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Nearly A Century in Reserve: Organized Baseball: Collective Bargaining and the Antitrust Exemption Enter the 80's

In her comment, the author fashions a compelling argument for congressional elimination of baseball's exemption from federal antitrust laws. After noting that the exemption had been formulated in 1922 by the Supreme Court, the author explains that it has been abused by baseball club owners to create a virtual monopoly over ballplayers through the reserve system. Although the reserve system's control was somewhat diluted in 1976, with the advent of free agency and collective bargaining, club owners are currently negotiating for mandatory compensation for the loss of free agents. The resultant threat of a player's strike has served to focus attention on the anomalous situation created by the antitrust exemption. The comment's thorough analysis of the history of the reserve clause, vis-a-vis the federal antitrust laws, and the ballplayers' continuing efforts to bargain freely for their services, lays a formidable framework for the argument against the exemption.

"Oh, somewhere in this favored land the sun is shining bright,
The band is playing somewhere, and somewhere hearts are light;
And somewhere men are laughing, and somewhere children shout,
But there is no joy in Mudville—mighty Casey has struck out."

Ernest Lawrence Thayer

I. INTRODUCTION

Baseball in 1980 is again embroiled in bitter controversy. Club owners longing for antediluvian days have launched an attack on the Mudville nine, perhaps prompting some to book passage on the next available ark.

Unfortunately, however, the dispute is not that humorous. It once again involves the celebrated reserve clause,¹ which in 1976

1. The reserve system prior to 1976 was not a singular "clause" at all. Rather, its effect was drawn from provisions of the Basic Agreement, the Major League Rules, Professional Baseball Rules and the Uniform Players Contract.

From the standpoint of a new player coming into the system as it existed until 1976, this is how the reserve system worked: each player seeking to enter baseball, whether initially or as a free agent, must go through a draft. *See, e.g.*, MLR 4. If selected by a club in a draft he may bargain only with that club. *Id.* If a new player wishes not to play for that club he must wait until the next draft is held. *Id.*

Each player is required to sign the Uniform Players Contract. It empowers the signing club to unilaterally renew the contract from year to year should the player and club fail to come to terms on a new agreement. There may be, however, no

gave rise to a new interpretation of free agency—the owners' nemesis. Since the late 1800's baseball players have served literally under the thumb of their economic "owners" unable to enforce laws² of our country against their employers. This was the rule until 1976 when, freed from a system of perpetual control, ballplayers gained the power to bargain with club owners to establish the terms of a system of reserve.³

It must be noted at the outset that there is widespread agreement that some sort of reserve system is necessary to the game of baseball. There is only disagreement, albeit bitter, as to the degree of control involved. League management and club owners have suggested that the restrictions imposed by the reserve system are reasonable and necessary to preserve the integrity of the game, maintain balanced competition and fan interest, and encourage continued investment in player development. Whatever the justification, the reserve system as it existed before 1976 denied baseball players the freedom to choose their employer throughout their tenure in baseball, in a denial of substantial federal rights granted all other laborers.⁴ Each team was and is allowed to so control forty ballplayers,⁵ in a total monopoly of the nation's baseball talent.

Baseball's past is littered with unsuccessful challenges to the reserve system. Most of the attacks were based upon the federal

more than a 20% pay cut from the preceding year. See MLR 3(a), UPC. Once signed, the player is forbidden to negotiate for baseball employment with any other club. See, e.g., MLR 3(g).

The signing club may assign a player's contract to any other club without permission of, or consultation with, the player. See, e.g., MLR 9. The assignee club enjoys all rights of the assignor club. See, e.g., MLR 9. The club holding rights to the player retains the exclusive right to negotiate with the player should he refuse to sign or play. See, e.g., MLR 15.

Before a player can be unconditionally released and his contract terminated he must be placed on waivers which renders his contract available to every other Major League Club. See UPC, MLR 8.

Thus, until 1976, players' careers were under the complete management and control of the signing club. During the entire course of a player's employment in professional baseball there was no alternative to these control mechanisms. Then, in the 1976 Basic Agreement, the reserve system was enumerated with monumental changes. See the text of the 1976 reserve system included in Appendix *infra*.

2. The laws referred to here are the federal antitrust laws. The Sherman Act, 15 U.S.C. §§ 1-7 (1976), The Clayton Act, 15 U.S.C. §§ 12-15, 19-22, 27, 44 (1976), and 29 U.S.C. § 52, 53 (1976).

3. Basic Agreement between the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs and the Major League Baseball Players Association. Effective January 1, 1976, see Article XVII Appendix *infra*.

4. See note 2 *supra*.

5. This includes a maximum of 25 actives on its major league roster and 15 minor league ballplayers. In turn, the minor league teams may reserve any players not reserved by the major league team.

antitrust laws.⁶ But successful challenge to the reserve system⁷ was not to be had through the courts. Players lacked the collective strength to exert any influence on their conditions prior to the mid-1960's. Thus, a history of unbridled monopoly has characterized the growth of an industry which controlled the lives of thousands of skilled laborers, "providing for their purchase, sale, exchange, draft, reduction, discharge, and blacklisting"⁸ in a system that seemed to establish a "species of quasi-peonage."⁹ The advent of collective bargaining in baseball and the formation of a players association was viewed as the means by which almost 100 years of unrestricted reserve system control exercised over the nation's baseball players would be ended. Finally in 1976, restrictions were placed on the reserve system as negotiated at the bargaining table.

But in 1980, a crisis is imminent which may threaten the very existence of baseball. For the first time in history, the club own-

6. Interestingly, the two initial challenges to baseball's reserve system denied the employer club the right to enjoin defendant athletes from playing for a club in the newly formed Players League. In *Metropolitan Exhibition Club v. Ewing*, 42 F. 198 (S.D.N.Y. 1890), and *Metropolitan Exhibition Club v. Ward*, 9 N.Y.S. 779 (1890), the New York club of the National League filed suit against two of its players designated as "reserve," who sought to play for a newly created league for the season. Both courts denied an injunction, but for very different reasons. The *Ewing* court found that the reserve clause pertained only to parties to the National Agreement and would not be a basis to support an injunction to prevent Ewing from playing in a non-signatory league. The *Ward* court did not support this theory, yet found such ambiguity, uncertainty, and lack of mutuality in the contract that they refused to issue the plaintiff's injunction. Needless to say, the leagues promptly plugged the holes left in the systems and prevailed thereafter.

7. The initial reserve system was actually adopted in 1879, by secret agreement of the National League club owners led by A.G. Mills, then president of the National League. The agreement was only reduced to written pact status because of the 1881 creation of the American Association which culminated in the National Agreement between the two leagues respecting the reserve system. Even at that point the player contracts made no mention of the reserve rules, save for an incorporation by reference of the National Agreement. Not until 1887, and only at the behest of player representatives, was wording finally included in player contracts outlining a reserve system. See L. SOBEL, *PROFESSIONAL SPORTS AND THE LAW*, 83-86 (1977) citing H.R. REP. NO. 2002, 82nd Cong., 2d Sess. 34 (1952). See also *Metropolitan Exhibition Co. v. Ewing*, 42 F. 198, 202-04 (S.D.N.Y. 1890).

8. *American League Baseball Club of Chicago v. Chase*, 86 Misc. 441, 149 N.Y.S. 6, 17 (1914).

9. *Id.* More than one judicial and legislative opinion has expressed the thought that the reserve system violated not only moral principles, but also established in fact a form of peonage in violation of the thirteenth amendment to the Constitution. See *Gardella v. Chandler*, 172 F.2d 402, 409-10 (2d Cir. 1949); *Hearings on S. 2373 before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 12 (1971) (statement of Senator Sam Erwin).

ers are challenging the reserve system. The loss of total owner control over player mobility in the 1976 negotiations has resulted in the vow to ruin free agency in 1980.¹⁰ The players association was left with a take-it-or-leave-it proposal in a bitter breakdown of collective bargaining this past spring.

Player challenges to owner control have not been very successful in all but the recent past. Only through an examination of this past may a solution be fashioned to cope with the situation as it exists today. The following represents a brief history of judicial doctrines, based upon antitrust principles, in response to challenges to owner control; the standards for antitrust liability; the collective bargaining process as it operates in professional baseball; and the spectre of an impending strike, its basis and avenues for reconciliation of the turmoil ahead.

II. JUDICIAL DOCTRINE: BASEBALL'S ANTITRUST EXEMPTION AND THE RESERVE CLAUSE

Organized baseball was in its infancy when, pursuant to the Commerce Clause,¹¹ Congress passed the Sherman Act¹² in 1890. The Act was in response to the racing expansion of new industries, and was designed to break up monopoly powers and combinations operating in restraint of trade among the states. Antitrust fervor was fueled by the national spirit that free competition was the healthiest and most efficient way to regulate economic activity in the marketplace, and that demand should determine the price and quantity of goods and services available to the public. The Act had no impact upon baseball during this period, however, for it was initially felt that antitrust laws were best applied to more highly developed industries.¹³

Throughout the period of baseball's chaotic formative years,¹⁴

10. The owners are not publicly advocating the ruination of free agency. But in effect the compensation proposal, if enacted, will do just that. See text following note 160 *infra*.

11. U.S. CONST. art. I, § 8, cl. 3.

12. Congress also passed the Clayton Act, 15 U.S.C. §§ 12-15, 19-22, 27, 44; and 29 U.S.C. §§ 52, 53, in 1914 to provide a treble damage remedy and injunctive relief for Sherman Act violations. In part, the Sherman Act provides:

§ 1 Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.

§ 2 Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor.

15 U.S.C. §§ 1-2 (1976).

13. Comment, *Baseball's Antitrust Exemption and the Reserve System: Reappraisal of An Anachronism*, 12 WM. & MARY L. REV. 859, 860 (1971).

14. Turbulent wars for player services rendered less wealthy clubs in small

baseball management developed massive control over all aspects of the sport. The Sherman Act and corresponding doctrines grew with baseball, but the Act's steady maturation never caught up with the more elusive moves of baseball. The result became the relic that rests with baseball today, the antitrust exemption.

A. *The Birth and Growth of the Exemption*

1. *Federal Baseball*

In 1922, the Supreme Court of the United States deemed organized baseball exempt from federal antitrust laws in *Federal Baseball Club of Baltimore, Inc., v. National League of Professional Baseball Clubs*.¹⁵ In *Federal Baseball*, an independent league of eight baseball clubs, desiring to become a major league, reached a settlement with the National and American Leagues effectively absorbing the independent Federal League. All parties were signatories to the agreement except the Baltimore club. The Baltimore club subsequently brought suit for treble damages against the National and American Leagues and others alleging that the agreement violated the Sherman Act.¹⁶ The club ob-

market areas on the verge of financial disaster. Consistently unsuccessful teams found themselves in stadiums devoid of spectators. From 1871-1875 16 of the 25 league clubs were financial failures. In 1876 the National League was formed with eight surviving clubs and, although the membership increased to 15 in the ensuing years, over half of these teams were eliminated by financial dissolution by 1879. Illustrative of the devastation faced by baseball in its early years is the fact that the 1869 Cincinnati Red Stockings played 57 games without a loss, the 1875 Boston Red Stockings won 71 games and had 8 losses, and the 1875 Brooklyn Atlantics won 2 games and had 42 losses. Professional baseball's response was the creation of the reserve rules and corresponding control mechanisms. See generally Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576, 586 (1953) (citing H.R. REP. NO. 2002, 82d Cong., 2d Sess. 17-22 (1952)).

15. 259 U.S. 200 (1922).

16. The claim asserted that the player contracts executed by the National and American Leagues violated §§ 1 and 2 of the Sherman Act entitling the Baltimore club treble damages pursuant to § 4 of the Clayton Act. See note 12 *supra*. The Clayton Act, provides the remedy:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1976).

The suit alleged: (1) that the reserve clauses were restraints of trade as they prohibited the Federal League from hiring quality players which resulted in the

tained a verdict in the trial court, but the court of appeals reversed¹⁷ in a decision affirmed by the Supreme Court.

In the unanimous decision by the Supreme Court, Mr. Justice Holmes delivered the opinion which was to have unequalled impact upon the development of professional baseball. Importantly, the Court held that exhibitions of baseball were purely state affairs; that the interstate transportation of players was merely incidental; and that the exhibitions were not trade or commerce in the ordinarily accepted use of the words.¹⁸ Since organized baseball was not involved in interstate commerce, it was therefore outside of the scope of federal antitrust laws, which precluded consideration of the merits of the case.

The ensuing years left baseball management to its own devices, expanding at an increasingly fast pace and clear, for the most part, of judicial restraint.¹⁹ At the same time, however, the concept of interstate commerce had been vastly enlarged. Following this it seemed as if the underlying rationale of *Federal Baseball* should crumble, thereby bringing the business of organized baseball within interstate commerce and thus within the purview of federal antitrust regulation. In fact, in a 1949 challenge to the reserve system, *Gardella v. Chandler*,²⁰ Judges Learned Hand and Jerome Frank agreed that in view of the expanded concept of interstate commerce and the growth of organized baseball, the antitrust immunity conferred by *Federal Baseball* was perhaps no longer valid.²¹ The case never came to the Supreme Court for re-

demise of the league; and (2) that the payoff to dissolve the Federal League coupled with the exclusive perpetual rights to ballplayers in the American and National League constituted an illegal monopoly of the trade and commerce in the business of baseball in the United States.

