

Grounding Into a Double Standard: Understanding and Repealing the Curt Flood Act

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ABSTRACT

This note calls for an end to Major League Baseball’s statutory exemption from antitrust law for acts that are considered part of the “business of baseball.” The Curt Flood Act was a Congressional mistake, the product of years of faulty analysis and absurd holdings by the Supreme Court. This note will explain how the exemption came to fruition, outline the various problems with its inception, and conclude by proposing that Major League Baseball should be subject to antitrust law, just like all other professional sports leagues.

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INTRODUCTION..... 304

I. ANTITRUST LAWS AND THEIR IMPACT ON HOW PROFESSIONAL SPORTS ARE CONDUCTED..... 305

II. ANTITRUST LAW AND CHALLENGES IN SPORTS 307

III. EXEMPTIONS IN SPORTS 310

IV. MAJOR LEAGUE BASEBALL’S EXEMPTION 311

 A. Case History Pre-Flood..... 312

 B. The Seminal Case of *Flood v. Kuhn* 314

 C. The Downfall of *Flood* 315

 D. Contrary Congressional Action..... 316

V. THE “INTENTIONAL WALK” 317

 A. The Societal Impact of Baseball From 1922–1998..... 317

 B. Faulty Interpretive Methodologies in *Toolson* and *Flood*..... 324

 1. Congressional Silence Prior to *Toolson*..... 324

 2. Stare Decisis Principles 326

 C. Current Analogous, Contradictory Case Law 327

VI. RECOMMENDATIONS 328

“Baseball is America’s pastime, but football is truly America’s passion.”¹

- Howie Long

INTRODUCTION

Major League Baseball’s (MLB) statutory exemption to antitrust law under the Curt Flood Act—derived from case law, archaic societal viewpoints, and erroneous interpretation principles—should be repealed to place MLB under the same scrutiny as every other professional league. Take, for example, that on October 3, 2011, almost eleven million viewers tuned in to watch the Monday Night Football game on ESPN between the Indianapolis Colts and the Tampa Bay Buccaneers.² That same night, the New York Yankees baseball team was playing against the Detroit Tigers in an American League Divisional Series playoff game.³ Only 6.05 million viewers watched the Yankees play the Tigers.⁴ This is one example of the disconnect between what Americans call their pastime and how we actually pass time.

Major League Baseball, the dominant professional group for American baseball, enjoys a significant qualified immunity from antitrust law that, despite evidence undermining its reasoning,⁵ remains codified in a federal statute.⁶ This note will look at the case law, the social context, and the logic that gave rise to MLB’s exemption, and explain not only why it should be repealed, but also why none of the major sports should be exempt from antitrust law, save for very limited circumstances.

This note will begin in Part I by addressing the purpose and impact of antitrust laws. Part II will briefly explain how antitrust law affects

¹ Howie Long, Enshrinement Speech to the Pro Football Hall of Fame (June 29, 2000), available at http://www.profootballhof.com/history/release.aspx?release_id=751.

² Michael David Smith, *Monday Night Football Easily Beats Baseball Playoff TV Ratings*, PRO FOOTBALL TALK (Oct. 5, 2011, 1:54 PM), <http://profootballtalk.nbcsports.com/2011/10/05/monday-night-football-easily-beats-baseball-playoffs-tv-ratings/>.

³ *Id.*

⁴ *Id.*

⁵ See *infra* Part V.A.

⁶ See 15 U.S.C. § 26b (2006).

professional sports leagues. Part III will address the courts' and Congress' willingness to grant various exemptions from antitrust law to activities carried out by professional sports leagues. Part IV delineates the history of how Major League Baseball's statutory exemption, known as the Curt Flood Act, came to fruition. Part V, the major focus of this note, will address the fallacies in reasoning behind both the major court decisions and Congress' improper codification of these decisions. Finally, Part VI will offer that Major League Baseball should be subject to antitrust law, just like any other professional sports league is.

I. ANTITRUST LAWS AND THEIR IMPACT ON HOW PROFESSIONAL SPORTS ARE CONDUCTED

The gravity of antitrust laws, and the threat of a suit filed for any alleged violation, greatly affects how leagues and teams make business decisions regarding the league or players.⁷ But before looking at antitrust laws and their application to MLB in more detail, a baseline understanding of why antitrust laws exist is necessary. This primer will aid in comprehending how incongruous the MLB's exemption to antitrust law is.

Antitrust laws are grounded on the principle that, in an open, free market, there should never be an instance when competition among economic rivals inhibits trade.⁸ The goal is to protect the consumer from groups of individuals either coming together or acting in a

⁷ See, e.g., *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193, 1194 nn.1,2 (6th Cir. 1979) (discussing the reserve system once common to most major league sports under which players were not free to sign with another team, even after their contract expired, unless the new team paid an exaction to the original team).

⁸ See *Nw. Power Prods., Inc. v. Omark Indus., Inc.*, 576 F.2d 83, 89 (5th Cir. 1978) (“[I]t is the elimination of the competition, by fair means or foul, that is the concern of the antitrust law . . .”). For example, in considering the National Basketball League's decision to reduce the playing season by five games, the Federal District Court in *Chicago Professional Sports Limited Partnership v. National Basketball Association*, 754 F. Supp. 1336, 1362 (N.D. Ill. 1991), *aff'd*, 961 F.2d 667 (7th Cir. 1992), held that, “The record plainly establishes that the NBA's 5-game reduction restrains trade and suppresses competition between the teams and the league and [TV networks]. The NBA has provided no evidence establishing that the reduction promotes competition, or will, between NBA basketball games or NBA games and other television programming of any kind.”

monopolistic capacity to restrain trade.⁹ The Sherman Act¹⁰ was enacted in 1890 with these goals in mind.¹¹

In any antitrust suit, a plaintiff must initially show that the alleged conduct affects interstate commerce in some form.¹² If the plaintiff can prove that the alleged restraint affects interstate commerce, the plaintiff must then satisfy three main requirements: (1) a collusive effort by two or more economic rivals, or “duality”; (2) an unreasonable restraint on trade; and (3) damages.¹³

With the goals of antitrust laws in mind, it is easy to see how the threat of enforcement might affect business decisions.¹⁴ If a company is aware that its actions may violate antitrust laws, the company will likely choose a different course of action.¹⁵ Thus, the looming threat

⁹ Monopolies are governed by 15 U.S.C. § 2 (2006). They will not be the focus of this note.

¹⁰ Act of July 2, 1890, Pub. L. No. 51-647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–7 (2006) (“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.”)).

¹¹ See, e.g., Nelson O. Fitts, Note, *A Critique of Noncommercial Justifications for Sherman Act Violations*, 99 COLUM. L. REV. 478, 483–84 (1999).

¹² *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 66 (1911) (“There must be some direct and immediate effect upon interstate commerce in order to come within the act.”); *United States v. U.S. Steel Corp.*, 251 U.S. 417, 461 (1920) (Day, J., dissenting) (“[I]t was the purpose of the Sherman Act to condemn, including all combinations and conspiracies to restrain the free and natural flow of trade in the channels of interstate commerce.”). See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 88 n.1 (1984).

¹³ See *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 99–127.

¹⁴ “The goal of the antitrust laws is to protect economic freedom and opportunity by promoting free and fair competition in the marketplace. Competition in a free market benefits American consumers through lower prices, better quality and greater choice. Competition provides businesses the opportunity to compete on price and quality, in an open market and on a level playing field, unhampered by anticompetitive restraints. Competition also tests and hardens American companies at home, the better to succeed abroad.” *Antitrust Division Mission*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/atr/about/mission.html> (last visited Dec. 3, 2012).

