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SYMPOSIUM: THE CURT FLOOD ACT

BEFORE THE *FLOOD*: THE HISTORY OF BASEBALL'S ANTITRUST EXEMPTION

ROGER I. ABRAMS*

"I want to thank you for making this day necessary"

—Yogi Berra on Yogi Berra Fan

Appreciation Day in St. Louis (1947)

As we celebrate the enactment of the Curt Flood Act of 1998 in this *festschrift*, we should not forget the lessons to be learned from the legal events which made this watershed legislation necessary. Baseball is a game for the ages, and the Supreme Court's decisions exempting the baseball business from the nation's antitrust laws are archaic reminders of judicial decision making at its arthritic worst. However, the opinions are marvelous teaching tools for inchoate lawyers who will administer the justice system for many legal seasons to come. The new federal statute does nothing to erase this judicial embarrassment, except, of course, to overrule a remarkable line of cases: *Federal Baseball*,¹ *Toolson*,² and *Flood*.³

I. STRIKE ONE—IN THE BEGINNING

The historical wellspring of baseball's antitrust exemption was a typical business war among entrepreneurs in the wake of the dismantling of the Federal League of Baseball after two seasons of play in 1914 and 1915. Federal League owners had created a rival circuit of baseball clubs, enticing some of the major league's finest talent to jump. Some stalwarts, such as Ty Cobb, turned down lucrative offers and, for substantial raises, remained loyal. Eighty-one major leaguers, however, including Mordecai "Three-Finger" Brown, Hal Chase and Joe Tinker, took the financial bait. The American public had become baseball crazy in

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1. *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, et al.*, 259 U.S. 200 (1922).

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

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

the first decades of the century, and the Feds met this pent-up consumer demand. When American and National League magnates, as big league club owners called themselves, brought "reason" to bear on their competition along with millions in cash, the Federal League folded.⁴

The benefits of the settlement were not evenly distributed among participants in the Federal League. The established leagues bought out owners with competing clubs in major league cities. They offered a few owners the opportunity to purchase interests in existing major league clubs. Charles Weeglunan of Chicago, for example, bought the Cubs and moved them into the North Side ballpark he had built for his ChiFeds, now named Wrigley Field. Phil Ball of the St. Louis Feds, who had first raised the possibility of a truce, bought the American League Browns. One owner, Ned Hanlon of the Baltimore Terrapins, felt particularly aggrieved by the settlement. He was offered \$50,000.00, but rejected it out of hand. Hanlon had a long, successful history of involvement in the game, as a player, manager, and owner, and Baltimore had enjoyed a glorious tradition of baseball play. It had shared possession of the National League pennant with the Boston Beaneaters throughout the 1890s. Yet, Charles Comiskey, owner of the White Sox could say, "Baltimore is a minor league city and not a hell of a good one at that."⁵

The insults, both financial and otherwise, triggered Hanlon's antitrust suit against Organized Baseball and those owners of the Federal League who benefitted from the collusive arrangement which resolved the business dispute. At the federal trial court level, Hanlon won \$80,000.00 before a jury. There was little doubt the owners had engaged in a combination and conspiracy in restraint of trade which injured the stockholders of the Baltimore franchise. In accordance with federal antitrust law, the district judge trebled the damages. On appeal before the District of Columbia Court of Appeals, George Wharton Pepper argued for the established leagues that baseball was sport and not trade; it was "a spontaneous output of human activity . . . not in its nature commerce."⁶ The Circuit agreed that baseball "affects no exchange of things."⁷ Ned Hanlon proceeded up Capitol Hill to the United States Supreme Court.

The *Federal Baseball* appeal was argued on April 19, 1922, before the United States Supreme Court, the day preceding Opening Day in the

4. The definitive history of the national pastime remains the multi-volume work of HAROLD SEYMOUR, *BASEBALL: THE EARLY YEARS & BASEBALL: THE GOLDEN AGE* (1960).

5. ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* 56 (1998)

6. *Id.* at 57.

7. *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore*, 50 App.D.C. 165, 269 F. 681, 685 (1920).

District of Columbia, a year in which the Washington Senators finished sixth, twenty-five games behind the pennant-winning Yankees. Chief Justice William Howard Taft, a third baseman during his less rotund days at Yale, reportedly had been approached by major league owners about the newly-created post of Commissioner of Baseball, obviously a promotion from his current position on the Supreme Court and his prior occupation as President of the United States. Taft declined the opportunity, but apparently he did not feel it necessary to recuse himself from the participation in the pending baseball case.

