

CURT FLOOD AT BAT AGAINST  
BASEBALL'S "RESERVE CLAUSE"<sup>1</sup>

In all time of our distress,  
And in our triumph too,  
The game is more than the player of the game,  
And the ship is more than the crew!

Rudyard Kipling,  
*A Song in A Storm*

The sports page of today's newspaper is filled with accounts of the labor-management problems of the world of professional sports.

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1. The reserve system . . . is the heart of plaintiff's complaint. No player seeking to play baseball professionally in this country can avoid its strictures since it applies to all clubs, in both the major and minor leagues and thus all of organized baseball. The effect of this system is to restrict a player throughout his baseball life to negotiate with only one club at any one time; that club being either the one with which he begins his career or the club to which his contract is assigned.

. . . The Uniform Player's Contract provides in part that if in the year of expiration of the contract a player and a club do not reach agreement on a new contract by a certain date, the club may unilaterally renew the existing contract subject to certain salary controls. Such renewal contract would itself contain this renewal clause. . . .

Another section of this same Uniform Contract provides that a player's contract may be assigned, without his approval, to any other major league club in accordance with the baseball rules.

To insure respect for these contract rights once obtained by a

Prominent are the National Football League players' strike and the owners' lockout; the suit of the National Basketball Players' Association to bar the merger plans of the National Basketball Association and the American Basketball Association; former boxing champion Cassius Clay's suit to gain reinstatement of his boxing licenses and credentials; and Curt Flood's suit seeking the elimination of baseball's reserve system. Flood's case focuses upon many of the differences which exist between the players and the owners of professional sports.

In 1969 Curt Flood received a \$90,000 salary. He was one of the highest paid and most respected players in the game of baseball. He had been a frequent .300 hitter, a seven time Golden Glove Award winner and was generally acclaimed to be the best center-fielder in baseball.<sup>2</sup> Now, in the prime of his career, Flood has seemingly forsaken his future as a player<sup>3</sup> to legally eliminate baseball's reserve system.

After the completion of the 1969 season Flood's Uniform Contract was assigned by the St. Louis Cardinals to the Philadelphia Phillies. Under the operation of his contract and its reserve provisions, Flood was given two alternatives. He could contract to play for the Phillies or not play at all within organized baseball. In a letter to Baseball Commissioner Bowie Kuhn in late December 1969, Flood asked to be released from the reserve provisions of his contract to enable him to receive employment offers from clubs other than Philadelphia. Kuhn denied Flood's request. Flood declined the contract offer of Philadelphia<sup>4</sup> and filed suit seeking to

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club, Rule 4-A of the Major League and Professional Baseball Rules provides that each club may place its players on a reserve list . . . and thereafter no player on any list shall be eligible to play for or negotiate with any other club until his contract has been assigned or he has been released.

Flood v. Kuhn, 309 F. Supp. 793, 796-97 (S.D.N.Y. 1970) (denial of motion for preliminary injunction).

2. SPORTS ILLUSTRATED, Aug. 19, 1968, at 19-20.

3. It is apparent that Flood desires to carry his action to the Supreme Court. This would likely idle him for three seasons. Baseball involves skills and timing which have to be continually exercised. As a result of three years inactivity, it is unlikely that Flood will ever regain the skills and expertise he had prior to his lawsuit.

Subsequent to writing this article, Flood's Uniform Contract was assigned by Philadelphia to the Washington Senators. Flood subsequently signed a one year Uniform Contract for a reported \$110,000. The contract specifically stipulated that it would in no way prejudice Flood's suit. Washington Post, Nov. 5, 1970, § F, at 1, col. 6.

4. Philadelphia offered Flood the same \$90,000 salary he received in

have the enforcement of the reserve system enjoined and to have the reserve system declared an unreasonable restraint of trade in violation of federal antitrust laws.

Flood is receiving strong support from the players of other organized sports as well as the Major League Baseball Players' Association.<sup>5</sup> Prior to the filing of his suit Flood sought and obtained the unanimous support of the Baseball Players' Association including a promise of financial aid.<sup>6</sup> The Baseball Players' Association, in their collective bargaining with the club owners, has unsuccessfully sought the elimination or modification of the reserve system.<sup>7</sup> Baseball owners have prospered with the reserve system and are convinced that it is necessary for the preservation of the game.<sup>8</sup> Two Supreme Court decisions<sup>9</sup> have exempted baseball from the application of the federal antitrust laws. So long as the owners in good faith bargain with the Players' Association, they are substantially free from an unfair labor practice sanction.<sup>10</sup> The owners are not required to make concessions with regard to negotiations upon the subject of the reserve system.<sup>11</sup>

Considering the favorable legal position and the stand that the reserve system is essential to the preservation of the game, the owners are reluctant to allow any changes in the system. Thus, the Flood suit affords the Players' Association the most effective means, short of a costly strike, to force a change in the system.<sup>12</sup>

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1969. They would also have let Flood play without prejudice to his lawsuit. N.Y. Times, Jan. 21, 1970, at 50, col. 5.

