



## Who Exempted Baseball, Anyway? The Curious Development of the Antitrust Exemption That Never Was

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### ABSTRACT

This article takes a fresh look at baseball's alleged antitrust exemption and explains why, after all, the exemption is alleged rather than actual. This article concludes that, contrary to popular opinion, the Supreme Court's 1922 *Federal Baseball Club* decision did not exempt Organized Baseball from federal antitrust laws. Instead, the opinion was much more limited in scope and never reached the question of whether Organized Baseball should be treated differently than other, similarly situated businesses or institutions, although Organized Baseball clearly invited the justices to make this determination in its brief to the Court. As this article discusses, the Court's silence on this question spoke volumes as to just what it was ruling on and, more importantly, what it was not. Regardless, the notion of an antitrust exemption arising out of the *Federal Baseball* opinion eventually took root. This article attempts to answer the following questions: where did the notion of the exemption come from? When did it arise in the consciousness of the nation's popular and legal experts? When did it actually arise as a matter of legal doctrine? How and why did the popular notion of the game's exemption take root? And how and why did the exemption finally become a legal reality as opposed to a popular theory? In order to answer these questions, this article bypasses the well-trod traditional mode of analysis with

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regard to this issue — the Supreme Court’s “baseball trilogy” (The 1922 *Federal Baseball*, 1953 *Toolson*, and 1972 *Flood* cases) — and instead tackles the issues from the perspectives of those who argued those three cases before the Supreme Court. Specifically, rather than simply analyzing the opinions themselves, this article examines the briefs filed by the parties which led to them. Through this process, the intent of the parties can be observed in light of the opinions that resulted from the Justices’ consideration of them. What did the litigants seek in their cases? For what did they believe they were arguing? How did they characterize the issues presented to the Court? By examining these briefs, and by comparing their arguments with the opinions that resulted, this article attempts to reach at least some preliminary conclusions with regard to what the Court was saying, as opposed to what most scholars have come to believe it to have said. Through this process, this article likewise attempts to discern the nature and extent of each ruling within the baseball trilogy. What emerges is an analysis of law and baseball that throws new light on the game’s alleged antitrust exemption.

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## I. INTRODUCTION

Among baseball legal scholars, the question of who exempted Organized Baseball from the nation's antitrust laws leads to an obvious answer: clearly, the United States Supreme Court did, in its 1922 *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*<sup>1</sup> decision. The Supreme Court itself echoed this conclusion when offered the opportunity to reconsider its *Federal Baseball* decision in *Toolson v. New York Yankees, Inc.*<sup>2</sup> during the Court's 1952–53 term. Within that one paragraph *per curiam* decision, the Court hinted that Congressional silence on the matter in the three decades since the *Federal Baseball* decision amounted to an affirmative endorsement of *Federal Baseball*, given the passage of time, and refused to discuss the matter further.<sup>3</sup> Finally, two decades hence, in the last case of what is now commonly referred to as the “baseball trilogy,” *Flood v. Kuhn*,<sup>4</sup> the Court closed the matter for good when it announced that although professional baseball was a business and was engaged in interstate commerce, the *Federal Baseball* and *Toolson* rulings would nonetheless stand because baseball was “in a very distinct sense, an exception and an anomaly,”<sup>5</sup> so much so that the Court's two previous rulings on the relationship between the game and the antitrust laws amounted to “an aberration confined to baseball.”<sup>6</sup> There. That settled it. Except that perhaps it did not.

Perhaps the Supreme Court did not exempt Organized Baseball from the antitrust laws in 1922. And perhaps Congressional inaction was just that — inaction, nothing more. If so, then nobody had exempted baseball from the antitrust laws when the *Flood* case reached the courthouse steps. Perhaps that *Flood* decision, despite its reputation for merely confirming the game's longstanding antitrust exemption for the third time, instead broke new ground by inadvertently creating it out of whole cloth — which would most likely be news to the opinion's author, Justice Harry M. Blackmun. And perhaps, in an irony above all else, Congress's 1998 Curt Flood Act — a largely ceremonial gesture intended to honor the man who sacrificed his career by bringing that final case to the Court in 1972 — actually cemented the game's antitrust exemption once and for all rather than overturning it,

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<sup>1</sup> 259 U.S. 200 (1922).

<sup>2</sup> 346 U.S. 356 (1953) (*per curiam*).

<sup>3</sup> *Id.*

<sup>4</sup> 407 U.S. 258 (1972).

<sup>5</sup> *Id.* at 282.

<sup>6</sup> *Id.*

as its supporters lauded it for doing. Perhaps the world of baseball law is not as we have long understood it to be.

This Article takes a fresh look at Organized Baseball's alleged antitrust exemption. Importantly, this Article treats it as an allegation unless and until the facts demonstrate otherwise. This Article attempts to answer the following questions: where did the notion of the exemption come from? When did it arise in the consciousness of the nation's popular and legal experts? When did it actually arise as a matter of legal doctrine? How and why did the popular notion of the game's exemption take root? And how and why did the exemption finally become a legal reality as opposed to a popular theory? In order to answer these questions, this Article bypasses the well-trod traditional mode of analysis with regard to this issue — the Supreme Court's aforementioned "baseball trilogy" — and instead tackles the issues from the perspectives of those who argued those three cases before the Supreme Court. Specifically, rather than simply analyzing the opinions themselves, this Article examines the briefs filed by the parties which in ways both subtle and overt shaped the resulting opinions. Through this process, the intent of the parties can be observed in light of the opinions that resulted from the justices' consideration of such intent. What did the litigants seek in their cases? For what did they believe they were arguing? How did they characterize the issues presented to the Court? By examining these briefs, and by comparing their arguments with the opinions that resulted, we can reach at least some preliminary conclusions with regard to what the Court was saying, as opposed to what we have come to believe it to have said. Through this process, we can likewise try to discern the nature and extent of each ruling within the baseball trilogy. What emerges from this type of analysis is something that throws new light on the game's alleged antitrust exemption.

Beyond the briefs, this Article examines the popular and scholarly response to each of the cases within the trilogy. How was each case perceived at the time it was handed down? What did people in the 1920s and '30s believe the *Federal Baseball* case to have held? Did the lay and scholarly public conclude at the time that *Federal Baseball* created an exemption for the national game? Or did they believe that the Court's focus was elsewhere? Was *Federal Baseball* considered a landmark opinion in its day as it is now? If not, when and why did the perception of the case change? Through an examination of 1) the briefs filed in anticipation of, and 2) the responses as a result of the cases themselves, we can perhaps see the baseball trilogy differently than we have ever seen it before. Perhaps through these methods of inquiry we can then better understand what the cases say, and more importantly, what the cases mean, than through the traditional process of examin-

ing them through our modern lens which, no matter how polished, sometimes distorts rather than clarifies. Perhaps then we can finally answer the question that seemed so obvious just four paragraphs ago.

## II. CONGRESS, THE CONSTITUTION, THE FEDERAL LEAGUE, AND ANTITRUST LAW IN THE EARLY 20TH CENTURY – A BRIEF REVIEW

Before delving into the *Federal Baseball* briefs themselves, some context is necessary to make sense of them. Although a comprehensive analysis of antitrust law as it existed in the late 19th and early 20th centuries is beyond the scope of this Article, a brief summary will be attempted here.

Despite national fervor over the ominous presence of large trusts in the latter half of the 19th century, the Sherman Act itself was initially considered little more than a ceremonial concession to this growing national unease.<sup>7</sup> Something had to be done on the political level to respond, at least superficially, to the outcry, and so the Sherman Act was passed, although few governmental officials viewed it as a legitimate or even necessary check.<sup>8</sup> Despite his reputation as a “trust buster,” Theodore Roosevelt in fact held a rather generous view of most of them, considering all but the most obviously insidious a necessary function of a modern economy.<sup>9</sup> “The man who advocates destroying the trusts by measures which would paralyze the industries of the country is at least a quack and at worst an enemy to the Republic,” he remarked early in his presidency.<sup>10</sup> Consequently, he, not unlike many in positions of power during the era, was not looking for excuses to bring down trusts or break up monopolies.<sup>11</sup> Instead, he made, or at least attempted to make, distinctions between what he considered “good” and “bad” trusts.<sup>12</sup> As he believed that trusts and monopolies themselves were not “bad” by definition, he limited the staffing of the Antitrust Division of the Department of Justice to a mere five attorneys with an annual budget of \$100,000, which even then was a relatively paltry sum given the millions of dollars generated by the largest trusts.<sup>13</sup> In the words of historian Richard Hofstadter: “By definition, since only a handful of suits could be undertaken

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<sup>7</sup> RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 245 (1955).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 246.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 247.

<sup>13</sup> *Id.*

each year, there could hardly be very many 'bad' businesses. Such was the situation as T.R. left it during his presidency."<sup>14</sup> In sum, pursuant to Roosevelt's logic, because the modern American economy could not be inherently "bad," neither could there be many inherently "bad" trusts. Enforcement against the few bad apples pursuant to the Sherman Act would be the exception rather than the rule, his trust busting reputation notwithstanding.

By the second decade of the twentieth century and into the era encapsulating the *Federal Baseball* decision, the White House's view of trusts had not evolved very much. President Woodrow Wilson exchanged Roosevelt's rudimentary definitions of "good" and "bad" trusts for the only slightly less rudimentary concepts of "free" and "illicit" competition, with "free" competition resulting in increased "efficiencies" and "illicit" competition resulting in unwanted inefficiencies.<sup>15</sup> Like Roosevelt, Wilson believed in the necessity and inevitability of modern trusts: "the elaboration of business upon a great co-operative scale is characteristic of our time and has come about by the natural operation of modern civilization . . . we shall never return to the old order of individual competition . . ."<sup>16</sup> No one knew for sure what distinguished an efficient from an inefficient trust. In practice, it seemed as if, nomenclature aside, Wilson was still operating on the level of Roosevelt's playing field of "good" and "bad" trusts. And within such a framework, many trusts and monopolies would be left unchecked by the Sherman Act.

Not surprisingly, considering this environment, by the early 1920s a majority of the Supreme Court (whose members, after all, were nominated by the President) felt similarly, although the Justices expressed their beliefs in more technical language. Of course, each Justice had his own view on the matter and some Justices were more wary of trusts than others, but as a whole, the Court was hesitant to check them. Justice Holmes, the author of the *Federal Baseball* decision, viewed the Sherman Act with condescension, once remarking privately that it was "a humbug based on economic ignorance and incompetence."<sup>17</sup> While his fellow Justices may not have shared

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<sup>14</sup> *Id.* at 247–48.

<sup>15</sup> *Id.* at 250.

<sup>16</sup> *Id.* at 249.

<sup>17</sup> Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption*, 38 THE BASEBALL RESEARCH J. 86, 87 (Fall 2009) (quoting letter from Oliver Wendell Holmes to Sir Frederick Pollock (Apr. 30, 1910), in 1 *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932*, at 163 (Mark DeWolfe Howe ed., 1944)).

the extremity of his disdain, the test the Court fashioned during this era resulted in many trusts and monopolies being held to be outside the scope of the federal antitrust laws. Unless the trust had a significant impact on interstate commerce, it would be allowed to stand; a mere incidental impact would not be sufficient.<sup>18</sup> This was consistent with the Court's more fundamental position that Congress's power to legislate pursuant to the Constitution's Commerce Clause was rather limited — a view that evolved significantly in later years<sup>19</sup> and an evolution that will become crucial to our understanding of the briefs later filed in the *Toolson* case during the Court's 1952–53 term. This test was rooted in the basic belief at the time that, as a general principle, trusts and monopolies were only “bad” (to use Roosevelt's term) when they significantly impacted local autonomy.<sup>20</sup> If they had only an incidental or indirect affect on it, they were not inherently odious and were therefore beyond Congress's grasp. Within this framework arose the *Federal Baseball* case.

### III. *FEDERAL BASEBALL CLUB OF BALTIMORE, INC. V. NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS*

By way of brief background, Major League Baseball found itself before the Court as a result of its battle with an upstart and rival major league, the Federal League. Prior to the birth of the Federal League, Major League Baseball consisted of two major leagues: the National League, formed in 1876, and the American League, formed from the ashes of the old Western League and proclaimed (by its president Ban Johnson) in 1901 as an upstart and rival major league itself. After a brief war over players, the Nationals begrudgingly accepted the Americans in 1903 through the signing of a peace agreement known as the National Agreement, wherein each league agreed to recognize the other as an equal, recognize and honor each other's contracts and, most importantly, recognize and observe the reserve clause — a unilaterally imposed term inserted in all player contracts which bound each player to his team indefinitely. Through the reserve clause, Major League Baseball, through the National and American leagues, was able to control the contracts, and therefore the players themselves, for eternity, thereby impeding the ability of potential rival leagues to attract top talent away from the more established National and American leagues.

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 92.

<sup>20</sup> ROBERT H. WIEBE, *THE SEARCH FOR ORDER: 1877–1920* 52–53 (Hill and Wang, 1967).