17. *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc.*, 269 F. 681 (D.C. Cir. 1920).

18. 259 U.S. at 208-09.

19. These years found the hegemony of the National and American Leagues spreading quickly to engulf all professional baseball within the snare of their reserve rules, eliciting agreements to respect these from the professional leagues of Panama, Puerto Rico, Mexico, Cuba, Venezuela, and Quebec, Canada. Baseball's expansion also included, but was not limited to, vast changes in the broadcasting area, minor league affiliates, league franchise expansion and transfer, involvement in stadium operation, and concessions and employee relations.

20. 172 F.2d 402 (2d Cir. 1949). *Gardella* involved a ballplayer under contract with the New York Giants who found himself blacklisted by the major leagues after he had played on a team in the Mexican League. His reserve rule challenge was based upon the charge that the rule constituted an unreasonable restraint of trade prohibited by the Sherman Act.

21. *Id.* In *Gardella*, the antitrust challenge to the reserve clause was dismissed by the district court based on the Federal Baseball precedent, but the second circuit court of appeals held that remand must be had to determine further issues that could make *Federal Baseball* obsolete. The court also held that *Federal Baseball* did not preclude such review, with Judge Frank supporting the remand, stating:

view, however, because of a subsequent out of court settlement, thereby eliminating any direct impact that the views of Judges Frank and Hand may have had upon the *Federal Baseball* rationale. Other antitrust attacks upon baseball during this period were unsuccessful, for the most part, as courts relied upon *Federal Baseball* in precluding the challenges.²²

Baseball decisional law had sanctioned management to solely control the development of the leagues for thirty-one years after *Federal Baseball*, until another antitrust attack on it made its way to the Supreme Court in 1953.

2. Toolson

In *Toolson v. New York Yankees, Inc.* and companion cases,²³ several baseball players challenged the reserve system alleging damage by the unlawful control of their freedom to participate as players. In a per curiam decision²⁴ the Court, without examining the underlying issues, affirmed the lower courts dismissal in reliance upon *Federal Baseball* "so far as that decision holds that Congress had no intention of including the business of baseball within the scope of the antitrust laws."²⁵ Although the Court suggested that it might not have reached the same conclusion in 1922 as the *Federal Baseball* Court had in that year, it felt that because the business of organized baseball had been left to develop

This court cannot, of course tell the Supreme Court that it was once wrong. But 'one should not wait for formal retraction in the face of changes plainly foreshadowed; this court's duty is 'to divine, as best it can, what would be the event of the appeal in the case before it.' L. Hand, C. J., dissenting in *Spector Motor Service Co. v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1944).

172 F.2d at 409 n.1.

22. See, e.g., *Corbett v. Chandler*, 202 F.2d 428 (6th Cir. 1953); *Kowalski v. Chandler*, 202 F.2d 413 (6th Cir. 1953); *Toolson v. New York Yankees, Inc.*, 101 F. Supp. 93 (S.D. Cal. 1951), *aff'd* 200 F.2d 198 (9th Cir. 1952); *Martin v. National League Baseball Club*, 174 F.2d 917 (2d Cir. 1949); *Niemiec v. Seattle Rainier Baseball Club, Inc.*, 67 F. Supp. 705 (W.D. Wash. 1946).

23. *Toolson v. New York Yankees*, 346 U.S. 356 (1953) (affirming *Toolson v. New York Yankees, Inc.*, 101 F. Supp. 93 (S.D. Cal. 1951)); *Toolson v. New York Yankees, Inc.*, 200 F.2d 198 (9th Cir. 1952); *Corbett v. Chandler*, 202 F.2d 428 (6th Cir. 1953); *Kowalski v. Chandler*, 212 F.2d 413 (6th Cir. 1953).

24. Unlike *Federal Baseball*, the *Toolson* decision was not an unanimous one. Dissenting Justices Burton and Reed placed importance on the particular facts involved in the case, the expanding interstate involvement in baseball, and the absence of an express congressional exemption of organized baseball from the Sherman Act. 346 U.S. at 357.

25. *Id.*

on its own for over thirty years on the understanding that it was exempt from antitrust laws, any change must be left to Congress, where subsequent legislation will have only prospective effect.²⁶ The Court seemed to be particularly sensitive to the fact that for three decades Congress had been aware of the ruling in *Federal Baseball*, the subsequent challenges in lower courts, as well as congressional studies, and had never seen fit to legislate on the subject.²⁷ A tacit approval was thusly inferred.²⁸

The *Toolson* decision eliminated any future challenges to the *Federal Baseball* rationale based upon the contention that organized baseball was, in fact, involved in interstate commerce and, therefore, subject to federal antitrust regulation for the courts reliance on *Federal Baseball* did not rest on any presumed absence of interstate commerce. The curious absence of the interstate commerce issue in the *Toolson* opinion was characterized, and perhaps excused, by two subsequent cases. In *United States v. International Boxing Club*, the Court refused to acknowledge that *Toolson* had also affirmed the interstate commerce issue, suggesting that the *Toolson* Court "neither overruled *Federal Baseball* nor necessarily reaffirmed all that was said in *Federal Baseball*."²⁹ *International Boxing*, an antitrust action against promoters of professional boxing contests, did not adhere to stare decisis; rather, it expressly distinguished different sports activities and eliminated a blanket sports exemption from antitrust. The companion case to *International Boxing* was *United States v. Shubert*.³⁰ In *Shubert*, the Supreme Court felt that the *Toolson* opinion, while appropriate to baseball, was but a narrow applica-

26. *Id.*

27. *Id.*

28. The opinion stated:

In *Federal Baseball Club of Baltimore v. National League of the Professional Baseball Clubs* . . . this Court held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws. Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs* . . . so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.

Id. at 356-57 (citations omitted). An excellent critique of the Supreme Court decision may be found in L. SOBEL, *PROFESSIONAL SPORTS AND THE LAW*, 28-29 (1977).

29. *United States v. International Boxing Club*, 348 U.S. 236, 242 (1955).

30. 348 U.S. 222 (1955). In *Shubert*, the Court, applying the Sherman Act to

tion of *Federal Baseball* under the rule of stare decisis³¹ and would not be applied to exempt the ambit of legitimate theatre from the antitrust laws. The susceptibility of baseball to an antitrust challenge was effectively quashed. Subsequent cases in lower courts acquiesced to the baseball exemption in light of the Supreme Court's position.

B. The Creation of the Anomaly

Aggrieved parties were hammerlocked by ensuing events. *Radovich v. National Football League*,³² a 1957 civil action brought under the Clayton Act, challenged the application of the antitrust exemption to professional football. Although the district court dismissed and the ninth circuit affirmed in reliance upon *Federal Baseball* and *Toolson*, the Supreme Court, in an anomalous move, reversed the lower courts' ruling. The result was that the Sherman Act was applicable to professional football.³³ The opinion in the *Radovich* case, while seeming to effectively erode the principles behind *Federal Baseball* and *Toolson*, only served to further frustrate baseball plaintiffs. Instead of reaffirming *Federal Baseball* and *Toolson* on solid and well reasoned legal principles, the Court felt that even admitting its dubious validity, the repercussions of overruling precedent precluded it from correcting its past errors.³⁴ The opinion left the "clean up" job to Congress, and the exemption was not extended to football with the Court specifically limiting the exemption to the business of

the production and presentation of legitimate theatrical attractions, explained and further distinguished *Toolson*.

31. 348 U.S. at 230.

32. 352 U.S. 445 (1957).

33. *Id.* at 450-52.

34. *Id.* The opinion by Justice Clark not only admits that the rationale of *Federal Baseball* and *Toolson* is of dubious validity, it suggests that the distinctions drawn may be unrealistic, inconsistent, and illogical; words generally used by critics of judicial positions, not by the authors themselves. Such hearty support for their judicial wisdom does not vindicate the fact that they default in the face of tacitly admitted injustice, in the eyes of those preyed upon by baseball's monopoly.

The Court perhaps should have been made aware of the comment of one of its own eminent jurists on the issue of precedent in a *Harvard Law Review* article:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

organized baseball.³⁵

The lower courts acquiesced to the baseball exemption in light of the Supreme Court's position.³⁶ In 1970, a second circuit decision in *Salerno v. American League of Professional Baseball Clubs*³⁷ declined to overrule *Federal Baseball* and *Toolson*, reserving to the Supreme Court the exclusive privilege of overruling its own decision. While the second circuit also suggested that the rationales of those cases were dubious at best,³⁸ the court felt they were also obliged to continue to apply the prevailing rule. The judiciary once again diminished the likelihood of success in a lower court challenge to the baseball exemption.

It would seem that as of 1970, the courts evinced enough intention not to disturb the holdings of *Federal Baseball* and *Toolson*. Coupled with the policy reasoning of the Supreme Court that change in the antitrust exemption enjoyed by baseball alone would have to be effected by legislation with prospective impact only, judicial avenues were shut down, leaving only congressional appeal as the last hurrah.³⁹ Yet, the most celebrated judicial chal-

35. 352 U.S. 445 (1957). Football was not the only professional sport brought under the purview of antitrust laws. In *Haywood v. National Basketball Ass'n*, 401 U.S. 1204 (1971), Mr. Justice Douglas reinstated a district court's injunction *pendente lite* in favor of a professional basketball player, stating "[b]asketball . . . does not enjoy exemption from the antitrust laws." *Id.* at 1205. Thus the baseball exemption is further splintered from the uniform coverage of other sports. See also note 29 *supra*.

36. See, e.g., *Portland Baseball Club, Inc. v. Baltimore Baseball Club, Inc.*, 282 F.2d 680 (9th Cir. 1960); *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W.2d 1, *cert. denied*, 385 U.S. 990 (1966).

37. 429 F.2d 1003 (2d Cir. 1970), *cert. denied*, *Salerno v. Kuhn*, 400 U.S. 1001 (1971) (suit brought by two discharged umpires who claimed that their discharge was caused by their endeavor to organize American League umpires for collective bargaining). It might be noted that the plaintiffs in *Salerno* as umpires were not subject to the provisions of a players reserve clause. Certiorari was thus not inferredly denied on the reluctance of the Court to reconsider previous kinds of challenges, because the umpires, it was stated, had "exceedingly difficult obstacles" to overcome in addition to *Federal Baseball* and *Toolson*. 429 F.2d at 1005.

38. 429 F.2d at 1005. The court, in refusing to depart from the *Toolson* holding, supported its view in a qualified manner, stating:

We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical' However, we continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom. While we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled, we are not at all certain the Court is ready to give them a happy dispatch.

Id. (citations omitted).

39. Note, however, that the federal exemption discussed herein is effective only to cover activities incidental to the maintenance of league structure. Although this could arguably cover the bulk of management dealing and certainly

lenge to baseball's reserve clause was not to come to the courts until January of 1970.

C. Flood and the Reserve Clause—Rigormortis in the Court?

In October, 1969, Curtis Charles Flood, an outfielder for the St. Louis Cardinals, was traded to the Philadelphia Phillies after fourteen seasons in the major leagues, twelve of those seasons with the St. Louis club. As was the practice in the past, as well as today, Flood was afforded no notice of the trade before the transaction was made, and allowed no objection through Club management, league structure, or the Commissioner's office.⁴⁰

Flood then instituted an antitrust suit in the southern district of New York⁴¹ charging violations of federal antitrust laws and civil rights statutes, state antitrust statutes and common law, as well as violations of the thirteenth amendment to the Constitution.⁴² In detail, Flood alleged that the reserve system constituted a conspiracy among the defendants to boycott him, preventing him from playing baseball with any club other than the Philadelphia club in violation of the Sherman and Clayton Antitrust Acts. The state law claims alleged violation of state antitrust and civil rights statutes as well as state common law, claiming unlawful restraint of the free exercise of playing professional baseball.⁴³ Under federal question and civil rights jurisdiction,⁴⁴ was the allegation that the reserve system is a form of peonage and involuntary servitude in violation of the antipeonage statutes⁴⁵ and the thirteenth

would always be the basis of reserve clause discussions; with the ever expanding involvement of clubs in broadcasting, gate receipts, concessions, and the like, such activities will not be protected by the baseball antitrust exemption. *See generally* H.R. REP. NO. 2002, 82d. Cong. 2d Sess. 7, 230 (1952). *See also* United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953) (league restrictions on the sale of radio and television rights held illegal); State v. Milwaukee Braves, Inc., 31 Wis. 2d 699, 725, 144 N.W.2d 1, 15 (1966).

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

41. The defendants, although not all named in each cause of action, were the Commissioner of Baseball, Bowie K. Kuhn, the presidents of the National and American Leagues, Joseph E. Cronin and Charles S. Feeney, and all 24 major league clubs.

42. 407 U.S. at 267. Treble damages and declaratory and injunctive relief were sought. *Id.*

43. State and common law jurisdiction over the 24 major league clubs was based on diversity.

44. 28 U.S. §§ 1331, 1343 (1976).

45. 42 U.S.C. § 1994 (1976); 18 U.S.C. § 1581 (1976).

amendment.⁴⁶ Lastly, Flood contended that the reserve system deprived him of "freedom of labor" in violation of the Norris-La-Guardia Act.⁴⁷

The *Flood* action, the most comprehensive challenge to baseball's reserve system to reach the courts, was the object of extensive lower court proceedings.⁴⁸ However, Flood was not successful in his judicial challenge. But a look at the underlying methods of attack is useful in determining whether further attempts may be successfully made in court to correct injustices resulting from the inconsistent and anomalous exemption of baseball from federal antitrust regulation.