¹⁵ This may be especially true given that a company’s officers, directors, and agents can be held personally responsible for knowing violations. See *United States v. Wise*, 370 U.S. 405, 416 (1962) (“Based upon the foregoing, we hold that a corporate officer is subject to prosecution under s 1 of the Sherman Act whenever he knowingly participates in effecting the illegal contract,

imposed by antitrust laws protects consumers by curbing collusive conduct and maintaining an open market.¹⁶ The next section will examine how antitrust law affects the decisions of professional sports entities, and how a challenge to league activity might be raised.

II. ANTITRUST LAW AND CHALLENGES IN SPORTS

This section will show the relationship between the different parties in professional sports and the kinds of activities that might give rise to a viable antitrust claim. Knowing the kinds of activities that may raise an antitrust claim is important in order to understand the kind of normally illegal activities from which Major League Baseball is immune. This section will first address the connections between the parties involved in the production of professional sports. It will then discuss the steps needed to sue for antitrust violations in the world of sports.

The parties involved in the production of professional sports can be classified into three different groups: the players, the teams, and the league.¹⁷ The players are legally connected to their team or club through the standard player contract.¹⁸ The players are legally involved with the league through the collective bargaining agreement.¹⁹ Finally, the team is connected to the league through the bylaws that each team

combination, or conspiracy-be he one who authorizes, orders, or helps perpetrate the crime-regardless of whether he is acting in a representative capacity.”).

¹⁶ See generally Robert H. Lande, *Proving the Obvious: The Antitrust Laws Were Passed to Protect Consumers (Not Just to Increase Efficiency)*, 50 HASTINGS L.J. 959 (1999) (discussing the purpose of antitrust law from an economic perspective).

¹⁷ See Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 647 (1989).

¹⁸ See generally WALTER T. CHAMPION JR., FUNDAMENTALS OF SPORTS LAW § 16:3. For examples of common terms contained in standard player contracts which have been the subject of antitrust cases, see *Flood v. Kuhn*, 407 U.S. 258, 259 n.1, and *Mackey v. Nat'l Football League*, 543 F.2d 606, 610 n.5 (8th Cir. 1976).

¹⁹ Collective bargaining agreements are not the subject of this note and are only used anecdotally to provide a complete picture of MLB and its relationship with antitrust law.

votes on which to adopt.²⁰ The bylaws govern the rules and laws to which each team must conform.²¹

In many sports situations, members, teams, or players challenge actions taken by the league under 15 U.S.C. § 1.²² Potential § 1 violations occur when economic rivals come together to inhibit competition within interstate commerce.²³ When an antitrust case is filed, sports leagues such as MLB or the National Football League (NFL) often move to dismiss the suit with the affirmative defense that they are acting as a ‘single entity’ regarding the conduct at issue.²⁴ Because § 1 challenges are premised on economic rivals coming together in a collusive effort, there can be no collusive acts if the court determines that the groups involved are not independent, distinct identities.²⁵ Courts have frequently found that leagues do not act as a single entity, but rather as groups of individual organizations.²⁶

²⁰ Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 907 (1999) (“The bylaws of the professional sports leagues have been designed to make expansion difficult, thus restricting the output of professional sports franchises. Indeed, the bylaws of Major League Baseball, the NFL, the NBA, and the NHL do not provide any objective standards for membership at all. They simply require a three-fourths vote of all of the owners for the admission of new teams.”).

²¹ *See Mackey*, 543 F.2d at 610 (“The League performs various administrative functions, including organizing and scheduling games, and promulgating rules. A constitution and bylaws govern its activities and those of its members.”).

²² *See, e.g., NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

²³ *Standard Oil of N.J. v. United States*, 221 U.S. 1, 60–71 (1911) (surveying historical applications of antitrust laws and § 1).

²⁴ *See Fed. Baseball Club of Balt. v. Nat’l League of Prof’l Base Ball Clubs*, 259 U.S. 200 (1922); *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953); *Radovich v. Nat’l Football League*, 352 U.S. 445 (1957); *Flood v. Kuhn*, 407 U.S. 258 (1972); *Am. Needle v. Nat’l Football League*, 130 S. Ct. 2201 (2010); *Piazza v. Major League Baseball*, 831 F. Supp. 420 (E.D. Pa. 1993).

²⁵ *See Am. Needle*, 130 S. Ct. at 2212 (“The key is whether the alleged contract, combination, or conspiracy is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a contract, combination or conspiracy amongst separate economic actors pursuing separate economic interests such that the agreement deprives the marketplace of independent centers of decisionmaking and therefore of diversity of entrepreneurial interests.” (internal quotations and citations omitted)). *See also* Nathaniel Grow, *American Needle and the Future of the Single Entity Defense Under Section One of the Sherman Act*, 48 AM. BUS. L.J. 449, 449 (2011) (“The Sherman Antitrust Act is structured around a fundamental distinction between concerted and independent action. . . . [T]he independent actions of a single firm

Since a professional sports league is a combination of teams coming together to exhibit professional sporting events, some acts that would normally violate antitrust law are allowed.²⁷ Even though restrictive actions are carried about by a group of teams, who are economic rivals,²⁸ certain conduct will not be in violation of § 1. As one well-cited author explained:

[I]n the final analysis, the unitary nature of the NFL's product should weigh heavily in favor of finding single-entity status. The NFL attempts to make NFL football as popular as possible so that it can compete effectively against other forms of entertainment for network television revenues. The internal restraints and agreements made by the League are designed to promote efficiencies in attaining this end. They are only ancillary to the main purpose of producing a more marketable product. Viewed in this manner, these restraints should not be subject to successful challenge under the Sherman Act.²⁹

Thus, while normally a § 1 claim would be appropriate to challenge concerted conduct, the restraint will be allowed if it is reasonable to further the purpose and goal of the league, and the purpose is legitimately pro-competition.

Normally, if a plaintiff can satisfy every element to a claim, including damages, a lawsuit would be viable. However, as the next section notes, both the courts and Congress have granted various exemptions to antitrust law in the sports realm.

are addressed by the Sherman Act's much narrower Section Two, which only regulates the monopolization, or attempted monopolization, of an industry.”).

²⁶ See *infra* Part V.C.

²⁷ *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 98–105 (1984).

²⁸ As the Supreme Court ultimately held in *Am. Needle*, 130 S. Ct. at 2212 (“The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each of the teams is a substantial, independently owned, and independently managed business. ‘[T]heir general corporate actions are guided or determined’ by ‘separate corporate consciousnesses,’ and ‘[t]heir objectives are’ not ‘common.’”).

²⁹ Myron C. Grauer, *Recognition of the National Football League as A Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1, 33 (1983).

III. EXEMPTIONS IN SPORTS

In an attempt to help professional leagues function smoothly, the courts and Congress have granted various exemptions that apply to all sports.³⁰ Although it would be logical to assume that antitrust principles apply to all aspects of professional sports, this assumption is faulty.³¹ Sports contain a combination of many different legal fields.³² Thus, a blind application of antitrust law would be inapposite to a holistic and comprehensive view of justice.

Congress has passed acts that specifically allow leagues to engage in activities that would normally be considered anticompetitive and, thus, make the league liable under antitrust law.³³ Congress also has passed legislation relating to the unionization of labor groups, which allows the players associations to bargain and agree on behalf of the associations' individual members.³⁴

However, the U.S. Supreme Court also has allowed for exemptions from antitrust law through non-statutory exemptions.³⁵ The most notable is the labor exemption, which allows for immunity from antitrust law if the conduct in question contemplates a mandatory subject matter of a typical collective bargaining agreement (CBA), in that the subject was negotiated at arm's length and in good faith

³⁰ Mackey v. Nat'l Football League, 543 F.2d 606, 623 (8th Cir. 1976) (discussing the nonstatutory labor exemption).