In 1913 a rival league, the Federal League, emerged, although initially it claimed to be nothing of the sort. A year later, however, it expanded and, seemingly flush with capital, declared itself a third major league, a putative equal of the National and American.<sup>21</sup> It sought fans as well as talent from its more established rivals and refused to honor the reserve clause, using as its strategy the lure of larger salaries to entice National and American League players to abandon their contracts and jump to the upstart Federal League.<sup>22</sup> The result was inevitable: despite the presence of the reserve clause, major league player salaries increased rapidly as the established owners attempted to ward off the threat.<sup>23</sup> By the close of the 1915 season, the by now clearly underfunded Federal League was buckling under the weight of the salary war it started.<sup>24</sup> By December 1915, the Federal League was all but defunct: several of the Federal League owners had sued Major League Baseball and had accepted buyouts, while others were permitted to buy Major League franchises.<sup>25</sup> The Baltimore Federal League club, however, opted out of the settlement (or was not invited to the settlement meeting, the record is not clear).<sup>26</sup> The other Federal League owners subsequently attempted to settle with Baltimore but Baltimore refused, choosing instead to sue Major League Baseball (among others) in federal court.<sup>27</sup>

Technically, the Baltimore club filed suit under Section 4 of the Clayton Act,<sup>28</sup> which was enacted in 1914 as a supplement to the Sherman Act. In its pleadings, Baltimore alleged that the defendants violated the Act by monopolizing talent and restraining trade.<sup>29</sup> At the trial level, Baltimore emerged victorious when the judge instructed the jury that the defendants did indeed engage in interstate commerce and that, through the reserve clause and National Agreement, a monopoly was created.<sup>30</sup> Accordingly, the only question for the jury was the amount of damages. The jury found that

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<sup>21</sup> There are a number of excellent sources for the details of the Federal League dispute and the emergence of the antitrust exemption. Supreme Court Justice Samuel Alito's account is particularly acute and concise. *See, e.g.,* Alito, *supra* note 11.

<sup>22</sup> *Id.* at 88–91.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Clayton Act 15 U.S.C. § 15 (1914).

<sup>29</sup> Alito, *supra* n. 11, at 90.

<sup>30</sup> *See Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Baltimore, Inc.*, 269 F. 681 (1920).



the Baltimore franchise suffered damages in the amount of \$80,000 which, when trebled pursuant to Section 4 of the Clayton Act, amounted to a verdict of \$240,000 in favor of the Baltimore club, plus counsel fees.<sup>31</sup> Major League Baseball appealed the verdict to the District of Columbia Circuit, which reversed the trial court's decision and set up the showdown at the Supreme Court. In essence, the D.C. Circuit court held that Major League Baseball did not engage in interstate commerce and, therefore, its actions could not be regulated by way of either the Sherman or Clayton acts.<sup>32</sup> This time, it was Baltimore's turn to appeal, which it did, thus presenting the Justices with the opportunity to consider Organized Baseball's status pursuant to the nation's antitrust laws for the first time.

Certainly, in hindsight, the *Federal Baseball* decision seems like a bad one. Indeed, upon consideration of it in 1970, the Second Circuit "freely acknowledges our belief that *Federal Baseball* was not one of Mr. Holmes' happiest days,"<sup>33</sup> while in his 1972 *Flood* dissent Justice Douglas remarked that the case was "a derelict in the stream of the law that we, its creator, should remove."<sup>34</sup> Baseball historians have been no kinder, with John Helyar, in his comprehensive treatise on baseball's labor issues, *Lords of the Realm*, summarizing both his and the received wisdom that Holmes's decision "was a piece of fiction, one that would grow sillier with each passing year."<sup>35</sup> However, when viewed within its historical context, the case seems to be more in keeping with its time than it would appear. This becomes even more evident when we delve more deeply into the case, by examining the briefs submitted to the Supreme Court on behalf of the Baltimore Federal League Club (the Petitioner) and Organized Baseball (the Respondent).

Given Congress's limited power to legislate pursuant to the Commerce Clause, the question, at least so far as *Federal Baseball* is concerned, is what the litigants on each side thought they needed to accomplish in order to prevail. How far did they believe they needed to go in order to receive a favorable ruling from the Court that would either preserve or advance their interests? For instance, did George Wharton Pepper, the lead appellate attorney for Organized Baseball, conclude that his best strategy would be to convince the Justices that Baseball was unlike any other business? Or did he

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<sup>31</sup> *Id.*

<sup>32</sup> *See id.*

<sup>33</sup> *Salerno v. Am. League of Prof'l Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970).

<sup>34</sup> *Flood*, 407 U.S. at 286 (Douglas, J. dissenting).

<sup>35</sup> JOHN HELYAR, *LORDS OF THE REALM: THE REAL HISTORY OF BASEBALL* 10 (1994).

believe that he could prevail if he argued the opposite — that Organized Baseball was no different from similarly situated industries? If the former, then it would appear that Pepper would have no choice but to argue for an exemption — a definitive and final, policy-based ruling from the Court that Organized Baseball, due to its unique requirements, was indeed something special that merited an exemption from the antitrust laws. This would be a difficult argument to make, as it would implicitly acknowledge that the Sherman and Clayton Acts technically applied to Organized Baseball but would argue that, notwithstanding this reality, other considerations unique to baseball merited a ruling that the antitrust laws nevertheless should not apply to Organized Baseball. Not today. Not ever.

If the latter, then a simpler, more straightforward argument would be all that was required — an argument that drove home the point that Baseball, like many other seemingly interstate businesses, was (upon further and closer analysis) nevertheless local in nature and, therefore, beyond the reach of Congress's power to regulate pursuant to the Commerce Clause. This purely legal argument, a much easier one by comparison, would protect Organized Baseball from upstarts like the Federal League for the moment but would perhaps not insulate Baseball from future attacks should the nature of either Organized Baseball or the Court's understanding of the Commerce Clause change in the future. Accordingly, the issue we can hope to resolve here by examining his brief was whether Pepper sought to win Organized Baseball's case that day or for all time.

Likewise, did counsel for the BaltFeds (as the club was sometimes referred to) believe that the possibility of a policy-based exemption for Organized Baseball was even within the realm of consideration? Or did they conclude that the issue before the Court was more basic: whether Organized Baseball, as it existed in the early part of the 20th century, constituted interstate commerce pursuant to the settled law on the issue? Ultimately, as the following analysis shows, both Organized Baseball and the BaltFeds made use of both arguments to varying degrees. For the most part, and perhaps contrary to what we might assume today given our current understanding of the resulting decision, the litigants on each side spent most of their time focusing on the more basic argument: whether Organized Baseball constituted interstate commerce. However, each side did pay some attention to the broader, more far-reaching argument as well: whether Organized Baseball was somehow and in some way "special" such that the antitrust laws should be held inapplicable even if the Commerce Clause permitted Congress to regulate our national pastime. How these arguments were received by the Court, as reflected in the *Federal Baseball* decision, perhaps says a lot about whether, regardless of the received wisdom regarding

this case, the Court did indeed take the bold step many now claim it to have taken by formally exempting Organized Baseball from the nation's antitrust laws then and forever.

A. *Petitioner's (Federal Baseball Club of Baltimore's) Brief*

The BaltFeds framed the issue as a basic one: whether Organized Baseball constituted interstate commerce so as to be subject to Congressional regulation pursuant to the federal antitrust laws.<sup>36</sup> They stressed that this was the sole issue facing the Court of Appeals and, accordingly, was likewise the only issue before the Supreme Court.<sup>37</sup> As a result, the overwhelming majority of their 202-page brief focused on this most basic argument. The BaltFeds drew the Court's attention to the reality that Organized Baseball operated in every state and, consequently, controlled professional baseball players at all levels of ability in every state.<sup>38</sup> To the BaltFeds, it was crucial that the Justices acknowledge the difference between the sport of baseball and the business of baseball: "In the beginning, it must be understood that the defendants in error are not baseball players. *They are voluntary associations and corporations engaged upon a vast scale, involving the investment of millions of dollars, in the business of providing, by the transportation from state to state of baseball teams and their necessary attendants and equipment, exhibitions of professional baseball.*"<sup>39</sup> Therefore, "[d]efendants in error who dominate ORGANIZED BASEBALL are not engaged in a sport. They are engaged in a money-making business enterprise in which all of the features of any large commercial undertaking are to be found."<sup>40</sup> From this perspective, the conclusion was obvious: "Inherently and essentially, the business of providing exhibitions of professional baseball is intersectional, intercity and interstate."<sup>41</sup> Without the necessity of interstate travel, the American and National leagues, as they were then comprised, would, in the opinion of the BaltFeds, cease to exist:

The circulation of the teams of these clubs around the organic unit of the League or circuit is as essential to the life of the League and its several constituent enterprises as is the circulation of blood around a human body

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<sup>36</sup> Brief on Behalf of Plaintiff In Error at 3, *Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922) (No. 204).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 4–6.

<sup>39</sup> *Id.* at 116.

<sup>40</sup> *Id.* at 120.

<sup>41</sup> *Id.* at 13.

to the life of a human being. If that circulation is stopped the League dies.<sup>42</sup>

Accordingly, the answer to the question before the Court was self-evident because “[n]ot only is interstate commerce an element in the business of providing exhibitions of professional baseball . . . *it is the very essence and foundation of it.*”<sup>43</sup>

In the eyes of the BaltFeds, the fallout from this reality struck at the core of federal antitrust statutes such as the Sherman and Clayton Acts. Given that all professional baseball players were controlled by Organized Baseball (a point conceded at trial by Garry Herrmann, the Chairman of Organized Baseball’s National Commission — the tripartite body that governed the American and National Leagues prior to the creation of the Office of the Commissioner of Baseball)<sup>44</sup>, the resulting structure of Organized Baseball provided it with unparalleled market power that it could wield to stifle competition by crushing competing leagues such as the Federal League and sending them to their financial ruin.<sup>45</sup> Thus, business considerations, not sporting ones, resulted in the demise of the Federal League. To the BaltFeds the issue came down to one of business over pleasure: as the game itself was not the issue before the Court, its peculiarities and nuances — those unique qualities that rendered it our national pastime — were irrelevant to the analysis. Instead it was the business of baseball that confronted the Court. And this business, not unlike any other that operates interstate, was clearly subject to Congressional regulation pursuant to the Commerce Clause.

Addressing Organized Baseball’s contention that it was the game itself that was at issue before the Court, and not the alleged (at least in the eyes of Organized Baseball) “business” of baseball, the BaltFeds contended that:

Defendants in error ignore every element and every detail in their business except the playing of the baseball teams employed by them in the baseball field; the whole elaborate commercial system through which the business is organized and conducted, and all its manifold operations, over and through different states is brushed aside and they argue that the mere muscular contraction and relaxation of the player in the baseball field at a particular instant of time is not interstate commerce. They say that these muscular operations of the players are “*personal effort*” and not *articles* of interstate commerce . . . . The defendants in error seek to separate the act

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<sup>42</sup> *Id.* at 119.

<sup>43</sup> *Id.* at 14.

<sup>44</sup> *Id.* at 29–30.

<sup>45</sup> *Id.* at 29–30, 99.

of a player in throwing a ball upon a ball field, from all the steps which are taken to bring the ball player in the due course of business from other states . . . .<sup>46</sup>

Accordingly, each moment on the ball field was not a “new fact in history”<sup>47</sup> as Organized Baseball contended, but rather a mere point on the continuum of interstate transactions that were required to bring that moment to pass.

Moreover, Organized Baseball’s contention that baseball was merely an amusement and, therefore, not an article of interstate commerce, was likewise a diversionary tactic in the eyes of the BaltFeds. As the BaltFeds noted, “[d]efendants are not in the business of amusing themselves, but are engaged in conducting a business whose profit is derived by sending baseball teams from city to city in various states to gratify a desire for amusement on the part of the public.”<sup>48</sup> This profit-making enterprise succeeded in amusing customers who attended the games, as well as those who did not but who were informed of the results via the Telegraph facilities which by that point had been installed in all Major League ballparks, along with some minor league ballparks, and which sent game reports across state lines to fans throughout the country.<sup>49</sup> Thus, for all of these reasons, the BaltFeds spent the first 163 pages of their brief making the rather straightforward argument that Organized Baseball was little more than a standard business operation, no different than any other. Accordingly, the federal antitrust laws applied to it just as well.

The BaltFeds’ brief moved beyond the vanilla, however, when it came to addressing Organized Baseball’s contention that it needed to control the contract of every professional player in order to survive. The BaltFeds wondered what Organized Baseball was alleging via this contention: “Do they mean to contend that in order to conduct the *business* of providing exhibitions of professional baseball, every concern in that business in the whole country must be brought into one gigantic combination? But remarkable as it may seem, this in effect is exactly what they contend.”<sup>50</sup> Here, finally, was the argument that many today assume was the sole bone of contention within *Federal Baseball* — that there was something special, something unique about baseball that justified a ruling more sweeping than one that merely held that Organized Baseball did not rise to the level of “interstate

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<sup>46</sup> *Id.* at 142.

<sup>47</sup> *Id.* at 143; *infra*, note 52.

<sup>48</sup> *Id.* at 145.

<sup>49</sup> *Id.* at 154.

<sup>50</sup> *Id.* at 164.

commerce” as the term was then understood. For as the BaltFeds recognized, Organized Baseball appeared to be making the additional argument that, irrespective of the interstate commerce issue, the game deserved an exemption from the nation’s antitrust laws for other reasons.

To the BaltFeds, such a contention was both ludicrous and typical: all monopolists, the BaltFeds noted, allege that their business is somehow special and unique so as to justify their unfettered market power.<sup>51</sup> The BaltFeds asserted, however, that Organized Baseball was taking this argument a step further:

[I]t has never been argued before that individuals or corporations in private business are entitled to take the scope of their greed [i.e., their desire to control the contract each and every professional baseball player] as ‘the unit’ of a business and thereby remove it from the condemnation of a law which prohibits that very unification.<sup>52</sup>

Putting aside the obvious benefits of unregulated market power inuring to Organized Baseball, the BaltFeds could discern no societal rationale for the justification of such market power. “The suggestion that there is anything peculiar about baseball requiring a larger unit than a league is not supported by a scintilla of testimony.”<sup>53</sup>

This rebuttal was merely a sidebar, however, as the BaltFeds’ brief clearly contemplated the issue before the Court as being the more fundamental one; namely, whether the structure of Organized Baseball rose to the level of interstate commerce as contemplated by the Commerce Clause. From the BaltFeds’ perspective, the answer was obvious, and they dedicated the bulk of their brief to the analysis of this issue. Their refutation of the contention that baseball was somehow unique was passionate, but only ran a little more than two pages.<sup>54</sup> On this basis alone it appears as if the BaltFeds either believed that the Court would take such an argument seriously or would not reach that question at all.

