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Three Strikes and You're Out: An Investigation of Professional Baseball's Antitrust Exemption

H. Ward Classen

THREE STRIKES AND YOU'RE OUT: AN INVESTIGATION OF PROFESSIONAL BASEBALL'S ANTITRUST EXEMPTION

by

H. WARD CLASSEN*

Professional sports comprise one of the most interesting industries in the United States today. Even though the professional sports industry is small in comparison to other industries, personal consumption expenditures on spectator sports in 1985 amounted to almost three billion dollars.[1] These expenditures have increased nearly threefold from 1970 and continue to grow, unaffected by changes in the economic climate.[2] The professional sports industry is also one of the most studied industries in academia. This interest does not arise from its size or percentage of G.N.P., but rather from the inequalities that exist within its economic structure as well as its unusual relationship with regulatory authorities.[3] Of particular importance is professional baseball's judicially created immunity from antitrust laws.[4]

The Supreme Court's decision in *Federal Baseball Club v. National League*[5] removed professional baseball from federal antitrust scrutiny in contrast to all other professional sports, placing professional baseball in a unique position.[6]

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*Associate General Counsel, International Mobile Machines Corporation, Philadelphia, Pennsylvania. B.A. Trinity College 1982; J.D. The Catholic University of America 1985. The author would like to thank Professor Richard A. Scheuch, Vernon J. Glenn, Deborah A. Kaminski and the law firm of Weinberg and Green for their help in producing this Article.

[1] *Statistical Abstract of the United States* 211 (1987).

[2] *Id.*

[3] *See generally,* Noll, *Major League Team Sports* in ADAMS, THE STRUCTURE OF AMERICAN INDUSTRY (1977). "Nearly every phase of the operations of a team or a league is influenced by practices or rules that limit economic competition within the industry. In most cases, government has either sanctioned or failed to attack effectively these anticompetitive practices." *Id.* at 365. *See e.g.* Jacobs and Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage,* 81 YALE L.J. 1 (1971); Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws: Los Angeles Memorial Coliseum Commission v. National Football League,* 15 CONN. L. REV. (1983); Morris, *In the Wake of the Flood,* 38 LAW & CONTEMP. PROBS. 85 (Winter/Spring 1973); Roberts, *The Single Entity Status of Sports Leagues Under Section 1 of the Sherman Act: An Alternative View,* 60 TUL. L. REV. 562 (1986); Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints,* 75 GEO. L.J. 19 (1986); Roberts, *Sports League Restraints on the Labor Market: The Failure of Stare Decisis,* 47 U.P.H. L. REV. 337 (1986); Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era,* 41 U. MIAMI L. REV. 729 (1987); Wong, *Major League Baseball's Grievance Arbitration System: A Comparison with Nonsports Industry,* 12 EMPLOYEE REL. L.J. 404 (1987); Note, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws,* 81 HARV. L. REV. 418 (1967).

[4] *Id. See also* notes 66, 67, 73-81 and accompanying text.

[5] 259 U.S. 200 (1922).

[6] As to other professional sports *see* United States v. Int'l Boxing Club, 348 U.S. 236 (1955) (boxing); Radovich v. Nat'l Football League, 352 U.S. 445 (1957) (football); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971), *preliminary inj. reinstated* Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204 (1971) (Justice Douglas, in his capacity as Circuit Justice); Washington Professional Basketball Corp. v. Nat'l Basketball Ass'n, 147 F. Supp. 154 (S.D.N.Y. 1956) (basketball); Deesen v. Pro-

The *Federal Baseball* decision has allowed professional baseball to mature without the concern of acting in restraint of trade. It has also spawned a body of case law that defies traditional legal reasoning and creates great disparity among different professional sports. Recently, this exemption has received greater scrutiny in light of the Professional Football Players Association's[7] and the United States Football League's (USFL) antitrust suits against the National Football League (NFL).[8]

This Article will examine the economic structure of the professional sports industry, explore professional baseball's judicially created exemption from antitrust laws and discuss the impact of the *Federal Baseball* and subsequent decisions on the professional sports industry. Finally, this Article will demonstrate that while baseball's antitrust exemption may have been justified sixty-five years ago, it now promotes economic inefficiency and infringes upon the constitutional rights of professional baseball players to freely market their talents.

THE ECONOMICS OF THE PROFESSIONAL SPORTS INDUSTRY

The professional sports industry, which constitutes all professional sports, is one of the most unusual and perplexing industries in the United States today. Different sports have been exempted from federal antitrust laws to varying degrees, while others have been forced to comply with the law.[9] The industry utilizes a unique economic structure which acts as a "cartel."[10] The barriers to entry are significant,[11] giving rise to the supposition that the professional sports industry is a "collection of natural monopolies."[12]

One problem in evaluating the professional sports industry is the judiciary's dissimilar treatment of different sports. Baseball has been completely exempted

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fessional Golfers' Ass'n, 358 F.2d 165 (9th Cir. 1966), *cert. denied*, 385 U.S. 846 (1966); Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973) (golf); Flood v. Kuhn, 407 U.S. 258 (1972) (baseball). In *Flood*, the Supreme Court stated: "[o]ther professional sports operating interstate — football, boxing, basketball, and, presumably hockey and golf, are not so exempt" from the federal antitrust laws. *Id.* at 282-83. Philadelphia World Hockey Ass'n v. Philadelphia Hockey Club, 351 F. Supp. 462 (E.D. Pa. 1972) (ice hockey); Gunter Harz Sports, Inc. v. United States Tennis Ass'n, 665 F.2d 222 (8th Cir. 1981); Drysdale v. Florida Team Tennis, 410 F. Supp. 843 (W.D.Pa. 1976) (tennis); United States Trotting Ass'n v. Chicago Downs Ass'n, 665 F.2d 781 (7th Cir. 1981) (trotting). *See also* United States v. Shubert, 348 U.S. 222 (1955) and H. B. Marienelli, Ltd. v. United Booking Offices, 227 F. 165 (S.D.N.Y. 1914) ("legitimate" theatrical attractions).

[7] Major League Professional Football Players Ass'n v. Nat'l Football League, filed Oct. 15, 1987 in the federal district court for the District of Minnesota.

[8] United States Football League v. Nat'l Football League, 634 F. Supp. 1155 (S.D.N.Y. 1986).

[9] Baseball is the only professional sport that has been completely exempted from the federal antitrust laws. All other professional sports have received only limited exemptions. *See supra* note 6.

[10] *See infra* note 23.

[11] Most professional sports franchises are valued in excess of $100 million. In addition to purchasing a team, significant financial resources are needed to provide working capital.

[12] A "natural monopoly" is a monopoly that arises as a result of the significant entry barriers to an industry such as telephone or utility companies.

from antitrust legislation while football,[13] basketball,[14] hockey,[15] boxing,[16] golf[17] and tennis[18] have received only partial exemptions. The reasoning employed by different courts in limiting the application of antitrust laws, while recognizing baseball's total exemption, is illogical, as each league operates in essentially the same manner and follows the same philosophy of maintaining a cartel.