1. Federal Antitrust Contentions

The lower courts' extensive discussion of the antitrust contentions upheld the rulings in *Federal Baseball* and *Toolson*. The courts did not proceed to the issue of whether or not the baseball reserve system would be deemed reasonable if it was, in fact, subject to antitrust regulation,⁴⁹ leaving the baseball exemption intact unless and until the Supreme Court or Congress holds to the contrary.⁵⁰

In disposing of the antitrust contentions in the Supreme Court, the opinion by Mr. Justice Blackmun enumerated a number of conclusions, once again reaffirming the Court's resolve to relieve itself of further pressure to change the system on its own. Importantly, these conclusions stated that, while adhering to *Federal Baseball* and *Toolson*, the Court's continued support for the exemption granted to baseball rested on grounds other than the interstate commerce issue⁵¹ by declaring finally that "[p]rofessional baseball *is* a business and it *is* engaged in interstate commerce."⁵² The alternative grounds set forth by the Court were based upon more than the previous conclusions that saw congres-

46. U.S. CONST. amend. XIII. See note 75 *infra*.

47. 29 U.S.C. §§ 102, 103 (1976). A fifth and largely unrelated cause of action against the St. Louis Cardinals and the New York Yankees alleged that certain relationships between those clubs and other non-baseball enterprises were anti-competitive and were in violation of antitrust laws. 316 F. Supp. 271, 272 n.1 (1970). The court dismissed the action on summary judgment. 312 F. Supp. 404 (S.D.N.Y. 1970).

48. *Flood v. Kuhn*, 407 U.S. 258 (1972); *Flood v. Kuhn*, 443 F.2d 264 (1971); *Flood v. Kuhn*, 316 F. Supp. 271 (S.D.N.Y. 1970); *Flood v. Kuhn*, 312 F. Supp. 404 (S.D.N.Y. 1970); *Flood v. Kuhn*, 309 F. Supp. 793 (S.D.N.Y. 1970).

49. 316 F. Supp. at 278.

50. *Id.*, 443 F.2d at 266.

51. See *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc.*, 269 F.2d 681 (1970).

52. 407 U.S. at 282 (emphasis added).

sional silence as evidencing Congress's tacit approval.⁵³ Rather, the Court pointed out that "[s]ince *Toolson* more than fifty bills have been introduced in Congress relative to the applicability or nonapplicability of the antitrust laws to baseball,"⁵⁴ and emphasized that Congress had not merely been silent on the issue, instead characterizing the rejections of specific proposals as "positive inaction."⁵⁵ The Court concluded that it was not dispositive that Congress had failed to act, for they had "acted," in the Court's view, with no intention to subject baseball's reserve system to the reach of its antitrust statutes.⁵⁶

Even in the majority opinion, the Court's rigid adherence to stare decisis was not uncriticized. Accepting that the application of *Federal Baseball* and *Toolson* had become an "aberration" in light of the growth of the baseball industry and subsequent judicial holdings in the field of sports and entertainment law, the Court felt "the aberration is an established one."⁵⁷ Thus, because this eccentricity had been in decisional law for fifty years as well as before the Supreme Court on over five occasions, it was deemed fully entitled to stare decisis by the Court to be remedied only by congressional legislation.⁵⁸ The *Flood* majority effectively

53. See notes 23-28 *supra* and accompanying text.

54. 407 U.S. at 281.

55. *Id.* at 284.

56. The Court apparently was referring to a number of cases which expressly or impliedly held that the antitrust exemption is limited to baseball and not to the sport or entertainment litigated therein. *Haywood v. National Basketball Ass'n*, 401 U.S. 1204 (1971) (basketball); see, e.g., *Radovich v. National Football League*, 352 U.S. 445 (1957) (football); *United States v. International Boxing Club*, 348 U.S. 236 (1955) (boxing); *United States v. Shubert*, 348 U.S. 229 (1955) (theatrical production); *Bridge Corp. of America v. American Contract Bridge League, Inc.*, 428 F.2d 1365 (9th Cir. 1970) (bridge); *Deesen v. Professional Golfers Ass'n*, 358 F.2d 165 (9th Cir. 1966) (golf); *Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir. 1966) (hockey); *National Wrestling Alliance v. Myers*, 325 F.2d 768 (8th Cir. 1963) (wrestling); *STP Corp. v. United States Auto Club, Inc.*, 286 F. Supp. 146 (S.D. Ind. 1968) (auto racing).

57. 407 U.S. at 283.

58. *Id.* Justices Marshall and Douglas wrote stinging dissents joined by Justice Brennan. The dissents disputed the validity of reliance on the lack of congressional action and pointed out that the danger of mechanical application of stare decisis may, in light of later events, deny substantial federal rights. In opposing the view that the lack of specific congressional action evinced a tacit approval of the baseball exemption, Mr. Justice Douglas opined:

[I]f congressional inaction is our guide, we should rely upon the fact that Congress has refused to enact bills broadly exempting professional sports from antitrust regulation. . . . I would not ascribe a broader exemption through inaction than Congress has seen fit to grant explicitly. . . . The

closed the doors on further judicial discussion of the antitrust issue. The ball was in Congress's "court" to determine the fate of the baseball anomaly. Future plaintiffs would, thusly, not be well advised to return to the judicial system armed with only a bat and the Sherman Act to do battle with baseball's antitrust exemption.

2. The Application of State Antitrust and Congressional Stalemate

Flood's third cause of action involved the applicability of state antitrust laws to the reserve mechanism. It was argued that, if the federal antitrust laws were not in conflict nor applicable to baseball, then state antitrust laws must be applied. The Supreme Court summarily dismissed the issues of state antitrust violations in affirming the judgment of the court of appeals. Nevertheless, they merit some discussion.

At the district court level the state law claims were rejected because state antitrust regulation would conflict with the "nation wide character of organized baseball . . . [which] requires that there be uniformity in any regulation of baseball and its reserve system."⁵⁹ In affirming the district court, the court of appeals stated that, "as the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application of state antitrust law."⁶⁰

Congress has made no express provision that the business of organized baseball is to be left free of state or federal control. If such provision were to be in existence, there would be no question that the states would have no power to challenge, through their antitrust laws, the present reserve system.⁶¹ Nevertheless, there is no such provision and, thus, a question is whether Congress has manifested an intent to keep baseball free of state control. In *Graves v. New York ex rel. O'Keefe*,⁶² the Court addressed this issue stating that

[t]he failure of Congress to regulate interstate commerce has generally been taken to signify a Congressional purpose to leave undisturbed the

unbroken silence of Congress should not prevent us from correcting our own mistakes.

407 U.S. at 287-88. (Douglas, J., dissenting); see also *Helvering v. Hallock*, 309 U.S. 106 (1940). "It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. . . . [W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Id.* at 119-21. See also *United States v. Southeastern Underwriters Ass'n*, 322 U.S. 553 (1944).

59. 316 F. Supp. at 279-80.

60. 443 F.2d at 268.

61. Preemption is authorized by the supremacy clause of the United States Constitution.

62. 306 U.S. 466 (1939).

authority of the states to make regulations affecting the commerce in matters of peculiarly local concern, but to withhold from them authority to make regulations affecting those phases of it which, because of the need of a national uniformity, demand that their regulation, if any, be prescribed by a single authority.⁶³

The courts have gleaned a congressional intent to keep baseball free from antitrust regulation and have further surmised that, as a corollary principle, the application of other antitrust provisions defeats the congressional intention of non-regulation. Such application renders impotent the policy reasons behind the federal exemptions. However, this belies the fact that even in the face of many proposals, Congress has not seen fit to "unexempt" baseball, nor have they seen fit to reinforce the exemption, judicially conferred, in light of repeated calls for a congressional stand on the issue.

Two theories have arisen to justify the preempting of state antitrust application. The first presumes the recognition by Congress that the structure of organized baseball, and the growth of its business relationships and internal agreements which have been in reliance on the federal exemption, are all integral components of organized baseball as it now exists. Therefore, the application of any type of antitrust provision would be inappropriate, and congressional acquiescence does not evince a desire to leave the industry to ad hoc regulation by the states. This theory, by itself, may not be enough to obviate state regulation. In support, *Welch Co. v. New Hampshire*⁶⁴ created a clear manifestation requirement holding that,

[i]n construing federal statutes enacted under the power conferred by the commerce clause of the Constitution . . . it should never be held that Congress intends to supercede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is *clearly* manifested.⁶⁵

The dissent in *State v. Milwaukee Braves, Inc.* suggests, in reaction to *Welch*, "[t]hat [the clear manifestation requirement] being the standard where specific legislation is involved, can there be a less rigorous criterion than the preemption of state police power where our only clue to congressional intent is nonaction?"⁶⁶ Thus, the congressional intention theory, in absence of

63. *Id.* at 479 n.1.

64. 306 U.S. 79 (1939).

65. *Id.* at 85 (quoting *Illinois Central R. Co. v. Public Utilities Comm'n*, 245 U.S. 493, 510 (1918) (emphasis added)).

66. 31 Wis. 2d at 734, 144 N.W. 2d at 19.

additional support, may not be sufficient to justify preemption of state antitrust laws. It must be shown that the silence of Congress fails to establish or indicate a national policy regarding baseball that is sufficiently certain to rise to the level of federal preemption of state policy.⁶⁷

The blow to state antitrust regulation in *Flood* was the result of the coupling of the congressional intent theory with the view that the operation of organized baseball is so nationwide in character that uniformity of regulation is a necessity, and in that baseball is a business which operates in interstate commerce,⁶⁸ regulation, even if not controlled expressly by Congress, may not unduly burden interstate commerce. Thus, there is an area of interstate commerce within which a state may not operate at all because the application of various state laws would seriously interfere with commerce, here organized baseball, among the states. As mandated by *Southern Pacific Co. v. Arizona*,⁶⁹ baseball would have to comply with the strictest state standard in order to permit regulation by non-conflicting states.⁷⁰ This burden on league operation outweighed the states' interest in the *Flood* case, as it most likely would with any challenge to the reserve system. Absent a strong state interest the application of state law would place an impermissible burden on interstate commerce.⁷¹

The above discussion of state action, while impermissible in the *Flood* case, points out that there may be instances where state law will lie, but the injury to the state⁷² would have to exceed the kind of injury involved in a reserve clause challenge. If only the congressional intent defense is used, it may be more easily defeated than if it is coupled with the uniform regulation theory. It is well settled that a state may exercise its police powers by means of its antitrust law, provided that the law or its application does not discriminate against interstate commerce or disrupt its required uniformity.⁷³ Nonetheless, *Flood* has effectively eliminated the possibility that a reserve clause challenge may be sub-

67. 316 F. Supp. at 279.

68. It is interesting to note the changes in the role that interstate commerce has played since the *Federal Baseball* decision. For example, state antitrust power is rendered virtually impotent by the need for uniform operation of the commerce which baseball engenders between the states. Organized baseball now argues the importance of the uniform nature of interstate commerce while pressing the need for a void in the regulation of baseball altogether.

69. 325 U.S. 761 (1945).

70. *Id.* at 774-75.

71. *Id.*

72. For example, club action may so affect the economic well-being of the state or the health and welfare of its citizens thereby outweighing any incidental burden on interstate commerce.

73. 31 Wis. 2d at 739, 144 N.W.2d at 22 (citing *Huron Cement Co. v. Detroit*, 362

ject to state antitrust laws for its holding falls squarely within the preclusion of the Commerce Clause and the necessity for uniformity, despite challenges that may be made on the congressional intent theory.

3. Involuntary Servitude

The fourth cause of action in the *Flood* case asserted that the reserve system violated the thirteenth amendment and its enforcing legislation which similarly prohibits holding any person to "involuntary servitude."⁷⁴

Involuntary servitude is not a charge that is common to modern day pleading.⁷⁵ Yet the assertion has come up in baseball litigation since 1914 in *American League Baseball Club of Chicago v. Chase*.⁷⁶ In *Chase*, Judge Bissell characterized the conditions of employment that a ballplayer is subjected to as follows:

If a baseball player . . . who has made baseball playing his profession and means of earning a livelihood, desires to be employed at the work for which he is qualified and is entitled to earn his best compensation, he must submit to dominion over his personal freedom and the control of his services by sale, transfer, or exchange, without his consent, or abandon his vocation and seek employment at some other kind of labor. . . . [T]he involuntary character of the servitude which is imposed upon the players . . . is so great as to make it necessary for the player to either take the contract prescribed by the commission or abandon baseball as a profes-

U.S. 440, 448 (1960)). See also the dissent in *Milwaukee Braves* for a good discussion of feasible actions to uphold state regulation.

74. 316 F. Supp. at 280. Jurisdiction to grant relief for a violation of 18 U.S.C. § 1584 is found in 28 U.S.C. §§ 1331 and 1343. *Id.* The court also considered *Flood's* contention that the antipeonage statutes and the public policy declared in the Norris-La Guardia Act had been violated and the court concluded that they were inapplicable. In addition, it was noted that the plaintiff's post-trial brief argued only the involuntary servitude claim and that the court assumed that the plaintiff no longer alleged violation of antipeonage statutes and the Norris-La Guardia Act. *Id.* at n.1.