Counsel for the magnates argued before the High Court that "the very existence of baseball depended upon its exemption from the anti-trust laws."⁸ After the catastrophe of the Chicago Black Sox scandal, the Court would not blemish further the National Pastime. Justice Oliver Wendell Holmes drew the assignment to write for the unanimous court. He concluded that the baseball enterprise, albeit a business, did not affect interstate commerce. The major league contests were "purely state affairs."⁹ The travel across state lines that is necessary to produce the exhibitions was "a mere incident."¹⁰ The player's participation was "personal effort, not related to production," and therefore it was "not a subject of commerce."¹¹

If commerce meant only the production of goods, then Holmes might have had it right under contemporary notions of the limitations of federal power. Yet the following term, again writing for a unanimous court, Holmes found vaudeville to fall within interstate commerce.¹² The only distinction between the two cases is that the first involved baseball, the second did not. This, of course, is a difference, but not a distinction of relevance in the analysis of the statutes.¹³

II. STRIKE TWO—BOUND BY PRECEDENT

Thirty years later, the Court had the opportunity to rethink baseball's antitrust exemption. *Toolson v. New York Yankees* involved a minor

8. ABRAMS, *supra* note 5, at 57.

9. *Federal Baseball*, 259 U.S. 200, 208.

10. *Id.* at 209.

11. *Id.* 208-209.

12. *Hart v. Keith Vaudeville Exchange*, 262 U.S. 271 (1923).

13. Holmes' decision in *Federal Baseball* has been subjected to ridicule for decades. See, e.g., Robert C. Berry & William Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls and Strikes*, 31 CASE WEST. RES. L. REV. 685, 729-30 (1981). Judge Henry Friendly commented in *Salerno v. American League*, 429 F.2d 1003, 1005 (2 Cir. 1970), *cert. denied, sub nom. Salerno v. Kuhn*, 400 U.S. 1001 (1971), "[w]e freely acknowledge our belief that, *Federal Baseball* was not one of Mr. Justice Holmes' happiest days. . . ."

league ballplayer with the Newark Bears, the Yankees' AAA farm team, who sued under the antitrust laws to resist assignment to another club and to escape baseball's ironclad personnel system. The lower courts did not reach the merits of his claim, dismissing the suit on the basis of *Federal Baseball*. The Supreme Court, in a one paragraph per curiam, reaffirmed its *Federal Baseball* precedent, although antitrust cases in the interim had made Holmes' analysis obsolete. The Court wrote, "[t]he business [of baseball] has . . . been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation."¹⁴ Evidently, the magnates had a reliance interest in being allowed to engaged in otherwise unlawful conduct.

In addition to its formalistic invocation of *stare decisis*, the *Toolson* case is interesting because of the interplay surrounding the decision between the judicial and legislative branches of government. Before the case was argued in the Supreme Court, a House subcommittee chaired by Congressman Emanuel Cellars of New York, conducted a hearing on the baseball industry, focusing on the need for the reserve system and the impact of the antitrust exemption. In addition to a singular performance by witness Casey Stengel, those hearings are notable for the assertion by counsel for the major leagues that Congress need not disturb *Federal Baseball* because the exemption issue would be heard by the Supreme Court the next term in the *Toolson* case. That tribunal, the Subcommittee was assured, will surely correct any error it might have committed. Based on this warrant, Congress agreed it would do nothing.

In oral argument before the Supreme Court, counsel for the major leagues became a switch hitter. He argued for the major leagues that the Court should not disturb its long-standing precedent because Congress had had the opportunity to clarify its legislative intentions as a result of its 1952 investigation, and it had chosen not to act. Counsel's duplicitous assertion apparently did not disturb the Court, assuming it even knew of the chicanery.

III. STRIKE THREE—A JUDICIAL EMBARRASSMENT

The story of Curt Flood's valiant struggle for personal dignity and freedom in defending his right to play baseball is worth retelling. A stellar center fielder whose flawless play led the Cardinals to three pennants in the 1960s, Flood was a respected figure on his club and in his community. His letter to Bowie Kuhn rejecting his involuntary reassignment to

14. *Toolson*, 346 U.S. 356, 356.

Philadelphia from his adopted hometown of St. Louis remains a classic document of the civil rights struggle. More than money was at stake. He wrote, "[a]fter 12 years in the Major Leagues, I do not feel I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic rights as a citizen."¹⁵

Flood filed suit against the Commissioner of Baseball, the presidents of the two major leagues and the twenty-four major league clubs, claiming violations of both the federal and state antitrust laws and civil rights statutes. The lower federal courts dismissed the antitrust claim based on the *Federal Baseball* and *Toolson* precedents. With the financial support of the Major League Baseball Players Association and the representation of former Supreme Court Justice Arthur Goldberg, Flood offered the Supreme Court the opportunity to right its wrong. The Court declined the invitation.