The Market Structure

The professional sports industry is usually thought to consist of the four major professional team sports: football,[19] baseball,[20] basketball,[21] and hockey.[22] The market structure of the industry is unique in that it does not resemble that of any other industry. In order to maximize profits, the individual team owners operate collectively as a cartel.[23] This behavior raises the collective profits of the group, but does not necessarily maximize the profits of an individual owner. An owner that has the opportunity to achieve greater profits may be tempted to cheat on the cartel.[24] However, prohibitions against cheating have become more stringent, reducing the desire of owners to cheat.[25]

Five aspects of the market structure of the professional sports industry give rise to its unique composition: the player market,[26] broadcasting rights,[27] local broadcasting rights, gate receipts and concessions,[28] and playing facilities.[29] All

[13] Radovich v. Nat'l Football League, 352 U.S. 445 (1957).

[14] Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204 (1971); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D Cal. 1971); Washington Professional Basketball Corp. v. Nat'l Basketball Ass'n, 147 F. Supp. 154 (S.D.N.Y. 1956).

[15] Philadelphia World Hockey Ass'n v. Philadelphia Hockey Club, 351 F. Supp. 462 (E.D. Pa. 1972).

[16] United States v. Int'l Boxing Club, 348 U.S. 236 (1955).

[17] Deesen v. Professional Golfers' Ass'n, 358 F.2d 165 (9th Cir. 1966), *cert. denied*, 385 U.S. 846 (1966); Blalock v. Ladies Professional Golf Ass'n, 359 F. Supp. 1260 (N.D. Ga. 1973).

[18] Gunter Harz Sports, Inc. v. United States Tennis Asso., 665 F.2d 222 (8th Cir. 1981).

[19] Comprised mainly of the National Football League (NFL) and periodically of other upstarts such as the World Football League (WFL), which became defunct in 1975, and the United States Football League (USFL), which failed in 1986.

[20] Consisting primarily of the American and National Leagues and their farm systems.

[21] Consisting primarily of the National Basketball Association (NBA) and several minor leagues such as the Continental Basketball Association (CBA).

[22] Consisting primarily of the National Hockey League (NHL) and its farm systems. Soccer is generally not considered on the same level as other professional team sports because its financial development and popularity is limited. The outdoor professional soccer league failed several years ago, leaving only the National Indoor Soccer League (NISL).

[23] Noll, *supra* note 3 at 6-7. The term "cartel" is used "to refer to an organization and structure adopted by the firms in an oligopolistic industry in an attempt to effect a collusive [monopolistic] set of price-output decisions."

[24] Noll, *supra* note 3 at 5-8.

[25] *Id.* at 391.

[26] *See infra* notes 30-32 and accompanying text.

[27] *See infra* notes 33-41 and accompanying text.

[28] *See infra* notes 42-48 and accompanying text.

[29] *See infra* notes 49-58 and accompanying text.

are divided on a national level, excepting local broadcasting rights.

A. *The Player Market*

The player market, which introduces players into the league, is one of the most criticized elements of the professional sports industry and the aspect players resent the most. An athlete who is drafted by a professional team becomes exclusive property of that team.[30] He is forbidden from marketing his talents to any other team, thereby preventing competitive bidding. Veteran players have the right to "play out" their contracts and attempt to negotiate with other teams, but the team signing the player usually compensates the player's old team for his loss, which in turn decreases the player's worth to any potential bidder.[31] These rules create a monopsony over the player market, reducing competition and presumably increasing profits.[32]

B. *Broadcasting Rights*

The professional sports industry also treats broadcasting rights uniquely. Each league markets the national broadcasting rights for the entire league.[33] Individual teams are then permitted to market their games locally for their metropolitan area.[34] However, they are not allowed to broadcast their games into another team's metropolitan area or to interfere with games that are being televised nationally.[35] The Sports Broadcasting Act of 1961 (the Act)[36] exempts all leagues from antitrust scrutiny if they market their games collectively.[37] This exemption has benefitted the professional sports industry enormously. Television revenues have risen significantly; most leagues were able to double or triple their television revenues within a year of the Act's passage.[38] For example, professional baseball alone will receive $1.125 billion from NBC and ABC for the right to televise its games over the 1984-1989 period.[39]

Exemption from antitrust scrutiny when allocating broadcast rights also

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[30] *See e.g.*, Article 17 of the existing "Basic Agreement between The American League of Professional Baseball Clubs and The National League of Professional Baseball Clubs and Major League Baseball Players Association" effective January 1, 1987, which is the existing contract between management and professional baseball players.

[31] *Id.*

[32] Noll, *supra* note 3 at 6-7. When the American Basketball Association ("ABA") and NBA merged, ending competition for players, player salaries dropped drastically. *Id.* at 13-19.

[33] For example, CBS has contracted for the right to televise National Football Conference games while NBC has the right to televise American Football Conference games.

[34] *See, e.g.*, WTWV, Inc. v. Nat'l Football League, 678 F.2d 142 (11th Cir. 1982).

[35] *Id.*

[36] 15 U.S.C. § 1291 (1982) exempts joint agreements by professional sports leagues to sell the collective television rights to the games of its member clubs.

[37] Noll, *supra* note 3 at 372.

[38] *Id.* at 288.

[39] Staudohar, *The Sports Industry and Collective Bargaining* 19 (1987).

provides a competitive edge to an established league when it is threatened by the formation of a new league because it is able to create a formidable barrier to entry. When the World Football League (WFL) tried to negotiate a television contract for broadcasting its games, it found that the NFL had contracts with the three major television networks and that the NFL pressured the networks not to broadcast WFL games.[40] The United States Football League (USFL) also encountered great difficulty in obtaining television contracts even though its games were played in a different season than the NFL games.[41]

C. *Local Broadcasting Rights, Gate Receipts and Concessions*

Local broadcasting rights, along with gate receipts and concessions, provide the major source of revenue for individual teams. Gate receipts accounted for sixty-six percent of all revenue for major league baseball teams in the 1970's, in comparison to football, where gate receipts accounted for only half of a team's revenue.[42] In baseball and football, gate receipts are split between the home and visiting teams.[43] The division of revenue is an attempt to equalize revenue between owners with strong and weak teams as well as large and small marketing areas. It also compensates for differences in stadium seating capacities and induces owners to take a strong interest in the market's potential for expansion or relocating franchises.[44]

Local broadcasting rights generate significant income for a team because of their market potential. A single local broadcast may reach more people than the total attendance for all of a team's home games.[45] Ted Turner agreed to pay 30 million dollars over five years for the right to televise the Atlanta Braves' games.[46] Little, if any, competition comes from amateur teams, giving professional teams leverage in negotiating contracts with local broadcasters.[47] Networks and local stations can generate substantial revenues through the sale of commercial time. For example, ABC charged $650,000 for a thirty second commercial during its broadcast of the 1988 NFL Superbowl.[48]

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[40] *See* United States Football League v. Nat'l Football League, 634 F. Supp. 1155, 1159-69 (S.D.N.Y. 1986); *see also* the testimony of Ed Garvey, former director of the National Football Players Association, *Inquiry into Professional Sports, Hearings Before the House Select Comm. on Prof. Sports*, 94th Cong., 2d Sess. 219 (1976).

[41] *Id.*

[42] Noll, *supra* note 3 at 372.

[43] *Id.*

[44] *Id.* at 374.

[45] *Id.* at 375.

[46] Staudohar, *supra* note 39 at 19. It must be noted that the Braves are unique because Ted Turner broadcasts their games nationwide on WTBS, his cable television station.

[47] Noll, *supra* note 3 at 375.

[48] USA Today, Sept. 25, 1987, at 12A, col. 1.