5. The National Hockey League Player's Association gave their support to Curt Flood in his suit against baseball. N.Y. Times, Jan. 21, 1970, at 52, col. 3. In basketball, the National Basketball Player's Association filed suit seeking the declaration that basketball's reserve system, which is patterned after baseball's, is an illegal restraint of trade. N.Y. Times, April 17, 1970, at 34, col. 1.

6. N.Y. Times, Dec. 30, 1969, at 42, col. 1.

7. *Players Go to Bat Against Baseball*, BUSINESS WEEK, Feb. 28, 1970, at 74.

8. Defendant's Post-Trial Memorandum, *Flood v. Kuhn*, 316 F. Supp. 271 (S.D.N.Y. 1970), at 73-75, 80-84 [hereinafter cited as Defendant's Memo].

9. *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Federal Baseball Club of Baltimore v. National League*, 259 U.S. 200 (1922).

10. National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1964) provides: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . ."

11. National Labor Relations Act, 29 U.S.C. § 158(d) (1964) provides: "[S]uch obligation [to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession . . ."

12. The bargaining roles of the Players' Association and the owners are not typical of the conventional employer-union relationship. The Players' Association is not the players' representative for the negotiation of salaries. The players individually negotiate terms of their salary. The Players' Association collectively bargains for the other terms of employ-

*Baseball's Exemption from Federal Antitrust Laws*

Section I of the Sherman Antitrust Act provides that "Every . . . combination . . . or conspiracy in restraint of trade or commerce among the several States . . . is declared to be illegal . . ." <sup>13</sup> In 1922 the Supreme Court held in *Federal Baseball Club of Baltimore v. National League* <sup>14</sup> that the business of providing public baseball exhibitions did not fall within the provisions of the Sherman Act. Justice Holmes, for the Court, explained that baseball ". . . would not be called trade or commerce in the commonly accepted use of those words." <sup>15</sup> He further explained that exhibitions of baseball were "purely state affairs." <sup>16</sup> Justice Holmes analogized the business of performing baseball exhibitions to the business of issuing insurance policies. <sup>17</sup> Insurance policy writing had been exempted from the effect of the federal antitrust laws because the policies were, like baseball exhibitions, local in nature. <sup>18</sup>

By the latter 1940's, the criteria of interstate commerce used by the Supreme Court in *Federal Baseball* had become obsolete. The Court had repeatedly asserted that activity which crosses state borders, <sup>19</sup> activity which uses the channels of interstate commerce, <sup>20</sup> or any local activity which even remotely concerns other states or interstate commerce <sup>21</sup> falls within the classification of commerce power. Thus tests of direct or indirect effects on interstate commerce or the amount of interstate business activity involved became irrelevant. <sup>22</sup>

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ment such as minimum salaries, arbitration procedures, and fringe benefits.

13. 15 U.S.C. § 1 (1964).

14. 259 U.S. 200 (1922).

15. *Id.* at 209.

16. *Id.* at 208.

17. *Id.* at 209. "According to the distinction insisted upon in *Hooper v. California* . . . the transport [of players from state to state] is a mere incident, not the essential thing . . ."

18. *Hooper v. California*, 155 U.S. 648, 654 (1895).

19. *Polish National Alliance v. NLRB*, 322 U.S. 643 (1944); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

20. *Associated Press v. United States*, 326 U.S. 1 (1945); *Associated Press v. NLRB*, 301 U.S. 103 (1937).

21. *Cf. Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940).

22. *Mandville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) (combination among local sugar refiners to pay uniform prices to local beet growers held a violation of Sherman Act) (modern approach draws no sharp line where interstate commerce ends and in-

In 1944 the insurance antitrust exemption case upon which *Federal Baseball* relied was invalidated.<sup>23</sup> The Court held that “. . . [A] nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature.”<sup>24</sup> The Court stated that no business “. . . which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance.”<sup>25</sup>

Baseball’s federal antitrust exemption was not challenged until 1949 when blacklisted player Danny Gardella sued the Commissioner of Baseball for damages incurred for his exclusion from baseball via the reserve system. Gardella sought a declaration that baseball’s reserve system was an unreasonable restraint of trade in violation of the federal antitrust laws. The district court dismissed the complaint on the authority of *Federal Baseball*.<sup>26</sup> The Second Circuit Court of Appeals reversed and remanded concluding that the business of baseball *pro tanto* was engaged in interstate commerce.<sup>27</sup> Judge Learned Hand reasoned that the development of radio and television broadcasts subsequent to the 1922 *Federal Baseball* case was a sufficient factor to change the nature of the business of baseball to fall within the terminology of trade and commerce used in the antitrust laws. He depicted the broadcasts as not merely incident, but that “. . . [T]he players are the actors, the radio listeners and the television spectators are the audiences; together they form as indivisible a unit as do actors and spectators in a theatre.”<sup>28</sup> Nevertheless, Judge Hand concluded that the district court, as a trier of fact, would have to determine whether the business of baseball in 1949 was interstate commerce before the court of appeals could rule upon the validity of the reserve system.<sup>29</sup> Judge Frank, concurring, thought that baseball’s radio and television activities necessarily placed it within interstate commerce.<sup>30</sup>

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trastate commerce begins); *Wickard v. Filburn*, 317 U.S. 111 (1942) (wheat grown only for consumption on the farm nevertheless held subject to commerce power); *United States v. Socony-Vacuum Co.*, 310 U.S. 150 (1940) (the character of the restraint is illegal, not the amount of commerce affected).