³¹ LOUIS ALTMAN & MALLA POLLACK, 1 CALLMANN ON UNFAIR COMP. TR. & MONO. § 4:16 (4th ed.)

³² Labor law dictates the relationship between the player and league, and what falls under the collective bargaining agreements. Any broadcasting rights are subject to the standards of the Federal Communications Commission. The teams' logos and symbols have intellectual property implications. See Matthew J. Mitten & Hayden Opie, "Sports Law": Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution, 85 TUL. L. REV. 269, 271 (2010).

³³ See, e.g., 15 U.S.C. § 1291 (2006) (granting immunity from antitrust liability for acts associated with broadcasting rights and the merger of the NFL and American Football League).

³⁴ 15 U.S.C. § 17 (2006).

³⁵ See Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 200 (1922).

between the parties.³⁶ If these three requirements are met, then the issue or conduct is one to be decided by labor law, and not antitrust.³⁷

This labor exemption has an elucidatory effect. When dealing with groups of individuals who unionize, the courts want the parties to negotiate between themselves.³⁸ These negotiations are then memorialized into a CBA. The CBA has the threefold purpose of protecting every party's interest, redistributing wealth, and helping to ensure the future economic growth of the league.³⁹ Thus, courts are hesitant to interject their opinions and rulings into matters that are very complex, and typically the result of months or years of negotiation.⁴⁰

The importance of these exemptions is that they illustrate how certain league conduct can be immune from antitrust suits, aside from arguing the merits and regardless of its meritorious or detrimental effects or character.⁴¹ This recognition becomes critical as we now shift our focus into Major League Baseball's exemption.

IV. MAJOR LEAGUE BASEBALL'S EXEMPTION

In 1998, Congress passed the Curt Flood Act, which codified a longstanding tradition of case law that held baseball exempt from antitrust liability.⁴² This section will explain how Major League Baseball became exempt through social bias and faulty interpretive methods. The section starts by discussing the historical cases that led to the legal decision that created the non-codified exemption, *Flood v. Kuhn*.⁴³ After discussing *Flood* and its progeny, this section will conclude by examining how Congress passed the Curt Flood Act, codifying an incorrect line of reasoning into law.

³⁶ Mackey v. Nat'l Football League, 543 F.2d 606, 623 (8th Cir. 1976).

³⁷ *Id.* at 611 ("The statutory exemption was created to insulate legitimate collective activity by employees, which is inherently anticompetitive but is favored by federal labor policy, from the proscriptions of the antitrust laws." (citing Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940))).

³⁸ *Id.* at 611–12.

³⁹ *Id.*

⁴⁰ *Id.* at 619.

⁴¹ *Id.*

⁴² Curt Flood Act of 1998, Pub. L. No. 105–297, § 3, 112 Stat 2824 (codified as amended at 15 U.S.C. § 26b (2012)).

⁴³ Flood v. Kuhn, 407 U.S. 258 (1972).

A. Case History Pre-Flood

The foundations for Major League Baseball's antitrust exemption began in 1922 with the case of *Federal Baseball v. National League of Professional Base Ball Clubs*.⁴⁴ *Federal Baseball* was a challenge to the National and American League merger.⁴⁵ The plaintiffs charged that the defendants came together as separate leagues to monopolize the business of baseball by the use of the reserve clause.⁴⁶

The reserve clause gave teams the right to exercise an option to re-sign a player in perpetuity.⁴⁷ The club could exercise the option and have the player re-sign with the team, or the club could assign the option to another team.⁴⁸ If the player did not want to re-sign with the team, despite the team's wishes, the player would not be allowed to play in the league in the next season.⁴⁹ As a result, clubs participating in the Federal Baseball League were unable to obtain players who had contracts with the National and American League.⁵⁰

The Supreme Court, led by Justice Holmes, held that baseball was not engaged in interstate commerce.⁵¹ The failure to satisfy this threshold question bars relief for the claimant, irrespective of the merits of the case. The Court's justification was based on the principle that Major League Baseball was not primarily engaged in interstate commerce because teams merely exhibited baseball games.⁵² The

⁴⁴ *Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Base Ball Clubs*, 259 U.S. 200 (1922).

⁴⁵ *Id.* at 207.

⁴⁶ *Id.*

⁴⁷ *Piazza v. Major League Baseball*, 831 F. Supp. 420, 434 (E.D. Pa. 1993) ("The reserve clause bound a player to either enter a new contract with the same team in the succeeding year of the player's contract or be considered ineligible by the National and American Leagues to serve any baseball club.").

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Base Ball Clubs*, 259 U.S. 200, 208 (1922). ("The business is giving exhibitions of base ball, which are purely state affairs.").

⁵² *Id.* ("But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. . . . As it is put by defendant, personal effort, not related to production, is not a subject of commerce. That

Federal Baseball holding that baseball is a game laid the groundwork for later courts to hold that the commercial benefits that baseball received as a result of the exhibition of their games were ancillary.

This key factor is foundational in understanding why MLB is exempt from antitrust laws. This initial case prevented baseball from being considered a business. It was not until 1953 in the case of *Toolson v. New York Yankees* that the Supreme Court spoke again regarding Major League Baseball.⁵³ Player George Earl Toolson was traded from the Newark International Baseball Club to the Binghamton Exhibition Company, Inc.⁵⁴ When Toolson refused to report to Binghamton, he was placed on the “ineligible list” and thus was no longer allowed to play professional baseball.⁵⁵ When Toolson learned of his banishment, he sued, arguing that the New York Yankees, among others, were individual entities engaged in collusive activity that unfairly restrained trade.⁵⁶

Although practical logic in 1953 should have dictated the conclusion that MLB was engaged in interstate commerce and subject to antitrust suits, the Court refused to overrule *Federal Baseball*.⁵⁷ With the 1950s being the “heyday” of MLB, featuring players such as Mickey Mantle, Yogi Berra, and Bobby Thompson,⁵⁸ the Court listed four reasons why it would not overturn *Federal Baseball*.⁵⁹

First, thirty years had passed since the *Federal Baseball* decision, and Congress did not pass any legislation that placed the “business” of baseball within the purview of antitrust law.⁶⁰ Second, in those thirty years, the business of baseball had developed while basing its decisions on the understanding that it would not be subject to antitrust

which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place.”).

⁵³ *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953).

⁵⁴ *Toolson v. N.Y. Yankees, Inc.*, 101 F. Supp. 93, 93 (S.D. Cal. 1951), *aff'd*, 200 F.2d 198 (9th Cir. 1952), *cert. granted* 345 U.S. 963, *aff'd* 346 U.S. 356 (1953).

⁵⁵ *Id.*

⁵⁶ *Id.* 93–94.

⁵⁷ *Toolson*, 346 U.S. at 357.

⁵⁸ *Baseball's Best: 1950's*, MLB.COM, http://mlb.mlb.com/mlb/baseballs_best/mlb_bb_library50.jsp (last updated June 6, 2011). Thompson is best known for his “Shot Heard ‘Round the World” in the 1951 National League Playoff. *Id.*

⁵⁹ *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953).