D. *Playing Facilities*

The use of playing facilities and the negotiations for their use is perhaps the most interesting facet of the professional sports industry. Stadiums and sports complexes cost several hundred million dollars to build and are usually financed by state and local authorities, which in turn are financed by the taxpayer.[49] Occasionally, as in the case of Robert F. Kennedy stadium in Washington, D.C., the federal government sponsors or builds a complex.[50] It is even more unusual when a private group finances and builds a stadium such as Joe Robbie Stadium in Miami.[51]

Unlike other investments, a stadium cannot be relocated and has few secondary uses, so it is imperative that it attract and retain sports franchises. Minneapolis and St. Paul built a domed stadium in order to retain the Vikings and Twins,[52] while Indianapolis built a stadium to attract the "Baltimore" Colts, as well as other teams and events.[53] After the Colts left Baltimore, Baltimore immediately instituted plans to build a new stadium to attract an NFL franchise.[54] When the Milwaukee Braves moved to Atlanta, Milwaukee enticed the Brewers from Seattle by leasing Milwaukee County Stadium to the team for an annual rent of one dollar.[55]

Even if there are several professional franchises in a metropolitan area, individual teams still have strong bargaining power. Teams often threaten to relocate in order to negotiate a more favorable lease.[56] Furthermore, they usually insist on the exclusive right to use a stadium or to have the right to veto any potential tenant. As a result, stadiums tend to be under-utilized and may operate at a considerable loss.

Municipalities accept economic inefficiencies in operating a stadium because

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[49] *See e.g. infra* note 57, where Maryland's feasibility study assumes public financing through a public bond issue.

[50] Noll, *supra* note 3 at 377.

[51] Joe Robbie, the owner of the Miami Dolphins of the National Football League, decided to build his own stadium when local taxpayers voted against a bond issue to finance the stadium three times. He built his one hundred million dollar stadium under budget as well as ahead of schedule and expects to realize a substantial profit. FORTUNE, Aug. 31, 1987 at 9, col. 1; WALL STREET JOURNAL, Sept. 8, 1987 at 38, col. 1.

[52] Noll, *supra* note 3 at 377.

[53] Indianapolis undertook a national marketing effort to obtain a major league sports team and major athletic competitions such as the Pan American Games.

[54] As part of its plan, the city formed a commission to build a new stadium which undertook enabling authority and commissioned Peat, Marwick, Mitchell and Co. to undertake a study of the project. *See infra* note 57.

[55] Noll, *supra* note 3 at 377.

[56] The Baltimore Orioles and Colts threatened to relocate their franchises unless they received greater benefits from the city of Baltimore. The Colts later moved to Indianapolis when the city of Indianapolis offered the team a better financial package than the city of Baltimore. The Oakland-Los Angeles-Irwindale Raiders have relocated several times in order to obtain greater financial benefits. For these and other reasons, the New York Jets and the New York Giants play their games in New Jersey.

the franchises and their attendant industries generate substantial revenues for the local business community.[57] Furthermore, many municipalities provide financial incentives to retain teams because of the substantial loss of tax revenues and the negative effect on the business community if a franchise relocates.[58]

Team Ownership

The peculiar economics of the professional sports industry often make it advantageous to own a team. It cannot be assumed, however, that all owners pursue ownership for profit, as George Wrigley, George Steinbrenner, and Ewing Kauffman illustrate.[59] Many individuals and corporations purchase franchises for the publicity and recognition that come with ownership. Moreover, the tax laws provide favorable incentives to own a team because players can be depreciated like an ordinary capital asset.[60]

Investment in a professional sports team is not without risk, but losses are rare in the long run, making team ownership a good investment, especially in light of a team's strong appreciation and tax benefits.[61] *Forbes* magazine has estimated that the value of every professional team has increased, even though many teams have not shown an accounting profit.[62] Discrepancies in "profitability" arise because the amount of income that can be sheltered by depreciating the value of player contracts can exceed the operating profits earned by a team, even if the team is exceptionally well managed.

Labor and Capital Requirements

The professional sports industry is also unique in that it can be considered both labor and capital intensive. An owner must make large financial outlays to obtain players and to provide equipment and training facilities.[63] A player's salary is considered to be a capital cost and not a variable labor cost because a player is depreciated over time for tax purposes as a capital asset.[64] Player salaries have continued to grow, with many players earning over one million dollars a year.[65] This increase has threatened the stability of some sports, caus-

[57] Peat, Marwick, Mitchell and Co., *Report On the Economic and Tax Impacts of the Camden Yards Stadium Development* (1987).

[58] Such incentives include "free" renovations, building sky boxes or new facilities, reduced taxes and low rents for municipal stadiums.

[59] Each of these individuals amassed significant fortunes prior to entering baseball. Their ownership of professional franchises is purely for "entertainment."

[60] *See generally, I.R.C.* § 1245 (West Supp. 1987), *amended by* 100 St. 2141 (1988) which allows up to 50% of the sale price of a franchise to be allocated to player contracts which allows an owner to generate substantial losses through depreciation.

[61] *Noll, supra* note 3 at 59.

[62] *Id.* at 164-65.

[63] Player salaries have continued to escalate with several players earning over one million dollars a year.

[64] *See generally, I.R.C.* § 1245 (West Supp. 1987), *amended by* 100 St. 2141 (1988).

[65] *See* New York Times, Nov. 3, 1987 at A. 25, col. 1.

ing the National Basketball Association to respond by putting a salary cap on individual team salaries.

The industry is also labor intensive. In addition to athletes, there are thousands of office personnel, scouts, coaches, referees, management and other support personnel, as well as minor league players. Without these individuals, the professional sports industry could not continue to maintain the high-caliber level of play needed to attract strong fan support.

BASEBALL'S ANTITRUST EXEMPTION AND THE LEGALIZATION OF COLLUSION

Baseball is the most interesting of all professional sports both politically and historically. The "national pastime" was the first professional team sport in the United States. It has been differentiated from other professional sports in that it has been exempted from antitrust scrutiny by the Supreme Court in *Federal Baseball Club v. National League.*[66] In *Federal Baseball,* the Court held that baseball is a sport, not business or commerce and thus is not subject to the Sherman Antitrust Act.[67] This decision, although widely criticized, has been upheld in a series of challenges, and the Supreme Court has charged Congress with responsibility for revoking this judicially created exemption.[68] Although legislation has been under consideration for over twenty-five years, Congress has not acted.[69]

Federal Baseball Club v. National League

A. *Early History*

The National League, founded in 1876, was the only professional "baseball" league in the United States until 1901 when the American League was formed.[70] Soon after its formation, the American League proceeded to sign most of the National League's better players, sparking a bidding war which raised player salaries dramatically. The two leagues quickly reached a settlement, agreeing to co-exist peacefully and to abstain from signing the other leagues' players.[71]

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[66] 259 U.S. 200 (1922).

[67] *Id.* at 209. The decision was later criticized by the presiding Supreme Court Justice who found for the majority. *Noll, supra* note 3 at 399.

[68] *See infra* notes 96, 106 and accompanying text.

[69] *See* Flood v. Kuhn, 407 U.S. 258 (1972).