23. *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944).

24. *Id.* at 547.

25. *Id.* at 553.

26. *Gardella v. Chandler*, 79 F. Supp. 260, 263 (S.D.N.Y. 1948).

27. *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949).

28. *Id.* at 407-08.

29. *Id.* at 408.

30. *Id.* at 414-15.

Judge Frank concluded that subsequent decisions of the Supreme Court completely destroyed the validity of *Federal Baseball*.<sup>31</sup>

Two other players, Fred Martin and Max Lanier, were blacklisted in the same way that Gardella was. They sought judicial relief for alleged antitrust violations by the owners of baseball. The Second Circuit Court of Appeals reaffirmed its position taken in *Gardella v. Chandler*. The Second Circuit held that the validity of the reserve clause would have to be tested by a trial court involving ". . . consideration, among other things, of the needs and conduct of the business as a whole."<sup>32</sup>

The Second Circuit rulings in *Gardella* and *Martin v. National League Baseball Club* threatened to upset the secure position which baseball had enjoyed since 1922. However, the suits were never retried as out of court settlements and the reinstatement of the three players averted such a showdown.

Following the *Gardella* and *Martin* suits Congress discussed the issue of the baseball exemption. In 1951, four bills<sup>33</sup> were introduced in Congress to study baseball's antitrust exemption. The congressional study came to the conclusion that it was too early to enact general legislation for baseball. The legislators wanted to wait until the courts decided upon the reasonableness of the reserve clause.<sup>34</sup>

The courts had another opportunity to weigh the problem in three suits brought by disgruntled baseball players heard between 1951 and 1953.<sup>35</sup> The three suits were decided together by the Supreme Court in *Toolson v. New York Yankees, Inc.*<sup>36</sup> *Toolson* was another suit by a blacklisted player for damages and the declaration that the reserve system was an unreasonable restraint

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31. *Id.* at 408.

32. *Martin v. National League Baseball Club*, 174 F.2d 917, 918 (2d Cir. 1949).

33. H.R. 4229, 4230, and 4231, and S. 1526, 82d Cong., 1st Sess. (1951).

34. H.R. REP. No. 2002, 82d Cong., 2d Sess. 231 (1952) [hereinafter cited as House Report].

35. *Toolson v. New York Yankees, Inc.*, 101 F. Supp. 92 (S.D. Cal. 1951), *aff'd per curiam*, 200 F.2d 198 (9th Cir. 1952); *Kawalski v. Chandler*, No. 2646 (S.D. Ohio Jan. 25, 1952), *aff'd per curiam*, 202 F.2d 413 (6th Cir. 1953); and *Corbett and El Paso Baseball Club v. Chandler*, No. 2589 (S.D. Ohio, Jan. 25, 1952), *aff'd per curiam*, 202 F.2d 428 (6th Cir. 1953).

36. *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953).

of trade in violation of the federal antitrust laws. Toolson, in a similar situation as Flood, refused to accept the assignment of his contract from one club to another and thus, under the operation of the reserve system, he was blacklisted. The case presented many of the same issues that had been raised by *Gardella* and *Martin*. On *certiorari*, the Supreme Court affirmed the lower court dismissal on the authority of *Federal Baseball* without re-examining the underlying issues.<sup>37</sup> The Court concluded that if any reasons existed which warranted application of antitrust laws to baseball, they should be applied by legislation.<sup>38</sup> Although *Toolson* affirmed the authority of *Federal Baseball*, it further broadened the older ". . . so far as that decision [*Federal Baseball*] determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."<sup>39</sup>

Justice Burton, in his dissent in *Toolson*, observed that the Supreme Court in 1922 did not hold that baseball would be forever exempt from the federal antitrust laws. Instead, he reasoned, *Federal Baseball* held that the activities of baseball did not amount to interstate commerce in 1922.<sup>40</sup> He expressed the opinion that the business of baseball had sufficiently changed since 1922 to be classified as interstate commerce and thus was subject to the antitrust laws.<sup>41</sup>

Nowhere in the three page opinion of *Federal Baseball* can there be found any mention of Congress' intention that baseball was to be excluded from the scope of the antitrust laws as held by *Toolson*. During the period after *Federal Baseball* and before *Toolson*, Congress enacted no express legislation pro or con regarding exemptions for baseball or any other professional sport from the effects of the federal antitrust laws.<sup>42</sup> The Supreme Court's interpretation of legislative intent came entirely from Congressional inaction to change the decision of the Court in *Federal Baseball*. It is difficult to understand how the Supreme Court in *Toolson* reached such a conclusion in light of its previous decisions applying antitrust laws to other businesses having interstate connections similar to baseball.<sup>43</sup> Nevertheless, *Toolson* today stands for the proposition

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37. *Id.* at 356-57.