⁶⁰ *Id.*

laws.⁶¹ Third, the Court was not in a position to “overrule the prior decision and, with retrospective effect, hold the legislation applicable.”⁶² Finally, the Court stated that if antitrust laws should apply to baseball, the steps to enforce antitrust should start with the legislature.⁶³

B. The Seminal Case of *Flood v. Kuhn*

After these cases, no major controversy arose until 1969 when Curt Flood—an all-star caliber center fielder for the St. Louis Cardinals,⁶⁴ historically one of the best teams in Major League Baseball⁶⁵—was traded to the Philadelphia Phillies.⁶⁶ Flood challenged the trade, and asked the Commissioner of Baseball to reconsider the trade and allow him to become a free agent.⁶⁷ When the Commissioner refused, Flood instituted suit challenging professional baseball’s reserve clause.⁶⁸

Justice Blackmun delivered the majority opinion for the Court.⁶⁹ After discussing the *Federal Baseball* and *Toolson* cases, Blackmun discussed the relevant cases since *Toolson*.⁷⁰ Blackmun’s critical analysis was the case of *United States v. Shubert*,⁷¹ wherein the Defendant tried to rely on the holding from *Federal Baseball* to argue that the business of exhibiting vaudeville shows did not amount to

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* (“We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.”).

⁶⁴ 407 U.S. 258, 264 (1972).

⁶⁵ The Cardinals are the second-most successful team in terms of World Series wins in the MLB with eleven World Series Championships, rivaled only by the New York Yankee’s twenty-seven World Series Championships. See Pete Palmer & Gary Gillette, *St. Louis Cardinals: Team History & Encyclopedia*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/teams/STL/> (last updated Oct. 19, 2012).

⁶⁶ *Flood v. Kuhn*, 407 U.S. 258, 265 (1972).

⁶⁷ *Id.* at 265.

⁶⁸ *Id.* at 258, 265.

⁶⁹ *Id.* at 259.

⁷⁰ *Id.* at 274-282.

⁷¹ 348 U.S. 222 (1955).

interstate commerce.⁷² Justice Blackmun noted that in *Toolson* Chief Justice Warren expressly limited the holding to baseball.⁷³

Justice Blackmun noted other cases of *professional* sports leagues held to be within the purview of antitrust laws.⁷⁴ Further, Blackmun noted the extensive amount of legislative proposals to expand the exemption which were introduced after *Toolson*, but which failed to pass both houses.⁷⁵ Justice Blackmun explicitly declared that “[I]t seems appropriate to now say that . . . Professional baseball is a business and it is engaged in interstate commerce.”⁷⁶ Ultimately, however, the majority in *Flood* did affirm MLB’s exemptions, and thus held MLB’s reserve clause exempt from antitrust lawsuits.⁷⁷

C. The Downfall of *Flood*

The 1993 case *Piazza v. Major League Baseball* critically analyzed the Court’s decision in *Flood* and limited MLB’s exemption to the reserve clause.⁷⁸ Although *Piazza* was not a challenge to the reserve clause,⁷⁹ Major League Baseball attempted to invoke its immunity from an antitrust suit based on the *Flood* decision.⁸⁰ Judge Pavoda opined that the Supreme Court in *Flood* undercut the reasoning of *Federal Baseball* by holding that MLB was engaged in interstate commerce, and he concluded that the “*Flood* Court viewed the disposition in *Federal Baseball* and *Toolson* as being limited to the reserve system, for baseball developed between 1922 and 1953 with the understanding that its *reserve system*, not the game generally, was exempt from the antitrust laws.”⁸¹ Thus, he held that “the antitrust exemption created by *Federal Baseball* is limited to baseball’s reserve

⁷² *Shubert*, 348 U.S. at 226.

⁷³ *Flood*, 407 U.S. at 275–77.

⁷⁴ *Id.* at 276–82 (discussing *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); *Haywood v. Nat’l Basketball Ass’n*, 401 U.S. 1204 (1971) (basketball)).

⁷⁵ *Id.* at 281 n.17.

⁷⁶ *Id.* at 282.

⁷⁷ *Id.*

⁷⁸ 831 F. Supp. 420, 435 (E.D. Pa. 1993).

⁷⁹ *Id.* at 423.

⁸⁰ *Id.* at 435.

⁸¹ *Id.* at 436.

system, and because the parties agree that the reserve system is not at issue in this case, I reject Baseball's argument that it is exempt from antitrust liability in this case."⁸²

Although the case has limited precedential value, *Piazza* is indicative of how interpretations of *Federal Baseball*, *Toolson*, and *Flood* have evolved, signaling what may be the beginning of the end to the MLB's broad exemption.⁸³ After seventy years, courts seem willing to correct this past mistake. In *Piazza*, the "business of baseball" was subject to the same antitrust scrutiny as any other sports league.⁸⁴

D. Contrary Congressional Action

After years of "punting" by the Supreme Court and the more recent contrary case law like *Piazza*, Congress finally acted. In 1998 an act was passed to codify MLB's antitrust exemption into federal law.⁸⁵ The Act, entitled the Curt Flood Act (which may be viewed as a slap in the former all-star's face by an occult hand), grants MLB an excessively broad exemption with but a few exceptions to the *business of baseball*, not just the reserve clause.⁸⁶ Despite the small number of exceptions to the exemption, most issues arising out of conduct that concerns the "business of baseball" will be exempt from antitrust lawsuits under the Act.⁸⁷

This "intentional walk" for baseball was an unfortunate consequence of weighing societal value and poor judicial decisions,

⁸² *Id.* at 438. Judge Pavoda added that cases from other jurisdictions applying the exemption beyond on the reserve clause were not binding on his court and he would not follow them, that exemptions to antitrust are to be narrowly construed, and that "the exemption at issue has been characterized by its own creator as an 'anomaly' and an 'aberration.'" *Id.* at 439 (citing *Flood*, 407 U.S. at 286 (Douglas, J. dissenting) ("*Federal Baseball* is a 'derelict in the stream of the law.'")).

⁸³ Compare *Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Base Ball Clubs*, 259 U.S. 200 (1922), and *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953), and *Flood v. Kuhn*, 407 U.S. 258 (1972), with *Piazza v. Major League Baseball*, 832 F. Supp. 420 (E.D. Pa. 1993).

⁸⁴ *Piazza*, 831 F. Supp. at 436.

⁸⁵ Curt Flood Act of 1998, Pub. L. No. 105-297, § 3, 112 Stat 2824 (codified as amended at 15 U.S.C. § 26b (2006)).

⁸⁶ *Id.* Labor issues, umpires, and minor league players are a few of the things outside of the scope of the act. See 15 U.S.C. § 26b(1)-(6) (2006).

⁸⁷ *Id.* § 26b.

while undervaluing more recent, appropriate case law, and should be reversed. The next section will explain the problematic reasoning behind the decisions above and examine contradictory case law that carelessly was dismissed.

V. THE “INTENTIONAL WALK”

This section will show that the Curt Flood Act is unacceptable because of the unique social influence that led to its passage, the troubling interpretive methods employed by the Supreme Court, and the disregard of contrary case law. This section will begin with an analysis of the historical social view of baseball, and how that shaped the holdings in *Federal Baseball*, *Toolson*, and *Flood* that ultimately led to the passage of the Curt Flood Act. Next, the reliance on congressional silence by the Court in *Toolson* will be deconstructed and analyzed. Then, the baseball-related decisions between *Federal Baseball* and *Piazza* will be used to demonstrate that the Act should never have been passed if stare decisis was a factor that drove Congress to pass the Act. This section will close by noting other professional sports league antitrust cases that demonstrate that the legal rationale for continued enforcement of the Act is illogical.