[70] *Id.* Soon after the National League was formed, the players felt they were being exploited by team owners. John Ward, a star outfielder for New York and a lawyer, formed the first players union after the owners added a reserve clause to the players' contract. LOWEN FISH and LUPIEN, THE IMPERFECT DIAMOND 30-32 (1980). The charter of the Brotherhood of Professional Baseball Players "promised to protect and benefit its members collectively and individually to promote a high standard of professional conduct and to advance the interests of the "national game." *Id.* at 30. The Brotherhood was mainly involved with protecting the rights of the individual players against the owners. The union refused to join the Knights of Labor, but closely followed their ideology, especially their motto: "An injury to one is the concern to all." *Id.*

[71] National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc., 269 F. 681 (D.C. App. 1920).

In 1914, the Federal League, which had previously existed as a minor league, attempted to become a third major league. The National and American Leagues responded by black-listing those players who played in the Federal League, which resulted in the demise of the Federal League.[72]

B. *The Decision*

The Baltimore Baseball Club, the sole surviving Federal League team, brought suit against the National and American Leagues on antitrust grounds alleging that their reserve clause was an illegal restraint of trade and an attempt to monopolize professional baseball. The Baltimore team argued that their actions had effectively denied the team a share of the baseball market.[73]

In an unreported opinion, the Supreme Court of the District of Columbia found for the Baltimore club, awarding it $80,000 which was tripled under the Sherman Antitrust Act to $240,000.[74] On appeal, the District of Columbia Court of Appeals reversed, concluding that giving baseball exhibitions did not constitute "commerce" under the Sherman Act.[75] It stated:

The business in which the appellants were engaged, as we have seen, was

[72] *Id.* "Reserve Clause is Complicated Thing," *New York Times*, Jan. 4, 1970, at 5, col. 2. The reserve clause was not written, *per se*, but requires each player to abide by all of their club's and league's rules. The contract binds a player to his team for the year following the expiration of his contract. At the same time, other teams are forbidden to make another offer. The player was therefore bound to the team perpetually. The reserve clause was honored by all the major and minor leagues in the United States, Mexico, South America, the Caribbean and Japan. Under the existing contract, a player whose contract expires becomes a "free agent" and is free to negotiate a contract with another team. His old team then has a set time period to match the other team's offer or the player will join his new team.

[73] 269 F. 681 (D.C. App. 1920).

[74] *Id.* at 682. Under Section 15 of the Sherman Antitrust Act all damage awards will be tripled. Section 15(a) provides:

> Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and *shall recover threefold the damages by him sustained*, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances . . . (Emphasis supplied). 15 U.S.C. § 15(a) (West Supp. 1987).

[75] Sections 1 and 2 of the Sherman Antitrust Act provide:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or *commerce* among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
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> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or *commerce* among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. (Emphasis supplied.) 15 U.S.C. §§ 1, 2 (West Supp. 1987).

> the giving of exhibitions of baseball. A game of baseball is not susceptible of being transferred. The players, it is true, travel from place to place in interstate commerce, but they are not the game. Not until they come into contact with their opponents on the baseball field and the contest opens does the game come into existence. It is local in its beginning and in its end. Nothing is transferred in the process to those who patronize it. The exertions of skill and agility which they witness may excite in them pleasurable emotions, just as might a view of a beautiful picture or a masterly performance of some drama; but the game effects no exchange of things according to the meaning of 'trade and commerce' . . . .[76]

Underlying the court's decision was its reasoning that organized baseball was not involved in an interstate activity. It upheld the legality of utilizing the reserve clause to ensure an even balance between teams, thereby making the games more "attractive" to spectators and preventing wealthier teams from obtaining the best players.[77]

The Supreme Court affirmed the appeals court's decision.[78] Justice Oliver Wendell Holmes, speaking for a unanimous Court, stated "[t]he business is the giving exhibitions of baseball, which are purely state affairs."[79] He continued that the concept of travelling to games was purely incidental to giving exhibitions and could not be considered interstate commerce.[80] Justice Holmes briefly mentioned but failed to address the appeals court's conclusion that the reserve clause was necessary to protect the viability of the clubs in retaining the services of a sufficient number of players.[81] Hence, the Court ignored a paramount concern.

The *Federal Baseball* decision has provided professional baseball with immunity from antitrust laws while tacitly acknowledging the validity of the reserve clause. The importance of this decision, however, was not fully realized until the Supreme Court re-examined baseball's exemption from the antitrust laws almost thirty years later.[82]

INTERPRETING THE FEDERAL BASEBALL DECISION

In *Gardella v. Chandler*,[83] organized baseball's use of the reserve clause was again challenged as violating federal antitrust laws.[84] Danny Gardella, an

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[76] 269 F. at 684-85.

[77] *Id.* at 687.

[78] Federal Baseball Club, 259 U.S. at 209.

[79] *Id.* at 208.

[80] *Id.* at 208-09.

[81] *Id.* at 209.

[82] *See infra* notes 83-89 and accompanying text.

[83] 79 F. Supp. 260 (S.D.N.Y. 1948), *rev'd*, 172 F.2d 402 (2d. Cir. 1949).

[84] *Id.* at 261-62.

outfielder for the New York Giants, chose to play in the Mexican League in order to receive a larger salary and greater job security.[85] For doing so, Gardella was banned from the "major leagues" for five years commencing upon his return.[86] Gardella brought suit claiming organized baseball involved interstate commerce and that its banning him from playing professional baseball violated federal antitrust laws.[87]

The District Court for the Southern District of New York, however, citing the Supreme Court's *Federal Baseball* decision as controlling authority, dismissed the action, even though Gardella never contracted with the Giants.[88] On appeal, the Second Circuit Court of Appeals framed the sole issue as whether " 'organized baseball' is, or is not, trade or commerce within the meaning of . . . the Sherman and Clayton Acts."[89] It found that organized baseball was involved in interstate commerce as the individual teams travelled from state to state to play their games.[90] Furthermore, the games were broadcast across state lines via radio and television.[91] The appeals court reversed and remanded. Organized baseball appealed to the Supreme Court but eventually settled out of court for $65,000 to avoid the possibility of the Supreme Court overturning the *Federal Baseball* decision.[92]

Shortly thereafter, in *Toolson v. New York Yankees*,[93] the Supreme Court again closely scrutinized the *Federal Baseball* decision, giving the Court another opportunity to rectify its earlier mistakes. George Toolson, a Yankee pitcher, had refused to report to the New York Yankees Binghamton farm club.[94] As a result, he was blacklisted, and prevented from playing for any other baseball organization.[95] Toolson sued, alleging that organized baseball violated the Sherman and Clayton Acts.[96] Specifically, Toolson contended that organized baseball constituted "commerce" and that radio and television broadcasting as well as the sale of interstate advertising constituted interstate commerce.[97] Furthermore, he argued that the facts of his case were clearly distinguishable from *Federal Baseball*.[98]

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[85] *Id.* Vera Cruz provided greater job security because many of the Giants' veteran players were returning from World War II.

[86] *Id.* at 262.

[87] *Id.* at 261-63.

[88] *Id.* at 263.

[89] 172 F.2d 402, 405 (2d Cir. 1949).

[90] *Id.* at 411-12.

[91] *Id.* at 407.

[92] New York Times, Jan. 25, 1970, sec. V, at 2, col. 2; New York Times, Jan. 4, 1970, sec. V. at 5, col. 2.

[93] 346 U.S. 356 (1953).

[94] 101 F. Supp. 93, 93 (S.D. Cal. 1951), *cert. granted*, 345 U.S. 963 (1953).

[95] *Id.*

[96] *Id.*

[97] *Id.* at 94.

[98] 98 L.Ed. 64, 65-67 (1953).

