baseball will try again in 2003*, Feb. 5, 2002, available at <http://sports.espn.go.com/espn/print?id=1323166&type=news>.

¹⁰¹ *Supra* n. 89 at 44.

¹⁰² *See* S. 516, 107th Cong. (2001).

¹⁰³ *See id.* at § 2.

antitrust exemption in place “in any other context or with respect to any other person or entity” involved in Baseball.¹⁰⁴

Seemingly, this bill was a political reaction to a decision that would affect a Senator’s constituents. This political reaction has followed every decision by Baseball that has created public outcry. In fact, in a speech following the recent bill’s announcement, Minor League Baseball’s Vice President Stan Brand stated “only one thing now has become as inevitable as death and taxes: congressional threats to repeal the exemption every time Major League Baseball makes a decision that ruffles congressional feathers.”¹⁰⁵ Regardless of the motivation behind the bill, it would accomplish its goal of chipping away at the antitrust exemption enjoyed by Baseball. Currently, however, the bill is stuck in committee and runs the likely chance of dying out due to public opinion simmering and congressmembers’ waning interest in issues that are not receiving publicity.

4. A Call for the Repeal of Baseball’s Antitrust Exemption in its Entirety

The continued, albeit sporadic, abuse by Baseball of its antitrust exemption coupled with the growing economic and competitive disparity requires the complete disposal of Baseball’s exemption. The FANS act paves the way, but will not finish the job. In order for Baseball to return to the parity it once enjoyed, there must be a complete reversal of the exemption.

As evidenced by the blue ribbon panel report, there is a significant difference between the championship possibilities of the teams who have money and those who do not.¹⁰⁶ This is in stark contrast to the purpose behind antitrust regulation.

¹⁰⁴ *See id.*

¹⁰⁵ Stan Brand, Opening Session Speech at the Annual Winter Convention (Dec. 13, 2001), *available at* http://www.minorleaguebaseball.com/pagetemplate/3col_gray_hdr.asp?pageid=1613.

¹⁰⁶ *See supra* n. 89.

Numerous scholars have argued that the antitrust exemption Baseball enjoys is adversely affecting the national pastime. Notably, some have argued that the exemption significantly hinders a player's freedom to contract.¹⁰⁷ This argument is rebutted today by the enactment of the Flood Act. The Act, however, does not entirely bring the players and management to a level playing field. Moreover, the Act does not apply to Minor League players.¹⁰⁸ Minor Leaguers are thus treated exactly in the same manner as Major Leaguers prior to the Flood Act. This problem, albeit seemingly less significant, is not remedied by the proposed FANS act. That act, as discussed above, specifically deals only with contraction or relocation of a franchise.¹⁰⁹ Minor Leaguers, therefore, are left with virtually no contractual rights absent a complete abolishment of the antitrust exemption.

A second reason advanced for the abolition of the exemption is that it tilts the bargaining table in favor of the owners. Many owners are able to use the antitrust exemption to their advantage during labor negotiations.¹¹⁰ Owners generally operate their clubs at a loss. In fact, the only clubs to operate at a profit from 1995 through 1999 were the Cleveland Indians, Colorado Rockies, and New York Yankees.¹¹¹ To offset these losses, the owners typically write off their losses against their other more profitable businesses.¹¹² This power allows owners the luxury of "locking out" the players. The players, regardless of the millions they make, need their salaries to cover their daily expenses. Thus, the players are at a weaker bargaining position.

¹⁰⁷ See Joshua Hamilton, *Congress in Relief: The Economic Importance of Revoking Baseball's Antitrust Exemption*, 38 SANTA CLARA L. REV. 1223, 1243 (1998).

¹⁰⁸ See *supra* n. 73.

¹⁰⁹ See *supra* n. 102.

¹¹⁰ See *supra* n. 107 at 1243.

¹¹¹ See *supra* n. 89 at i.

This disparity has been addressed by improvements in the bargaining process.¹¹³

Regardless, the players perception that the owners have the upper hand subconsciously affects negotiations. In order to remedy this disparity, the antitrust exemption must be repealed with regard to labor disputes.