A. The Societal Impact of Baseball From 1922–1998

Baseball has an incredibly important place in our nation’s history as a sport and as a cultural institution.⁸⁸ Professional baseball games date back to the mid-19th century.⁸⁹ The games and players have meant more to America than just nine innings with a stretch in the seventh. In 1947, Jackie Robinson became the first African American player to play in the MLB,⁹⁰ sixteen years before Martin Luther King, Jr.’s “I Have a Dream” speech.⁹¹ Baseball has produced players who have illnesses and surgeries named after them.⁹² Baseball has seen this

⁸⁸ See *History of the Game: Doubleday to Present Day*, MLB.COM, <http://mlb.mlb.com/mlb/history/> (last updated June 6, 2011).

⁸⁹ *Id.*

⁹⁰ *Biography*, JACKIEROBINSON.COM, <http://www.jackierobinson.com/about/bio.html> (last visited Dec. 3, 2012).

⁹¹ Martin Luther King, I Have a Dream Speech (Aug. 28, 1963), *available at* <http://www.mlkonline.net/dream.html>.

⁹² See *Lou Gehrig’s Disease: Biography of Lou Gehrig*, LOUGHERIG.COM, <http://www.lougehrig.com/about/bio4.htm> (last visited Dec. 3, 2012); *Tommy John*

country through two World Wars, the Korean War, the Vietnam War, the Cold War, and the terrorist attacks on September 11, 2001.⁹³

However, the history and tradition of baseball is exactly that. The game is still played today on a national level, but with the times, the importance of the game has changed.⁹⁴ The era when baseball was at its biggest was the glory days of newspapers and back-page box scores.⁹⁵ Yet, with the arrival of the 1960s, when radio broadcasts were booming and televisions were becoming fixtures in American households, professional baseball started to see its decline.⁹⁶ From 1961 to 1962, baseball and football switched positions as America's favorite sport in the opinion of American sports fans, going from a once even split of 24% and 24% to 21% and 32%, respectively.⁹⁷ The gap never really closed again, and in December of 2011, 36% of those surveyed said that professional football was their favorite sport, while only 13% preferred baseball—a tie with those who preferred college football.⁹⁸

Unfortunately, when the Supreme Court heard *Federal Baseball* in 1922, the Justices were likely just as enamored with baseball as the rest of the nation.⁹⁹ Society then might have been the roaring 1920s, but a staple in the American diet was talking about your baseball team after checking the box score on the back page of the daily newspaper. It was the only real game in town.¹⁰⁰ Though the NFL did have its

Surgery, ESPN.COM, http://espn.go.com/mlb/topics/_/page/tommy-john-surgery (last updated Dec. 5, 2012).

⁹³ See *History of the Game: Doubleday to Present Day*, *supra* note 88.

⁹⁴ See Smith, *supra* note 2.

⁹⁵ See *History of the Game: Doubleday to Present Day*, *supra* note 88.

⁹⁶ Joseph Carroll, *Football Reaches Historic Popularity Levels in Gallup Poll*, GALLUP.COM (Jan. 19, 2007), <http://www.gallup.com/poll/26188/football-reaches-historic-popularity-levels-gallup-poll.aspx>.

⁹⁷ *Id.* See also Regina A. Corso, *Football is America's New Favorite Sport as Lead Over Baseball Continues to Grow*, HARRIS.COM (Jan. 25, 2012), <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleId/950/ctl/ReadCustom%20Default/Default.aspx>.

⁹⁸ *Id.*

⁹⁹ For example, there is evidence that Justice Holmes' father was a baseball fan. See Thomas V. Silvia, *Baseball as a Source of Judicial Thought and Construction*, 78 MICH. B.J. 1296, 1298 n.12 (1999).

¹⁰⁰ See *History of the Game: Doubleday to Present Day*, *supra* note 88.

inaugural season in 1922,¹⁰¹ the first modern day Super Bowl was not until 1967.¹⁰² At the time of the *Federal Baseball* decision, professional-level, organized baseball had sixteen teams from Boston to St. Louis¹⁰³ and had enamored Americans with nineteen years of World Series.¹⁰⁴ Organized professional baseball had been around since the National League was formed in 1876,¹⁰⁵ when the eldest of the sitting Justices in *Federal Baseball* was thirty-five years old, and the youngest was just fourteen.¹⁰⁶ Having established its reputation as “America’s Game,” baseball was likely idolized equally by the Supreme Court and the common man, bestowing a profound and personal impact on both.

The crux of the argument in *Federal Baseball* was that MLB was acting as a monopoly and excluding teams from joining that were in the Federal Baseball League.¹⁰⁷ America was fresh out of fighting the First World War in 1919, and a decision against baseball would not have been viewed well, as Americans were trying to regain a sense of normalcy.¹⁰⁸ Consider the powerful effects of the *Standard Oil* decision in 1911, which ultimately destroyed John Rockefeller’s oil empire.¹⁰⁹ Perhaps the Justices did not want a similar destruction of

¹⁰¹ *American Heroes*, FOOTBALL HISTORIAN, http://www.footballhistorian.com/football_heroes.cfm?page=30 (last visited Dec. 3, 2012).

¹⁰² *History*, NFL.COM, http://static.nfl.com/static/content/public/image/history/pdfs/History/Super_Bowl_Sums_2011.pdf (last visited Dec. 3, 2012).

¹⁰³ Pete Palmer & Gary Gillette, *1922 Major League Baseball Team Statistics and Standings*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/leagues/MLB/1922.shtml> (last visited Dec. 3, 2012).

¹⁰⁴ *World Series Winners*, ESPN.COM, <http://espn.go.com/mlb/worldseries/history/winners> (last visited Dec 3, 2012).

¹⁰⁵ Peter Bendix, *The History of the American and National League, Part I*, BEYONDTHEBOXSCORE.COM (Nov. 18, 2008), <http://www.beyondtheboxscore.com/2008/11/18/664028/the-history-of-the-america> (noting that the World Series was the championship crowned after the National and American Leagues merged).

¹⁰⁶ With Holmes oldest (1841) and McReynolds and Sutherland youngest (1862).

¹⁰⁷ *Fed. Baseball Club of Balt. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200, 207 (1922).

¹⁰⁸ LYLE SPATZ & STEVE STEINBERG, *Preface to 1921: THE YANKEES, THE GIANTS, THE BATTLE FOR BASEBALL SUPREMACY IN NEW YORK* xv (2010).

¹⁰⁹ *See Standard Oil of N.J. v. United States*, 221 U.S. 1, 79 (1911) (“So far as the decree held that the ownership of the stock of the New Jersey corporation constituted a combination in violation of the 1st section and an attempt to create

their beloved pastime, realizing that the risks in applying antitrust law against the sport were too great. It is no stretch of the imagination that baseball in 1922 held a similar place in the hearts of Americans as the American flag.¹¹⁰

Toolson in 1953 only buttressed this stance by the Court. As noted, American football was still fourteen years from the first Super Bowl, and there had been thirty years of baseball as the exclusive sports outlet for Americans. After two World Wars, and at the tail end of the Korean War, the Court was again asked to determine whether baseball players could bring an antitrust suit against the MLB, potentially changing how the League operated.