The Supreme Court concluded that baseball "has . . . been left for thirty years to develop, on an understanding that it was not subject to existing antitrust legislation."[99] Consequently, it declined to address Toolson's arguments. The Court stated: "[w]ithout re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball* . . . ."[100] It continued that "if there are evils in this field which now warrant application to it of the antitrust laws, it should be by legislation."[101]

Following closely after *Toolson*, the Supreme Court decided the issue of whether other professional sports were exempted from the antitrust laws.[102] The Court determined in *United States v. International Boxing Club*,[103] that the International Boxing Club (IBC) had monopolized the television rights for boxing exhibitions and that its actions constituted a restraint of trade.[104] The Supreme Court rejected the IBC's arguments that professional baseball's exemption extended to other professional sports.[105] It clearly stated that the business of boxing constituted interstate commerce and that *Federal Baseball* only applied to the business of baseball.[106]

In *Radovich v. National Football League*,[107] the Supreme Court reiterated its interpretation of *Federal Baseball* that only the business of baseball was exempted from antitrust scrutiny.[108] The factual situation in *Radovich* was strikingly similar to *Gardella* in that Radovich was blacklisted by the NFL after he refused to play for the team that drafted him.[109] Radovich argued that his failure to find employment as a professional football player was the result of a conspiracy to monopolize interstate commerce in professional football.[110] In reviewing a lower court's dismissal of his claim, the Supreme Court concluded that Radovich had set forth a legitimate cause of action and that the antitrust laws were applicable to professional football.[111] It stated that baseball's continued exemption was unreasonable, illogical and inconsistent, but emphasized that it was Congress' responsibility to resolve any contradition with existing case law.[112]

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[99] 346 U.S. at 357.
[100] *Id.*
[101] *Id.*
[102] 348 U.S. 236 (1955).
[103] *Id.*
[104] *Id.* at 240-43.
[105] *Id.* at 241-43.
[106] *Id.*
[107] 352 U.S. 445, *reh'g denied*, 353 U.S. 931 (1957).
[108] *Id.* at 452.
[109] *Id.* at 447.
[110] *Id.* at 452.
[111] *Id.*
[112] *Id.* at 451-52.

More recently, in *Flood v. Kuhn*[113] the court again focused its attention on professional baseball's exemption. In *Flood,* Curt Flood, a player who had been traded against his will, brought suit in the Federal District Court for the Southern District of New York claiming that the forced trade violated his constitutional rights.[114] Specifically, he alleged the forced trade violated the antitrust laws as well as the thirteenth amendment's prohibition against involuntary servitude.[115]

The United States District Court for the Southern District of New York refused to grant him an injunction which would have allowed him to negotiate with other teams.[116] On appeal, the Second Circuit Court of Appeals affirmed the district court's decision on the basis of the *Federal Baseball* and *Toolson* decisions which placed the duty on Congress to address baseball's exemption.[117] The Supreme Court also upheld the district court's decision, citing the doctrine of *stare decisis.*[118] The Court emphasized that any change in federal antitrust policy must originate from Congress.[119] Furthermore, it stated that professional baseball was also exempted from state antitrust laws, providing further freedom for organized baseball.[120]

Three years after the *Flood* decision, Dave McNally and Andy Messersmith filed for release from their reserve clauses.[121] Both were well known pitchers who had played the 1975 season without contracts.[122] Section 10(a) of the Uniform Players Contract allowed for a one year renewal period for contracts that had expired but failed to provide any further guidance as to ownership rights by a player's team.[123] The players argued that because they had played without a contract for one year, they were "free agents."[124]

In taking their grievances to arbitration, the Major League Players' Asso-

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[113] 407 U.S. 258 (1972).

[114] *Id.* at 265.

[115] *Id.* at 265-66.

[116] 316 F. Supp. 271, 285 (S.D.N.Y. 1970), *cert. granted,* 404 U.S. 880 (1971).

[117] 443 F.2d 264, 268 (2nd Cir. 1971), *cert. granted,* 404 U.S. 880 (1971).

[118] 407 U.S. at 284-85. *Stare decisis* is the general legal doctrine to accept precedent. Neff v. George, 364 Ill. 306, 4 N.E.2d 388, 390, 391 (1936). The doctrine provides that when a court has set forth a principle of law, subsequent courts will abide by that principle, and apply it to all future cases where facts are substantially the same. Horne v. Moody, 146 S.W.2d 505, 509, 510 (Tex. Civ. App. 1940). The doctrine is founded upon policy considerations; *i.e.*, that security and certainty require that accepted and established legal principles, under which rights may accrue, be recognized and followed, though later found to be unsound legally, but whether previous holding of court shall be adhered to, modified, or overruled is within court's discretion under circumstances of case before it. Otter Tail Power Co. v. Von Bank, 72 N.D. 497, 8 N.W.2d 599, 607 (1942).

[119] *Id.*

[120] 316 F. Supp. at 283-85.

[121] *See generally,* Kansas City Royals v. Major League Baseball Players Asso., 532 F.2d 616, 618 (8th Cir. 1976).

[122] *Id.*

[123] *Id.*

[124] *Id.*

ciation[125] contended that the owners denied Messersmith and McNally the right to negotiate with other teams.[126] The owners maintained that the players' grievances "were beyond the scope of the grievance procedure and thus not arbitrable."[127] The arbitrator determined that "absent an express contractual relationship with a team, a player cannot be reserved under major league rules which permit individual clubs to reserve forty players and prohibit them from tampering with other teams' players."[128] This decision gave birth to today's notion of "free agency," as it prevented a club from keeping a player in perpetuity.

Organized baseball appealed the arbitrator's decision in *Kansas City Royal Baseball Corporation v. Major League Baseball Players Association.*[129] The Eighth Circuit Court of Appeals concluded, however, that the arbitrator's decision was binding and that it was not vague or indefinite.[130] The court determined that the issue of "free agency" was subject to arbitration because the players' agreement with the owners required such issues to go to arbitration.[131]

THE IMPLICATIONS OF PROFESSIONAL BASEBALL'S ANTITRUST EXEMPTION

Baseball's exemption from the antitrust laws has provided baseball with a competitive advantage over other professional sports. Its exemption has been particularly important in the player market, in recruiting and signing players. Other sports have been forced to weather significant legal challenges to the recruitment and entry of players,[132] rules governing player mobility,[133] and league rules involving player eligibility and involvement in other activities.[134]

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[125] The Major League Baseball Players Association is the exclusive union for professional baseball players.

[126] *See supra* note 113.

[127] *Id.*

[128] *Id.*

[129] 532 F.2d 611 (8th Cir. 1975), *cert. granted*, 428 U.S. 909 (1976), *rev'd*, 432 U.S. 438 (1977).

[130] *Id.* at 632.

[131] *Id.* at 621-22.

[132] *Smith v. Pro-Football*, 420 F. Supp. 738 (D.D.C. 1976), *aff'd. in part and rev'd. in part*, 593 F.2d 1173 (1978); *Drysdale v. Florida Team Tennis, Inc.*, 410 F. Supp. 843 (W.D. Pa. 1976); *Kapp v. National Football League*, 390 F. Supp. 73 (1974), *aff'd.*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975) *cert. granted* 454 U.S. 1141 (1982), *rev'd*, 459 U.S. 519 (1983). *Saunders v. National Basketball Ass'n*, 348 F. Supp. 649 (N.D. Ill. 1972); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971) (involving draft challenges).