### *B. Defendant’s (Organized Baseball’s) Brief*

Although technically a brief for the defense, Organized Baseball’s brief was attacking in nature; this was evident in both concrete and subtle ways. Organized Baseball overtly argued that when determining what constituted

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 165.

<sup>54</sup> *See id.* at 164–65.

a business and what did not, the BaltFeds had things backwards. By way of evidence, Organized Baseball immediately drew the Court's attention to the fact that far from a profit-making enterprise, the National and American leagues were "unincorporated association[s]." <sup>55</sup> Accordingly, each league "buys baseballs from the manufacturers and resells them at cost to the clubs."<sup>56</sup> Moreover, the Major League's governing body, the National Commission, "is an unincorporated body composed of the presidents of the two leagues and a third person selected by them. The commission is not a profit-making concern, but is merely an administrative body."<sup>57</sup> On the minor league level, Organized Baseball pointed out that things were run similarly: the National Association was little more than "an unincorporated association of minor leagues."<sup>58</sup>

Organized Baseball alleged that this non-profit mindset extended to all facets of the professional game. For instance, in order to determine which cities constituted appropriate homes for Major League clubs, a primary factor was a potential city's ability to allow its home team to merely break even financially: "The size and character of the population must be such as to warrant the expectation of a paid attendance at the games proportioned to the expense incident to the baseball produced."<sup>59</sup> All of this, contended Organized Baseball, was proof that the professional game was structured for entertainment purposes, not monetary gains.

By contrast, Organized Baseball intimated that the Federal League itself was organized for far different, seemingly more nefarious purposes: "Unlike the central organizations of the National League and the American League, the Federal League is itself a corporation. It exists under the law of Indiana."<sup>60</sup> As a money-making concern, the Federal League was hell-bent on destroying the unincorporated associations of Organized Baseball, and it was only these unincorporated associations that could be counted on to save the national game for the American public.<sup>61</sup> As Organized Baseball saw it, the organizers and backers of the Federal League were "determined to take a gambler's chance and publicly to announce grandiose plans for 'invading'

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<sup>55</sup> Brief on Behalf of Defendants In Error at 6–7, *Federal Baseball Club of Baltimore, Inc. v. The National League of Professional Baseball Clubs*, 269 U.S. 200 (1922) (No. 204).

<sup>56</sup> *Id.* at 6.

<sup>57</sup> *Id.* at 7.

<sup>58</sup> *Id.* at 8.

<sup>59</sup> *Id.* at 10.

<sup>60</sup> *Id.* at 18.

<sup>61</sup> *Id.* at 24, 26.

New York which they did not intend to carry out, but which if pushed would have ended in a collapse fatal to the credit and stability of professional baseball.”<sup>62</sup> Regardless of this evil plot, these unincorporated associations, contrary to the allegations of the Federal League during the course of the underlying trial, did not fear the Federals: “It was not competition, in the commercial sense, which they feared – it was the seduction of their players, the consequent destruction of the morale of teams and a deterioration in the quality of the baseball furnished to the public.”<sup>63</sup>

Organized Baseball perhaps sought to reinforce its primary point that it was anything but a formally-structured business throughout its brief in a far more understated, seemingly subliminal, way as well. Organized Baseball oftentimes referred to itself not as “Organized Baseball” but, in many places throughout its brief, by the much more casual moniker of “organized baseball.”<sup>64</sup> It is unknown if George Wharton Pepper consciously made the decision to forego capitalizing the title of his client’s “unincorporated association,” but the resulting effect is startling, particularly when his brief is read in conjunction with the BaltFeds’ brief, which is most likely how the Justices would have encountered them. Pepper did not consistently abstain from capitalizing the term (“Organized Baseball” does appear in several places later on in his brief)<sup>65</sup> but whenever his client’s corporate structure was discussed, it was, more often than not, referred to in the lower-case only. In fact, in the first heading of Organized Baseball’s argument (which, pursuant to Supreme Court rules, are required to be in all-caps), Pepper referred to his client as “ ‘ORGANIZED BASEBALL,’ SO CALLED . . . .”<sup>66</sup>

Once Organized Baseball (or “organized baseball”) turned to the specifics of the issue before the Court, it, like the BaltFeds, focused on the more fundamental one: whether it, as structured, constituted interstate commerce pursuant to the Commerce Clause. Here again, the bigger, more far-reaching argument that asked whether Organized Baseball was somehow unique was more of an appendage, although it was eventually broached.<sup>67</sup> For the most part, Organized Baseball simply sloughed off the interstate transit required of the clubs to play their games, contending that while it was indeed an “essential feature” of the sport, “transit is not the end in view . . . . The transportation of the paraphernalia is a wholly incidental and subsidiary fea-

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<sup>62</sup> *Id.* at 26.

<sup>63</sup> *Id.* at 24.

<sup>64</sup> *See id.* at 3, 5, 43; *but see* 23, 43 (wherein the term is capitalized).

<sup>65</sup> *See id.* at 23, 43.

<sup>66</sup> *See id.* at 45.

<sup>67</sup> *See id.* at 59–66.



ture, as would be the case with a surgeon's tools taken into another State for the purposes of an operation."<sup>68</sup> Rather:

[T]he central feature of the business is the local exhibition of skill. Each movement made by each player in the game is spontaneous; it is a new fact in history. The fact that the players come across the State line is a subordinate fact. That they have brought bats and balls with them instead of purchasing them locally is another subordinate fact.<sup>69</sup>

Indeed, the business aspects of Organized Baseball, such as its reserve clause, were not merely subordinate but necessary to protect the local autonomy of the clubs operating within it. Without the reserve clause, Organized Baseball averred, professional baseball would cease to exist, and if that should come to pass, there would be nothing for the local authorities to tax or regulate, thereby denying these local entities their ability to self-govern as well as the fruits of this self-governance.<sup>70</sup> Therefore, Organized Baseball surmised, federal regulation would be improper because, consistent with the prevailing understanding of the limited reach of the federal antitrust laws at the time, not only did the "trust" that comprised Organized Baseball fail to negatively impact local autonomy, it actually created an environment that permitted it to flourish. Without that trust, the National and American leagues, along with the multitudes of the minor leagues that likewise existed under its umbrella, would wither and die, and the deleterious effect of these deaths on the hundreds of localities that housed professional baseball teams would be both severe and obvious.

Beyond this basic argument, however, Organized Baseball likewise made a substantial and impassioned argument that, even should the Court conclude that its structure was such that it was subject to regulation pursuant to the Commerce Clause, it should nevertheless be held to be outside of Congress's grasp for policy reasons.<sup>71</sup> It was here where Organized Baseball reached for the stars, essentially asking the Court to declare it exempt from the Sherman and Clayton Acts, although the term "exemption" in any form, never appeared within its brief.

In essence, Organized Baseball asserted that, should the federal anti-trust laws be applied to it, the National Agreement (which bound each club and each league to honor the reserve clause) could very well be held illegal, and with disastrous effects:

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<sup>68</sup> *Id.* at 11.

<sup>69</sup> *Id.* at 52.

<sup>70</sup> *Id.* at 14, 67.

<sup>71</sup> *Id.* at 68–72.

If the National Agreement is an illegal document it must be because it regulates or restrains the freedom of action of each of the parties to it and of each of the clubs in the constituent leagues. But there is not a single feature of the National Agreement that is not necessitated by the end in view, namely the simultaneous contests for the pennant in each league, followed by the greatest of all sporting events, the contest for the world's championship between the two pennant winners. After everything is said that can be said about "reserve clauses," eligibility lists, assignment of players' contracts and every other feature of the organization, the fact remains that no part of the elaborate system was evolved for any other purpose except to create the situation in which the public takes so wholesome and vital an interest.<sup>72</sup>

In short, without the National Agreement, there would be no World Series:

[T]he thing sought to be produced, namely, dramatic and sensational contests between teams playing under precisely the same conditions, is attainable only by combination and restraint . . . . The question in this case before the Court is not whether the world's series games can be conducted to greater public advantage if the National Agreement is dissolved, but whether Congress intends that the crowning feature of the national game shall be done away with.<sup>73</sup>

In this respect, Organized Baseball clearly implied that baseball was ultimately unlike any other business. If a technical analysis of the business of baseball yielded a conclusion that it fell within the jurisdiction of the Sherman Act, the unique character of our national game dictated that it nevertheless should be held to be beyond its clutches.

In sum, Organized Baseball made four arguments to the Court:

First, that human energy, skill and labor, considered as ends in themselves and not in relation to the production of any article of commerce, are not the subjects of commerce and that combinations to regulate them are not within the Sherman Act.

Second, that while transit and other forms of interstate intercourse are subject to the regulatory power of Congress, yet this fact does not give jurisdiction to Congress where the transit is incidental to the activity and not its main element.

Third, that sporting competitions are peculiarly the subjects of local and not national regulation.

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<sup>72</sup> *Id.* at 69–70.

<sup>73</sup> *Id.* at 70–71.

Fourth, that the Sherman Act should not be construed to apply to a combination absolutely essential to the existence of so obviously a wholesome and popular sporting event as the world's series.<sup>74</sup>

The first three arguments were fundamental and asserted simply that Organized Baseball was not a proper subject of federal regulation pursuant to the Commerce Clause. The fourth argument, however, went further and called for an exemption on policy grounds should the first three arguments fail — a point buttressed by Pepper at Oral Argument where he made certain that the Justices understood that the World Series would be a casualty should they rule for the BaltFeds.<sup>75</sup>

### C. *The Opinion*

As is common knowledge, Pepper was ultimately persuasive: the Court not only ruled in favor of Organized Baseball, it adopted several of Pepper's arguments nearly verbatim.<sup>76</sup> Pepper was particularly proud of his achievement in not only convincing the Court of his arguments, but in putting his words in their mouths. Three decades after the fact, in the aftermath of the *Toulson* decision, he boasted to *The Sporting News*:

I knew that Justice Holmes had a keen appreciation for a well-turned phrase . . . and I thought that if I could implant such a phrase in his mind it might affect the court's decision. The phrase I selected was 'personal effort, not related to production, is not a subject of commerce.' Apparently I was successful because that same phrase occurs word for word in the Holmes decision.<sup>77</sup>

Indeed, the Court adopted Pepper's first three arguments, as outlined above, explicitly. But what about his fourth argument? Here, perhaps it is what the Court ultimately left out that says more about the decision than what it chose to include.

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<sup>74</sup> *Id.* at 71–72.

<sup>75</sup> *Big Leagues are Attacked in Suit*, N.Y. TIMES, Apr. 20, 1922, at 13. The *Times* noted that in the course of oral argument, Pepper averred that “the world's championship series would have to be ‘done away with’ should the national agreement be held unlawful.”

<sup>76</sup> See generally *Federal Baseball*, 259 U.S. 200 (1922).

<sup>77</sup> Lee Allen, *Radio and Video Have Not Altered Game, Says Pepper*, THE SPORTING NEWS, Nov. 25, 1953, at 4.

Although Justice Holmes's opinion mentioned the World Series in passing<sup>78</sup>, he did not go further, as Pepper urged him to in his brief, and hold that the application of the antitrust laws to Organized Baseball would result in the abolition of such championship series in the future. Rather, he grounded the Court's decision in the more fundamental proposition that, as presently structured, Organized Baseball's business simply fell outside of Congress's regulatory purview ("The business is giving exhibitions of base ball, which are purely state affairs. It is true that in order to attain for these exhibitions the great popularity that they have achieved competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business."<sup>79</sup>) Through the Court's acceptance of Pepper's first three arguments and its omission of his fourth, it seems clear that the Court never reached the more far-reaching question broached within Pepper's brief. As time passed, however, history would have a far different view of the nature of this rather straightforward decision.

Initially, at least, the popular press and the legal academy saw the case very much as Holmes did — not as an earthshaking decision and certainly not one that acknowledged any sort of unique status for the national pastime. Instead, much of the newspaper reaction focused on the Court's straightforward conclusion that Organized Baseball simply did not constitute interstate commerce pursuant to the contemporary understanding of that term in a legal sense.<sup>80</sup> Significantly, not a single article focusing on that decision published in the first two decades after it was handed down discussed it as having created any sort of an exemption for baseball. Even *The Sporting News*, nicknamed "the baseball bible" at the time, and infamous for its blind support of Organized Baseball's ownership cartel,<sup>81</sup> failed to read an exemption into the Court's ruling, even though the club owners surely would have preferred this to the opinion Holmes issued, and despite the fact that their lead attorney openly advocated for such an exemption

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<sup>78</sup> "When as the result of these [league] contests one club has won the pennant of its League and another club has won the pennant of the other League, there is a final competition for the world's championship between these two." *Federal Baseball*, 259 U.S. at 208.

<sup>79</sup> *Id.* at 208–09.

<sup>80</sup> See, e.g., *Knockout of Baltimore Feds Red Letter Day for Baseball*, THE SPORTING NEWS, June 8, 1922, at 3; *Baseball Gets O.K. of Supreme Court*, THE SPORTING NEWS, June 1, 1922, at 1.