38. *Id.*

39. *Id.* at 357.

40. *Id.* at 357-58.

41. *Id.* at 360.

42. See HOUSE REPORT, *supra* note 34, for an analysis of Congressional inaction.

43. Two previous Supreme Court decisions concerning similar businesses held them applicable to antitrust laws. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (distribution and showing of mo-

that it was Congress' intent that baseball would not fall within the scope of the federal antitrust laws.

Decisions of the Supreme Court subsequent to *Toolson* have established baseball as the only professional sport or similar business exempt from the effect of the antitrust laws. In 1955 the Court held that the booking of theatrical attractions on a multi-state basis was subject to antitrust laws.<sup>44</sup> The Court would not accept petitioner's argument that the rationale of *Toolson* exempted their business from the antitrust laws. The Court explained that *Toolson* was merely a narrow application of the rule of *stare decisis*.<sup>45</sup> In *United States v. International Boxing Club* it was held that professional boxing fell within the provisions of the antitrust laws.<sup>46</sup> In a dispute between a player and professional football the Court held that the business of professional football fell within the provisions of the federal antitrust laws and specifically limited the application of *Toolson* to the business of baseball.<sup>47</sup> The Court again reiterated their position that if any changes were to be made regarding baseball's antitrust exemption they would have to be made by Congress.<sup>48</sup>

Despite the Supreme Court's invitations to legislatively reconsider the antitrust exemption which baseball enjoys, Congress has not enacted such legislation. No less than fifty bills and five hearings have been considered on the subject since *Toolson* was decided.<sup>49</sup> To date, Congress has passed only two measures concerning matters of antitrust for professional sports.<sup>50</sup>

While the decision of Flood's trial was pending, the Second Circuit Court of Appeals in *Salerno v. American League*<sup>51</sup> affirmed the

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tion pictures in local theatres); *Hart v. B.F. Keith Vaudeville Exchange*, 262 U.S. 271 (1923) (booking of vaudeville exhibitions).

44. *United States v. Shubert*, 348 U.S. 222 (1955).

45. *Id.* at 230.

46. 348 U.S. 236 (1955).

47. *Radovich v. National Football League*, 352 U.S. 445, 449-52 (1957).

48. *Id.* at 451.

49. For a summary of these bills and hearings, see S. REP. No. 462, 89th Cong., 7-12 (1965).

50. 15 U.S.C. §§ 1291-95 (1964) (permitted professional football and other professional sports to adopt joint telecasting practices); 15 U.S.C. § 1291 (1964), as amended, 80 Stat. 1515 (1966) (authorized the merger of the National and American Football Leagues).

51. *Salerno v. American League*, 429 F.2d 1003 (2d Cir. 1970).



dismissal of a suit by two discharged umpires based on the authority of *Toolson*. The umpires had contended that the business of baseball was interstate commerce and therefore should fall within the provisions of the antitrust laws. The court explained that whether or not baseball's activities sufficiently affected interstate commerce was not at issue, as the ground upon which *Toolson* rested was that Congress had no intention of bringing baseball within the antitrust laws.<sup>52</sup> They also said that except for situations where prior opinions establish a near certainty that a case will be overruled, ". . . [W]e continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions . . . ."<sup>53</sup>

Therefore, the Southern District Court of New York was mandated by *Toolson* and the decision of its own appellate court in *Salerno* to dismiss Flood's suit in August 1970.<sup>54</sup> The Second Circuit Court of Appeals will surely follow its decision made in *Salerno*.

Thus the path is cleared for the Supreme Court to consider whether or not they will overrule *Toolson* should the question be so directed and should they grant *certiorari*.

#### *The Implication of Toolson*

In *Salerno*<sup>55</sup> the Second Circuit explained:

. . . [T]he rationale of *Toolson* is extremely dubious and . . . the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical' . . . . [W]e should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled . . . .<sup>56</sup>

Nevertheless, the Second Circuit was not at all sure the Supreme Court would overrule.<sup>57</sup> *Toolson* may have been improperly decided in 1953, but Flood must show today why it should be overruled.

Upon first impression, an analysis of the *Toolson* decision would indicate its dubious rationale. However, upon further examination the basis for such an irrational decision is revealed. The Supreme Court in 1953 was asked to overrule *Federal Baseball* and to hold baseball retroactively subject to antitrust laws.<sup>58</sup> The Court was

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52. *Id.* at 1005.

53. *Id.*

54. *Flood v. Kuhn*, 316 F. Supp. 271, 278 (S.D.N.Y. 1970).