[133] *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976) *cert. dismissed*, 434 U.S. 801 (1977). *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975) *cert. granted* 454 U.S. 1141 (1982), *rev'd* 459 U.S. 519 (1983). *Nassau Sports v. Hampson*, 355 F. Supp. 733 (D. Minn. 1972); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club*, 351 F. Supp. 462 (E.D. Pa. 1972); *Boston Professional Hockey Ass'n v. Cheevers*, 348 F. Supp. 261 (D. Mass. 1972), *remanded on other grounds*, 472 F.2d 127 (1st Cir. 1972) (involving challenges grounded on reserve and option clauses).

[134] *Radovich v. National Football League*, 352 U.S. 445 (1957); *Washington Bowling Proprietors Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966); *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315 (D. Conn. 1977); *Kapp*, 390 F. Supp. at 73; *Robertson* 389 F. Supp. at 867; *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260 (N.D. Ga. 1973); *Denver Rockets*, 325 F. Supp. at 1049; *Greenleaf v. Brunswick-Balke-Collender Co.*, 79 F. Supp. 362 (E.D. Pa. 1947).

The leagues justify these different forms of control as necessary for their survival. The Justice Department has closely examined these restrictions to determine if they constitute a "restraint of trade."[135] A player's contract can be interpreted as restraining free trade because member teams agree not to compete for a player under contract with another team. This behavior is similar to collective actions by trade associations against competitors which have been found to constitute illegal price fixing.[136]

By using collective action to enforce sanctions, as with the reserve clause, the leagues' actions are tantamount to boycotting. Boycotting was found to be illegal in *Fashion Originators Guild of America v. Federal Trade Commission.*[137] In evaluating restraints upon players, courts have looked to *Silver, d/b/a Municipal Securities Co. v. New York Stock Exchange.*[138] In *Silver,* the Supreme Court held that the New York Stock Exchange (NYSE) acting as a group of competing dealers, cut off the private-wire connection of a nonmember securities dealer on an arbitrary basis.[139] The Court held that although the NYSE had been granted a limited exemption from antitrust legislation by the Securities Exchange Act of 1934,[140] the NYSE must have a legitimate reason for doing so and that the arbitrary use of this exemption was illegal.[141]

The *Silver* decision has been the basis for several decisions involving the sports industry,[142] most importantly *Denver Rockets v. All-Pro Management.*[143] In *All-Pro Management,* the United States District Court for the Central District of California issued a preliminary injunction preventing the National Baseball Association (NBA) from prohibiting high school players from negotiating with league members until their high school class had graduated from college.[144]

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[135] *See generally* notes 132, 133, and 134.

[136] *See generally, Sugar Institute v. United States,* 297 U.S. 553 (1936); *Maple Flooring Mfrs' Ass'n v. United States,* 268 U.S. 563 (1925); *American Column & Lumber Co. v. United States,* 257 U.S. 377 (1921). For a general overview of this area *see* Sullivan, *Handbook of the Law of Antitrust* 270-74 (1977); Fellman, *Can Associations Develop Adequate Statistics and Participate Fully in Standard-Making Procedures on an Industry Basis Without Antitrust Liability,* 19 ANTITRUST BULL. 723 (1974).

[137] 312 U.S. 457 (1941).

[138] 373 U.S. 341, *reh. denied,* 375 U.S. 870 (1963).

[139] *Id.* at 361-67.

[140] 15 U.S.C. § 78a (1986).

[141] 373 U.S. at 341.

[142] *See e.g., infra* notes 133-36; *U.S. Trotting Association v. Chicago Downs Association,* 665 F.2d 781 (7th Cir. 1981); *Gunter Herz Sports v. U.S. Tennis Ass'n,* 511 F. Supp. 1103 (D. Neb. 1981).

[143] 325 F. Supp. at 1064-66, *preliminary inj. reinstated; Haywood v. National Basketball Association,* 401 U.S. 1204 (1971).

[144] *Id.* at 1067.

Section Two of the Sherman Antitrust Act bars monopolization, attempts to monopolize, or combinations or conspiracies to monopolize any part of trade. *See supra* note 75. It has been broadly applied to professional sports. *See supra* note 7. In *International Boxing Club, see supra* notes 97-100 and accompanying text, the IBC was found to be in violation of Section Two since it monopolized the professional boxing market, controlling all aspects of fights.

Similarly in *Linesman v. World Hockey Association*,[145] the United States District Court for the District of Connecticut found that the WHA rule that players must be at least twenty years of age would most likely violate the antitrust laws and issued an injunction allowing a nineteen year old player to play.[146]

Prohibitions against collective actions provide emerging leagues with a means of challenging the dominant existing leagues. When the WHA was formed, it sued the National Hockey Association (NHA), alleging the NHA had a monopoly over the professional hockey.[147] The United States District Court for the Eastern District of Pennsylvania agreed and issued an injunction preventing the National Hockey League from enforcing its reserve clause.[148] It found that the NHL exercised unreasonable monopoly power because it controlled essentially all of the major league hockey players.[149]

Baseball, by virtue of its exemption, has been unaffected by prohibitions against collective actions. Consequently, it has been able to control the two most important aspects of the player market: the selection and continued employment of players and the equalization of playing strengths. Baseball justifies the continued existence of the reserve clause as necessary to control the equalization of team playing strengths which makes the game more appealing to spectators. The ability of organized baseball to do so which was tacitly accepted in *Flood,* has been substantially weakened by the *Messersmith-McNally* arbitration decision.

Exemption from the antitrust laws has recently allowed professional baseball to restrict the growth of player salaries. Although baseball experienced a period of skyrocketing player salaries through the implementation of free agency, owners now balk at signing free agents and the accompanying increase in player salaries. In 1987, many free agents were unable to negotiate contracts with other teams. The unwillingness of owners to sign free agents was not a coincidence but a concerted effort to reduce expenditures on player salaries. The owners denied undertaking collective action, but an impartial artibtrator found the owners guilty of collusion.[150]

Football, basketball and baseball all use the same format in drafting players, with teams picking in reverse order from the previous year's finish. In football, the chosen player must play for the team that picked him, be traded or

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[145] 439 F. Supp. 1315.

[146] *Id.* at 1315, 1326.

[147] *Philadelphia World Hockey,* 351 F. Supp. 462.

[148] *Id.* at 519.

[149] *Id.* at 508-09.

[150] *See generally,* In the Matter of the Arbitration between Major League Baseball Players Ass'n and The Twenty-Six Major League Baseball Club, (1986) (Roberts, Arb.). *See generally,* Owners Find Way to Lower Payroll by not Offering Contract," NEW YORK TIMES. Dec. 27, 1987, Sec. H, at 5, col. 1; "Baseball Players Contend Owners Continue to Thwart Free Agency," WALL STREET JOURNAL. Jan. 15, 1988, Sec. 2 at 1, col. 4.

sit out the season. In baseball, however, after choosing a player, a team has exclusive rights to negotiate with him for six months; if they are unable to reach an agreement during that time, his name is placed in a pool and can be chosen by another team. His previous team cannot choose him in the next draft unless the player agrees.

Baseball is different from most sports because most players negotiate a contract before demonstrating their playing abilities. After signing a contract, traditionally out of high school, a player is assigned to a farm club before reaching the major leagues. Many players sign long term contracts for a salary far below their actual net worth because their future value cannot be determined. Fernando Valenzuala, the best pitcher in the National League during his rookie year, signed for $32,500 a year as a rookie, while many lesser pitchers were earning over $400,000 a year.