<sup>81</sup> See THE SPIRIT OF ST. LOUIS: A HISTORY OF THE ST. LOUIS CARDINALS AND BROWNS 9, 55 (2001).

within his brief. Instead, *The Sporting News* satisfied itself with its conclusion that, in holding that baseball was not commerce, the Court demonstrated that it “knows its baseball.”<sup>82</sup> Although it opined in a sub-heading that “Had Those Damage Seekers Won In Supreme Court Then Whole System Under Which Game Is Organized Might Have Been Endangered,”<sup>83</sup> it did not go further and suggest that the decision signified that the national game had been placed upon a pedestal of its own. Moreover, although an earlier article within *The Sporting News* claimed that “the decision was such that no further suits can be based on the allegations that Organized Baseball is a trust under the meaning of the Sherman Act,”<sup>84</sup> it later clarified this suggestive assertion by stating that this was because “the court held that baseball clubs and players are not engaged in commerce any more than is a lawyer or a Chautauqua lecturer . . . .”<sup>85</sup>

Of course, the scribes at *The Sporting News* could hardly be considered to have been sufficiently versed in the nuances of the Commerce Clause and the Sherman Act to serve as reliable commentators on the true nature and reach of the *Federal Baseball* decision; they were baseball writers after all, not legal scholars. But their reaction to the opinion, along with those of the scribes at general dailies such as *The New York Times*, is nevertheless relevant in measuring the pulse of the populous at the time. Judging from the stories they submitted in the aftermath of the decision, it does not appear as if many believed *Federal Baseball* to have been the monumental ruling it is now considered. This perception does not change when we shift our gaze to the scholarly reaction to the decision.

In the Journal of the American Bar Association’s 1922 “Review of Recent Supreme Court Decisions,”<sup>86</sup> *Federal Baseball* was discussed, albeit rather briefly and in cursory fashion. The underlying legal dispute between the BaltFeds and Organized Baseball was summarized in two sentences, a paragraph of the Holmes decision was reprinted, and the names of the attorneys on both sides of the issue were identified. In summarizing the Court’s holding, the Journal stated that the Court held that “[t]he playing of organized professional baseball is not interstate commerce, and hence its participants do not come within the Sherman Act.”<sup>87</sup> Although the Journal’s yearly review of the Court’s decisions devoted several paragraphs to the anal-

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<sup>82</sup> *Knockout of Baltimore Feds Red Letter Day for Baseball*, *supra* note \_\_\_, at 3.

<sup>83</sup> *Id.*

<sup>84</sup> *Baseball Gets O.K. of Supreme Court*, THE SPORTING NEWS, June 1, 1922, at 1.

<sup>85</sup> *Id.*

<sup>86</sup> Edgar Bronson Tolman, 8 A.B.A. J. 490 (1922).

<sup>87</sup> *Id.* at 494.

ysis of other cases decided that term, it apparently concluded that the *Federal Baseball* decision did not warrant similar scrutiny and analysis. A 1927 Columbia Law Review article entitled "Anti-Trust Laws and the Federal Trade Commission, 1914–1927"<sup>88</sup> mentioned the case as well, but not as one which established a special status for Organized Baseball. Instead, it discussed *Federal Baseball* as fitting in neatly with the Court's other pronouncements of Congressional reach pursuant to the Commerce Clause.<sup>89</sup> As such, it noted that, beyond interstate professional baseball, the Court had held that the Sherman Act did not apply to interstate publishers who "refused to accept advertising from an unapproved advertising agency," organized mine workers who acted in concert to prevent the employment of non-union miners, interstate manufacturers who combined with their workmen to apportion labor among these manufacturers, and so on.<sup>90</sup> The thrust of the analysis therein was not that the Court ruled for Organized Baseball because there was something special about Organized Baseball, but rather because the specific activity at issue in *Federal Baseball*, not unlike the activity at issue in the cases involving the mine workers, publishers and manufacturers in those other cases, did not rise to the level of interstate commerce. Had the defendants in *Federal Baseball* been miners rather than a consortium of baseball club owners, the article implies, the ruling would have come out no differently.

Among the smattering of scholarly mentions of the case throughout the 1920's and '30's (and there was only a smattering), was a 1929 Wisconsin Law Review article entitled "Monopoly and Restraint of Trade Under the Sherman Act."<sup>91</sup> Here again, the article did not consider *Federal Baseball* an anomaly, but merely another piece in the puzzle of how the Court treats industries that furnish amusement.<sup>92</sup> The article took note of how the Court viewed industries such as motion pictures, vaudeville, and baseball, and was able to parse a judicial theory from these decisions:

These decisions indicate that those amusements, which consist primarily in the personal efforts of the performers, such as in baseball and vaudeville, do not come under the Anti-Trust Act for in such cases the main work and the greater portion of the expense is incurred within the state, and interstate commerce is but incidentally affected in the preparation for such exhibit. However, in the case of motion-picture exhibitions, where the chief

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<sup>88</sup> 27 COLUM. L. REV. 650 (1927).

<sup>89</sup> *Id.* at 668–69.

<sup>90</sup> *Id.*

<sup>91</sup> 5 WIS. L. REV. 65 (1928–30).

<sup>92</sup> *Id.* at 67–69.

business consists in short leases of the films to be sent across state lines where the transportation of such films involves a large expense, interstate commerce is directly involved. It is analogous to buying and selling across state lines which is in essence interstate commerce. Hence, the distinction which the court draws in these two cases would appear to be sound.<sup>93</sup>

Later, *Federal Baseball* was referenced again, in the article's analysis of the perceived failure of the Clayton Act to fortify the Sherman Act as a trust-busting mechanism.<sup>94</sup> However, even here, where the focus of the argument was on the failure of the federal legislature to prevent or repress such trusts, the article did not suggest that the *Federal Baseball* ruling was an anomaly. Instead, it theorized that the decision was simply an example of the failure of the Clayton Act to expand Congress's ability to regulate interstate trusts given that disparate treatment of two seemingly similar amusement industries such as baseball and motion pictures remained even after passage of the Act.<sup>95</sup> Although the distinction between the baseball and motion picture industries, as created by the Court, made sound legal sense when analyzed through the prism of jurisprudential precedent, the article noted it was the Clayton Act, not *Federal Baseball*, that was to blame for the incongruity that nevertheless resulted when these decisions were viewed through a more expansive lens.<sup>96</sup> Thus, as the 1920's drew to a close, there was neither a general nor scholarly perception that *Federal Baseball* was in any way out of the ordinary. Baseball may not have been subject to the Sherman Act, but apparently nobody believed that this was because the Court had carved out an exemption for it.

Even by the late 1930's the prevailing view of *Federal Baseball* had not changed much. In conjunction with the purported centennial of the national pastime, a 1939 article in the *United States Law Review* examined the relationship between baseball and the law throughout the game's first hundred years, in an effort to provide "due recognition . . . to the lasting influence of baseball in the development of an important branch of American jurisprudence."<sup>97</sup> The 18-page article focused on the many different ways baseball and the law had become intertwined over that period but devoted only a single paragraph to *Federal Baseball*, 14 pages in.<sup>98</sup> Like those few scholarly articles that preceded it, there was no discussion of the impact of the deci-

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<sup>93</sup> *Id.* at 68–69.

<sup>94</sup> *Id.* at 89–91.

<sup>95</sup> *Id.* at 90–91.

<sup>96</sup> *Id.*

<sup>97</sup> Frederic A. Johnson, *Baseball Law*, 73 U.S. L. REV. 252, 252 (1939).

<sup>98</sup> *Id.* at 266.

sion beyond the Court's explicit holding that the business of baseball was not interstate commerce within the meaning of the Sherman Act.<sup>99</sup> The possibility of an exemption was not addressed, although the author did take pains to mention that the decision was delivered by Justice Holmes, who "was a pretty good ball player himself in his early years."<sup>100</sup>

#### IV. *TOOLSON V. NEW YORK YANKEES, INC. ET. AL.*

The decade of the 1930's did, however, see a gradual shift in the perception of the meaning of *Federal Baseball*, although the transformation of the decision's meaning would not be complete until the late 1940's and early 1950's, in the run-up to *Toolson*, the case that cemented the modern understanding of it. This shift was due to events that had nothing whatsoever to do with baseball: the Great Depression and the resultant labor movement, highlighted by the passage of the Wagner Act,<sup>101</sup> which compelled private-sector management to bargain collectively with recognized unions, during the 1930's. When viewed through these societal prisms, the status of professional baseball players — as laborers rather than merely as athletic entertainers — looked very different than it had in the early 1920's. Consequently, questions regarding the intent and ramifications of *Federal Baseball* were raised within Congress for the first time.

In 1937, in response to the U.S. Attorney General's opinion that baseball was not subject to federal antitrust laws pursuant to *Federal Baseball*, Wisconsin Congressman Raymond Cannon urged a Congressional inquiry into Organized Baseball's labor practices.<sup>102</sup> Cannon, a former semi-professional pitcher who once represented former Black Sox player Happy Felsch in his suit against White Sox owner Charles Comiskey for back pay, World Series money and damages (Cannon later represented Felsch's Black Sox teammates Joe Jackson, Buck Weaver and Swede Risberg), introduced a resolution on the House floor that tied the players' cause to that of organized labor: "The baseball players' constitutional rights are flagrantly violated without recourse . . . Such violation of players' rights serves only to increase the millions of annual profits of the great baseball magnates and does not improve baseball as a sport. The conventional contract exacted from ball

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<sup>99</sup> See generally *id.*

<sup>100</sup> *Id.* (The author attributed this observation to John Kieran, a *New York Times* sportswriter).

<sup>101</sup> 29 U.S.C. §§ 151–69, 1935.

<sup>102</sup> See *Baseball Inquiry is Urged on House*, N.Y. TIMES, May 5, 1937, at 11.



players is an affront to American labor.”<sup>103</sup> With the Wagner Act as a backdrop, *Federal Baseball* began to look a bit different than it ever had before. Cannon’s resolution continued:

The big leagues which control organized baseball are engaged in interstate commerce . . . and the whole country is affected by their activities. The baseball situation presents a national problem and it is the duty of Congress to abolish such nation-wide injustice and enslavement of hard-working ball players who are dependent for their living on their ability to sell their labor at a fair price and under decent working conditions and without sacrificing the basic rights of free men.<sup>104</sup>

Although no definitive Congressional action was taken as a result of Cannon’s resolution, the debate over what *Federal Baseball* said and, more importantly, what *Federal Baseball* meant, had now begun. Did the Court really mean to exempt Organized Baseball from the antitrust laws? For the first time, nearly two decades after the decision was handed down, the issue was finally coming to the fore.

A few years later, a Georgetown Law Journal article on the Sherman Act’s impact on the music industry drew interesting parallels between that “amusement industry” and Organized Baseball.<sup>105</sup> It noted that, like the 1922 *Federal Baseball* decision, the Court in 1918 held that ASCAP’s (the American Society of Composers, Authors and Publishers) operations, which consisted of providing licenses to radio stations and other venues permitting them to perform the works of ASCAP’s members in exchange for a flat fee, fell outside of the purview of the Sherman Act.<sup>106</sup> Regardless of this decision, the article contended that the passage of time rendered it useless, given the modernization of the radio and broadcasting industries over the subsequent decades.<sup>107</sup> Accordingly, the article implied that the 1918 decision did not bestow upon ASCAP an exemption from the Sherman Act but merely held that, given the technology of the time, its actions did not sufficiently impact interstate commerce as to trigger the Sherman Act.<sup>108</sup> The article noted the changes in the character of the recording industry since 1918, most notably, the explosion of radio and the resultant broadcasting of ASCAP material across state lines, which, by 1941, rendered it clearly an

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Marcus Cohn, *Music, Radio Broadcasters and the Sherman Act*, 29 Geo. L.J. 407, 423–24 (1941).

<sup>106</sup> *Id.* at 423–24.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

interstate activity.<sup>109</sup> Turning to *Federal Baseball* directly, the article argued that Justice Holmes's ruling was not an anomaly in that it merely "gave expression to a number of decisions which held that those engaged in artistic or literary expression were not engaged in commerce."<sup>110</sup> Times, in baseball as well as the recording industry, had changed in the intervening decades, however:

Owning, controlling and leasing theatres, and producing great operas have been held not to be commerce . . . . These cases were decided in 1907, 1914, and 1922, at a time when theatrical presentations may have been professional, but Lord Mansfield's remark that "theatres are not absolute necessities of life" was still held axiomatic. Radio and theatrical entertainers had not been organized on the gigantic basis that we know it today. This shift of dependency upon entertainment in the past decade — as attested by what the public pays for it annually — may well lead a court to rule that the performance of music is now commerce.<sup>111</sup>

As the article contended, all such "artistic and literary expressions" — music, theatre *and* baseball — may now be considered interstate commerce, previous Court decisions of an earlier era notwithstanding.<sup>112</sup>

Bringing the evolution of broadcasting into the discussion, as this article did, sharpened the debate over the meaning of *Federal Baseball*. Thereafter, commentators, legal and otherwise, would begin to line up on either side of the issue. Some would focus on these technological advances to posit that *Federal Baseball* was simply a decision of its time, and one which had been relegated to the dustbin of jurisprudence by technological innovation.<sup>113</sup> Others would argue instead that the broadcasting developments were immaterial and contend that *Federal Baseball* was not premised solely or even primarily on the technology of the era. These supporters would begin to make the argument for the first time that *Federal Baseball* was a decision for all time — that it established a rigid, policy-based exemption from federal antitrust laws, although the word "exempt" would not appear in conjunction with *Federal Baseball* for another six years.<sup>114</sup> Nobody on either side brought up perhaps the most salient point, however, and the one that likely could have ended the debate — the fact that Organized Baseball made an

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<sup>109</sup> *Id.* at 425–26.

<sup>110</sup> *Id.* at 427.

<sup>111</sup> *Id.* at 427–428.

<sup>112</sup> *Id.*

<sup>113</sup> See *infra* note \_\_\_\_.