The *Toolson* opinion contained fewer than 200 words, and the Court refused to consider the facts of the case.¹¹¹ Instead, the Court relied on shaky interpretive methods and punted the matter to the legislature.¹¹² Instead of viewing the facts or hearing the claims, the Court may have understood the societal ramifications of taking away the blue-collar summer escape. Even in the dissent, Justice Burton recognized the “major asset which baseball is to our Nation, the high place it enjoys in the hearts of our people and the possible justification of special treatment for organized sports which are engaged in interstate trade or commerce.”¹¹³ Baseball was still the great equalizer, and it could help jurists in Washington, D.C., or coal workers in central Pennsylvania relate to one another through discussion of their favorite teams, their pastime. Baseball was a uniting factor, and with over sixty years of near exclusive control over the sports pages, the Court would have been faced with unparalleled criticism had it destroyed America’s beloved game.

Just as *Toolson* was decided shortly after the Korean War in 1953, certiorari was granted in *Flood* during Vietnam in 1972.¹¹⁴ However, the rise in popularity of other sports such as football seemed to influence the Court’s decision in *Flood*. *Flood* was a challenge on the

a monopoly or to monopolize under the 2d section, and commanded the dissolution of the combination, the decree was clearly appropriate.”).

¹¹⁰ See *Halter v. Nebraska*, 205 U.S. 34 (1907) (upholding laws prohibiting flag desecration).

¹¹¹ See *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953).

¹¹² See *infra* Part V.B.

¹¹³ *Toolson*, 346 U.S. at 364 (Burton, J., dissenting).

¹¹⁴ *Flood v. Kuhn*, 404 U.S. 880 (1971) (granting cert.).

reserve clause in the standard player contract in professional baseball, just like *Federal Baseball* and *Toolson*.¹¹⁵ Interestingly, as the rise in other sports' popularity increased, the holding in *Flood* narrowed the exemption that baseball enjoyed.¹¹⁶ In fact, in the opinion, the Court quickly outlines other sports that did not share the exemption, something that it did not do in *Federal Baseball* or *Toolson*.¹¹⁷ *Flood* seemed to be indicative of baseball losing its grip on its antitrust exemption.

Today, baseball, and specifically the MLB, does not conjure up notions of Americanism the hearts of fans as it once did. Starting with the MLB lockout of 1994 to 1995,¹¹⁸ Major League Baseball has entered a downward spiral that it cannot seem to escape.¹¹⁹ The homerun sluggers Barry Bonds,¹²⁰ Mark McGwire,¹²¹ and Sammy Sosa¹²² of the late 1990s and early 2000s are just now getting their cases involving steroid use and subsequent perjury before grand juries and Congress.¹²³ Roger Clemens even faced trial for perjury charges for steroid use; he later was acquitted.¹²⁴ In any other sport, if these

¹¹⁵ *Flood v. Kuhn*, 407 U.S. 258 (1972).

¹¹⁶ *Id.* at 289; see also sources cited *supra* notes 96–98.

¹¹⁷ *Id.* at 276–81.

¹¹⁸ See April Weiner, *NFL and the CBA: Ranking the Worst Work Stoppages in Pro Sports History*, The Bleacher Report (Mar. 10, 2011), available at <http://bleacherreport.com/articles/631338-nfl-and-the-cba-ranking-the-worst-work-stoppages-in-pro-sports-history/page/13> (describing the 232-day lockout that caused 938 games to be cancelled).

¹¹⁹ Andy Benoit, *Football, Baseball and the Evolving Tastes of Fans*, THE FIFTH DOWN: THE N.Y. TIMES N.F.L. BLOG (April 17, 2012, 10:30 AM), <http://fifthdown.blogs.nytimes.com/2012/04/17/football-baseball-and-the-evolving-tastes-of-fans/>

¹²⁰ *Barry Bonds*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/b/bondsba01.shtml> (last visited Dec. 3, 2012).

¹²¹ *Mark McGwire*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/m/mcgwima01.shtml> (last visited Dec. 3, 2012).

¹²² *Sammy Sosa*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/s/sosasa01.shtml> (last visited Dec. 3, 2012).

¹²³ Paul Elias, *Feds Urge Appeals Court to Uphold Bonds Conviction*, THEBIGSTORY.AP.ORG (Jul. 19, 2012, 7:00 PM), <http://bigstory.ap.org/article/feds-urge-appeals-court-uphold-bonds-conviction>.

¹²⁴ Pete Kasperowicz, *House Agrees to Aid Prosecutors in Roger Clemens Trial*, THE HILL (Feb. 17, 2012, 1:42 PM), <http://thehill.com/blogs/floor-action/house/211433>; Russell Berman, *Jury Acquits Roger Clemens on Charges of Lying to*

sure-fire hall-of-fame caliber players were facing these types of charges and allegations, it would be national, front-page news. However, between the Mitchell Report,¹²⁵ President George W. Bush's statements during his 2004 State of the Union,¹²⁶ and Congress proposing and enacting six different bills regarding mandatory minimum drug testing in professional sports,¹²⁷ America has become numb to the bad acts of baseball players.

Take for instance that in 2012 the reigning National League MVP Ryan Braun had prevailed in an appeal of his fifty-game suspension after having tested positive for performance enhancing drugs; it was the first time such an appeal had been successful.¹²⁸ What makes the situation worse is that Braun could not prove that the test was faulty; he could only show that the specimen collector did not follow the established depositing procedures, but did follow generally accepted

Congress, THE HILL (June 18, 2012 4:04 PM), <http://thehill.com/blogs/blog-briefing-room/news/233315>.

¹²⁵ See, e.g., Robert D. Manfred, Jr., *Federal Labor Law Obstacles to Achieving a Completely Independent Drug Program in Major League Baseball*, 19 MARQ. SPORTS L. REV. 1 (2008–2009) (summarizing the Mitchell Report, an independent investigation into the illegal use of performance enhancing drugs in the MLB).

¹²⁶ See *President Bush Hopeful MLB Can Turn Page on Steroids Era*, ESPN (Dec. 15, 2007, 4:20 AM), <http://sports.espn.go.com/mlb/news/story?id=3154659>.

¹²⁷ Manfred, Jr., *supra* note 125 at 1 n.2 (citing Brent D. Showalter, Comment, *Steroid Testing Policies in Professional Sports: Regulated by Congress or the Responsibility of the Leagues?*, 17 MARQ. SPORTS L. REV. 651, 653 n. 13, 660–63 (2007) (summarizing the following bills: Drug Free Sports Act, H.R. 3084, 109th Cong. (2005); Clean Sports Act of 2005, H.R. 2565, 109th Cong. (superseded by H.R. 1862); Prof'l Sports Integrity Act of 2005, H.R. 2516, 109th Cong.; Clean Sports Act of 2005, S. 1114, 109th Cong. (companion bill to H.R. 2565); the Integrity in Prof'l Sports Act, S. 1960, 109th Cong. (2005); and the Prof'l Sports Responsibility and Accountability Act, S. 1334, 109th Cong. (2005))).

¹²⁸ Hobson Lopes, *Ryan Braun Wins Appeal of Suspension: Still Guilty to the Fans*, YAHOO! (Feb. 29, 2012, 7:56 AM), <http://sports.yahoo.com/top/news?slug=ycn-10930734>.

practices.¹²⁹ Braun's critics say that he got off on a technicality and that justice was not done.¹³⁰

Disappointingly, Ryan Braun, Barry Bonds, etc., are not the only MLB players, past or present, that have had allegations mounted against them. Other current players have admitted to hardcore drug use such as crack cocaine,¹³¹ managers have gotten DUIs,¹³² and players from foreign countries have been accused of using false identities and deported.¹³³ These black marks on the sport have taken their toll on the reputation of MLB.