In football most prospective players have demonstrated their abilities in college and are able to negotiate a contract closer to their actual value. Football's draft is also less confining. A player usually signs for a shorter time period and always has the option to play in the Canadian Football League. Professional football players do not, however, enjoy the same free agency rights as professional baseball players. Thus, baseball players enjoy a few advantages over other sports. In fact, a strong argument can be made that professional baseball players have made significant advances through the collective bargaining process.[151]

Baseball's exemption does not provide an advantage in generating revenues. The Sports Broadcasting Act of 1961[152] allows *all* leagues to act collectively to maximize their revenues. Since its enactment, every league has experienced increased broadcasting revenues. As greater percentages of profits come from broadcasting revenues instead of gate receipts, baseball's antitrust exemption will become less important. Baseball's exemption will, however, restrict the growth of player salaries because owners can act without fear of legal retribution. The NBA which is subject to antitrust regulation has achieved the same effect by "capping" the total amount that a team can spend in salaries each year. Thus, each NBA franchise expends the same amount on players' salaries and must work within that limit evening playing strengths. To date, this rule has withstood legal challenge.

Often overlooked, when considering the economic impact of professional baseball's exemption, is the effect on baseball's players. Baseball's exemption allows management to negotiate in bad faith since its bargaining power is almost overwhelming. Most professional athletes can only compete in a single sport, and thus, are limited to a single employer. Most would be unable to find another equivalent paying job outside the sports industry. Furthermore, there

[151] *See infra* note 153 and accompanying text.

[152] 15 U.S.C. § 1291 (1961).

are a large number of individuals willing to take their jobs at a fraction of their present salary.[153]

The weakness of professional athletes' bargaining positions was illustrated by the 1987 NFL strike where management continued to play the league's regular schedule without concern. After four weeks, the players were forced to come back without a contract. Owners were unaffected by strike and actually experienced an increase in revenues because they still received their television revenues, but paid much lower salaries to the replacement players.

The pressures upon professional baseball players are much worse. Although the NFL players "lost" their strike, they have since filed suit, alleging the owners violated the antitrust laws.[154] The NFL has already lost three antitrust suits[155] and is faced with the realistic proposition of future losses. Professional baseball players lack legal recourse, even though organized baseball is in flagrant violation of the antitrust laws.

Professional baseball players do not possess a viable means of protecting their economic interests. Any strike or player action by baseball players would almost certainly be handled by management in a means similar to the NFL strike. Unlike football, only ten to twelve players would be needed to field a baseball team. In addition, one must assume that some highly paid players would cross the picket line to receive their salary. Because of the smaller number of players needed, the major leagues could be filled from the farm system with many players who would have been brought up to the major leagues at a later date or players who had previously played in the major leagues. Ultimately, any strike would fail, especially since the players would generate little fan sympathy.

Although the differences between baseball and other professional sports have narrowed with the eradication of the perpetual reserve clause and the required compensation by a team who signs another's "free agent," baseball still enjoys a competitive advantage over other sports as well as in dealing with its players. To allow owners to continue to enjoy these advantages is inequitable[156]

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[153] Professional baseball players do not receive a great deal of sympathy. Presently the minimum salary is $62,500 for which they actually provide services only eight months a year. Of the 684 players on the active or disabled lists in 1987, 57 earned over one million dollars a year with five earning over two million dollars a year. Furthermore, several earned over five-hundred thousand dollars a year even though they had retired because they had signed long-term contracts. These figures do not include bonuses. *See* NEW YORK TIMES, November 3, 1987, Sec. A, at 25, col. 1.

[154] *See supra* note 7 and accompanying text.

[155] *See e.g. Radovich*, 352 U.S. at 445; *Kapp*, 586 F.2d at 644; *United States Football League v. National Football League*, 634 F. Supp. 1155 (S.D.N.Y. 1986).

[156] The term "inequitable" originates from the courts of equity, or chancery as they were sometimes known, which evolved in England as an alternative to the strictly formulated rules of the common law. These courts administered justice on the basis of "fairness" with their decisions being dictated by what "fairness" demanded in that particular situation. The flexible approach adopted by the courts of equity avoided the rigid and harsh results that often accompanied the common relief could be granted. The first required

especially as other professional sports are coming under increasing scrutiny and their players are enjoying greater freedom.[157]

WHERE DO WE GO FROM HERE?

In examining the conditions that produced baseball's antitrust exemption, it is difficult to find any similarity between professional baseball as it existed in the early twentieth century and today. Baseball has greatly matured since the Supreme Court's determination that baseball is a game not a business. Although there was a possible legal basis for this interpretation in 1920, it is clearly untrue today.

Baseball should be brought in line with the other professional sports either by extending a similar exemption to all professional sports or revoking baseball's exemption. Organized baseball's special status cannot be justified in light of its present economic status. Not only does this exemption breed economic inefficiency, but it hurts players and consumers. Its effect on players is especially disturbing in light of their short career span and inability to earn similar salaries in other jobs.

Although baseball has been exempted for over sixty-five years, equity and economic efficiencies dictate that its exemption be revoked. The Supreme Court has stated that Congress must undertake any corrective action, but Congress has yet to act. Congress has held hearings on this, and other concerns of the sports industry since the mid 1950's without result.[158] It is unlikely Congress will act in the foreseeable future because of the pressure exerted by special interest groups.

Revoking baseball's exemption would not alter its existing structure or operation. The primary advantage of baseball's exemption is its protection of owners from the ramifications of acting as a cartel. The most important area for franchise owners is the generation of revenues of which broadcasting rights comprise the greatest portion. Existing legislation allows owners to act as a

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that no other remedy be available at law or that such remedy be inadequate or incomplete. Secondly, property or a property right had to be involved. In short, "courts of equity intervene[d] only to protect property and property rights . . . of a purely person or individual nature which [had] no connection or association with property interests." W. DEFUNIAK, HANDBOOK OF MODERN EQUITY 122-23 (2d ed. 1956). Changes in society, however, have brought about the recognition of new property rights, both personal and individual. *Id.* at 124. *See generally, Note, The Protection of Personal Rights in Equity Since 1946,* 32 B.U.L. REV. 419 (1952) (discussing equitable protection of personal rights). Not all courts have accepted the broadening of the equity doctrine. Those courts that have acknowledged this change require that there by "personal right existent and judicially cognizable to warrant" its imposition. W. DEFUNIAK, *supra* at 125.

In 1938, with the merger of equity and law in the federal and state courts resulting from the introduction of the Federal Rules of Civil Procedure, equity courts have been abolished. The principles of equity, however, have remained as both the concepts of trust and mortgages developed by actions in equity courts. W. Cook, *Cases and Materials on Equity* 11 (1948).

[157] *See supra notes* 7 and 8 and *Los Angeles Memorial Coliseum Com'n v. National Football League,* 791 F.2d 1356 (9th Cir. 1980), *cert. denied,* 108 S.Ct. 92 (1987).

[158] *See id. and supra* note 36.

cartel in marketing broadcasting rights. Thus, their most important protection will remain.