<sup>114</sup> See *infra* notes \_\_\_\_–\_\_\_\_.

explicit plea for an exemption within its brief which was met by judicial silence.

A 1946 law review article likewise analyzing the entertainment industry pursuant to the Sherman Act responded to the sorts of contentions made by the 1941 Georgetown Law Journal article and in doing so, firmly established itself on the “exemption” side of the debate, although here again the term itself was never used:

It may be that baseball clubs use more means of interstate transportation than they used in 1922 when the *Baseball* case was decided, and that interstate transportation and communication is now used more frequently, and that the baseball exhibitions are broadcast nationally at the present time. Unless the object of the restraint is the national broadcasting or the interstate communication or transportation, the “effect on” such interstate activity is only incidental and constitutes neither “restraint” nor interstate activity or commerce . . . . Vague reference to new conditions and the expanding scope of interstate commerce is not sufficient . . . .<sup>115</sup>

To conclude otherwise, the article contended, would be to overrule *Federal Baseball*.<sup>116</sup> Although the term “exemption” was not used, the article clearly contemplated a *Federal Baseball* decision not of its era but for all eras, technological advancement notwithstanding. This interpretation was far different, and far broader, than any that had come before.

The following year, the term “exemption” was used in conjunction with *Federal Baseball* for the first time — a full quarter century after the decision itself was handed down. In a Fordham Law Review article entitled “Baseball and the Antitrust Laws,”<sup>117</sup> the author, an attorney in the Antitrust Division of the U.S. Department of Justice, understatedly used it to buttress his point that those who now claimed that *Federal Baseball* created an exemption were sadly incorrect:

The *Federal Baseball* case is a decision on baseball of another age. It antedates the era of nationally sponsored coast to coast broadcasts, television, million dollar gate receipts, and \$80,000 salaries . . . . In keeping with changing times, new philosophies in government, and new techniques in business, the Supreme Court has also evolved, and so has the law . . . . If [recent cases on the understanding of interstate commerce] are any portents of things to come, then *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc.*, affords little *appui* to those

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<sup>115</sup> Bernard Reich, *The Entertainment Industry And The Federal Antitrust Laws*, 20 S. CAL. L. REV. 1, 34 (1946).

<sup>116</sup> See *id.* at 33–36.

<sup>117</sup> John W. Neville, *Baseball And The Antitrust Laws*, 16 FORDHAM L. REV. 208 (1947).

who would maintain that baseball is not commerce, and is therefore exempt from antitrust law enforcement.<sup>118</sup>

As the article noted, Organized Baseball constituted a big business monopoly, and although the Court in 1922 held it to be outside of the clutches of federal regulation pursuant to the Commerce Clause, the Court's interpretation of the Commerce Clause was hardly static. Rather, it had evolved significantly since 1922, "and what might have been 'indirect' or 'incidental' and consequently not interstate commerce in 1890 or even 1921, would not necessarily be so today."<sup>119</sup> Because so many of the interstate commerce cases from earlier eras had been abandoned, cases of a paradigm into which *Federal Baseball* fit squarely, it only made sense to reevaluate *Federal Baseball* as well. If the Court could hold in 1944 that the insurance industry now constituted interstate commerce and was therefore subject to the Sherman Act, reversing "an unbroken line of cases, covering a span of seventy-five years, which stood for the proposition that insurance was a personal contract and could not be a subject of commerce," then the propositions set forth within *Federal Baseball* were hardly set in stone either.<sup>120</sup>

As for the event that spurred this flurry of interest in the meaning of *Federal Baseball* after all those years, the Danny Gardella saga would only further crystallize the debate and set the stage for the *Toolson* decision — the case that would officially confuse things once and for all. Gardella was an outfielder with the New York Giants who bickered with team management over his 1946 contract. Eventually, he jumped to the rival Mexican League, a move that prompted baseball Commissioner Happy Chandler to impose a five-year ban on Gardella as well as 22 other players who similarly signed contracts with the Mexican League.<sup>121</sup> When Gardella attempted to return to Major League Baseball, he found himself blacklisted.<sup>122</sup> He sued MLB for reinstatement, but his case was thrown out at the trial level.<sup>123</sup> On appeal, however, the Second Circuit remanded the case to the trial court for a determination of whether baseball had developed into interstate commerce in the

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<sup>118</sup> *Id.* at 230.

<sup>119</sup> *Id.* at 215.

<sup>120</sup> *Id.* at 225.

<sup>121</sup> G. RICHARD MCKELVEY, MEXICAN RAIDERS IN THE MAJOR LEAGUES: THE PASQUEL BROTHERS VS. ORGANIZED BASEBALL, 1946 70 (2006).

<sup>122</sup> See BRAD SNYDER, A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN BASEBALL 26 (2006).

<sup>123</sup> See *Gardella v. Chandler*, 172 F.2d 402, 403 (2d Cir. 1949).

twenty-seven years since *Federal Baseball*.<sup>124</sup> If the language of Judge Jerome Frank in his concurring opinion was any indication, the answer was obvious. Frank took note of the “steadily expanding content of the phrase ‘interstate commerce’ in recent years,” and concluded that the sweeping expansion of the term had rendered *Federal Baseball* “an impotent zombi [sic].”<sup>125</sup> Clearly, he was not of the opinion that *Federal Baseball* had established any sort of exemption for Organized Baseball. By now, those on both sides of the debate over *Federal Baseball* were out for blood, a point recognized within a 1949 Yale Law Journal article discussing the issue of monopolies within baseball and other professional sports:

In the February 23 issue of *The Sporting News*, baseball’s weekly bible, appeared pictures of the late Justice Oliver Wendell Holmes and of Judge Jerome N. Frank. That the pictures were printed could not have surprised most readers. By that time, two weeks after the decision in *Gardella v. Chandler*, every baseball fan in the country knew of the controversy that was rocking professional sports. But it must have surprised some to see that in the pictures, Justice Holmes looked fierce while Judge Frank looked benign. In the eyes of most of the sports world, Justice Holmes should have worn the look of benevolence, while Judge Frank should have come equipped with horns.<sup>126</sup>

Judge Frank’s opinion in *Gardella* sharpened the debate because it dismissed, out of hand, any ongoing relevance of *Federal Baseball*. Instead, it ghettoized the case as a decision of an earlier era, one that, due to changed circumstances, had become an “impotent zombi” [sic] and which could therefore be wholly ignored. This argument, which had simmered in relative anonymity within the law reviews for a few years previous to the *Gardella* saga, was now before a broader audience. And many were concerned about what effect a narrow interpretation of *Federal Baseball* could potentially have on the modern game they knew and cherished.<sup>127</sup>

*Gardella*’s suit ultimately prompted a Congressional response in 1949: proposed legislation to formally exempt Organized Baseball, along with

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<sup>124</sup> See *Gardella*, 172 F.2d at 402. For a detailed discussion of the *Gardella* case within the context of the Sherman Act, see SNYDER, *supra* note \_\_\_, at 25–27, 101.

<sup>125</sup> *Gardella*, 172 F.2d at 409. The subsequent trial over this issue never took place because *Gardella* subsequently settled his case for \$60,000 along with reinstatement in MLB.

<sup>126</sup> Jay H. Topkis, *Monopoly in Professional Sports*, 58 YALE L.J. 691, 691 (1949).

<sup>127</sup> See *id.* at 694 (noting that representatives of baseball, including Commissioner Happy Chandler, feared that baseball would not survive without the “stringent” players market).

other professional sports, from the federal antitrust laws.<sup>128</sup> As the bill's proponents indicated, the 1922 *Federal Baseball* decision would most likely not save Organized Baseball from the grip of federal regulation, given that it was decided before the explosion of interstate radio and television broadcasts of the games.<sup>129</sup> Significantly, the tone of the proposed bill was consistent with the tone of Judge Frank's *Gardella* concurrence in that it did not assume that *Federal Baseball* established any sort of exemption for Organized Baseball. Rather, both Judge Frank as well as the Congressional bill assumed that the decision was a limited one, as well as one that did not survive into the modern era, for there would be no reason for Congress to propose an exemption in 1949 if the Court had already created one in 1922. The bill was met with less than enthusiastic reaction by members of the House and subsequently died on the floor.

Once *Gardella* ignited the embers of the controversy, however, the issue would not be so easily snuffed out. Judge Frank's concurrence spurred a backlash that led to the popular and modern distortion of the meaning of *Federal Baseball*. A 1950 University of Chicago law review article dissected *Gardella* by concluding that the district court had decided correctly by concluding, in effect, that Danny Gardella had no case under the Sherman Act because *Federal Baseball* held that Organized Baseball was exempt from it. Twenty-seven years later, nothing had changed:

It has been the general consensus of opinion both in and out of baseball that the *Federal* case disposed of the issue with respect to the character of the game, and that, since baseball was deemed not to be "interstate trade or commerce," it did not come within the ambit of the Sherman and Clayton Acts.<sup>130</sup>

On appeal, the article posited, Judge Frank misconstrued the essence of baseball, as well as Justice Holmes's understanding of both the game and the business, by concluding that Organized Baseball had "changed its spots" through his assertion that the emergence of broadcasting had somehow rendered it a fundamentally different game than it had been in 1922.<sup>131</sup> To the contrary:

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<sup>128</sup> See *Bill in Congress Proposes to Bar Anti-Trust Prosecution of Sports*, N.Y. TIMES, Apr. 6, 1949, at 40.

<sup>129</sup> *Id.* (quoting co-sponsors Rep. Albert Sydney Herlong, Jr. (D-FL) and Rep. Wilbur D. Mills (D-AR)).

<sup>130</sup> John Eckler, *Baseball – Sport or Commerce?*, 17 U. CHI. L. REV. 56, 60–61 (1950).

<sup>131</sup> *Id.* at 61.

The rationale of the *Federal* case is that baseball is not trade or commerce, and it is submitted that the court's decision would have been quite the same had the facts shown that every ball park was located on a state line and the players had to pass from one state to another as they ran from first to second base.<sup>132</sup>

According to this revisionist understanding of the case, interstate broadcasting was a red herring; *Federal Baseball* had exempted Organized Baseball from the federal antitrust laws for all time. In further support of its assertion, the article advanced a policy rationale similar to the one proposed within Pepper's 1921 brief: that baseball required special rules to maintain its integrity.<sup>133</sup> Thus, the unique properties of the game necessitated rules pursuant to "[b]aseball law" rather than federal law.<sup>134</sup> If a court failed to understand this, "a finding that the operation of 'organized baseball' violates the anti-trust laws would mean the end of baseball as we know it."<sup>135</sup> This was, at its core, not much different than Pepper's argument regarding the potential harm the Sherman Act would wreak upon the World Series — ironically the only argument advanced by Pepper not to be adopted by the Court. Now, three decades later, this article assumed that such a policy rationale was instead implicit within the decision. It was by now becoming a common misinterpretation of the holding that would only become crystalized further as the issue careened towards the Supreme Court once again.

As *Toolson* wound its way up the judicial ladder towards the Justices in 1952 and '53, the revisionist understanding of *Federal Baseball* became the predominant one. By now, many legal commentators blithely assumed not only that *Federal Baseball* had granted Organized Baseball a blanket exemption from federal antitrust laws, but that the decision itself was a monumental one. A 1953 Yale Law Journal Comment, typical of the era, remarked that "[t]he breadth of this opinion has given organized baseball an exemption which it would have been difficult for Congress to match."<sup>136</sup> Although the Comment recognized the reality that the foundations of the case had long since been washed away through the Court's evolving understanding of

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<sup>132</sup> *Id.* at 66.

<sup>133</sup> *Id.* at 76 ("'Baseball law' and the Uniform Player's Contract, for which it provides, are designed solely for the production of baseball games and to preserve all aspects of the games integrity.").

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 78.

<sup>136</sup> Comment, *Monopsony In Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576, 608 (1953).

the Commerce Clause, this was of little matter.<sup>137</sup> For the case was not limited in nature; although “[a]pplication of present-day tests to the facts revealed by the recent congressional investigation would indicate that organized baseball is unquestionably interstate activity,”<sup>138</sup> this was irrelevant. “Until [*Federal Baseball*] is overruled or distinguished, it will indefinitely perpetuate organized baseball’s intricately-woven monopsony . . . .”<sup>139</sup> In what must surely have been a surprise to the commentators of the 1920s and ‘30s who paid the case little mind, by the early 1950s the decision was thought by many to have given the game “*carte blanche* exemption from the antitrust laws.”<sup>140</sup> It was through this lens (rose-colored, at least from the perspective of Organized Baseball), that both the academic as well as popular commentariat increasingly viewed the upcoming *Toolson* showdown in the Supreme Court. Many viewed the case with intense interest, wondering if the Court would overturn the game’s three-decades-old exemption that closer inspection reveals it never created in the first place.

#### A. *Petitioner’s (George Earl Toolson’s) Brief*

By the time the Supreme Court’s briefing schedule had been established, the petitioners were swimming upstream against a heavy current. In his Petition for Writ of Certiorari to the Court, Toolson hoped to make the argument that *Federal Baseball* said what many believed it to have said when it was handed down, rather than what it by now had been interpreted and assumed to have said. He framed the issue as a fundamental circuit split: the Court of Appeals in the Ninth Circuit, in affirming the dismissal of his case in the District Court, held that organized baseball was not engaged in interstate commerce — splitting from the Second Circuit in *Gardella*, which held that organized baseball was engaged in interstate commerce.<sup>141</sup> Therefore, he urged the Justices to accept the case in order to resolve the divergence in views.<sup>142</sup> Turning to the merits of the case, Toolson perhaps erred in taking his argument further than he needed; not content to argue that the *Federal Baseball* opinion was limited in scope, he alleged that it was incorrect

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<sup>137</sup> *Id.* at 609–10.