55. *Salerno v. American League*, 429 F.2d 1003 (2d Cir. 1970).

56. *Id.* at 1005.

57. *Id.*

58. *Toolson v. New York Yankees, Inc.*, 346 U.S. at 357.

concerned about the flood of litigation that would follow a retroactive overruling of their 1922 decision and the effect that this would have upon the substantial interests baseball had developed in reliance upon its antitrust exemption.<sup>59</sup>

In analyzing Flood's case, the Supreme Court will need to consider the same pivotal issues it reviewed in 1953 with *Toolson*. The Court will need to determine whether it will overrule *Toolson* with retroactive effect, how to assess baseball's reliance upon its antitrust exemption, and whether or not the reserve system is an unreasonable restraint of trade.<sup>60</sup>

### *The Overruling of Toolson with Retroactive Effect*

The Supreme Court in *Toolson* expressed the dangers of granting retroactive effect to the requested overruling of *Federal Baseball*. The Court distinguished between the judicial solution which would have retroactive effect and the legislative solution which would have prospective effect.<sup>61</sup>

Normally, when a decision is overruled, this signifies not that the precedent was bad law, but that it was not law at all.<sup>62</sup> In recent years, the Supreme Court has given additional flexibility to the use of prospective overruling. They have seen the need to balance the equities of the parties and deny retroactive effect in particular where the parties have ordered their affairs in reliance upon what they perceived the law to be.<sup>63</sup>

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59. *Radovich v. National Football League*, 352 U.S. at 450-51.

60. The other arguments presented by the Flood case are not discussed. These include: (1) If federal antitrust laws do not apply, then the individual state antitrust laws are applicable; (2) if neither federal nor state antitrust laws apply, then principles of common law would apply to find the reserve system unreasonable; and (3) the reserve system violates the Thirteenth Amendment's prohibition of involuntary servitude. These arguments were denied by the trial court. *Flood v. Kuhn*, 316 F. Supp. at 280, 281-82.

61. *Toolson v. New York Yankees, Inc.*, 346 U.S. at 357.

62. 1 W. BLACKSTONE, COMMENTARIES \*68-70. ,

63. *City of Phoenix v. Kolodziejske*, 399 U.S. 204, 214 (1970) (issuance of municipal bonds violated voting rights; but the ruling was given prospective effect); *Simpson v. Union Oil Co.*, 396 U.S. 13, 14 (1969) (prospectively overruled a decision but allowed immediate litigant retroactive application); *Simpson v. Union Oil Co.*, 377 U.S. 13, 24-25 (1964) (reserved the question of whether the antitrust laws should be given prospective effect); *James v. United States*, 366 U.S. 213, 221-22 (1961) (prospectively overruled a previous decision that embezzled funds were not taxable income).

Recognizing the problems presented by a retroactive decision, Flood seeks a decision which is partly or wholly prospective. He seeks to differentiate his case from *Toolson* by requesting damages only from December 30, 1969, the time when his request to be released from the reserve provisions of his contract was denied. The Supreme Court has given application of prospective overruling to events that occur after the date of its decision except as to the litigants immediately before the Court.<sup>64</sup>

Because of the strong likelihood of successive suits by others in similar situations, the Supreme Court is always reluctant to give a retroactive decision. It is apparent that should the Supreme Court overrule *Toolson*, they would do so without retroactive application. There is great difficulty when overruling in determining at what time the question of its effect will become effective. Such difficulty could, as in *Toolson*, weigh heavily on the redetermination that Congress is better equipped to make a prospective ruling.

#### *Baseball's Reliance upon Antitrust Exemption*

The Supreme Court was concerned in *Toolson* that baseball had expanded in reliance on their antitrust exemption.<sup>65</sup> In the seventeen years since *Toolson*, baseball has continued to grow in reliance of this exemption and in particular upon the validity of baseball's reserve system. In the years since *Toolson* was decided, the number of professional major league teams has increased from sixteen to twenty-four. The latest franchise was sold for over ten million dollars.<sup>66</sup> The only assets of any significance that are connected with a franchise are the skills and the fan identity of the players. Without a reserve system to protect these assets the franchise would be of little value.<sup>67</sup> Because of baseball's continued economic expansion, the Court, even more than in 1953, will have to consider the effect its decision will have on baseball's reliance upon its antitrust exemption.

#### *The Reasonableness of the Reserve System*

Whether or not an act restrains trade under the Sherman Act is based on the rule of reason.<sup>68</sup> The rule of reason is that not

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64. *Simpson v. Union Oil Co.*, 396 U.S. 13, 14 (1969); *Stovall v. Denno*, 388 U.S. 293, 296-301 (1967).

65. 346 U.S. at 357.

66. Interview with Buzzie Bavasi, President and co-owner of the San Diego Padres Baseball Club, in San Diego, California, Aug. 21, 1970.