The case came to Justice Harry Blackmun to write for the majority. Blackmun was in his sophomore year on the Supreme Court, and, although he would later develop into one of our nation's great jurists, his opinion in *Flood* is quite bewildering. His opinion reaffirmed the 50-year-old holding of *Federal Baseball* as an "established aberration" without justification under modern antitrust and interstate commerce jurisprudence: "It rests on a recognition and an acceptance of baseball's unique characteristics and needs."¹⁶ Justice Blackmun did not suggest what these might be.

Blackmun's work product is an embarrassing display of sentimentality combined with rigid adherence to notions of *stare decisis*. Baseball was just different, according to Blackmun. It would remain so for as long as Congress maintained its "positive inaction," a curious construct for judicial interpretation of legislative inertia in the face of a hoard of lobbyists.

The majority opinion in *Flood v. Kuhn* opens with a song of praise for our National Game. Blackmun lists his favorite all-time players. In *THE BRETHREN*, Bob Woodward and Scott Armstrong report that Justice Marshall complained to Blackmun that his list contained no players of color.¹⁷ Blackmun responded that his roster only included major league players who preceded the reintegration of the sport. Marshall

15. ABRAMS, *supra* note 5, at 65.

16. *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

17. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 191 (1979).

retorted that this was his point exactly. Blackmun's beloved sport had systematically excluded from its potential players splendid athletes from ten percent of the population, such as Josh Gibson and Buck Leonard. Twenty-five years early, Curt Flood would not have been allowed to play in the major leagues. Blackmun added Jackie Robinson, Satchel Paige and Roy Campanella, to his list, but Marshall was preparing to dissent in any case combining the legal acuity and moral outrage at injustice which characterized his tenure on the Court.

Blackmun's opinion states flatly that the holding in *Federal Baseball* was wrong. Yet, because the wrong had lasted so long, he concluded that it was a wrong the Court, which gave it birth, could not right. If correction were to come, it would be for Congress to accomplish. Congress was no more willing to overturn *Federal Baseball* in 1972 than it had been for the prior half century. It would take another twenty-six years before it enacted the Curt Flood Act.

IV. A LONG, DEEP DRIVE AND BASEBALL COMES HOME

If baseball was to end its wanderings through this legal desert, it would take the concerted effort and economic strength of the players to locate the promised land. For a century, the players had been bound by the shackles of the reserve system, and neither the courts nor the legislature were about to set them free. In the late 1960s, under Marvin Miller's determined leadership, the players transformed their fraternal organization into a real trade union. Over the next decades under Miller's stewardship and the equally able direction of his successor, Donald Fehr, the players effectively instituted by contract a private regime prohibiting the same collusive conduct by the owners that would have been proscribed by the antitrust laws had those laws applied to the baseball enterprise. The collective bargaining agreement even provided for treble damages awarded in arbitration for the violation of the no-collusion promise. Yet *Federal Baseball* remained a potent symbol of baseball management's supremacy in the forums of public policy.

At the final stage of the protracted negotiations leading to the resolution of the 1994-1995 labor dispute, the Player Association sought a promise from the owners to join the union in securing Congressional action to overturn the antitrust exemption in so far as it affected players at the major league level. Management's able bargaining representative, Randy Levine, agreed. The proposed repeal of the exemption would not change one iota of the relationship between the major league club owners and the major league players, but it would be an important symbol. Article XXVIII of the current collective bargaining agreement provided:

The Clubs and the Association will jointly request and cooperate in lobbying the Congress to pass a law that will clarify that Major League Baseball Players are covered by the antitrust laws (i.e., that Major League Players will have the same rights under the antitrust laws as do other professional athletes, e.g., football and basketball players), along with a provision that makes it clear that the passage of that bill does not change the application of the antitrust laws in any other context or with respect to any other person or entity. If such law is not enacted by December 31, 1998 (the end of the next Congress), than this Agreement shall terminate by December 31, 2000 (unless the Association exercises its option to extend this Agreement as set forth in Article Y-XVII).¹⁸

In the fall of 1998, Congress acted upon the joint request of the club owners and the players association. The statute leaves open many significant issues of the applicability of the antitrust exemption in other areas, issues explored elsewhere in this symposium. The Curt Flood Act of 1998 brought baseball home again, back into the mainstream of American law. It ends a disgraceful chapter in American jurisprudence, which, to paraphrase Yogi, made this statute necessary.

Baseball was unassailable in court and in Congress, even when its actions conflicted with reason, law and principle. The disturbing saga told by the cases before the Flood Act demonstrate that sometimes the judiciary is no better at righting wrongheaded decisions than a .200 hitter is at hitting a nasty slider.

18. BASIC AGREEMENT BETWEEN THE AMERICAN LEAGUE OF PROFESSIONAL BASEBALL CLUBS AND THE NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, Article XXVII "Antitrust," at 107 (effective January 1, 1997).