<sup>138</sup> *Id.* at 610.

<sup>139</sup> *Id.* at 609.

<sup>140</sup> *Id.* at 630.

<sup>141</sup> Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof at 11, *Toolson v. New York Yankees, Inc.*, No. 647, 346 U.S. 356 (1953).

<sup>142</sup> *Id.*



even in its time.<sup>143</sup> Unintentionally, this had the effect of focusing the Court's attention on the appropriateness of the ruling, thereby opening the door for the opposing contention that not only was it properly decided in 1922, it created a blanket exemption for Organized Baseball. Rather than follow the lead of Judge Frank in *Gardella* and conceding that it perhaps was correctly decided in its time but had by now become Frank's "impotent zombi,"<sup>144</sup> Toolson went for broke and attempted to discredit *Federal Baseball* both now and as an historical document.<sup>145</sup> The upshot of this approach was to allow the Court to frame the issue as one of *stare decisis* rather than one created out of whole cloth. Consequently, the resulting burden on Toolson, who was thereby required to convince the Court to overturn its own precedent, grew even heavier than it already was.

Most of his Petition, however, focused on his better argument — that regardless of the merits of the decision in its time, *Federal Baseball* was simply no longer applicable, given both the modernization of society as well as the Court's broadened definition of the scope of the Commerce Clause.<sup>146</sup> It cited to *Gardella* for the proposition that the advent of radio and television made "the *Federal Baseball* case no longer applicable to professional baseball," and posited that:

This conflict is not as to present validity of the *Federal Baseball Club* case on its particular facts, but is a conflict as to present applicability of that decision to the modern professional baseball organization, which organization receives in excess of 10.5% of its gross revenues from radio and television exhibitions of its games . . . . Even if the *Federal Baseball Club* case were correctly decided on its facts it is not applicable to the present day situation and facts.<sup>147</sup>

Moreover, in an argument that drew upon the traditional view of *Federal Baseball* as a decision of limited scope, it noted that Congress itself paid the decision little deference when the 82nd Congressional House Sub-Committee on Study of Monopoly Power concluded that given "the modern judicial interpretation of the scope of the commerce clause," the Sub-Committee did

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<sup>143</sup> *Id.* at 11–12.

<sup>144</sup> *Gardella*, 172 F.2d at 409.

<sup>145</sup> *Id.*

<sup>146</sup> Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof at 12, *Toolson v. New York Yankees, Inc.*, No. 647, 346 U.S. 356 (1953).

<sup>147</sup> *Id.* at 18–19, 22.

indeed have jurisdiction to investigate and legislate Organized Baseball despite *Federal Baseball*.<sup>148</sup>

After the Court granted Toolson's petition, his brief on the merits reiterated many of the same points and also honed in on Organized Baseball's contention that *Federal Baseball* was a decision for all time. It took direct aim at both Pepper's final argument within his *Federal Baseball* brief and the Yankees' brief in the current litigation by dismissing the claim that the supposed unique qualities of baseball somehow justified special judicial treatment of its business practices.<sup>149</sup> Although it conceded that a team sport might be unable to exist in a completely free market, "it is no argument whatsoever that baseball is not within federal jurisdiction. To uphold the *Federal Baseball* case on such grounds would give organized professional baseball a carte blanche immunity to all otherwise illegal restraints on competition in the baseball industry whether they are necessary to the unique character of the industry or not."<sup>150</sup> Striking a patriotic theme, Toolson alleged that it was simply un-American to exempt the national pastime from the laws that govern nearly everyone else. Quoting Judge Frank in *Gardella*:

The system created by "organized baseball" in recent years presents the question of the establishment of a scheme by which the personal freedom, the right to contract for their labor wherever the will, of 10,000 skilled laborers, is placed under the dominion of a benevolent despotism through the operation of the monopoly established by the National Agreement. I may add that, if the players be regarded as quasi-peons, it is of no moment that they are well paid; only the totalitarian minded will believe that high pay excuses virtual slavery.<sup>151</sup>

Given the tenor of the times, with the perceived "red menace" and McCarthyism in full flower, Toolson attempted to align himself with the growing nationalistic fervor, demonizing Organized Baseball's attempt to convince the Court that *Federal Baseball* went as far as many were now claiming as dictatorial, communistic and nearly everything else from which the House Un-American Activities Committee was then purporting to rid the United States.

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<sup>148</sup> *Id.* at 13.

<sup>149</sup> Petitioner's Opening Brief on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 44, *Toolson v. New York Yankees, Inc.*, No. 18, 346 U.S. 356 (1953).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 47 (quoting *Gardella*, 172 F.2d at 409).

B. *Respondent's (New York Yankees) Brief*

In their brief in opposition to Toolson's petition for certiorari, the Yankees took up the revisionist mantle by alleging that *Federal Baseball* had already resolved the issue of baseball's status under the federal antitrust laws and, as a result, there was no need to revisit it once again. They brushed off Judge Frank's contention that the emergence of radio and television broadcasting rendered *Federal Baseball* irrelevant, noting that Justice Holmes considered the issue of interstate transmission of game details and results (via the telegraph) and found it to be unpersuasive within the context of the Commerce Clause: "The advent of radio and television has not affected the basic character of the game of baseball as defined in the *Federal Club* case. It remains a local activity and a sport, not interstate trade or commerce."<sup>152</sup> They noted that even though the Court ruled in 1877 that telegraphing itself was interstate commerce, it held in *Federal Baseball* that this was of no matter.<sup>153</sup> As for Judge Frank, he, along with concurring Judge Learned Hand "overlooked the foregoing principles and establish[ed] no tenable basis for overruling the *Federal Club* decision."<sup>154</sup>

The Yankees' brief was most significant, however, for its repeated assertions that Organized Baseball was somehow unique and that it was this unique character that justified special judicial treatment. Unlike Pepper's *Federal Baseball* brief, where the purported unique characteristics of the game were merely a final argument tacked onto a brief that focused primarily on the more foundational issue of the ability of federal law to reach Organized Baseball at all pursuant to the Commerce Clause,<sup>155</sup> here the Yankees relied much more heavily on this argument, despite the fact that this was the one argument of Pepper's the Holmes Court failed to adopt. In dismissing Toolson's allegation that the Court's subsequent broadening of the definition of the Commerce Clause post-*Federal Baseball*, as indicated through its reversal of some of the foundational cases that underpinned it, rendered *Federal Baseball* itself outdated and legally unsupported the Yankees contended that this was only further evidence of the special status

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<sup>152</sup> Brief For Respondents In Opposition To Petition For Certiorari at 20, Toolson v. New York Yankees, Inc., No. 647, 346 U.S. 356 (1953) (per curiam) (No. 18).

<sup>153</sup> *Id.* at 12–13.

<sup>154</sup> *Id.* at 22.

<sup>155</sup> See Brief on Behalf of Defendants In Error at 68–72, Federal Baseball Club of Baltimore, Inc. v. The National League of Professional Baseball Clubs, 269 U.S. 200 (1922) (No. 204).

of our national pastime.<sup>156</sup> From their perspective, those cases dealt with ordinary businesses and baseball certainly was anything but ordinary: “There is an inherent distinction between an athletic sporting contest and the sale of insurance policies.”<sup>157</sup> Although Toolson would allege within his brief that baseball was, in essence, no different than the traveling musical comedies which had previously been held to be subject to federal regulation,<sup>158</sup> the Yankees disagreed, contending instead that baseball was not analogous to any other type of activity.<sup>159</sup> Baseball, being baseball, required a different set of rules.

As the Yankees viewed the issue, that the underpinnings of *Federal Baseball* had been swept away in the 29 years since the decision had been handed down was of little matter. For even if the decision was presently doubtful as a legal proposition, the fact that so many had relied upon it for so long was enough. As the Yankees’ brief noted, the District Court opinion highlighted that “[u]ndoubtedly large investments have been made on the strength of Mr. Justice Holmes’ opinion in the *Federal Baseball Club* case . . . .”<sup>160</sup> To overrule it now would be simply unfair and inequitable. However, this argument assumed that Justice Holmes had intended for the *Federal Baseball* decision to reach three decades into the future. By not adopting Pepper’s argument regarding the alleged unique qualities of baseball, it is quite likely that he did not. Instead, the possibility exists that he simply issued a ruling that captured Organized Baseball’s national reach as it existed in the early 1920’s, pursuant to the contemporary understanding of the limited reach of the Commerce Clause.

In their brief on the merits, the Yankees drove home the “baseball is special” argument even more resolutely, arguing that to apply the Sherman Act to baseball as if it were no different than a shirt factory would be to imperil the game itself:

If the Court now overrules the *Federal Baseball* case, it cannot decree any modification of, or a partial application of, the existing Anti-trust Statutes, but must enforce them in their entirety even though that enforcement

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<sup>156</sup> *Id.* at 17.

<sup>157</sup> *Id.*

<sup>158</sup> Petitioner’s Opening Brief on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 35, *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam) (No. 18).

<sup>159</sup> Brief For Respondents In Opposition To Petition For Certiorari at 30, *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam) (No. 18).

<sup>160</sup> *Id.* at 30 (quoting *Toolson v. New York Yankees, Inc.*, 101 F. Supp. 93 (S.D. Cal. 1951)).

destroys the organization of professional baseball to the detriment of the players, the persons producing the games, and to the public.”<sup>161</sup>

Unlike typical businesses which produce optimal results through heavy competition, Organized Baseball was different; it required cooperation between clubs in order to run a successful league replete with numerous clubs and a well-ordered championship season: “Each club is almost as interested in the financial success of the others in the league as it is in its own success.”<sup>162</sup> Their brief likewise took note of the necessity of regulation “in such a way as to insure honest and keen competition in the playing of the game and thus to maintain public confidence in the integrity of that competition.”<sup>163</sup> As they contended, “[t]hese factors show the absurdity of applying statutes drawn to regulate commercial enterprises to the conducting of competitive team athletic exhibitions such as professional baseball games.”<sup>164</sup>

The Yankees’ argument was sound in all ways but for its premise, which assumed that the foundation of the *Federal Baseball* ruling was rooted in the Court’s consideration of the business of professional baseball. To the contrary, and on Pepper’s repeated urging, it was based on the game itself. As discussed above, the BaltFeds devoted much of their brief to their argument that the Court was required to separate the game of baseball, which was largely local, from the business of baseball, which was clearly national in scope. They criticized Pepper’s attempt to focus the Court’s attention on the vagaries of the game on the field rather than the business arrangements that were required to stage it. Contrary to Pepper’s assertion, the BaltFeds urged the Court to see each moment on the playing field not as “a new fact in history,” but rather, as one intricately connected with unavoidable interstate business transactions. However, the Court chose to view the issue through the lens provided by Pepper. Through its reliance on this faulty premise, the Yankees, most likely mistakenly, offered to the Court a case for the game’s antitrust exemption based on a theory not adopted within *Federal Baseball*, but argued as if it had been. Presented as merely an issue of *stare decisis*, it was, in actuality, something else altogether.

The Yankees put forth an additional, equally curious argument: “Plainly the question of whether the alleged activities of Respondents are within the orbit of the Sherman Act is also a matter of statutory construc-

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<sup>161</sup> *Id.* at 66.

<sup>162</sup> *Id.* at 24.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

tion and not of constitutional power.”<sup>165</sup> Pursuant to this argument, the Yankees alleged that, contrary to *Federal Baseball*, Congress always had the power to regulate Organized Baseball but simply chose not to do so.<sup>166</sup> As such, it was a legislative decision to exempt Organized Baseball from the Sherman Act: “The error of the Petitioner is in assuming that because it [Congress] has such power it exercised it in the Sherman Act with respect to the Respondents’ activities alleged in this case.”<sup>167</sup> This argument was not a novel one, in that it had its roots with Pepper. Subsequent to briefing, but before the *Federal Baseball* decision was announced, Pepper suggested to *The New York Times* that “no statute can be construed as applying to combinations to regulate sport . . . unless Congress has plainly indicated that this should happen.”<sup>168</sup> This was consistent with Pepper’s “baseball is special” argument to the Court within his brief, in that it assumed that professional sports were unique and that Congress naturally would not include them in legislation pertaining to ordinary business absent measured consideration. Although the logical progression of this proposition is surely absurd, as Congress is certainly not required to specifically identify every trade or industry which it intends a particular statute such as the Sherman Act to cover, the point Pepper appeared to be making here was a more specific one: that professional sports were simply different, and consequently, the assumptions concerning Congressional intent regarding ordinary businesses did not carry over into the arena or playing field. According to Pepper, and now the Yankees, Congressional inaction was every bit as meaningful as clear Congressional action.

In furtherance of this point, the Yankees drew a distinction between the Court’s 1944 decision in *United States v. South-Eastern Underwriters Association*,<sup>169</sup> (which reversed the Court’s longstanding position that the insurance industry was not subject to federal regulation) and the situation presently facing the court in *Toolson*. In the former, the Yankees noted, “no decision involving the application of the Sherman Act or any other federal statute to the insurance business had theretofore come before this Court.”<sup>170</sup> Therefore, given the passage of the Sherman Act, the Court could take notice that Congress had indeed intended to exert its power over the indus-

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<sup>165</sup> *Id.* at 63.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Big Leagues are Attacked in Suit*, N.Y. TIMES, April 20, 1922, at 13.

<sup>169</sup> See *United States v. S.-E. Underwriters Ass’n*, 322 U.S. 533 (1944).