75. U.S. CONST. amend. XIII. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

76. 86 Misc. 441, 149 N.Y.S. 6 (1949). In *Chase*, the Chicago Club of the American League sought to enjoin one of its contract players from playing baseball with any club other than Chicago for the term of his contract. The court denied the injunction on the grounds of lack of mutuality of contract and unclean hands. The finding of lack of mutuality stemmed from the complete control exercised over Chase as balanced against the right of the club to terminate Chase upon 10 days notice. Although *Chase* was not a reserve rule case, the court, while holding the Sherman Act inapplicable, cited baseball's monopolistic practices as an "unconscionable transaction" and held that it would not further the practices by rendering aid by means of an injunction. *Id.* at 16, 20.

sion.⁷⁷

The *Chase* court went on to say that, "[t]he right to employ his labor and capital as he pleases for any lawful purpose is an essential part of the personal liberty guaranteed each man by free institutions."⁷⁸ "The quasi-peonage of baseball players under the operations of this plan and agreement is contrary to the spirit of American institutions, and is contrary to the spirit of the Constitution of the United States."⁷⁹

Influenced by the involuntary servitude question, courts have refused to order mandatory injunctions obligating a transferred⁸⁰ ballplayer to report to a transferee club.⁸¹ Nevertheless, the effectiveness of the reserve rules have traditionally stemmed from the blacklisting practices of club and league management,⁸² which effectively leave a player with the choice of either playing the game by management's rules or not playing at all.

Acquainted with only the largest salary figures and success stories in professional baseball, the peonage argument seems to be a bit tainted in the public eye. Yet Judge Frank aptly put this in perspective in *Gardella v. Chandler*⁸³ stating, "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."⁸⁴

Stinging criticisms of the baseball reserve system were principally relied upon by plaintiff Flood in advancing his involuntary servitude claim. Nevertheless, the court of appeals minimized their potential impact and looked instead to a different view of peonage, the thirteenth amendment, and involuntary servitude. In relying upon two cases brought before the Supreme Court, *Pollack v. Williams* and *Hodges v. United States*,⁸⁵ Judge Cooper held that a showing of a condition of enforced compulsory service is a prerequisite to proof of involuntary servitude.⁸⁶

77. 86 Misc. at 465, 149 N.Y.S. at 19.

78. *Id.* at 464, 149 N.Y.S. at 18 (citing 1 ARTHUR J. EDDY, EDDY ON COMBINATIONS § 559 (1901)).

79. 86 Misc. at 465, 149 N.Y.S. at 19.

80. Transfer here refers to the purchase, sale, trade, waiver, or draft of ballplayer services. Although perhaps of only historical import, ballplayers have been transferred for as little as 25 cents, a bird dog, a bulldog, a turkey, and an airplane. Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576, 587 n.59 (1953).

81. *Id.*

82. *Id.*

83. 172 F.2d 402 (1949).

84. *Id.* at 410.

85. *Pollack v. Williams*, 322 U.S. 4 (1944) (with respect to peonage and the thirteenth amendment); *Hodges v. United States*, 203 U.S. 1 (1906) (with respect to involuntary servitude and the thirteenth amendment).

86. 316 F. Supp. at 281.

The court failed to lend import to the fact that a ballplayer was, in fact, compelled to accept terms and conditions that require him to relinquish the freedom to pursue his trade where he could procure a position. The appellate court felt that as long as the ballplayer was left to pursue another career entirely, the thirteenth amendment and enforcing statutes were not violated. The court only addressed the legal precedents on the issue of involuntary servitude and did not express opinion as to the substantially similar effect the reserve system and compulsory service has on an employee.⁸⁷ It seemed of little consequence to the court that a ballplayer under contract to a club is compelled to serve under the kind of control present in few, if any, other vocations. His only alternative may be to break the contract and be precluded from ever again practicing his trade, unless with his previous employer or its assignee.

D. The Congress and the Court—A Joint Finger in the Dike

The *Flood* case was, thusly, disposed of on all four counts. This made it expressly clear that baseball's reserve system is not subject to antitrust attack in the courts. As long as the reserve system is seen by all parties as part and parcel of the operation and maintenance of league structure and Congress has not seen fit to alter its present status by limiting or abolishing the baseball exemption, the courts will not be an effective forum in which to challenge the reserve system on antitrust grounds.

Flood was a major blow to the young Players Association and its membership. The courts had closed their doors and refused to right admitted wrongs, choosing instead to rely on an anomalous application of stare decisis in refusing to grant relief from a system which claimed perpetual control of employees in an industry "rife with violation of the Sherman Act."⁸⁸

In the face of judicial challenges to baseball's reserve mechanisms, antitrust law has been rendered virtually impotent. The

87. The court's only reference to the effect of the reserve system did not suggest alternative legal or legislative theory:

We recognize that, under the existing rules of baseball, by refusing to report to Philadelphia plaintiff is by his own act foreclosing himself from continuing a professional baseball career, a consequence to be deplored. Nevertheless, he has a right to retire and to embark upon a different enterprise outside organized baseball.

Id.

88. 31 Wis. 2d at 729, 144 N.W.2d at 17.

lower courts have refused to act in deference to the Supreme Court; the Supreme Court has refused to act in deference to implied congressional intent; and Congress has refused to act, period. Although legislation has been introduced in the 82d, 85th, 86th, 87th, 88th, 89th, and 91st Congresses, respective of antitrust and sports legislation, nothing has come of the call for a stand on the baseball exemption. In response to the *Flood* decision, the House quickly introduced two bills and conducted a subcommittee hearing.⁸⁹ But, true to form,⁹⁰ the legislation died as mechanically as it had been introduced. Again in 1977, the Joint House Committee on Professional Sports stated that there was no justification for baseball's immunity from the antitrust laws, and recommended that Congress remove the exemption. But at present, Congress has taken no substantive action.

The reason for congressional inaction may lie in the fact that there has been insufficient external pressure exerted upon the na-

89. H.R. 12401, H.R. 14614, 92d Cong., 2d Sess. (1972).

90. In 1952 three bills were introduced in the House of Representatives (HR 4229, HR 4230 and HR 4231), and one bill in the Senate which enumerated a blanket antitrust exemption to all professional sports organizations and their activities. The House subcommittee issued its report to the 82d Congress after extensive hearings on the bills. H.R. REP. NO. 2002, 82d Cong., 2d Sess. 1 (1952). The subcommittee's report was unfavorable to the passage of the bills, and concluded that baseball should not be granted complete immunity from antitrust scrutiny. *Id.* at 230. Nevertheless, assured by organized baseball that its activities would be judicially tested by a reasonableness standard, along with the desire not to interfere with pending litigation, here *Toolson et. al.*, the subcommittee recommended that no legislative action be taken. *Id.* at 231-32.

The *Toolson* decision followed, with baseball management asserting that antitrust did not apply to baseball and that it would bring about baseball's demise if it did. A series of bills were the subject of a subcommittee investigation in 1957 relative to enacting some variety of antitrust exemption for professional sports. *Hearings on H.R. 5307, et al., before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 85th Cong., 1st Sess. (1957). The House all but ignored these bills. In 1958, the House Judiciary Committee recommended passage of H.R. 10378, a bill which was drawn to subject professional baseball, football and hockey to the antitrust laws, but provided an exemption to activities which were designed to protect public confidence and integrity in the sport, franchise territories and balance of competition if they satisfied a reasonableness standard. H.R. REP. NO. 1720, 85th Cong., 2d Sess. (1958) (commonly known as the Celler Report). Much debate was engendered by the bill and despite its recommendation, it was only passed when the bill was greatly emasculated by the removal of the reasonableness standard. Nevertheless, the bill was tabled in the Senate subcommittee and died at the close of the 85th Congress.

Seven bills introduced in the House of Representatives died without action during the 86th Congress. One hotly debated bill introduced into the Senate, S. 3483, was resubmitted to committee but never reappeared.

In the 87th and 88th Congresses bills were introduced and quickly discussed, ignored or forgotten. The only sport-related bill passed was a broadcasting rights bill in the 87th Congress. Baseball emerged unscathed from the 89th and 91st Congress, where again, bills never found their way out of committee. For an excellent discussion of the bills introduced during this period see L. SOBEL, *PROFESSIONAL SPORTS AND THE LAW* § 1.2(c) (1977).

tion's legislative representatives to sustain any action to dissolve the exemption. Handicapping any effort on the part of organized baseball to eliminate the exemption is the lack of an influential power base in any of the geographical areas where it operates. Other industries have a larger number of employees concentrated in one or more states or localities enabling the possibility of greater impact upon local representatives. Baseball employees, on the other hand, are scattered sparsely throughout the country where an appeal to local representation would create minimal impact in comparison. Nevertheless, Congress seems to remain the only governmental avenue open to eliminate baseball's anomaly. There has been no sound reason set forth to support the existing continuance of this aberration and the laws applicable to professional sports need to be standardized.

The need for the abolition of the antitrust exemption reached a crisis point after the Court, in *Flood*, waived its power over the issue. Baseball careers were under management control in perpetuity in blatant violation of the thrust and spirit of antitrust law. Lacking the collective strength to influence a congressional stand on the issue, the only recourse for player-employees was to the labor laws. The system of collective bargaining in organized baseball was viewed as the only vehicle through which the traditional reserve rules could be challenged after *Flood*. It was through this system that the reserve rules were effectively attacked a few short years later.

III. THE COLLECTIVE BARGAINING PROCESS AS IT OPERATES IN ORGANIZED BASEBALL

Collective bargaining has only recently become an important force in the sports industry. Although the Major League Baseball Players Association was organized in the mid 1950's, the workings of its initial decade, like that of its predecessor the American Baseball Guild, were dominated by team ownership and league management. Not until 1966, with the hiring of former steelworkers' union official Marvin Miller, did the association see leadership truly dedicated to representing the welfare of its members in the union stance.

A. *The Mechanics of Collective Bargaining in Baseball*

In 1969, the National Labor Relations Board held, in *American League of Professional Baseball Clubs*,⁹¹ that organized professional baseball is an industry in, or affecting commerce, and is thereby subject to National Labor Relations Act coverage as well as NLRB jurisdiction.⁹² The case also indicated that the players association, which previously lacked union status, was a labor organization within the meaning of the Act.⁹³ With jurisdiction and coverage conferred, the Act guarantees to those under its protection "the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, and . . . to refrain from any or all such activities. . . ."⁹⁴

The Major League Baseball Players Association is now recognized as the exclusive⁹⁵ bargaining agent for all members of the association. This carries with it certain duties which the association must carry out in representing the nation's major league baseball players.⁹⁶ The Act imposes on the Union, as well as their management counterparts, the duty to bargain in good faith⁹⁷ with respect to mandatory subjects of bargaining. The failure to do so is an unfair labor practice.⁹⁸ The Supreme Court has defined "good faith bargaining" as that which evinces a "willingness to enter into negotiations with an open and fair mind and

91. 180 N.L.R.B. 190 (1969).

92. *Id.* at 192-93.

93. *Id.* A labor organization is defined in the National Labor Relations Act § 2(5), 29 U.S.C. § 152(5) (1976), as "any organization . . . which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

94. National Labor Relations Act § 7, 29 U.S.C. § 157 (1976).

95. National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1976).

96. Duties of good faith bargaining, fair representation, and subject matter classification play important roles in any challenge to proposed restraint mechanisms. Violation of any prescribed duties or misclassification will subject an agreement to scrutiny.

97. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1976), provides:

(d) For purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Id.

98. National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976).

"(a) It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." *Id.*

with a sincere desire to reach a mutual basis for agreement."⁹⁹ The Players Association is also required to fairly represent all members of the Union, that is, not to bargain more effectively for one class of players than another. Baseball's Basic Agreement covers only the minimum terms and conditions of employment. Although the Union is the exclusive bargaining representative for the players and required to negotiate on behalf of all members equally, individual players are allowed to negotiate more favorable terms with their respective clubs, on their own, by means of special covenants in the Uniform Player Contract.¹⁰⁰

The subject matter of collective bargaining in baseball includes all matters which relate to the terms and conditions of the employment of the ballplayers.¹⁰¹ Both management and the Players Association recognize the reserve system to be a mandatory subject of collective bargaining.¹⁰² Thus, the reserve system issue is forced onto the bargaining table to be dealt with under the watchful eye of the NLRA.

The rights and duties of the parties to collective bargaining briefly enumerated above, will serve to illuminate what rules have affected past events respecting collective bargaining and the reserve clause, and set the stage upon which upcoming controversy will play.

B. Opening Day: The Reserve Rules in the Arbitration Arena

Unlike athletes in other sports¹⁰³ who may use the threat of antitrust litigation to prevent certain mobility restraints and, thus, obtain a greater level of negotiating power at the bargaining table, the collective bargaining process currently offers baseball players their only mode of challenge to the player reserve system. The

99. J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* 803 n.203 (1979) (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956)); *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941).

100. See generally *Midland Broadcasting*, 93 N.L.R.B. 455 (1951); *Television Film Producers Ass'n.*, 93 N.L.R.B. 929 (1951) (discussion of individual contract provisions negotiated with terms less favorable than union agreements).

101. National Labor Relations Act § 8(d), 29 U.S.C. 8(d) (1976).

102. 316 F. Supp at 283.

103. See note 56 *supra*. The threat of antitrust litigation may temper management's stance in effecting certain practices, whether the subject of a labor dispute or not. Antitrust has an important place in the system of checks and balances that allows management and workers to operate fairly in an atmosphere that benefits both free enterprise and the public welfare, the cornerstones of our democratic society.

process of collective bargaining has correspondingly become particularly important to the modification of traditional player control.