67. *Id.*

68. *Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911).

every act or combination restraining trade is illegal, but only those which have an undue or unreasonable tendency toward monopoly or its attendant evils. The rule has been developed and applied in Supreme Court decisions, although its fundamental uncertainty makes prediction extremely difficult.<sup>69</sup>

Flood contends that the reserve system unreasonably restricts the player's freedom to choose where, for whom and for how much he will work.<sup>70</sup> The defendants explain that the reserve system is reasonable and necessary to secure the legitimate objectives of their joint league venture.<sup>71</sup>

On first impression, a review of baseball's reserve system indicates that it is too restrictive. Judge Cooper, in denying Flood's motion for a preliminary injunction, noted that the system appeared ". . . excessively restrictive, far beyond that necessary to protect its aims . . ." <sup>72</sup> The major purpose to hold Flood's trial was to make the determination whether or not the reserve system was reasonable.<sup>73</sup> Upon further consideration it became apparent that to make such a determination would be very difficult. Judge Cooper took refuge behind the mandate of *Toolson* concluding that there was no basis to warrant considering the underlying question of the reasonableness of the reserve system.<sup>74</sup> However, Judge Cooper noted that the testimony at the trial failed to support the view held by many that the reserve system occasioned rampant abuse. He determined that there was no general disregard of the position which the player occupied.<sup>75</sup>

The adverse effect which the reserve system may have upon the bargaining position of the player can be illustrated by the only extreme case found. Ken Harrelson, a player from the then Kansas City Athletics, was given an unconditional release from his

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69. See *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969); *White Motor Co. v. United States*, 372 U.S. 253 (1963); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Maryland and Virginia Milk Prod. Ass'n v. United States*, 362 U.S. 458 (1960).

70. Plaintiff's Post-Trial Brief, 316 F. Supp. 271 (S.D.N.Y. 1970) at 10, 19 [hereinafter cited as Plaintiff's Brief].

71. See Defendant's Memo, *supra* note 8, at 58-85.

72. *Flood v. Kuhn*, 309 F. Supp. 793, 801 n.26 (S.D.N.Y. 1970).

73. *Id.* at 809.

74. *Flood v. Kuhn*, 316 F. Supp. at 277-78.

75. *Id.*

contract due to disciplinary action. At the time of his release he was playing exceptionally well. The unconditional release enabled Harrelson to bargain freely with the other clubs. He finally signed for an estimated \$75,000 salary. Before the change he received only an average salary.<sup>76</sup> In the short term, it has been the experience of professional players that where there are competing clubs or leagues with no restrictive contracts, higher salaries can be obtained.<sup>77</sup> Defendants argue, and with persuasive precedent on their side, that where the competition for player services is unbridled, soon the leagues and clubs are unable to survive.<sup>78</sup>

The courts have recognized that some form of a reserve system is needed to preserve the balance among the league teams. Experience and common sense indicate that fan interest and profits are greatest when all teams are able to compete effectively for the league championship.<sup>79</sup> In the absence of restraints upon player movement, the best players would be purchased by the wealthiest teams.<sup>80</sup> Thus if such an unrestrained system existed, the cham-

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76. SPORTS ILLUSTRATED, Sept. 4, 1967, at 52.

77. Notable examples are: Pete Maravich signed a five year pact with Atlanta of the National Basketball Association for an estimated \$1.5 million. The salary is believed to be the highest ever paid for a basketball player. N.Y. Times, Mar. 27, 1970, at 4, col. 5 (it is notable that the proposed merger between the NBA and the ABA is now before Congress); the year before their merger, the National and American Football Leagues reportedly paid \$7 million to sign 20 college players. N.Y. Times, Jan. 9, 1966, § V, at 2, col. 2; before the merger of the football leagues, quarterback John Brodie of the San Francisco 49er's, who had played out the option provision of his contract, succeeded in obtaining a 12 year contract for \$921,000 from the 49er's. *The Fabulous Brodie Caper*, SPORTS ILLUSTRATED, Aug. 29, 1966, at 20. During 1914 and 1915, when the Federal Baseball League was in a bidding war for player personnel with the National and American Leagues, Ty Cobb's salary increased from \$12,000 to \$20,000. HOUSE REPORT, *supra* note 34, at 52-53.

78. Of the twenty-five clubs which competed in the first professional league, 1871-75, sixteen were financial failures due to the competition for players' services. Eight of the nine survivors formed the National League, but until the reserve system was put into effect no club could make money. HOUSE REPORT, *supra* note 34, at 18-25. The bidding war of the National and American Football Leagues led to their merger sanctioned by 15 U.S.C. § 1291 (1964), *as amended*, 80 Stat. 1515 (1966). The bidding war of the American and National Basketball Associations has led to their proposed merger. N.Y. Times, June 19, 1970, at 42, col. 2.