<sup>170</sup> Brief for Respondents at 63, *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam) (No. 18).

try.<sup>171</sup> In the latter, Congressional silence in the aftermath of *Federal Baseball* apparently spoke volumes, indicating, at least to the Yankees, legislative intent *not* to exert authority over Organized Baseball.<sup>172</sup> Here too, their argument's premise was shaky in that it presumed that Congress was constitutionally empowered to take action in light of the Court's *Federal Baseball* decision. Given that the Court's ruling was based solely on Congressional reach pursuant to the Commerce Clause, however, and not on policy grounds (i.e., that baseball was somehow unique and, consequently, should be accorded special treatment under the law), Congress was powerless to act. Unless the Yankees believed that the principles of *Marbury v. Madison*<sup>173</sup> were likewise inapplicable to Organized Baseball, Congress was barred from overruling the Court on matters of Constitutional interpretation. Had the Court based its ruling on policy, the Yankees surely would have had a salient point here. But given that the *Federal Baseball* Court remained silent on this issue, there was no action available for Congress to take unless and until the Court (not Congress) broadened its definition of Congressional reach pursuant to the Commerce Clause.

The Yankees found a teammate in the courtroom as the Boston Red Sox, their rival on the field, filed an Amicus brief in the case.<sup>174</sup> Although largely irrelevant as a legal document, the Red Sox's brief was noteworthy for its persistence in asserting the revisionist interpretation of *Federal Baseball*. Misstating the basis for the opinion, the Red Sox alleged that "[i]t must be apparent to this Court, as it was to Mr. Justice Holmes and his colleagues more than thirty years ago, that baseball is a unique enterprise."<sup>175</sup> Given this imaginary framework, the issue came down to this:

The question is whether this Court shall overrule or distinguish the earlier baseball case and now hold that these rules and regulations are subject to the prescriptions of the Sherman Act notwithstanding the peculiar and anomalous characteristic of the enterprise of organized baseball and of the injuries to the game and to the public if there were a requirement of unbridled competition.<sup>176</sup>

In his reply brief, Toolson drew the Court's attention to the mischaracterizations of Organized Baseball as alleged by both the Yankees and

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<sup>171</sup> *Id.* at 63–64.

<sup>172</sup> *Id.* at 64.

<sup>173</sup> See *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>174</sup> Brief For Boston American League Base Ball Company as Amicus Curiae at 2, *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam) (No. 18).

<sup>175</sup> *Id.* at 2.

<sup>176</sup> *Id.*

the Red Sox: “The brief Amicus Curiae opens and closes with the argument that Baseball is unique. All through the brief of respondents is the same theme . . . .”<sup>177</sup> In his attempt to urge the Court to review the issues in much the same way the *Federal Baseball* Court did, Toolson advocated for a legal, rather than policy-based, ruling: “The trial court having the facts before it will judge the regulations of baseball with respect to their history, purpose and result [citation omitted]. If the regulations are reasonable, they of course will stand. If not, they are unreasonable and, no one can argue, an unreasonable regulation should fall.”<sup>178</sup> In the end, this proved to be too much to ask of the Court.

### C. *The Opinion*

In its one-paragraph per curiam decision, the Court announced its acceptance of much of the Yankees’ position, agreeing that Congressional silence in the three decades since *Federal Baseball* spoke louder than words.<sup>179</sup> Implicit in its ruling was the determination that *Federal Baseball* was, at its core, a policy-based decision, even though, as discussed above, it was in fact anything but. Through this misreading of *Federal Baseball*, the *Toolson* Court put its stamp of approval on the revisionist interpretation of the case, endowing it with significant power and rendering it, three decades hence, the most significant baseball-related decision in American jurisprudence, a far cry from how it was viewed contemporaneously or even into the mid-1940’s. Contrary to the *Toolson* Court’s assertion, Congressional silence in fact meant little in the aftermath of the *Federal Baseball* decision. As noted above, Congress was impotent to overrule the explicit ruling given that it was constitutionally-based. And it was likewise powerless to reverse any implied judicial notion therein that baseball was unique and, therefore, should be accorded special treatment under the law for the simple reason that no such notion existed; Pepper asked the Court to rule on this issue specifically and the Court responded with judicial silence.

By the time the *Toolson* case reached the Court, the scholarly as well as popular understanding of *Federal Baseball* had become hopelessly skewed, resulting in an opinion that made sense only if one ignored the realities and circumstances surrounding *Federal Baseball* itself. Ultimately, the *Toolson*

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<sup>177</sup> Petitioner’s Reply Brief on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 11, *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam) (No. 18).

<sup>178</sup> *Id.*

<sup>179</sup> *See Toolson*, 346 U.S. at 357.



Court did just this: it looked backwards at the opinion from its 1953 perch and substituted the prevailing contemporary interpretation of the case for the interpretation of it as it was understood at the time it was handed down. Despite the *Toolson* Court's assertion that "Congress has had the [*Federal Baseball*] ruling under consideration but has not seen fit to bring such business under [the federal antitrust] laws by legislation,"<sup>180</sup> Congress did indeed broach the issue on numerous occasions. However, beginning in the 1930s, Congressional discussion was premised on the issue of whether to *exempt* Organized Baseball from the federal antitrust laws, not on removing an already existing exemption.<sup>181</sup> This distinction is significant: given the limited scope of *Federal Baseball*, Organized Baseball was presumed to have been subject to the federal antitrust laws once the Court expanded its definition of Congressional reach pursuant to the Commerce Clause. Congress's failure to speak definitively on this issue in the three decades since *Federal Baseball* signaled, if anything, its belief that Organized Baseball should remain subject to the federal antitrust laws rather than a belief that Baseball should remain exempt, for it was not exempt and had never been made exempt. The *Toolson* Court failed to recognize this distinction and, as a consequence, cemented the revisionist interpretation of *Federal Baseball* in perpetuity.

*Toolson*, in effect, declared the revisionists the victors in the battle over the meaning of *Federal Baseball*. In its wake drifted barges of commentary reintroducing the newly-imagined meaning of Holmes's decision to the American public. Upon the Court's denial of Toolson's petition for rehearing, the *New York Times* wrote that "The Supreme Court refused today to reconsider its ruling of Nov. 9 that organized baseball is exempt from the anti-trust laws . . . . The opinion handed down by the Supreme Court on Nov. 9 left standing a previous ruling by the late Oliver Wendell Holmes in 1922 . . . ." <sup>182</sup> Implicit in these words was the notion that no new law was made in *Toolson*, that it merely reaffirmed *Federal Baseball*. But if so, where did the exemption come from? As discussed above, it did not originate with *Federal Baseball* and was not explicitly created within *Toolson* either. Reports in newspapers across the nation contained similar language, implying an exemption within *Federal Baseball* that did not in fact exist.<sup>183</sup>

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<sup>180</sup> *Id.*

<sup>181</sup> See, e.g., *Baseball Inquiry Is Urged on House*, N.Y. TIMES, Apr. 6, 1949, at 11.

<sup>182</sup> *Rehearing Denied in Baseball Suits*, N.Y. TIMES, Dec. 15, 1953, at 57.

<sup>183</sup> See, e.g., *High Court Rules Baseball Exempt From Trust Laws*, PHILADELPHIA INQUIRER, Nov. 9, 1953, at 1; *Baseball a Sport, and Not Business, High Court Rules*, N.Y. TIMES, Nov. 10, 1953, at 1.

*Toolson's* mischaracterization of Congressional inaction likewise became embedded within the public consciousness in the decision's aftermath. Speaking to the baseball-loving multitudes, *The Sporting News* repeated the fiction that by failing to act, Congress intended to exempt Organized Baseball from the federal antitrust laws.<sup>184</sup> In an opinion piece that ran alongside the reporting of the decision itself, columnist Shirley Povich offered a more nuanced view of Congress's role, however:

From time to time, members of Congress friendly to baseball have attempted to enact special legislation exempting the game from application of the anti-trust laws. None of their bills even reached committee. The latest was Senator Edwin Johnson of Colorado, who apparently believed the game needed the special legislation that the Supreme Court now has said it doesn't need, except in the discretion of Congress. If the fears of baseball men were unfounded, they never truly knew it until November 9.<sup>185</sup>

His voice was one of an increasingly small minority, however.

The scholarly discussion of the state of baseball and the law, post-*Toolson*, largely tracked that of the popular one. A 1955 article, "Baseball and the Anti-Trust Laws," plainly announced, without further analysis, that "[t]he *Federal Baseball* decision gave organized baseball an exemption so broad that it was not challenged until 1947 . . . ."<sup>186</sup> Although the article detailed the numerous congressional bills introduced since *Federal Baseball*, including four in 1951 alone, which attempted to provide Organized Baseball with an antitrust exemption,<sup>187</sup> it did not go further and question the relevance of these bills if indeed the article's premise was correct: that Organized Baseball already had an exemption pursuant to *Federal Baseball*. Notably, the article's author clearly read the *Federal Baseball* briefs and made much of them in his discussion of how the *Federal Baseball* ruling might have served as an effective barometer for how the *Toolson* Court would eventually rule. Speaking on the possible outcomes of the *Toolson* case as it

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<sup>184</sup> Jack Walsh, *O.B. Wins the 'Big One' in Court 7-2*, THE SPORTING NEWS, Nov. 18, 1953, at 5. ("The brief opinion, less than 200 words long, pointed out that Congress has had the 1922 ruling under consideration all this time but has not seen fit to act. The majority emphasized, too, they were not re-examining the underlying issues but affirming the 1922 decision so far as it determined that Congress had no intention of including baseball within the scope of the anti-trust laws.")

<sup>185</sup> Shirley Povich, *Game Gets 'Safe' Ruling From High Court*, THE SPORTING NEWS, Nov. 18, 1953, at 5.

<sup>186</sup> Charles Gromley, *Baseball and the Anti-Trust Laws*, 34 NEB. L. REV. 597, 601 (1955).

<sup>187</sup> See *id.* at 604-05.

careened toward the Court, the article acknowledged that the expanded definition of the Commerce Clause did not bode well for Organized Baseball on legal grounds.<sup>188</sup> However, the article recognized that Organized Baseball's case was far from hopeless:

On the other hand, there was the possibility that the Supreme Court might reaffirm the *Federal Baseball* decision on other policy considerations. Senator George W. Pepper (Fla.), who represented organized baseball in its fight for antitrust immunity in the *Federal* case, had used essentially a policy approach. The defenders of baseball followed the same line of argument in their efforts to obtain continued antitrust immunity. They contended that baseball, like other team sports, faced problems unique in the realm of business; that the sport demanded restraints on economic competition if it was to survive as an amusement industry; and implicitly that the industry merited special consideration under the antitrust laws.<sup>189</sup>

True enough — except that the *Federal Baseball* Court remained silent as to Pepper's policy approach. Misunderstandings such as this would only become more common and ingrained as time marched on. By the time St. Louis Cardinals' outfielder Curt Flood brought his case to the Court in 1972, any understanding of the limitations and nuances of *Federal Baseball* was gone for good.

## V. *FLOOD V. KUHN*

### A. *The Opinion*

Although considered little more than a useless appendage to the baseball trilogy by most, and considered to add little to what had already been said in *Federal Baseball* and *Toolson*, *Flood* in fact is the case where Organized Baseball's antitrust exemption shows itself most explicitly. Here, the Court, for the first time, grounded its decision in policy and held that Organized Baseball was exempt from the federal antitrust laws due to reasons related to its unique qualities. Although the Court finally acknowledged that “[p]rofessional baseball is a business and it is engaged in interstate commerce,”<sup>190</sup> this was not the end of the analysis (as it was for the *Federal Baseball* Court when it concluded to the contrary). Rather, because of the Court's “recognition and acceptance of baseball's unique characteristics and needs,” it declined to hold Organized Baseball to the strictures of the Sher-

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<sup>188</sup> *Id.* at 606.

<sup>189</sup> *Id.*

<sup>190</sup> 407 U.S. at 282.

man Act.<sup>191</sup> Here at last was a decision that grounded its holding in the type of policy concerns of which Pepper advocated in his *Federal Baseball* brief a half-century earlier. Here at last was a decision that did everything most people by then had assumed *Federal Baseball* had already done.

Unfortunately, by now, even the Court itself had become entwined in the suppositions and assumptions surrounding *Federal Baseball*. Justice Blackmun, the author of the *Flood* opinion, did not believe that he was making new law within it. Instead, he believed that he was merely reaffirming *Federal Baseball* and *Toolson*. Implicit within the opinion was the assumption that Organized Baseball had been exempt ever since Justice Holmes's ruling: "With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball."<sup>192</sup> As a result, the otherwise plainly acknowledged pronouncement, at last, of Organized Baseball's antitrust exemption became muddled once again, this time by the Court's confusion over the nature and scope of its own precedent.

#### B. *Petitioner (Curt Flood's) Brief*

Although he would prove to be unsuccessful in doing so, Flood hoped to draw the Court's attention, most importantly, to what the *Federal Baseball* Court did not decide. As he noted, the Court did not hold that Organized Baseball was exempt from the Sherman Act. Rather, "this Court held that it need not reach the validity under the federal antitrust laws of Organized Baseball's reserve system as it then existed . . . Mr. Justice Holmes, writing for the Court, made no analysis of the reserve clause or of the antitrust laws . . ." <sup>193</sup> Instead, he "simply relied upon then current doctrine which declared 'personal efforts, not related to production' not to be a 'subject of commerce' and which disregarded 'interstate' aspects of multistate businesses when they related only to 'transportation.'" <sup>194</sup> Turning to *Toolson*, Flood alleged that that case was, in effect, as antiquated and irrelevant as *Federal Baseball's* understanding of the Commerce Clause, given the expansion of the business of baseball in the two-decades since that decision was handed down:

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Brief for Petitioner at 19, *Flood v. Kuhn*, 407 U.S. 258 (1971) (No. 71-32).