Perhaps the most important reason to abolish the antitrust exemption is that it actually *promotes* anti-capitalistic behavior on the part of the owners. Specifically, the antitrust exemption allows the owners to block relocations. This phenomenon causes a ripple effect that forces small market teams to remain in non-profitable, hopeless environments, while allowing big market teams to reap the financial and championship benefits.

In an attempt to explain Baseball's system, Professor Bruce Johnson used the simple example of two pizzerias.¹¹⁴ Johnson explains

Imagine what would happen if all of greater New York had only two pizza restaurants, one in the Bronx and one in Queens. People would line up for blocks to wait for tables. The restaurants would need huge fleets of cars to handle home deliveries. With no competition and high demand, a pizza meal would be pretty expensive.

Those pizza restaurants would earn a fortune-for a while. Soon, clever entrepreneurs, and even some not-so-clever ones, would open pizzerias all over town. The new restaurants would force pizza prices and profits down, and pizza lovers would have many more options to satisfy their cravings.

Competition would destroy the monopoly power of the two original restaurants. If a group of pizzerias tried to prevent competition, whether through collusion or coercion, they'd be violating the Sherman Act....¹¹⁵

Johnson picks two New York pizzerias because the two New York teams have the largest monopoly. Johnson posits, "If the Yankees and Mets played by the same rules as restaurants,

¹¹² See Hamilton, 38 SANTA CLARA L. REV. at 1243.

¹¹³ See *id.* at 1244.

¹¹⁴ See Johnson *supra* n. 57 at 139.

¹¹⁵ *Id.*

they'd soon have plenty of competition."¹¹⁶ The New York market, split between two teams, draws from virtually 10 million people in the immediate surrounding area.¹¹⁷ Compare this draw to Montreal, perhaps the least supported and most financially troubled franchise. Montreal's population is just over one million.¹¹⁸ Simple numbers put the Expos at a distinct disadvantage. That is, the Montreal Expos draw from roughly one million, while the Yankees and Mets draw from nearly 10 million.

The Expos are in a dying neighborhood and could greatly benefit from a move to a more populated and baseball friendly metropolitan area. But under current Baseball policy that simply will not happen.

Baseball has agreed among its owners to allow all teams a 75 mile radius, which bans relocation by a team from the same league.¹¹⁹ Thus, the Expos even if they wanted to move would likely be barred from doing so at the request of their fellow National League franchise Mets. This rule perpetuates the financial disparity between the two teams. The Expos must continue operating at significantly lower revenues while the New York teams continue to see increased revenues. These increased revenues allow the New York teams to raid the smaller market teams for their best players. In fact, one could conceivably comprise an entire all star team of former small market players.¹²⁰

¹¹⁶ *Id.*

¹¹⁷ The most recent (2000) census pegs NYC's population at 8,008,278. The surrounding area of New Jersey, Connecticut and other environs assuredly pushes the New York baseball market over 10 million. Census data available at <http://www.nyc.gov/html/dcp/html/pop2000.html>.

¹¹⁸ See http://www.tourism-montreal.org/1_0/1_13_10.htm

¹¹⁹ See Johnson *supra* n. 116.

¹²⁰ The Expos alone have produced talent such as Randy Johnson, Moises Alou, Larry Walker, Pedro Martinez, and many others.

What then is the solution? The commissioner's office has suggested contraction. This, however, will not remedy the problem. The disparity will still continue. Getting rid of the Expos and Twins will force us to turn attention to the Royals, Brewers, and other small market teams. Further, the commissioner's office stands to gain from contraction because it would not lose its antitrust exemption.

Johnson has argued that the antitrust exemption should be abolished regarding franchise location restrictions.¹²¹ His suggestion is to allow teams to move freely and once the "dust settles" the competitive balance will be restored purely because of economic competition.¹²² Specifically, Johnson notes that many large markets (i.e. New York, Los Angeles, Chicago) will have multiple teams and others will likely lose their teams for good. This social cost, however, will outweigh the great gains made in balancing the economic and competitive imbalance currently in place.¹²³

This may seem to be a drastic measure; however, economically it makes sense. The migration of small market teams to large markets will dilute those large markets. This dilution will effectively create numerous small market teams in cities like Chicago and New York. The large population of these markets will support the multiple teams, all the while driving down the profits. These decreased profits would mean "player salaries would fall to a level all teams could afford."¹²⁴ Moreover, the competition between teams would force owners to reduce ticket prices

¹²¹ *See supra* n. 119.