79. A club which wins 63 percent of its games tends to draw twice as many fans as it would if it won 42 percent and three times as many as if it won only 25 percent of its games. The desire of each club in employing the best player talent to win a high percentage of its games is not consistent with the overall performance of the league. A league derives 50 percent more gate receipts if the pennant-winning club averages .575 in won and lost percentage than if it averages .750. HOUSE REPORT, *supra* note 34, at 103-05. The run-away of the National League pennant in 1968 by the St. Louis Cardinals cost the league an estimated \$50,000 per day in lost gate receipts. SPORTS ILLUSTRATED, Aug. 19, 1968, at 19.

80. HOUSE REPORT, *supra* note 34, at 104-05.

pionships would be dominated by the teams with the most money while the poorer teams would continually lose.<sup>81</sup> Only one club in a league can win the championship and unless the losers can also prosper, the victor of one year may become bankrupt the next year through lack of opponents to play.<sup>82</sup> Such a result would in the long term eliminate the market for players.<sup>83</sup>

In *Flood v. Kuhn*, Judge Cooper commented on the reserve system: ". . . [W]e find no general or widespread disregard of the extremely important position the player occupies."<sup>84</sup> An analysis of the average salaries paid to players for a five month season also fails to indicate an inadequate bargaining position. The average salary for the 1970 season was \$28,376.<sup>85</sup> The highest paid team in baseball in 1968, when the league average was less than today, was the St. Louis Cardinals. The average player salary was \$38,800 with the starting nine, including Curt Flood, averaging \$62,800.<sup>86</sup>

Baseball's reserve system is not essentially different from the reserve systems and practices used by the other professional sports. Clubs in professional football, basketball and hockey have all patterned their practices of restricting player mobility after baseball's.<sup>87</sup> Professional football relies upon a nominally less restrictive system than the other professional sports in the form of its "option clause."<sup>88</sup>

Flood, to show that the reserve system is unreasonable, proposed

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81. *Id.* at 111-27.

82. *Id.* at 104-05.

83. *Id.* at 25.

84. *Flood v. Kuhn*, 316 F. Supp. at 276.

85. Based upon the player contracts filed in the league offices. Defendant's Memo, *supra* note 8, at 76.

86. See *Not Just a Flood, But a Deluge*, SPORTS ILLUSTRATED, Aug. 19, 1968, at 19; SPORTS ILLUSTRATED, Oct. 7, 1968, cover.

87. *Hearings before Subcommittee on Study of Monopoly Power of the Committee on the Judiciary, House of Representatives*, 82d Cong., 1st Sess., ser. 1, pt 6, at 1504-05 (1951).

88. The football player's contract has an option which can only be unilaterally extended one year. The player can play the additional year without signing a new contract at 90 percent of his previous year's salary. Upon playing out his option, the player becomes a free agent who is able to negotiate with any club. But if another club signs a player who has played out his option, the signing club must compensate the player's former team with a player or players of similar value and abilities. Because of the unknown factor of the compensation provision which is enforced by the commissioner of football, most clubs are reluctant to negotiate with a player who has played out his option.

various modifications which would satisfy the aims of baseball and also provide greater player freedom.<sup>89</sup> The district court though, was not asked to determine whether there was a better alternative to the reserve system. They were only asked to consider whether or not the present system was and is reasonable. In *Toolson*, the Supreme Court did not rule on the reasonableness of the reserve system. A ruling that the reserve system was an unreasonable restraint of trade would have left baseball without the protection of any kind of a reserve system.<sup>90</sup> They reasoned that Congress was better equipped to resolve that difficult question.<sup>91</sup> Congress, if they concluded that the reserve system was unreasonable, would not be forced to abolish such a system altogether. Congress could enact an appropriate alternative or modification to the reserve system while keeping intact the essential goals of baseball.

### *Labor Antitrust Exemption*

The Clayton Act provides that labor organizations may not be restrained from lawfully performing their legitimate objects and that they are not to be considered illegal combinations or conspiracies in restraint of trade.<sup>92</sup> The Norris-LaGuardia Act extends labor's protection by prohibiting injunctions against certain kinds of labor activities.<sup>93</sup> The effect of these statutes is to make ordinary concerted activity by the union immune from antitrust sanctions.<sup>94</sup>

In addition to their present antitrust exemption via *Toolson*, baseball contends that the application of the federal labor statutes exempts the reserve system from the operation of the antitrust laws.<sup>95</sup> To fall within the collective bargaining provisions of the

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89. Flood proposed the following changes to the reserve system: (1) independent leagues; or (2) a reserve system limited to a term of years or allowing a player to become a free agent after the option period expired; and (3) provide a trade veto for a veteran player; or (4) an automatic salary progression or smaller reserve list; and (5) salary arbitration procedures. Plaintiff's Brief, *supra* note 70, at 39-46.

90. Clearly the preponderance of credible proof does not favor elimination of the reserve clause. With the sole exception of the plaintiff himself, it shows that even plaintiff's witnesses do not contend that it is wholly undesirable; in fact they regard substantial portions meritorious.

Flood v. Kuhn, 316 F. Supp. at 276.

91. Radovich v. National Football League, 352 U.S. at 452.

92. 15 U.S.C. § 17 (1964).