Following the disposition of the *Flood* case came the debut of collective bargaining's role respecting the reserve clause. The inclusion of both the reserve clause and the grievance-arbitration procedures in the 1973 Basic Agreement gave rise to the first successful challenge to the perpetual system of player control.

The 1970 Basic Agreement had provided for a tripartite grievance arbitration panel with a permanent impartial chairman.¹⁰⁴ Article X of the 1973 Basic Agreement set forth further procedures for the resolution of certain grievances. These included presentation of the grievance to the player's club, provision for appeal to the Clubs' Player Relations Committee and the League President, as well as a final step providing for resolution by tripartite panel in binding arbitration. "Grievance" was defined as a:

[C]omplaint which involves the interpretation of, or compliance with the provisions of any agreement between the Association and the Clubs or any of them, or any agreement between a Player and a Club¹⁰⁵ . . . excepting disputes related to the Benefit Plan, the Agreement re the Benefit Plan, dues checkoff, as well as action taken by the Commission relating to maintenance of the integrity of baseball or disputes involving public appearances as stated in paragraph 3(c) of the Uniform Players Contract.¹⁰⁶

Article X also defined the arbitrators' authority as follows:

With regard to the arbitration of Grievances, the Arbitration Panel shall have jurisdiction and authority only to interpret, apply or determine compliance with provisions of agreements between the Association and the Clubs or any of them, and agreements between individual Players and Clubs. The Arbitration Panel shall not have jurisdiction or authority to add to, detract from, or alter in any way the provisions of such agreements.¹⁰⁷

Following these procedures in October of 1975, the Players Association filed grievances on behalf of Andy Messersmith of the Los Angeles Dodgers and Dave McNally of the Montreal Expos. The grievances alleged that the language of paragraph 10(a) of the Uniform Players Contract¹⁰⁸ gave the club the right to renew

104. Prior to 1970 the Commissioner of Baseball held the power over disputes concerning bargaining agreements.

105. This is the Basic Agreement between the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs and Major League Baseball Players Association effective January 1, 1973, Article X [hereinafter referred to as the 1973 Basic Agreement].

106. *Id.*

107. *Id.*

108. Paragraph 10(a) of the Uniform Players Contract provides:

10(a) On or before December 20 (or if a Sunday, then the next preceding business day) in the year of the last playing season covered by this contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his address following his signature hereto, or if none be given, then at his last address of record with the

the contract for one year on the same terms, but that the contractual relationship between the club and the athlete terminated at the end of the renewal period. The grievance further alleged that the club owners had denied both Messersmith and McNally the right to deal with other teams for their services upon expiration of the renewal period, and asked that the club owners be ordered to treat both athletes as free agents and to compensate them for any financial detriment incurred by club owner delays. In response to the grievances and relative to the merits, the owners countered with the assertion that upon renewal of the contract, the club renewed all contractual terms including that term which gave the club the right to renew the contract originally, thereby rendering the right to renew perpetual.¹⁰⁹ But the club owners' primary contention in response to the grievances was that the claims were outside the scope of the grievance procedure and, therefore, not subject to the jurisdiction of the arbitration panel. They argued that Article XV of the 1973 Basic Agreement excluded disputes concerning the "core" or "heart" of the reserve system from Article X procedures.¹¹⁰

The grievances were submitted to arbitration¹¹¹ and on Decem-

Club. If prior to March 1 next succeeding said December 20, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the Club shall fix it in said notices; provided, however, that said amount, if fixed by a Major League Club, shall be an amount payable at a rate not less than 80% of the rate stipulated for the next preceding year and at a rate not less than 70% of the rate stipulated for the year immediately prior to the next preceding year.

UPC § 10(a).

109. National League and American League of Professional Baseball Clubs v. Major League Baseball Players Ass'n, Grievance Nos. 75-27, 75-28. Decision of the Arbitration Panel No. 29 (Dec. 23, 1975) (Seitz, Miller, and Gaherin arb.).

110. Article XV in the 1973 Basic Agreement provided:

Except as adjusted or modified hereby, this Agreement does not deal with the reserve system. The Parties have differing views as to the legality and as to the merits of such system as presently constituted. This Agreement shall in no way prejudice the position or legal rights of the Parties or of any Player regarding the reserve system. During the term of this Agreement neither of the Parties will resort to any concerted action with respect to the issue of the reserve system, and there shall be no obligation to negotiate with respect to the reserve system.

Id. reprinted in *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 532 F.2d 615, 618-19 (1976).

111. Before the matter was submitted to arbitration, the Kansas City Royals Baseball Corporation fled suit in the United States District Court for the Western District of Missouri seeking a declaratory judgment that the grievances were non-

ber 23, 1975, the panel¹¹² rendered its decision. The holding involved a monumental interpretation of the Uniform Players Contract and the Major League Rules in deciding that the relevant provisions did not renew the contract in perpetuity, thereby denying the right of a club to perpetually control a player. Messersmith and McNally were declared free agents. Additionally, the panel held that the grievances were within the scope of its jurisdiction. It directed that Messersmith and McNally be removed from the disqualified or reserve lists and that the leagues promptly notify their members that they may negotiate with the ballplayers with respect to employment. The panel did deny the damage claim as premature, but retained jurisdiction over the matter. Following the panel decision, the club owners revived the district court action.¹¹³ The district court held that the Messersmith-McNally grievances were within the scope of the panel's jurisdiction and that neither the resolution of the merits, nor the relief awarded, exceeded the panel's authority. Therefore, the court ordered enforcement of the panel's award.¹¹⁴ Subsequently, the United States Court of Appeals for the Eighth Circuit affirmed the district court.¹¹⁵

By this action, the players were finally emancipated from a control system that had traditionally bound each player to the club with which he first signed a contract for the rest of his playing days. The players were exultant over the decision and, for the first time, possessed bargaining power to control their own destinies.

C. Finally a Forum: Limitations and Strategies

No discussion of the Messersmith-McNally arbitration can be made without noting that the panel decision did not alter or condemn the existing reserve system on moral or constitutional

arbitrable and an injunction to prohibit the arbitration. The remaining 23 major league clubs joined the action as plaintiff-intervenors. The Players Association counterclaimed, seeking to compel the plaintiffs to arbitrate pursuant to the Labor-Management Relations Act § 301, 29 U.S.C. § 185 (1976). The parties stipulated at the pretrial hearing that the arbitration could proceed, reserving the right to revive the district court action after the panel rendered its decision. 532 F.2d at 619.

112. The panel consisted of Marvin J. Miller, the Players Association arbitrator, John J. Gaherin, Club Owners arbitrator, and Peter Seitz, who was chairman and impartial arbitrator selected by the other two arbitrators.

113. See note 110 *supra*.

114. 409 F. Supp. 233 (W.D. Mo. 1976).

115. 532 F.2d 615 (8th Cir. 1976). The proceedings in both courts were extensive, and afford a comprehensive and informative discussion relative to the courts' power to examine an arbitration hearing and recent developments concerning interpretation and effect of the reserve system.

grounds.¹¹⁶ Any attempt to alter agreements made by league management and the players association is not the function of an arbitration panel and should not be resorted to as such. The proper place for that is the bargaining table and, in the alternative, the courts. The function of arbitration is to interpret, apply, or determine compliance with provisions of previously negotiated agreements. The Messersmith-McNally arbitration did just that in determining that the nature of the parties' agreement regarding the renewal clause of the reserve system, as evidenced in the Uniform Players Contract, did not provide for perpetual club control.

Judicial review of an arbitration award is limited to the question of whether it "draws its essence from the collective bargaining agreement."¹¹⁷ The courts may not be resorted to as an appellate tribunal to review the merits of an arbitration panel's decision by parties who have subjected themselves to binding arbitration.¹¹⁸ The courts may resolve the question of whether a grievance under a collective bargaining agreement providing for arbitration is arbitrable.¹¹⁹ The Supreme Court discussed the legal principles applicable to the arbitration of labor disputes in the *Steelworkers* trilogy,¹²⁰ reaffirming them in 1974, in *Gateway Coal Co. v. United Mine Workers of America*.¹²¹ The Court deemed arbitrable, "a grievance arising under a collective bargaining agreement providing for arbitration . . . 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'"¹²² The arbitration provision in the last two Basic Agreements have been broad, subject to certain enumerated grievances which are to be excluded from the grievance procedures. It is likely that, to foreclose arbitration, a party initially will assert that a particular grievance is not arbitrable, if there is some basis, however tenuous to do so. This was the case

116. 532 F.2d at 631.

117. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960).

118. 532 F.2d at 621.

119. The question is one of contract construction and is for the courts to decide. *Id.* at 620.

120. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel Car Corp.*, 363 U.S. 593 (1960).

121. 414 U.S. 368 (1974).

122. 532 F.2d at 620 (citations omitted).

in the challenge to the Messersmith-McNally arbitration. But, the courts have fashioned a strict standard of review for such a complaint. The Supreme Court has given sanction to the rule that a broad arbitration provision may be deemed to exclude a particular grievance in only two instances: (1) where the collective bargaining agreement contains an express provision clearly excluding the grievance involved from arbitration; or (2) where the agreement contains an ambiguous exclusionary provision and the record evinces the most forceful evidence of a purpose to exclude the grievance from arbitration.¹²³ Review will be based primarily on the language of the agreement although the court has the power to receive other evidence presented to it.

Thus, the players association, on behalf of an aggrieved player or players, may resort to arbitration and grievance procedures to assert rights which have been collectively bargained for. Previously subject to the unilateral decision of club and league management, the athlete now finds himself represented at the bargaining table where the acts and policies of all parties are judged in terms of their compliance with the National Labor Relations Act. As the years have passed, the power of the Players Association has increased, resulting in improvements in the terms and conditions of employment. Importantly, the collective bargaining process may afford a tribunal where complaints may be aired and effectively resolved pursuant to agreement by the parties reached in the bargaining process. The reserve system, perhaps the most troublesome aspect in the structure of organized baseball, has found a forum where it may be discussed, bargained for, then made the subject of agreement of both parties. The Messersmith-McNally arbitration prompted the owners and players to go to the bargaining table to seriously determine the future of the reserve clause.¹²⁴ The owners were finally forced to "play ball" with the Players Association, and the unilateral domination of restraint systems had come to an end.

123. *Id.* at 621.

124. This is not to say that there had been no previous discussion of the reserve clause between the Players Association and the owners. But the Association and the owners had never been forced to come to terms. As early as August 1967, the Players Association included in its policy statement a passage doubting the legality of the reserve system and called for a reasoned, open-minded approach toward some accommodation. The first Basic Agreement executed in February 1968, effective through February 1970, provided for a joint study of the reserve system, but no specific proposals were made and no joint study was conducted. Proposals were bandied about in 1969, but the club owners staunchly supported the status quo. Then in February of 1970, the Players Association and the clubs stipulated that neither party would bargain with respect to the reserve system until the *Flood* action was adjudicated. This was the situation until the negotiation of the 1976 Basic Agreement. See generally 316 F. Supp. at 283-84 n.18.

The 1976 Basic Agreement included, for the first time in history of baseball, a provision respecting the parties' agreement as to the reserve system.¹²⁵ The crux of the provision allowed any player whose contract was executed on, or after August 9, 1976, to become a free agent if he had six or more years of Major League service and he had not executed a contract for the next succeeding season. Article XVII of the 1976 Basic Agreement represented the essence of collective bargaining with both parties making proposals less stringent than those made in the course of the Messersmith-McNally arbitration, resulting in a middle ground reached by agreement of club owners and the players association.¹²⁶

But as "fair" as the process has seemed to be, the controversy surrounding the reserve system has not, unfortunately, come to an end.

IV. ANTITRUST APPLICATIONS AND THE LABOR EXEMPTION

The future of antitrust in sports litigation has engendered much controversy and debate of ideological differences.¹²⁷ It has been offered that as a byproduct of the labor exemption, antitrust is no longer a predominant feature of disputes in professional athletics, primarily owing to the advent of collective bargaining. The relative weight that this lends to counteract the efforts of those advocating the abolition of the antitrust exemption could be devastating.¹²⁸ It is suggested here that antitrust could still be an important device to maintain a checking influence on the bargaining process as baseball enters the 1980's. Therefore, it is still of major importance that baseball's antitrust exemption be dissolved. The following illustrates how the antitrust laws would ap-

125. The Basic Agreement between the American League of Professional Baseball Clubs and National League of Professional Baseball Clubs and the Major League Baseball Players Association effective January 1, 1976, Article XVII [hereinafter the 1976 Basic Agreement]. The text of Article XVII of the 1976 Basic Agreement is included in the Appendix, *infra*.

126. This agreement was not reached by calm and unruffled negotiation. An owners' lockout closed spring training for 13 days until Commissioner Kuhn reopened the camps. The players and owners agreed to the Basic Agreement in July of 1976.

127. See, e.g., Kheel & Millstein, *Professional Sports: Has Antitrust Killed the Goose That Laid the Golden Egg?* 45 ANTITRUST L.J. 290 (1976).

128. The lack of geographical power bases and congressional dormancy on the subject are only further aggravated by the decline in the significance of antitrust applicability.

ply to baseball, the effect of the labor exemption and the role that antitrust would play in the forthcoming negotiations, should the anomaly be destroyed.