¹²² *See id.* at 140.

¹²³ *See id.*

¹²⁴ *Id.* at 141.

and other costs to the fans, in order to entice them to attend the games. Economically this would be ideal, socially it may not.

The ramifications of a mass exodus of small market teams would be great for the communities that currently call the teams their own. Assuming that the lower rung of revenue generators in the Major Leagues decided to move, based on 1999 revenue the following cities would be without their clubs: Minnesota, Kansas City, Pittsburgh, Milwaukee, and Montreal.¹²⁵ Many of these cities rely on their Baseball franchises to provide entertainment and generate revenue for the area. All of the cities lack at least one of the major professional sports (i.e. football, hockey and basketball), which only magnifies the importance of their professional baseball clubs entertainment value.

Conversely, many of these teams are unable to generate much interest from their fan base. In Montreal, for example, it is commonplace to draw less than 10,000 fans for a game in a stadium that seats four times that amount. It begs the question, would it really matter if the teams deserted their current locales for more lucrative environs? Regardless of the answer, the reality in today's Baseball world is that it is impossible. This should not be the case.

The blue ribbon panel, formed by the commissioner, opines that the growing disparity between the rich and poor is significantly hindering the game.¹²⁶ Rather than contract teams, as the commissioner has suggested is likely, Baseball should allow the teams to engage in a free market system without restraint on the location of franchises.

The foregoing three reasons--disparity in bargaining power, restriction of players' rights to contract, and promotion of anti-competitive policies--solidify the call for the complete repeal

¹²⁵ See *supra* n. 89 at 82.

¹²⁶ See *id.* at 1.

of Baseball's antitrust exemption. The restriction of location of franchises, by itself, severely perpetuates the growing economic disparity in Baseball. By repealing the exemption, Baseball would be subject to the antitrust rules that govern other professional sports.

The standard for other sports is defined by a “rule of reason” inquiry.¹²⁷ This standard would likely allow some teams to relocate while still maintaining competition reasonably. By applying the reasonableness standard the courts could allow the free market theory to correct the current flawed system.

The exemption, however, must be repealed in order for this standard to apply and for the free market system to be implemented. This comment does not suggest which body (i.e. the Court or Legislature) should implement the repeal. The courts have adhered steadfastly to *stare decisis* in declining to overrule *Federal Baseball*. Further, the legislature seems to only act when there is significant public outcry or threats from Baseball’s owners. Most certainly, the free market system will not be implemented by Baseball. Both parties, owners and players, stand to lose too much. The owners would lose control, while the players would likely see decreased salaries. Thus, the only hope is that the current public outcry creates enough steam to propel the legislature to repeal Baseball’s exemption.

V. CONCLUSION

In America, Baseball is treated unlike any other professional sport. It enjoys an exemption from antitrust policy that covers every other business. Baseball is allowed to regulate itself and restrain those that are a part of the organization. The exemption was created by a case that has been continuously criticized as being an incorrect application of the law. Regardless, the exemption remains to this day.

¹²⁷ See *Los Angeles Memorial Coliseum Comm’n v. National Football League*, 726 F.2d 1381 (9th Cir. 1984).

The time has come to bring Baseball to the same regulatory level as its professional sports counterparts. Without this regulation the current and growing economic and competitive disparity between Baseball's richest and poorest clubs will permanently ruin the national pastime. With the probability of contraction in 2003 and the very realistic possibility of a lock out in 2002, Baseball has overstepped its boundaries and has abused its exemption too severely to warrant continued enjoyment. Without the complete abolition of the antitrust exemption, Baseball will continue to be an ugly example of the lack of parity created by a system that hinders a natural, free-market system.