93. 29 U.S.C. § 101 (1964).

94. American Federation of Musicians v. Carroll, 391 U.S. 99 (1968); Hunt v. Crumboch, 325 U.S. 821 (1945); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); United States v. Hutcheson, 312 U.S. 219 (1940).

95. Defendant's Memo, *supra* note 8, at 25. For an analysis of the

National Labor Relations Act, there must be competent representation and good faith bargaining on mandatory subjects.<sup>96</sup> Baseball contends that they qualify in that the Players' Association is a proper representative to bargain on the subject of the reserve system,<sup>97</sup> that there has been good faith bargaining on the subject,<sup>98</sup> and that the reserve system is a mandatory subject of bargaining.<sup>99</sup>

Baseball relies upon *Meat Cutters Union v. Jewel Tea Co.*<sup>100</sup> to support their contention that the mandatory subject of bargaining, the reserve system, is exempt from antitrust sanctions. In a three-three divided opinion, the Supreme Court concluded that the activities of the union in imposing marketing hours upon the employer were clearly within the labor exemption from the effect of the Sherman Act as established in prior decisions.<sup>101</sup> Justice White, writing for the majority, explained: "The crucial determinant is not the form of the agreement—e.g. prices or wages—but its relative impact on the product market and the interests of union members."<sup>102</sup> The defendants claim that their reserve system clearly falls within the provisions which Justice White set out, in that the reserve system has impact upon the product market and concerns the interests of the union members. Justice Goldberg wrote for the three man minority asserting: ". . . [C]ollective

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similar argument made in Toolson, see Note, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 *YALE L.J.* 576, 613-21 (1953).

96. . . . [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .

29 U.S.C. § 158(d) (1964).

97. "The Major League Baseball Players' Association . . . has proved a particularly effective bargaining representative . . ." *Flood v. Kuhn*, 316 F. Supp. at 283.

98. *Players Go to Bat Against Baseball*, *BUSINESS WEEK*, Feb. 28, 1970, at 74.

99. "Both management and the Players' Association recognize the reserve system to be a mandatory subject of collective bargaining." *Flood v. Kuhn*, 316 F. Supp. at 283.

100. 381 U.S. 676 (1965).

101. *Id.* at 682, 683. The prior decisions referred to are: *Hunt v. Crumboch*, 325 U.S. 821 (1945); *United States v. American Federation of Musicians*, 318 U.S. 741 (1943); *United States v. Hutcheson*, 312 U.S. 219 (1940).

102. *Meat Cutters Union v. Jewel Tea Co.*, 381 U.S. 676, 690 n.5 (1965).



bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws."<sup>103</sup> He explained that Congress intended to prevent judges and juries, under the pretense of antitrust sanctions, from prying into the private negotiations of the employer and the union on subjects of mandatory bargaining.<sup>104</sup>

Flood claims that there is a difference between the conspiracy among employers who restrain trade and labor unions who conspire to restrain trade. He asserts that *Jewel Tea* does not allow the employer such an exemption.<sup>105</sup> He relies upon a 1949 Supreme Court case which held that certain contractors' illegal restraint of trade did not fall within the labor union's antitrust exemption.<sup>106</sup> The Court explained that ". . . [The] benefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires."<sup>107</sup>

Judge Cooper, in reviewing Flood's motion for a preliminary injunction, recognized the substantial and complex questions raised by the labor agreement exemption.<sup>108</sup> In his subsequent decision he reaffirmed his belief of its difficulty and took refuge behind *Toolson* just as he had done on the question of the reasonableness of the reserve system.<sup>109</sup>

### *Conclusion*

Judge Cooper suggests that the most effective solution to the controversy surrounding the reserve system will come through negotiation of the respective bargaining units. The Players' Association is now sufficiently powerful to effect meaningful agreements thus enabling the players to gain greater bargaining parity with the owners. The National Labor Relations Board exercised jurisdiction over the business of baseball for the first time in December 1969.<sup>110</sup> This significant step enables both baseball and the players a forum where they may bring any unfair practice or

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103. *Id.* at 710. Justice Goldberg is now one of plaintiff Flood's counselors.

104. *Id.* at 716.

105. Plaintiff's Post-Trial Reply Brief, *Flood v. Kuhn*, 316 F. Supp. 271 (S.D.N.Y. 1970) at 1.

106. *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460 (1949).

107. *Id.* at 464. See *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Allen Bradley Co. v. Local Union No. 3, I.B.E.W.*, 325 U.S. 797 (1945).

108. *Flood v. Kuhn*, 309 F. Supp. at 806.

109. *Flood v. Kuhn*, 316 F. Supp. at 278.

110. *American League and Association of Umpires*, 180 N.L.R.B. No. 30, 72 LRRM 1545 (1969).

grievance charges. This same step may also present the Supreme Court with the opportunity to bypass the difficult antitrust problems presented by the Flood case.

JOHN J. McQUAIDE