The perception that baseball is America's pastime grounded the Court's decision to grant an antitrust exemption to baseball in *Federal Baseball*. The idea that *crossing state borders* to exhibit games that fans *pay money* to see is somehow not interstate commerce clearly shows that something else was at play. It is hard to imagine that Justice Brandeis or then Chief Justice-turned-President Taft would not hold baseball to be interstate commerce today, as baseball is no longer the definitive American pastime. If the same standard were applied to professional sports today, with the NFL being the clear favorite, the NFL would be the most appropriate organization to receive immunity from antitrust. However, the 1957 Court in *Radovich v. NFL*¹³⁴ explicitly held that the NFL does not have any broad immunity like

¹²⁹ *Collector Says He Acted as Instructed*, ESPN, (Feb. 29, 2012, 11:14 AM), http://espn.go.com/mlb/story/_/id/7625905/milwaukee-brewers-ryan-braun-case-sample-collector-says-followed-protocols (containing the statements by the collector of Ryan Braun's sample saying he acted in accordance with the policies and procedures of the testing program).

¹³⁰ *See, e.g., The Herd with Colin Cowherd*, ESPN RADIO (Feb. 29, 2012) (comparing the Braun situation to a police officer pulling someone over for going 100 mph and writing 2012 on the ticket instead of 2011).

¹³¹ Ben Brown, *Josh Hamilton: Rescued by Faith*, BLEACHER REPORT (Feb. 28, 2009), <http://bleacherreport.com/articles/131756-faith-delivered-josh-hamilton-from-the-control-of-heroin-and-alcohol>.

¹³² *Cardinals Manager Arrested for DUI in Florida*, ESPN (Mar. 22, 2007, 7:36 PM), <http://sports.espn.go.com/mlb/news/story?id=2807935>.

¹³³ Jamele Hill, *Blame the Game for Leo Nunez's Name*, ESPN (Sept. 27, 2011), http://espn.go.com/espn/commentary/story/_/page/hill-110927/mlb-florida-marlins-share-blame-leo-nunez-fake-name-age.

¹³⁴ 352 U.S. 445, 451 (1957).

baseball and has continued to refuse to apply any similar immunity to the NFL since the ruling in *Radovich*.¹³⁵

It is a different time. The fifty-year-old of today was born in 1962. Today's average man was raised during the NFL boom, it is unlikely that baseball is his pastime. All of the recent polls indicate that football is the predominant favorite American sport.¹³⁶ Describing baseball as "America's" pastime is thus idiomatic at best. In viewing the social preferences of today versus those at the time of *Federal Baseball, Toolson* and *Flood*, it is clear that the melding of baseball with notions of patriotism and American nationalism is no longer valid.

B. Faulty Interpretive Methodologies in *Toolson* and *Flood*

The interpretive methods used by the *Toolson* and *Flood* courts were fallacious. This section will explain the Supreme Court's reliance on congressional silence or inaction to rule in favor of the MLB in *Toolson*. By analyzing this reliance, it will be shown that the interpretive methods relied on were faulty. Then the distinction between *reason* and *result* stare decisis will be identified and discussed to show that both *Toolson* and *Flood* misapplied the doctrine of stare decisis. Finally, it will be shown that when Congress looked to these faulty decisions to pass the Curt Flood Act, it codified the faults into law.

1. Congressional Silence Prior to *Toolson*

In the *Toolson* decision, the Supreme Court listed four reasons why it upheld *Federal Baseball*.¹³⁷ The first of these factors was that "Congress has had the ruling under consideration but has not seen fit to bring [the baseball] business under [antitrust] laws by legislation having prospective effect."¹³⁸ In other words, the Court took the fact that Congress had not acted as evidence that Congress agreed with the Court's decision. While there are some positive benefits of giving

¹³⁵ See e.g., *Am. Needle v. Nat'l Football League*, 130 S. Ct. 2201 (2010) (holding that NFL's grant to Reebok International of an exclusive license to market NFL team clothing "constitute[s] concerted action that is not categorically beyond the coverage of § 1 [of the Sherman Antitrust Act.]).

¹³⁶ Carroll, *supra* note 96.

¹³⁷ *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953).

¹³⁸ *Id.*

weight to legislative inaction,¹³⁹ congressional inaction in *Toolson* should not have been considered a controlling factor in the case.

First, in Justice Burton's dissent in *Toolson*, with whom Justice Reed concurred, Justice Burton pointed to a 1952 subcommittee report on the Study of Monopoly Power which said, in relevant part, that baseball was clearly involved with interstate commerce.¹⁴⁰ This report was an indication to the Supreme Court that the year before the *Toolson* case was decided, Congress had serious doubts about the exemption that the Court granted in *Federal Baseball*.¹⁴¹

Also, the Justices in *Toolson* didn't recognize one of their fellow Justices' view on legislative silence; in Justice Burton's view:

[A]lthough recognizing that by silence Congress at times may be taken to acquiesce and thus approve, we should be very sure that, under all the circumstances of a given situation, it has done so before we so rule and thus at once relieve ourselves from and shift to it the burden of correcting what we have done wrongly. . . . Just as dubious legislative history is at times much overridden, so also is silence or inaction often mistaken for legislation.¹⁴²

Thus, the Court was aware in 1946 of the dangers of relying on legislative silence. Though the debate over the reliance on legislative silence continues,¹⁴³ the overwhelmingly dominant current theme is that Legislative silence is one of the least reliable methods of interpretation.¹⁴⁴ Applying the heavy reliance on legislative silence in

¹³⁹ See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 31–32 (1982); see also *Cleveland v. United States*, 329 U.S. 14, 22–24 (1946) (Rutledge, J., concurring).

¹⁴⁰ *Toolson*, 346 U.S. at 358–59 (Burton, J., dissenting) (citing H.R. REP. NO. 2002, at 7 (1952) (“Inherently, professional baseball is intercity, intersectional, and interstate.”)).

¹⁴¹ *Id.* at 361 n.9.

¹⁴² *Cleveland v. United States*, 329 U.S. 14, 23–24 (1946) (Rutledge, J., concurring).

¹⁴³ See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990). Eskridge also provides a good example of legislative silence: “The silence of legislators can be as significant as their utterances. Sherlock Holmes once solved a case by making inferences from the fact that a dog did not bark.” *Id.* at 634.

¹⁴⁴ See generally Matthew Baker, *The Sound of Congressional Silence: Judicial Distortion of the Legislative-Executive Balance of Power*, 2009 B.Y.U. L. REV. 225 (2009) (arguing that courts should refrain from giving weight to judicial

such an important case today—with facts that clearly indicate that the group is engaged in interstate commerce—would be absurd.

2. Stare Decisis Principles

Aside from legislative silence, the Court in *Flood* applied the principles of stare decisis and in doing so, the Court reaffirmed more than fifty years of case law.¹⁴⁵ However, as noted in Part IV, *supra*, *Piazza v. MLB* critically analyzed the Court's decision in *Flood* and its improper reliance on stare decisis.¹⁴⁶ Again, MLB was sued for violating antitrust laws unrelated to the reserve clause.¹⁴⁷

In addressing MLB's contention that it was exempt from antitrust lawsuits, the *Piazza* Court echoed the *Flood* Court's holding that MLB was engaged in interstate commerce, essentially cancelling out *Federal Baseball* and *Toolson*.¹⁴⁸ Quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the *Piazza* Court identified the principle of stare decisis—an interpretive principle heavily relied upon in *Toolson* and *Flood*—as having two major aspects.¹⁴⁹

The *Piazza* court stated that when examining a case “the Court provides the legal standard or test that is applicable to laws implicating a particular . . . provision.”¹⁵⁰ Deference to another court's choice of rule is known as rule stare decisis,¹⁵¹ and it was the aspect of stare decisis applied to the case at hand. After a court decides upon which rule to apply, they apply it and reach their result. Deference to another

silence because their oft frequent misconstruction of Congressional silence causes tension between the executive and the legislature).