A. *Antitrust Standards*

Liability under the Sherman Act is not absolute,¹²⁹ although the language appears absolute on its face. By forming different standards to determine liability, the courts have demonstrated a tolerance to certain alleged violations which have been defended as having overriding justification in spite of anticompetitive effects. Antitrust liability is therefore to be evaluated by either of two tests; the "per se" approach and the "rule of reason" test. It would be preferable, from the standpoint of a baseball plaintiff, to have the challenged conduct deemed "illegal per se." The Sherman Act absolutely prohibits certain activities that are clearly contrary to public policy, deeming them illegal *per se*. Examples of such activities are: horizontal price-fixing agreements,¹³⁰ tying arrangements,¹³¹ division of markets,¹³² and secondary or group boycotts.¹³³ Strict application of the *per se* approach precludes the admissibility of any evidence proffered to justify a particular restraint.¹³⁴ Since justification is not a relevant inquiry in a *per se* case, the baseball plaintiff does not have the burden of overcoming any evidence tending to make reasonably necessary an activity that otherwise violates antitrust law. The burden upon a baseball plaintiff is correspondingly minimal in comparison with analysis by the rule of reason.

Historically, baseball ownerships engaged in open price-fixing by dividing the player market and refusing to deal with, in effect,

129. Although the language of the Sherman Act seemingly proscribes all contracts or combinations in restraint of trade, a lesser standard of review was formulated in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911). There, the Court established the rule of reason test, declaring only unreasonable restraints of trade to be illegal.

130. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Price fixing agreements between parties within the same competitive level may well be shown to be an effect of a future reserve system given the present stance of management but the argument seems less cogent in the face of today's free market.

131. *International Salt Co. v. United States*, 332 U.S. 393 (1947).

132. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

133. *Klor's v. Broadway-Hale Stores Inc.*, 359 U.S. 207 (1959). A secondary boycott has been defined as "the application of coercive pressure upon a third party to refrain from dealing with a competitor of the party applying the pressure." Note, *Baseball's Antitrust Exemption and the Reserve System: Reappraisal of An Anachronism*, 12 WM. & MARY L. REV. 859, 870 n.68 (1971). Today it appears that there is much less likelihood of the success of a secondary boycott charge, with respect to the reserve system, than as it stood pre-1976.

134. See, e.g., *Fashion Originators Guild of America, Inc. v. F.T.C.*, 312 U.S. 457 (1941).

blacklisting, any player who did not wish to play for his original employer-club, all relative to the selection, retention and transfer of the player services market. All were blatant *per se* violations of antitrust laws.¹³⁵ But while preferable, the *per se* approach in sports litigation will be seen less frequently than in the past¹³⁶ particularly with the increasing scope of collective bargaining and the narrow confines¹³⁷ of *per se* applicability. Following this, there is authority that even with the allegation of *per se* illegality, unless an activity falls squarely within precedents set for *per se* illegality, the activity may be evaluated according to some compromise between the *per se* approach and the rule of reason approach.¹³⁸

135. Activities such as blacklisting, boycotting, exclusive division of territorial markets, and exclusion of competitive leagues have all historically been used by organized baseball without antitrust constraint. For an excellent discussion of specific violative instances, see H.R. REP. NO. 2002, 82d Cong., 2d Sess. (1952), and Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576 (1953).

136. Successful *per se* arguments have been made in sports related litigation. See, e.g., *Washington State Bowling Prop. Ass'n. v. Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir. 1966); *Smith v. Pro-Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971). In *Smith*, the court invalidated the professional football draft, deeming it *per se* illegal, "a group boycott in its classic and most pernicious form." 420 F. Supp. at 744. The court pointed out also that there were "significantly less restrictive alternatives available." *Id.* at 745. It must be closely noted that the draft invalidated in *Smith* was not the subject of a collective bargaining agreement, such that the labor exemption question would not apply. That would not be the case today. The subject in *Denver Rockets* was the "4 year rule" in professional basketball, presumably designed to foster and protect collegiate basketball. Athletic contracts could not be entered into in professional basketball (here the NBA) until four years from high school graduation. The rule was declared illegal *per se* as a group boycott, proscribed by § 1 of the Sherman Act. 325 F. Supp. at 1067. On authority of *Fashion Originators Guild of America* and *Broadway-Hale Stores*, see notes 132 and 133 *supra*, the rule was held illegal as an example of a group boycott conclusively presumed illegal without inquiry into justification for its implementation.

137. *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); *Klors v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *International Salt Co. v. United States*, 332 U.S. 393 (1947); *Fashion Originators Guild of Am., Inc. v. F.T.C.*, 312 U.S. 457 (1941); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918); *Timken Roller Bearing Co. v. United States*, 532 F.2d 615 (8th Cir. 1976); *Cowen v. New York Stock Exch.*, 256 F. Supp. 462 (N.D.N.Y. 1966), *aff'd*, 371 F.2d 661 (2d Cir. 1967).

138. Comment, *Player Control Mechanisms in Professional Team Sports*, 34 U. PITT. L. REV. 645 (1973); *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418, 423-24 (1967); see also *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918); *Cowen v. New York Stock Exch.*, 256 F. Supp. 462 (N.D.N.Y. 1966), *aff'd*, 371 F.2d 661 (2d Cir. 1967). Sports cases in particular have

One may find, and must be prepared for, the imposition of a variety of compromise in a case that seemingly involves *per se* illegality. This compromise in a reserve system challenge would involve a balancing of the particular restraint, its effect upon the players interest in their freedom to contract and competitive freedom, and the factual inquiry into any special circumstances tending to justify the imposition of the restraint.¹³⁹ Although it seems to be a kind of rule of reason test in and of itself, this test is less rigorous than the traditional one.

It is interesting to note the courts' willingness to allow limited evidence tending to justify restrictive agreements in a seemingly *per se* case when the purposes of the restraints have been non-commercial.¹⁴⁰ Justification of baseball's reserve system has, in fact, been primarily non-commercial. This is not to say, however, that it is completely non-economic. There are both economic influences, which include rising salaries, club financial existence and league balance, and non-economic influences, such as the integrity of the sport. For example, the forcing out of competitive leagues by the reserve rules, although not at issue today, comes within the commercial purpose. It is suggested, therefore, that even a *per se* case will be evaluated, to some extent, by a reasonableness standard in a reserve rule challenge.

If an activity does not constitute that kind of conduct deemed illegal *per se*, the courts will apply the rule of reason standard which, necessarily entailing exceptionally difficult burdens likely to involve expensive and lengthy litigation, requires the court to:

[C]onsider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.¹⁴¹

Under this rule of reason approach, if management can show an

engendered controversy as to whether a *per se* illegality will be applied to player restraint mechanisms. The view that unless such restraints are so wholly pernicious and so wholly one-sided that the summary *per se* approach is the only proper rule, the rule of reason or some modification theory is the proper standard. *Chicago Board of Trade* is one case among others that precludes the imposition of the illegal *per se* framework whenever the collective regulations of an organized market structure are involved.

139. Comment, *Player Control Mechanisms in Professional Team Sports*, 34 U. PITT. L. REV. 645, 654-55 (1973).

140. *Id.* Particular attention is paid to this theory in Comment, *Player Control Mechanisms in Professional Team Sports*, 34 U. PITT. L. REV. 645, 656-60 (1973) (citing Coons, *Non-Commercial Purpose As A Sherman Act Defense*, 56 N.W.U.L. REV. 705 (1962)).

141. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1968).

overriding economic justification for a restrictive agreement then it will be upheld as reasonable.

Valid justifications for player restraints deal with the sports industry as being unique in the field of antitrust. Unlike general industry, team and league competitors compete by agreement. This creates the competitive balance with an element of continuity whereby every team has a reasonable chance of success in a given season—elements necessary for customer patronage and financial success. The burden placed upon baseball plaintiffs in a player restraint case to be evaluated under the rule of reason test seems onerous. Given the premise that restraint mechanisms have been upheld in greater as well as lesser degrees due to the justifications presented in light of the unique business relationships in the sports industry, challenge to player mobility restrictions may be particularly less successful than other challenges based upon management antitrust violations.

The 1976 agreement providing for a reserve rule, momentarily ignoring the labor exemption, would probably survive under the rule of reason due to the allowance of the courts examination into justification for anticompetitive effects of mobility restraints. The court would require that the reserve period, which is presently six years, genuinely support the league's justifiable interests in maintaining balanced league competition and non-commercial purposes, such as integrity, with the least amount of anticompetitive potential. To date there has been little substantive argument with the reserve system as it stands from the viewpoint of player-employees. Because the ends sought are being achieved with the present system, alterations made upon it would only be upheld where they promoted lesser restrictive potential, and not more. Hindsight being what it is, the 1976 agreement would likely survive a rule of reason test. The reason? It has worked. But as to what the future holds for the system, again ignoring the labor exemption, will depend upon the alterations in the restrictions and will fall to antitrust if too extreme and too anticompetitive in accomplishing the necessary balance of competition.¹⁴² It is sug-

142. The club owners seek to modify the existing rules relating to reserve and free agency by imposing a system of compensation. The justification advanced for the greater restrictiveness of their proposal deals with the correlative spiraling of salary demands due to the present free agency system. The owners contend that this system upsets the balance of competition by leaving the wealthiest teams with the "best" players, contributes to the financial demise of poorer clubs, and raises consumer prices which, in return, diminishes public confidence in the sport.

gested that any changes in the reserve system as it stands which impose greater restrictions on player mobility and the ability to market his skills would be particularly suspect, as the courts have favored the imposition of provisions with the least amount of restrictive or anticompetitive effect necessary to achieve the justifiable ends in a rule of reason analysis.

It has been seen that even assuming the applicability of the antitrust laws to organized baseball, the road to modifying total management control of player mobility is not clear. The reserve rules as they existed before the Messersmith-McNally arbitration would probably have been susceptible to even an illegal *per se* argument, although this is not the case today. Not only have the reserve rules gone through a complete change in their implementation and effect, the process has been submitted to collective bargaining, which gives rise to the labor exemption. Nevertheless, although the justifications for player restraint mechanisms limit the success of an attack upon it based upon antitrust principles, it is important to understand the substantive antitrust standards in light of other antitrust challenges that may surface once the exemption is dissolved.

B. The Labor Exemption

The only major factor limiting the application of antitrust principles to professional baseball's virtual monopoly is the labor exemption to the antitrust laws. According to some authorities the labor exemption means the demise of antitrust litigation in professional sports.¹⁴³ But as will be seen below, the labor exemption does not render antitrust dead and buried as applied against monopolistic practices in professional athletics today. It should be noted that antitrust could have special meaning in regards to the forthcoming free agency negotiations, making the need for the abolition of the antitrust exemption all the more immediate.

Response to the arbitrary denial of legislative protection led baseball players to organize in order to avail themselves of the right to bargain collectively. Although a particularly important step in the development of baseball in improving the terms and

Facts seem to belie, in part, these so-called justifications. Public attendance is at an all-time high, and the teams spending the most dollars on free agents have not uniformly left them at the top of the heap in the final standings. See Staudohar, *Player Salary Issues in Major League Baseball*, 33 ARB. J. 17 (1978). Although escalating salaries are a genuine concern, it should be noted that free agency has only functioned as a vehicle by which greater bargaining power is reached. The solution effectively lies not in further restriction of player mobility, but rather in owner control of their individual pocketbooks.

143. See note 127 *supra* and accompanying text.

conditions of its player-employees, the entrance into the collective bargaining arena triggers the right to engage in some practices which will escape sanctions imposed by antitrust. Congress has seen fit to allow collective bargaining a shelter under which, subject to certain criteria, antitrust will not apply to otherwise monopolistic practices.

A combination of provisions of the Clayton Act,¹⁴⁴ the Norris-LaGuardia Act,¹⁴⁵ the National Labor Relations Act, and decisional law¹⁴⁶ compromise this "labor exemption" to the antitrust laws. In the face of the present management position on the intolerability of the system as it stands, an inquiry should well be made into the limits of the labor exemption, for the future may hold in store a new reserve system that has not been the subject of meaningful collective bargaining.

The labor exemption is not applied automatically to agreements solely because they fall under the rubric of collective bargaining. Judicial interpretations compromise the criteria by which the labor exemption comes into effect.

Initially, although of least import to the present reserve challenge, there can be no evidence that a union is combining with non-labor groups to produce an external market effect, that is, to eliminate competition by non-consenting entities.¹⁴⁷ More important to present discussion is the requirement that the union act in its own self interest.¹⁴⁸ This may ideologically be tied with the duty of fair representation. The union must represent the interests of all of its members, which in the case of professional sports is not as easily accomplished as it would seem on its face. Especially with respect to a reserve system challenge in which the de-

144. 15 U.S.C. § 17 (1976); 29 U.S.C. § 52 (1976).

145. 29 U.S.C. §§ 101-15 (1976).

146. *Amalgamated Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mineworkers of America v. Pennington*, 381 U.S. 657 (1965); *Allen Bradley Co. v. Electrical Workers Local 3*, 325 U.S. 797 (1945); *United States v. Hutcheson*, 312 U.S. 219 (1941); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

147. *Allen Bradley Co. v. Electrical Workers Local 3*, 325 U.S. 797 (1945). *Allen Bradley* involved a closed shop agreement between electrical contractors and manufacturers which had the effect of restricting the market area products to that of the union only. Suit was brought by a nonsignatory manufacturer who was unable to market his product in the area due to the agreement. It was held that Congress had not intended that violations of antitrust should be protected merely because unions were involved, acting in concert with nonlabor to create a market monopoly.