The Supreme Court must take the inenviable action of admitting and reversing its previous errors. The doctrine of *stare decisis* is not absolute especially when there have been significant intervening factors since the initial decision was rendered.[159] The *Dred Scott* case has been overruled and the Supreme Court has reversed itself on several occasions.[160] Several cases are filed each year which would allow the Court the opportunity to rectify the *Federal Baseball* decision.

The Supreme Court cannot place responsibility for resolving the inherent inequities in the *Federal Baseball* decision with Congress. It alone rendered the original decision and it should therefore bear responsibility for acting.

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[159] In *Flood*, 107 U.S. 258, Justice Douglass stated in his dissent:

> [t]he Court's decision in *Federal Baseball Club v. National League* . . . , made in 1922, is a derelict in the stream of the law that we, its creator, should remove. Only a romantic view of a rather dismal business account over the last fifty years would keep that derelict in midstream. In 1922 the court had a narrow, parochial view of commerce . . . *Id.* at 286.
>
> If congressional inaction is our guide, we should rely upon the fact that Congress has refused to enact bills broadly exempting professional sports from antitrust regulation . . . The only statutory exemption granted by Congress to professional sports concerns broadcasting rights . . . I would not ascribe a broader exemption through inaction than Congress has seen fit to grant explicitly.
>
> There can be no doubt "that were we considering the question of baseball for the first time upon a clean slate" we would hold it to be subject to federal antitrust regulation. The unbroken silence of Congress should not prevent us from correcting our own mistakes. *Id.* at 287-88. He further stated, "[w]hile I joined the Court's opinion in *Toolson v. New York Yankees, Inc.*, . . . I have lived to regret it and I would now correct what I believe to be its fundamental error. *Id.* at 286 n.1.

Justice Marshall also filed a strong dissent. In it he commented:

> Baseball players cannot be denied the benefits of competition merely because club owners view other economic interests as being more important, unless Congress says so.
>
> Has Congress acquiesced in our decisions in *Federal Baseball Club* and *Toolson*? I think not. Had the Court been consistent and treated all sports in the same way baseball was treated, Congress might have become concerned enough to take action. But, the Court was inconsistent, and baseball was isolated and distinguished from all other sports. In *Toolson* the Court refused to act because Congress had been silent. But the Court may have read too much into this legislative inaction.
>
> We do not lightly overrule our prior constructions of federal statutes, but when our errors deny substantial federal rights, like the right to compete freely and effectively to the best of one's ability as guaranteed by the antitrust laws, we must admit our error and correct it. We have done so before and we should do so again here. *Id.* at 292-93.
>
> Justice Marshall emphasized that the Court cannot rely on congressional inaction. He cited *Helvering v. Hallock*, 309 U.S. 106, 119-21 (1940) where the Court stated:
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> Nor does want of specific Congressional repudiations . . . serve as an implied instruction by Congress to us not to reconsider, in the light of new experience . . . those decisions . . . . It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines . . . . Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle. *Id.* at 288, n.3.

The strong dissents voiced in *Flood* raise the question of whether the present Court would decline to act. Recently, the Supreme Court has attempted to reduce antitrust restraints and provide for greater competition in the markets. Justice Marshall, typically at odds with the recent Reagan appointees would most likely, on the basis of his opinion in *Flood*, join in overturning the *Federal Baseball* decision.

[160] 60 U.S. (20 How.) 393 (1854).

Congress is an easy target upon which to attach blame. Congress is slow, lumbering and terribly inefficient. Furthermore, because Congress has over five hundred members, it is difficult to place responsibility on a few identifiable individuals.

Congress will not act. Bills must be drafted, testimony taken and hearings held even before the bill gets to the floor. Special interest groups will attempt to kill it or at least ensure that it serves their own personal interests. Because this issue is unlikely to attract great publicity, few senators or congressmen will be willing to expend sufficient resources to ensure its passage. Consequently, any bill is almost certain to die in committee.

The Supreme Court is not subject to these considerations or concerns. Once the Court hears oral arguments, it will render a decision usually within nine months. It is not subject to political pressures to the same degree as Congress and is much more efficient. Furthermore, outside contacts are limited to the submission of briefs, eliminating the ability of special interests groups to derail its decision. Consequently, the Supreme Court is the logical entity for correcting the existing inequality.

The Supreme Court's actions do not necessarily have to cause drastic consequences or severe economic policy considerations. Furthermore, the decision need not directly affect the financial stability of organized baseball. By noting in one of the present NFL cases, one of which will most likely be heard by the Supreme Court, that court questioned whether the *Federal Baseball* decision would be decided in the same manner today, the Court would encourage baseball to conform its behavior to the antitrust laws.

The principal benefit of this action would be to allow organized baseball's actions to correct with the antitrust laws prior to a suit. This solution would also prevent a plaintiff from receiving a significant monetary award which would be tripled under Section 15 of the Sherman Act.[161] Directly overturning the *Federal Baseball* decision would be preferable, however, avoiding any misinterpretation of the Court's warning. Yet such action would not necessarily allow organized baseball enough time to correct its behavior and escape economic hardship.

Revoking professional baseball's exemption will not cause its demise as some proponents of its special status may claim. Ted Turner, an innovator in the financial world, and owner of the Atlanta Braves, has commented that baseball could survive without its present antitrust exemption.[162] Arguably, baseball's protected status does not provide the benefits as it once did. Peter Rose, former Associate Counsel for the MLBPA has stated that the exemption of baseball from the antitrust laws no longer provides management with ultimate

[161] *See supra* note 74.

[162] Noll, *supra* note 3, at 380.

control over the players. Rose noted:

> the decision rendered [in the *Messersmith-McNally* case] which led to the 1976 collective bargaining agreement on the reserve system put baseball far ahead of the other professional sports with respect to free agency. Baseball now has the truest system of free agency and the most workable one as evidenced by the movement of players and increased compensation compared to that found in other sports.[163]

Mr. Rose assumes management will act in good faith. If management fails to do so, baseball's free-agency system is worthless. The recent arbitration decision that owners have acted in collusion to limit the salaries of free agents is indicative of management's lack of integrity. To allow management to continue to act in bad faith while using the shield of its antitrust exemption, flies in the face of our economic principles and is an affront to a free market economy.

CONCLUSION

Professional baseball's exemption from the federal antitrust laws can no longer be supported. There is no economic or social justification for continuing baseball's unique status. Its exemption is inequitable in light of the judiciary's unwillingness to grant other professional sports a similar exemption. In a free market economy one competitor should not be the benefactor of special economic advantages over its competitors, unless dictated by special circumstances, which are absent in the present situation.

Although the Supreme Court's decision in *Federal Baseball* may have had a rational basis at one time, it is clearly inequitable today. The Supreme Court cannot and should not rely solely on the doctrine of *stare decisis* to support its decision to avoid the ramifications of rectifying the *Federal Baseball* decision. Placing the burden upon Congress to correct this decision effectively ensures that no action will be taken.

Baseball's exemption is also inequitable to professional baseball's players. Although professional baseball players have gained many advantages they once lacked through collective bargaining, each player should be allowed to market his talents freely as may every other individual in American society. The recent arbitration decision that the owners of major league baseball franchises acted in collusion in deciding not to negotiate in good faith with "free agents" emphasizes the need for personal autonomy. By removing professional baseball's antitrust exemption, professional baseball will be forced to operate competitively in a free market environment creating greater economic efficiency and personal autonomy for its players.

[163] Letter to author from Peter Rose, former Associate Counsel for the MLBPA (Apr. 22, 1982).