¹⁴⁵ *Flood v. Kuhn*, 407 U.S. at 284 (1972) (applying *Federal Baseball* and *Toolson*).

¹⁴⁶ *Piazza v. Major League Baseball*, 831 F. Supp. 420, 436–41 (E.D. Pa. 1993) (“Application of the doctrine of stare decisis simply permits no other way to read *Flood* than as confining the precedential value of *Federal Baseball* and *Toolson* to the precise facts there involved. To understand why this is so, one must fully understand the doctrine of stare decisis and its application by lower courts to Supreme Court decisions.”).

¹⁴⁷ *Id.* at 434.

¹⁴⁸ *Id.* at 436.

¹⁴⁹ *Id.* at 438 (citing *Planned Parenthood of Se. Pa. v. Casey* 947 F.2d 682 (3d Cir. 1991)).

¹⁵⁰ *Id.* at 437 (quoting *Planned Parenthood*, 947 F.2d at 691–92).

¹⁵¹ James Hardisty, *Reflections on Stare Decisis*, 55 IND. L.J. 41, 52–53 (1979).

court's result is known as result stare decisis.¹⁵² This dichotomy seems straightforward enough. According to the *Piazza* court the Supreme Court in *Flood* did not apply rule stare decisis in upholding the exemption.¹⁵³ Instead, the Court applied result stare decisis and effectively “invalidate[d] the rule of *Federal Baseball* and *Toolson*.”¹⁵⁴ The *Piazza* court concluded that the Supreme Court's invalidation of the reasoning in *Flood* meant that stare decisis should not decide the case before it.¹⁵⁵

Combining this ruling with the theories that discredit the use of legislative inaction, the *Piazza* court suggested that *Flood* was wrong in holding that there should be a continued exemption to the “business of baseball.”¹⁵⁶ It also bolsters the proposition that Congress relied wrongly on the *Flood* decision in enacting the exemption into law; a proposition that reinforces the need to repeal the exemption.

C. Current Analogous, Contradictory Case Law

Finally, looking back to *Piazza v. MLB*, the court held that only the reserve system was exempt and that the “business of baseball” was well within the purview of antitrust law.¹⁵⁷ Other case law since the passage of the Curt Flood Act has held that other professional sports entities *are* subject to the Sherman Act.¹⁵⁸

First, and most importantly, the 1957 case of *Radovich v. NFL* refused to allow the NFL an exemption similar to MLB.¹⁵⁹ Most recently, in *American Needle, Inc. v. National Football League*,¹⁶⁰ the Supreme Court unanimously held that the NFL, America's most popular sports league,¹⁶¹ and the National Football League Players Association (NFLPA) are subject to antitrust law and do not act as a

¹⁵² *Id.*

¹⁵³ *Piazza*, 831 F. Supp. at 438.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 440.

¹⁵⁸ *Id.* at 435 (listing various professional sports that have been subjected to the Sherman Act).

¹⁵⁹ *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957).

¹⁶⁰ 130 S. Ct. 2201 (2010).

¹⁶¹ *See supra* Part IV.A.

single entity.¹⁶² Other case law has established that the National Hockey League (NHL) cannot shield itself with a single entity defense.¹⁶³ The Courts' holdings in these cases showed judicial unwillingness to grant an exemption from antitrust lawsuits to any other major sports league.¹⁶⁴ These cases support the assertion that if the issue were one of first impression today, the Court would not create an exemption for baseball. And while the Court may disapprove of its earlier decision, its mistaken rule of law is now codified and may only be corrected legislatively.

VI. RECOMMENDATIONS AND CONCLUSION

This section will take the analysis of Section V and propose a new approach to Major League Baseball's exemption to antitrust law under the Curt Flood Act. After combining all of the fallacies that led to the codified exemption, this section will conclude that MLB no longer deserves an exemption.

As Section V discusses, flawed reasoning and social influences led Congress to the unfortunate passage of the Curt Flood Act. By straying from the fundamental basis of antitrust law, which places great emphasis on consumer protection, the Act places arbitrary emphasis on the game of Baseball. Combining MLB's apparent inability to regulate itself, the game's loss of credibility in the national spotlight, and the loss of admiration among Americans, it is time to repeal the Curt Flood Act. The Supreme Court holdings in *Federal Baseball*, *Toolson*, and *Flood* were flawed and legally unsound due to reliance on dubious interpretive methods and heavy social influence. Furthermore, the Act's purpose—protecting a game with an inflated sense of its own relevance to modern society—is illegitimate. Baseball is an important sport in America, but it is not the *most* important sport. In relying on these cases to formulate the Curt Flood Act, Congress ignored the contradictory case law and to this day continues to allow an outdated,

¹⁶² *Am. Needle v. Nat'l Football League*, 130 S. Ct. 2201, 2216 (2010).

¹⁶³ *See, e.g., Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 517 (E.D. Pa. 1972) (“The NHL and its member teams operate in interstate commerce and their actions described in the Findings of Fact affect interstate commerce within the meaning of the Sherman Act.”).

¹⁶⁴ The courts have distinguished the NFL, MLB, NBA, and NHL, as “major sports leagues.” *See N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249, 1253 (2d Cir. 1982).

poorly based exemption to stand. It is time to recognize these mistakes and correct the course by repealing MLB's broad antitrust exemption.

Making MLB subject to the same standards as other leagues would not impose any kind of an undue burden on MLB. The repeal of the Act would put MLB under the same rules as any other professional sports league, and football seems to be doing just fine. In addition, repeal would foster greater competition between the clubs, it would enhance the open markets in which baseball deals, and would force the owners to seek out more competitive deals with players, owners, teams, networks, and everyone else involved in the production of baseball. This competition would help cut costs. By enhancing the clubs' freedom to open-bid their contracts—similar to the NFL's practices—costs of certain things such as hats and bats will decrease because the contract would go to the most competitive bidder. The lower the expenditures, the higher the potential for profit, and the money saved by the clubs could go to be more competitive. For example, money saved could be spent to acquire free agents or to retain current players, thus preventing the loss of good players to other teams.¹⁶⁵ In addition, being more competitive as a team would increase attendance and viewership, and being more competitive as a business would increase revenue. Increased revenue and greater attendance would further enhance the competition between the teams. All of these measures would ensure that the consumer is getting the best product available, fulfilling the purpose of antitrust law.

However, repeal of the Curt Flood Act would not mean that every action that Major League Baseball makes would be subject to antitrust law. By repealing the Act, Congress would leave the current legal landscape to its own devices. The courts take a case-by-case approach to antitrust claims, and MLB may fend off claims just as well as other antitrust defendants have prevailed. The difference is that the defendants will win or lose on the merits of the case, and the outcomes will conform to the goals of antitrust law. The result of repealing the Act would be to allow the courts to determine what type of actions are unreasonable restraints on trade made between colluding economic rivals, instead of having their hands tied by an antiquated and illegitimate federal statute.

¹⁶⁵ See, e.g., Tyler Kepner, *Pujols Leaves Behind Fractured Legacy in St. Louis*, N.Y. TIMES, Dec. 9, 2011, at B12, available at <http://www.nytimes.com/2011/12/09/sports/baseball/in-st-louis-pujols-leaves-behind-a-statue-and-a-fractured-legacy.html>.