148. *United States v. Hutcheson*, 312 U.S. 219 (1941).

gree of restrictiveness may be traded off to gain concessions in other areas to balance its duty of fair representation.¹⁴⁹

That the reserve system is a mandatory subject of collective bargaining has been established.¹⁵⁰ But because a subject is mandatory, does not automatically exempt it from antitrust scrutiny.¹⁵¹ Because there is no clear cut policy indicating that internal labor effects as well as external market effects preclude the immunization of an agreement from antitrust, it has been suggested by some that, by implication, agreements which relate to mandatory subject matter which have no external market effects are not affected by the limitations imposed upon the labor exemption.¹⁵² The internal-external effects that are distinctions in decisional law should not be used to assert that only external effects may result in antitrust liability. To do that requires reading seemingly conflicting opinions¹⁵³ with blinders. That an "agreement" is related to mandatory subjects does not mean antitrust liability may be excluded with impunity. Laws drawn to protect those who challenge an "agreement" may not be arbitrarily denied to those who challenge the provision solely because it is a mandatory subject under the rubric of collective bargaining. "There are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement may disregard other laws."¹⁵⁴ In accordance with this view, sports cases heretofore have adopted the rationale that even upon finding that an agreement relates to a mandatory subject of collective bargaining the court will not automatically apply the exemption.¹⁵⁵

149. See discussion of the problems presented by the duty of fair representation in relation to the reserve system proposal *infra* n.167.

150. See note 102 *supra*.

151. *UMW v. Pennington*, 381 U.S. 657 (1965). No labor exemption was available to a union combination with management, which imposed a set wage scale to be applied to nonconsenting management groups, and thereby had an external market effect. *Cf.*, *Amalgamated Meat Cutters v. Jewel Tea Co., Inc.*, 381 U.S. 676 (1965). In *Jewel Tea*, there was no comparable external market effect against persons outside the bargaining unit. A provision negotiated between the butcher's union and member employers provided for an hour restriction on meat markets. Under duress, Jewel Tea Stores signed the agreement, but brought suit against the union seeking to have the restriction declared illegal, as violative of the antitrust laws. The Supreme Court refused to apply the antitrust laws, claiming the labor exemption controlled. However, the opinions were diffuse. See note 153 *infra* and accompanying text.

152. J. Weistart & C. Lowell, *THE LAW OF SPORTS* 556 (1979).

153. In fact, the Court in *Jewel Tea* gave two inconsistent reasons for its external-internal distinction in its decision. In addition, three Justices dissented and would have ruled in favor of the Jewel Tea stores.

154. *United Mineworkers of America v. Pennington*, 381 U.S. at 665.

155. *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976); *Smith v. Pro-Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976); *Philadelphia World Hockey Club*,

At that point the courts will inquire as to the ultimate, and perhaps most relevant consideration here: was the agreement a product of "serious, intensive, arms-length collective bargaining."¹⁵⁶ The presence of genuine arms-length bargaining has remained the one constant standard in the somewhat problematic interpretations in sports cases involving the labor exemption.¹⁵⁷

The factors enumerated above indicate the criteria which must be met to activate the imposition of the labor exemption. Lacking the proper combination subjects an agreement to scrutiny under the antitrust laws. This is where the antitrust principles will have their life in baseball. While granting the immunity for the players association to collectively bargain for provisions which may have impermissible antitrust effects, the antitrust laws may keep a watchful eye that true bargaining has occurred during negotiations. In light of the posture that club ownership has recently taken with regard to the reserve system, their "take-it-or-leave-it" proposal raises serious doubts as to the system's propriety under the antitrust laws. It is because of this kind of stand that baseball's antitrust exemption must be eliminated. While the labor laws may stand in the forefront in future litigation, replacing the impact antitrust once had, antitrust is nevertheless alive and well,

Inc. v. Philadelphia Hockey Club, 351 F. Supp. 462 (E.D. Pa. 1972); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975). The *Mackey* court refused to apply the labor exemption in the face of an antitrust challenge to football's Rozelle Rule on the basis of a lack of true arms-length collective bargaining on the subject. 543 F.2d 606 (8th Cir. 1976).

Although the court in *Smith* found that no collective bargaining agreement was in force when the challenged draft was held, the court, in dicta, did suggest that the college draft would be a mandatory subject of bargaining. An inquiry would be proper to determine whether true collective bargaining had taken place. 420 F. Supp. at 742. *Robertson* was in accord, Judge Carter holding that "[t]here is no operative labor exemption barring or protecting the [National Basketball Association and American Basketball Association] from being sued for antitrust violations." 389 F. Supp. at 884.

156. 351 F. Supp. at 499.

157. *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975) (additionally denying the use of the labor exemption to protect employer defendants from antitrust suits); *Kapp v. National Football League*, 390 F. Supp. 73 (N.D. Cal. 1974) (suggesting that even if collective bargaining is present, apart from antitrust, unreasonable restrictions on employee rights to seek employment are unenforceable); *Mackey v. National Football League*, 407 F. Supp. 1000 (D. Minn. 1975), *modified*, 543 F.2d 606 (8th Cir. 1976) (suggesting that the availability of the exemption requires also that alleged restraint primarily affects only the collective bargaining parties and that the restraint involves a matter which is a mandatory subject of collective bargaining). See generally J. WEISTART & C. LOWELL, *THE LAW OF SPORTS*, 568-90 (1979).

providing the necessary link in a system which assures arms-length negotiation and fair competition in the marketplace for professional athletic talent.

V. BASEBALL TODAY

A. *Impasse in 1980*

The 1976 Basic Agreement terminated on December 31, 1979. Negotiations for a new basic agreement have been far from tranquil. Months of parleying reaped only wide differences. The key confrontation between the players association and the club owners is again the baseball reserve system.

In the spring of 1980, the players association appeared to concede the status quo of the reserve system as it stood at the expiration of the 1976 Basic Agreement,¹⁵⁸ proposing only that the six year eligibility be reduced to five years.¹⁵⁹ In a unique turn of events, it is the club owners who were the mavericks this year. They proposed that when a free agent is signed by any of the twenty-six major league teams, the club he leaves has a limited right to select a quality player from the team that signed the free agent. Under these particular terms, a team may exempt fifteen of twenty-five of their roster players, leaving ten players subject to claim by the club which the free agent left. The owners claim that compensation for the loss of a free agent is only fair¹⁶⁰ to recompense a team for the time, money, and effort expended in training the player as well as for the talent they lose by the player becoming a free agent. But in reality the reasoning behind their posture goes further than that. Forcing free agency to a virtual halt for most baseball players, excepting so-called "superstars," will be the result of this deflation of the free agent market.

The owners served notice, however, that the reserve system is unacceptable as it stands and that they were prepared to withstand a long strike in order to get it modified.¹⁶¹ The players association was no less adamant. But it should be noted too that

158. See appendix *infra*.

159. The five year proposal is a concession from the original four year proposal.

160. The reasoning for the owners' scheme, a baseball adaptation of the Rozelle Rule, is poor indeed. Limited only by the inopposite standards of draft selections the freeze of 15 players would cover only a starting field and the pitching rotation, leaving the bullpen and backups (the 10 remaining players) open to be snatched by a club losing a player to free agency. This not only would effectively stop a team from contracting with a free agent, it would leave 10 men on every team living with the likelihood that they would lose all prospect of playing out their option and seeking another club to play for and the chance for better pay. It all but stops free agency cold. The word "fair" is not quite appropriate here.

161. The owners were reported to have taken out an approximately 50 million dollar insurance policy to indemnify themselves in case of a strike.

unions, while amenable to concession, have rarely been found to accept such a sweeping retreat of an employment condition in the negotiation process. In fact, with regard to the present reserve system, some association members have accused the association negotiators of "selling out" with respect to the six year eligibility requirement negotiated in 1976. This may serve to indicate the kind of stance that the players association will take in the face of the owners' demands for modification.

During the 1980 spring training, players voted with but a single dissent, to authorize a strike should an agreement not be reached. They did, in fact, close out spring training a week early. The season commenced on schedule, however, but a new strike deadline was set for midnight on May 22, 1980, if no agreement was reached.

Negotiation was at an impasse from the start of the 1980 season up to and throughout the May 22nd deadline. The public, media, and players alike¹⁶² seemed to accede to the fact that a strike was inevitable. Yet, as unanticipated as the Mets of 1969 and snow in June, a strike was narrowly averted by baseball management and player representatives just before dawn on May 23, 1980. A kinship between cat and mouse? Not exactly. Although settlement was not reached, an agreement was made for an arrangement that deferred further settlement of the reserve system controversy until January of 1981. Other issues were reconciled, however, including among them, pension contributions and minimum salary requirements.¹⁶³

Critical to the avoidance of a strike was the disposition of the free agent compensation issue. The agreement reached authorized a committee of two player representatives and two management representatives to meet no later than August 1st, to study the free agent system and submit reports no later than January 1, 1981. If the committee agrees on a replacement for Article XVII of the 1976 Basic Agreement, it will become part of the 1980 Basic

162. Reporters from coast to coast confirmed the likelihood of a strike. From the early close of spring training, newspapers across the country filled their sports pages with "strike stories." As well, a sign adorned the Los Angeles clubhouse "Gone Fishin."

163. Other negotiations involved the owners agreement to a \$15.5 million annual pension plan contribution from their original offer of \$14.4 million. The owners accepted the player proposal for minimum salary levels of \$30,000 in 1980 and \$32,500 in 1982 and the players accepted the owners' offer of \$33,500 in 1983 and \$35,000 in 1984.

Agreement. But, if the committee is not in agreement as to the terms of the new article then, (1) management has the right to unilaterally implement their compensation proposal or a variation thereof, "not less favorable" to player-employees, between February 15th and 20th; and (2) the players association, by giving notice by March 1st, have the right to strike by June 1, 1981 over the impasse in the free agency negotiations. The single limitation on the players association's right to call a strike is the fact that should they decide not to strike at the prescribed time, they will lose their right to strike for the balance of the agreement.¹⁶⁴

The deferment of the reserve system issue may be seen as a victory of sorts for the young players association. They stood fast to their commitment to strike and, barely hours before the first game of the day was scheduled, the owners agreed to a proposal which they had unilaterally rejected only a week earlier. The unexpected move sent ballplayers, who had shut off their alarms for the morning of May 23rd, scuttling for flights to their road destinations. Baseball was on for 1980.

B. Labor Pains in '81?

The year 1981, may find baseball either reconciling its differences at the collective bargaining table, or as a ghostly presence in silent ballparks across the country. The ambit of collective bargaining includes within it both the "right" of employee strikes as well as management lockouts.¹⁶⁵ The use of a strike as a weapon of economic warfare in collective bargaining is well established. The usual case in a strike, however, is that employees refuse to work as a means to coerce their employer into acceding to a demand which has been refused. Nevertheless, it is here that management has made the demand, and the players in refusing to bargain away rights they have heretofore enjoyed with no accompanying concession, seek to use a strike in defense.

Yet the right to strike is not without limitation. Both parties are still under the obligation to bargain in good faith. A potential challenge that the players association may lodge against the owners is a lack of good faith bargaining, constituting an unfair labor

164. The right to strike *may* be waived, however, with reinstatement of the right by club permission in 1982. As this article goes to print, the major league club owners have exercised their right to unilaterally implement their compensation proposal, suggesting that negotiations are at a virtual standstill as baseball opens its 1981 spring training camp. Marvin Miller of the players association has charged the owners with bad faith refusal to bargain. Owner George Steinbrenner recently indicated that the owners are "more ready than ever" to withstand a strike. Baseball has a rough road to travel in 1981.

165. For in-depth effects of strikes and lockouts in professional sports see J. Weistart & C. Lowell, *THE LAW OF SPORTS* 823 (1979).

practice. Bad faith may have been found in management's earlier stance in issuing an adamant "take-it-or-leave-it" proposal,¹⁶⁶ and very well could be found if in 1981, they take the same stance.

Other problems are inherent in any decision to effect a work stoppage. The owners may have already formented dissent within the ranks of the players association which may ultimately erode its web of support for a strike. Any strike would most certainly affect the life of a player on the low end of the salary scale more devastatingly than so-called "superstars" and those players with a number of years of major league service under their belts. The charge of the owners that the players association has refused to trade off proposals aimed at benefiting the newer and lower paid players, with a modification of the reserve system, thus forcing a strike to the greater detriment of those players, may create dissension within the ranks of the association. Charges of a violation of the association's duty of fair representation¹⁶⁷ may follow, doing great damage to the solidarity of its bargaining position with the owners.

Throughout the spring of 1980, the owners conducted a media blitz engendering the majority of the public who expressed an opinion on the issue to side with the "poor owners," who were presented as being backed against a wall by a gang of bat-wielding brutes.¹⁶⁸

The public interest is an important element in labor disputes involving professional athletics. This public interest is itself reflected in a general manner, in the principles of the National Labor Relations Act.¹⁶⁹ It is also reflected in the congressional hearings on the subject of professional sports. And Judge Cooper, in his district court opinion in *Flood v. Kuhn*,¹⁷⁰ even felt compelled to take judicial notice that "baseball is everybody's business."¹⁷¹

166. See *General Elec. Co.*, 150 N.L.R.B. 192 (1964), *enforced*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970). This bargaining technique is frequently referred to as "boulwarism," named after its apparent founder at General Electric. J. Weistart & C. Lowell, *THE LAW OF SPORTS* 804 n.208 (1979).