<sup>194</sup> *Id.*

Whatever justification there was for regarding Baseball as a “sport” deeply rooted in the loyalties of particular groups of fans ceased to exist after 1953. The major leagues have grown from sixteen to twenty-four teams, expanding to every city which seems able to pay the freight, and abandoning communities with long baseball histories . . . . There have been other, perhaps more important, changes. The reserve system itself has been made drastically more restrictive since it was before the Court in 1953. It was possible in 1953, as in 1922, for a talented young man to select his first employer from among those teams interested in bidding for his services; it was only after the signing of his first contract that he became enmeshed in the reserve system. But in 1965 this one remaining player freedom was eradicated. The institution of the semi-annual draft meant that a drafted player could negotiate only with the team that drafted him. All other teams are forbidden-by threat of boycott-from approaching him. *Toolson* declined to reconsider the validity of the old reserve system. But this Court has never been called upon to make that decision with respect to the present reserve system, with its involuntary draft of players. By its own hand, Baseball has substantially diminished whatever precedential value *Toolson* had.<sup>195</sup>

With regard to *Toolson’s* pronouncement that Congressional silence in the wake of *Federal Baseball* spoke volumes, Flood pointed to the fact that, shortly after *Federal Baseball*, a series of Supreme Court decisions “quickly stripped *Federal Baseball Club* of precedential force, removing the impetus for legislative tinkering with the Sherman Act.”<sup>196</sup> Consequently, there was nothing for Congress to consider, given that the Court itself had subsequently rendered *Federal Baseball* impotent. Regardless, even were that not the case, Flood highlighted Supreme Court precedent stating that “[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.”<sup>197</sup> No matter how one chose to look at it, Congressional silence meant nothing.

### C. Respondent’s (*Bowie Kuhn, et. al.’s*) Brief

Organized Baseball, through the vessel of Commissioner Bowie Kuhn, responded to Flood’s assertions with a brief ladled thick with the assumptions many by then had come to accept with regard to the meaning of *Federal Baseball*. The tone of its brief was set in its first Question Presented, wherein it framed the issue as whether the Court should overturn Organized Baseball’s longstanding federal exemption:

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<sup>195</sup> *Id.* at 23.

<sup>196</sup> *Id.* at 29.

<sup>197</sup> *Id.* (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)).

Should this Court abandon its long, unbroken line of decisions holding that baseball's reserve system is not subject to the federal antitrust laws, when the record in this action and the history of Congressional consideration of baseball both provide compelling support for continued adherence to such precedents?<sup>198</sup>

Drawing on this theme, Kuhn presented to the Court an issue that, in his opinion, had already been decided: "All of these facts and circumstances, plus the important policy represented by the doctrine of *stare decisis*, compellingly indicate that this Court should reaffirm its precise and well-confined rulings that the fundamental structure and rules of baseball are not subject to the antitrust laws."<sup>199</sup> Moreover, as to the nature of the decision itself:

It was clear from the outset that the Court's opinion in *Federal Baseball* was a limited decision, grounded on a realistic perception of the unique characteristics and needs of professional baseball in contrast to other business activities . . . . In subsequent decisions, this Court has reaffirmed and reiterated the special factual considerations which support continued adherence to *Federal Baseball*, while at the same time ensuring that enforcement of the antitrust laws in other areas is not affected.<sup>200</sup>

Addressing the role of the federal legislature, Kuhn asserted that the *Federal Baseball* rule "was plainly intended to stand unless and until disturbed by Congress."<sup>201</sup> Accordingly, Congressional inaction clearly signaled "affirmative support for that rule."<sup>202</sup> As for the nature and specifics of the "*Federal Baseball* rule" to which he was referring, Kuhn left no doubt as the word "exemption" appeared repeatedly throughout his brief, within the context of his discussions of both *Federal Baseball* and *Toolson*.<sup>203</sup> Indeed, Kuhn characterized Flood's suit as an attempt to impel a "radical and abrupt change in baseball's antitrust status . . . *from exemption to per se violation* . . . ." <sup>204</sup> According to Kuhn, "the policy of the federal government has been consistently to exempt baseball from the operation of the antitrust laws."<sup>205</sup> Drawing on Pepper's assertion decades earlier, he concluded that had Congress desired to bring Organized Baseball under the jurisdiction of the fed-

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<sup>198</sup> Brief for Respondents at 1–2, *Flood v. Kuhn*, 407 U.S. 258 (1971) (No. 71-32).

<sup>199</sup> *Id.* at 21.

<sup>200</sup> *Id.* at 24, 26.

<sup>201</sup> *Id.* at 33.

<sup>202</sup> *Id.*

<sup>203</sup> *See id.* at 37, 43.

<sup>204</sup> *Id.* at 43.

<sup>205</sup> *Id.* at 57–58.

eral antitrust laws, it would have specifically done so.<sup>206</sup> That it did not could only indicate Congressional intent to exempt Organized Baseball.<sup>207</sup> A half-century later, as the issuance of the *Flood* opinion would confirm, what was once conjecture had by now somehow become fact.

#### D. *Reaction to the Flood Decision*

Upon the Court's announcement of the *Flood* decision, the by-now ingrained assumptions concerning *Federal Baseball* were only further confirmed within the media. Arthur Daley reminded his readers in *The New York Times* that "[s]ince precedent generally has considerable weight with most decisions, the noble jurists scrutinized the 1922 landmark opinion of Oliver Wendell Holmes when baseball was ruled exempt from antitrust in a case involving the deceased Federal League."<sup>208</sup> Another article brought *Toolson* into the mix when it wrote that in ruling against *Flood*, the Court "pointed to two previous Supreme Court decisions — in 1922 and 1953 — granting baseball exemption from antitrust laws."<sup>209</sup> Leonard Koppett likewise wrote in the *Times* that "[t]he 1922 ruling, referred to as Federal Baseball, stated that baseball was not the sort of business that the antitrust laws were intended to cover."<sup>210</sup> Moreover, in his view, the *Toolson* Court ruled "that the exemption should be continued."<sup>211</sup> In its editorial, *The Sporting News* likewise asserted that *Federal Baseball* "grant[ed] baseball[ ] special antitrust immunity."<sup>212</sup> Although these articles were, despite themselves, correct in announcing that, in the wake of *Flood*, baseball was indeed unique (at least to the Court) and certainly the bearers of an antitrust exemption, they were inaccurate to the extent that they alleged that this had always been the case. Therefore, contrary to Koppett's assertion within the *Times* that the Court held that baseball *remained* exempt from antitrust for reasons of precedent,<sup>213</sup> the implications of *Flood* were quite different. For now, for the first time,

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<sup>206</sup> *Id.* at 57.

<sup>207</sup> *Id.*

<sup>208</sup> Arthur Daley, *The Sad Story of the Leaky Umbrella*, N.Y. TIMES, June 22, 1972, at 31.

<sup>209</sup> *The Chance of a Called Strike*, N.Y. TIMES, June 25, 1972, at E3.

<sup>210</sup> Leonard Koppett, *Baseball's Exempt Status Upheld by Supreme Court*, N.Y. TIMES, June 20, 1972, at 45 [hereinafter *Baseball's Exempt Status*].

<sup>211</sup> *Id.* Koppett wrote that the *Toolson* court ruled "that the exemption should be continued, even though the legal philosophy had changed, because the industry had been allowed to develop for 30 years on the assumption of its immunity."

<sup>212</sup> *Flood's Loss Is Baseball's Gain*, THE SPORTING NEWS, July 8, 1972, at 14.

<sup>213</sup> See *Baseball's Exempt Status*, at 45.

baseball was indeed exempt, but not for precedential reasons. The lineage of Organized Baseball's antitrust exemption was by now hopelessly muddled.

As a historical matter, Red Smith of the *Times* was one of the few reporters to accurately gauge the development of baseball's status under the federal antitrust laws. Honing in on both the *Toolson* and *Flood* Court's assertions that Congressional silence signaled acquiescence to Organized Baseball's special status, Smith wrote that such an argument was:

[A] disappointment because none of the nine Justices except William Douglas will admit that the Supreme Court has been in error. Eight of them duck responsibility and say that if there is an error, Congress should rectify it. But it was not Congress that exempted baseball from antitrust regulation; nothing in the Sherman or Clayton Act says "except professional baseball."<sup>214</sup>

Players Association executive director Marvin Miller echoed Smith in *The Sporting News*: "Why leave remedial action to Congress? . . . Congress didn't make the original error. The Supreme Court did."<sup>215</sup> The *New York Times*' June 23, 1972 editorial was likewise largely on point:

It is perfectly evident that no judge on either side of the 5-to-3 decision believes that there is any statutory justification for reading into the antitrust laws an exemption which Congress did not create and which the Court has specifically refused to uphold for professional football, basketball or other sports.

The only basis for the judge-made monopoly status of baseball is that the Supreme Court made a mistake the first time it considered the subject fifty years ago and now feels obliged to keep on making the same mistake because Congress does not act to repeal the exclusion it never ordered.<sup>216</sup>

Although closer to the mark, Smith, Miller and the *Times* still missed it, however, as the "mistake" or "error" they were referring to was one they believed to have been committed by the *Federal Baseball* Court, when in fact, the miscue occurred in *Toolson*. No matter. For irrespective of these dissenting voices, the crowd had already spoken, even if the Court, prior to *Flood*, and Congress never did.

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<sup>214</sup> Red Smith, *The Buck Passes*, N.Y. TIMES, June 21, 1972, at 33.

<sup>215</sup> Ralph Ray, *Catalyst for Bargaining, Says Miller of Decision*, THE SPORTING NEWS, July 8, 1972, at 8.

<sup>216</sup> *Judge-Made Monopoly*, N.Y. TIMES, June 23, 1972, at 36.



## VI. CONCLUSION

Perhaps not surprisingly, given the muddled history of Organized Baseball and the antitrust laws, when Congress finally did speak affirmatively, its intent and actions once again were hazy, resulting in public misperceptions concerning just what it had accomplished, if anything. In the aftermath of *Flood*, wherein the Court, at last, issued a ruling based on policy rather than its interpretation of the Commerce Clause, Congress was finally empowered to act, if it so chose, to modify or overturn the decision. In 1998, through the Curt Flood Act,<sup>217</sup> it purported to do so, at least in theory. As stated within: “It is the purpose of this legislation to state that major league baseball players are covered under the antitrust laws (i.e., that major league baseball players will have the same rights under the antitrust laws as do other professional athletes, e.g., football and basketball players) . . . .”<sup>218</sup> Regardless, the Act was perceived to be largely ceremonial and, in fact, that has been the case — to date, no MLB player has ever filed suit under the Act.<sup>219</sup> Although the Act’s supporters claim that its mere presence nevertheless has a deterrent effect and may be at least partly responsible for MLB’s relatively long stretch of labor peace since 1995,<sup>220</sup> it is difficult to quantify its value in this regard. Moreover, the Act carved out so many exclusions that it ironically serves as the first affirmative Congressional statement that Organized Baseball is, in so many ways, officially exempt from the federal antitrust laws in almost every conceivable situation. Specifically, the following list of “conduct, acts, practices or agreements”<sup>221</sup> are not subject to review under the Sherman Act: any agreements “relating to the operation of employment in the minor leagues,” any “agreement between organized professional major league baseball teams and the teams of the National Association of Professional Baseball Leagues,” any agreements between “professional major league baseball” and minor league teams, along with “any other matter relating to organized professional baseball’s minor leagues . . . .”<sup>222</sup> In addition, “franchise expansion, location or relocation,

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<sup>217</sup> Curt Flood Act of 1998, 15 U.S.C. § 27a (1998) (current version at 15 U.S.C. § 26b (2002))

<sup>218</sup> Curt Flood Act of 1998, §2, 15 U.S.C.A. §27a note (Purpose).

<sup>219</sup> See Nathaniel Grow, *Reevaluating the Curt Flood Act of 1998*, 87 NEB. L. REV. 747, 752 (2008)

<sup>220</sup> See *id.* at 751, 754–56.

<sup>221</sup> Curt Flood Act of 1998, §3 (Application of the Antitrust Laws To Professional Major League Baseball).

<sup>222</sup> See Philip R. Bautista, Note, *Congress Says “Yooou’re Out!!! To the Antitrust Exemption of Professional Baseball: A Discussion of the Current State of Player-Owner Col-*

franchise ownership issues, including ownership transfers, the relationship between the Office of the Commissioner and franchise owners,” is outside of the Act.<sup>223</sup> “[C]onduct, acts, practices, or agreements’ protected by the Sports Broadcasting Act of 1961” are likewise outside of the Act as are agreements between organized professional baseball and umpires.<sup>224</sup> Finally, and most importantly, the Act does not apply to any issue “covered under the current collective bargaining agreement” between the Major League Baseball Players Association and the owners.<sup>225</sup>

The ironic twist of the Curt Flood Act makes perfect sense when viewed through the lens of the baseball trilogy. Just as *Federal Baseball* is now considered to be the case that gave baseball its antitrust exemption even though it did anything but, the Curt Flood Act is considered to have stripped the game of this exemption, even though, it in fact, cemented it. Indeed, through its elongated litany of exceptions, the Curt Flood Act created numerous, delineable exclusions for Organized Baseball that were never contemplated by the *Federal Baseball* Court and, in many aspects, does more to officially exempt Organized Baseball from the federal antitrust laws than *Federal Baseball* and *Toolson* combined. Pursuant to the Curt Flood Act, Organized Baseball, at last, received concrete acknowledgement that the Sherman Act was of little matter to it. That the Act is widely believed to have accomplished something else altogether is, to borrow a phrase from a sport with a much smaller ball, par for the course.

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*lective Bargaining and the Impact of the Curt Flood Act of 1998*, 15 OHIO ST. J. ON DISP. RESOL. 445, 473–74 (discussing the limitations of and exceptions to the Curt Flood Act).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 475.