167. See generally the collective bargaining section *supra*.

168. Informal survey of those responding to the *Los Angeles Times* and *New York Times* "letters to the editor" found support for management four to one. It was indicated, however, that the public was largely uninformed and misled early on as to actual work stoppage issues.

169. J. Weistart & C. Lowell, *THE LAW OF SPORTS* 837 (1979).

170. 309 F. Supp. 793 (S.D.N.Y. 1970).

171. *Id.* at 797.

The players, on the other hand, have not been particularly effective in rousing public support. Labor negotiations in the area of professional athletics are conducted in a fishbowl. The association would be wise to pay more attention to its public relations lest the owners continue their blitz on the public in 1981, further skewing association support.

The spectre of a baseball strike looms ominously in the near future. The hub of the dispute is the reserve system; nevertheless, management concedes that rising payrolls are the real concern. A viable method of control is sought as the means to the end of rapidly escalating salaries. But the element of control should be exercised among the owners themselves. Salary demands are not among the issues that will bring baseball to a strike. The reserve free agent system, on paper, has nothing to do with salaries. It has to do with mobility. If salary rates are grossly inflated then we must look to the ones who sign the checks. Unfortunately, the club owners stab each other in the back in the fall and cry poverty in the spring.¹⁷²

A strike is not an answer. At best it is a tactic. Circumstances point to the fact that if club owners are truly prepared to weather a strike, the losers will be the ballplayers. Thus, if the players association cannot obtain leverage to come to an agreement with the owners, whether by direct challenge to their stance that the reserve system is intolerable as it exists, or a concession based upon the leverage to wield antitrust power in other areas, there is a sad likelihood that along with a prolonged strike will come the financial devastation of hundreds of young men, as well as a potentially fatal blow to the Major League Baseball Players Association. The vast progress that ballplayers have made in the process of collective bargaining may be defeated by the very ills that plagued baseball from its early days.

VI. ANTITRUST AND LABOR—A PEACEFUL COEXISTENCE IN BASEBALL'S FUTURE

There is an oddly balanced set of interrelationships between the antitrust laws and the labor laws. The imposition of one,

172. Free agency may have spawned large salaries yet the market should adjust itself when the results are in. Owners may then perhaps control their pocket-books rather than attack the system.

It is too early to determine whether free agents with seven figure contracts will perform well enough to give the club owners a return on their investments since many free agent contracts have several years to run. Although free agents have played well, a majority of them have not provided the box office rewards that the owners expected.

Staudohar, *Players Salary Issues in Major League Baseball*, 33 ARB. J. 17, 19 (1978).

however, will not necessarily supercede, in total, the imposition of the other. In support, the Supreme Court has stated that, "benefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires."¹⁷³ Nevertheless, the very nature of the collective bargaining agreement mandates that the parties be able to "restrain" trade to a greater degree than management could do unilaterally.¹⁷⁴ It is suggested that there must be an examination of the purposes and competing interests of labor and antitrust statutes for the purpose of striking a balance.¹⁷⁵ There would be a limit to the antitrust violations to which the players and club and league management can agree.

If the club owners present the players association with a take-it-or-leave-it proposal as to changes in the reserve system constituting mandatory compensation for the loss of free agents, it would not be subject to the labor exemption should the antitrust laws apply.¹⁷⁶ Assuming that the labor exemption would not protect the agreement, it is dubious at best whether or not a form of compensation would be deemed reasonable under antitrust standards.¹⁷⁷ Unless club ownership could demonstrate that the previously negotiated system fostered vastly negative effects upon the justifications offered to uphold the restrictive practices, the courts will most likely find the promulgated restraints too extensive and thus violative of the antitrust laws. The judicial system seeks to posit the least restrictive systems necessary to achieve justifiable goals. A take-it-or-leave-it proposal imposed unilaterally by club ownership would have no effect under the protection of the antitrust laws. Without the present antitrust laws, redress may only be had through the National Labor Relations Board.

History has dictated that only by resort to the Congress will the anomaly that baseball's antitrust exemption rests upon be eradicated. Placing baseball on a par with other sports, thus subjecting management to operate under the purview of antitrust laws, would allow ballplayers to obtain the leverage they need at the bargaining table. With respect to an impending strike, the players association needs leverage *now*. While the elimination of the exemption would not *per se* assure a solution to the players' di-

173. *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949).

174. 407 U.S. at 295 (Marshall, J., dissenting).

175. *Id.*

176. See Zoller, *From Gridiron to the Courtroom*, 17 AM. BUS. J. 135 (1979).

177. See *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976).

lemma in face of the owners' demands today, it would afford them a stronger position in negotiation, and allow for increases in bargaining power. It could also serve to bind the membership tighter, despite attempts to splinter their unity.

It is certainly unlikely and unnecessary that baseball destroy itself.¹⁷⁸ Collective bargaining has shown itself to be a workable entity in baseball. It is important that management and labor come to a mutual compromise in the spirit of true bargaining for the benefit of the workers and the sport alike. The owners must not be allowed to unilaterally impose their compensation proposal because they are better able to withstand a strike. As Justice Douglas has opined, "[t]he owners, whose records many say reveal a proclivity for predatory practice, do not come to us with equities."¹⁷⁹ We may likely see a baseball strike in 1981 over the compensation issue. If the collective element of collective bargaining breaks down, then players are either forced to accept management's proposal or enter into economic warfare that may destroy careers, the players association, and perhaps baseball itself. It is hoped that the above examination of the past and suggestions for the future may emasculate these dire predictions. For above all, it is true that:

Baseball . . . enjoys a unique plane in our American heritage . . . [it] is avidly followed by millions of fans, looked upon with fervor and pride and provides a special source of inspiration . . . especially for the young. . . . To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and escape from the ordinary to most inhabitants of this land, were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations. The game is on higher ground; it be-

178. Predictions of doom are not new. After *Gardella*, a former minor league baseball official, Florida Congressman Syd Herlong, made a speech on the floor of the House of Representatives lamenting that the *Gardella* case would "sound the death knell for the sport that has kindled the fires of ambition in the breasts of so many thousands of young Americans." (quoted in L. SOBEL, PROFESSIONAL SPORTS AND THE LAW 15 (1977)).

179. 407 U.S. at 287 (Douglas, J., dissenting). This is somewhat of an understatement. Players Association figures represent that only 27.2% of the club owners income goes to payroll which is in stark contrast to the 50% figure of most other industries. This does not include parking, concessions and other revenue sources of which the club owners are not required to submit. Add the fact that many clubs are rapidly taking control of, or sharing in, the profits of concessions and parking and this represents a trend that will continue. Most persuasive, however, is the potential explosion of profit with the advent of pay cable television. The potential is limitless. Thus, the owners are not financially strapped. And if some may be, they must convince their brethren to exercise some restraint. To force the players to pay for the owners' lack of self-control is the epitome of inequity.

hooves everyone to keep it there.¹⁸⁰

NANCY JEAN MEISSNER

180. 309 F. Supp. at 797.

ARTICLE XVII—RESERVE SYSTEM

A. Reservation Rights of Clubs

Subject to the rights of Players as set forth in this Agreement, each Club may have title to and reserve up to 40 Player contracts. A Club shall retain title to a contract and reservation rights until one of the following occurs:

- (1) The Player becomes a free agent, as set forth in this Article;
- (2) The Player becomes a free agent as a result of
 - (a) termination of the contract by the Club pursuant to paragraph 7(b) thereof,
 - (b) termination of the contract by the Player pursuant to paragraph 7(a) thereof,
 - (c) failure by the Club to tender to the Player a new contract within the time period specified in paragraph 10(a) of the contract, or
 - (d) failure by the Club to exercise its right to renew the contract within the time period specified in paragraph 10(a) thereof; or
- (3) The contract is assigned outright by the Club.

A Club may also reserve, under separate headings on a Reserve List, Players who properly have been placed on the Voluntarily Retired List, the Military List, the Suspended List, the Restricted List, the Disqualified List or the Ineligible List. (See also Attachments 12, 13 and 14).

B. Free Agency

(1) *Player Contracts Executed Prior to August 9, 1976.* Following completion of the term of the contract as set forth therein, the Club may renew the contract, as specified pursuant to paragraph 10(a) thereof, for one additional year. The Player, unless he has executed a contract for the next succeeding season, shall become a free agent on the day following the last game played by the Club (in the championship season, or in the League Championship Series or the World Series if the Club participates in such Series) in the renewal year, subject to the provisions of Section C below.

(2) *Player Contracts Executed On or After August 9, 1976.* Following completion of the term of the contract as set forth therein, any Player with 6 or more years of Major League serv-

ice who has not executed a contract for the next succeeding season shall become a free agent, subject to the provisions of Section C below, by giving notice as hereinafter provided within the 15 day period beginning on October 15 (or the day following the last game of the World Series, whichever is later). Election of free agency shall be communicated by telephone or any other method of communication by the Player to the Players Association. Written notice of free agency shall then be given within the specified time limits by the Players Association, on behalf of the Player, to a designated representative of the Player Relations Committee, and shall become effective upon receipt.

C. Reentry Procedure

The procedure set forth in this Section C shall apply to Players who become free agents pursuant to Section B above. Players who otherwise become free agents under this Agreement shall be eligible to negotiate and contract with any Club without any restrictions or qualifications, shall be deemed not to have exercised rights of free agency for purposes of Section E of this Article XVII, and the Clubs signing such free agents shall do so without regard to the quota and compensation provisions of this Article.

(1) *Negotiation Rights Selection Procedure*

(a) A Selection Meeting of the Major League Clubs shall be convened by the Commissioner during the period between November 1 and November 15 of each year for the Clubs to select rights to negotiate and contract with free agent Players. Such Players shall be listed on an "Eligible List" certified by the League Presidents and the Players Association. Selections shall be made from the Eligible List.

(b) At the Selection Meeting, Clubs shall select in inverse order of their standing in the championship season just concluded. Percentage of games won and lost shall determine the order within each League without respect to Divisions. If two or more Clubs within a League have the same percentage, the order of selection among such Clubs shall be determined by lot. In 1976, the League drafting first shall be determined by lot and Leagues shall alternate choices thereafter. In succeeding years, the League which selected second in the previous year shall select first.

(c) Each of the 24 (26 beginning in 1977) participating Ma-

Major League Clubs may make one selection in each round. As the proceedings advance, round by round, each Player may be selected by a maximum of 12 Clubs (13 beginning in 1977), not counting the Player's former Club which need not select such a Player. The selections will continue until each eligible Player has been selected by 12 Clubs (13 beginning in 1977) or until each Club has indicated that it desires to make no further selections. At the conclusion of the selections, the former Club of each Player will be asked to indicate whether it wishes to have negotiation rights with respect to that Player, and, if it does desire to have such rights, it will then be added to the list of Clubs eligible to negotiate and contract with that Player.

(d) If less than 2 Clubs select negotiation rights to a particular Player, the Player immediately will be free to negotiate and contract with any Major League Club, without restrictions or qualifications applicable to either the Player or the Club, in the same manner as a Player who becomes a free agent other than by virtue of Section B above.

(e) Any Player who, under these procedures, is unsigned on February 15 may elect, within 7 days after that date, to re-submit himself to a new drawing of lots by the Clubs for the selection of negotiating rights with him. The new drawing shall be held within 3 days after communication of the Player's election. Negotiating rights shall be granted to 4 Clubs determined by lot from Clubs which indicate at the time of the drawing that they are interested in signing such Player. The Player's former Club shall not be eligible to acquire negotiating rights pursuant to this paragraph. Of the 4 Clubs so determined, 2 shall be from each League, except, in the event less than 2 Clubs from one League indicate interest, more than 2 Clubs may be determined from the other League in order that a total of 4 Clubs are determined. If a Player elects to invoke the optional procedure provided for in this paragraph, all prior negotiation rights shall be cancelled and only the 4 Clubs drawn by lot would then have negotiation rights with the Player. Any such Club may sign the Player without regard to the quota provisions of this Article. If less than 2 Clubs select negotiation rights to a particular Player under this optional procedure, paragraph (d) above shall apply.

(2) *Contracting With Free Agents*

(a) Regardless of the number of Players for whom they have drafted negotiation rights, Clubs shall be limited in the number they may subsequently sign to contracts. The

number of signings permitted shall be related to the number of Players on the Eligible List. If there are 14 or less players on the Eligible List no Club may sign more than one Player. If there are from 15 to 38 Players on the Eligible List, no Club may sign more than 2 Players. If there are from 39 to 62 Players on the Eligible List, no Club may sign more than 3 Players. If there are more than 62 Players on the Eligible List, the Club quotas shall be increased accordingly.

(b) Irrespective of the provisions of paragraph (a) above, a Club shall be eligible to sign at least as many Players as it may have lost through Players having become free agents at the close of the season just concluded, under the provisions of Section B of this Article.

(c) No Player shall be prevented from negotiating with (and potentially signing with) at least 6 Clubs, or if less than 6 Clubs have selected negotiation rights with him, then the number of Clubs that have selected negotiation rights with him. Should the signing of other Players to contracts reduce the number of Clubs (excluding the Player's former Club) eligible to sign a particular Player below 6 (or below the number of Clubs drafting him if less than 6), then the Commissioner shall make an additional Club(s) eligible to sign such Player. The additional Club(s) shall be determined by lot from Clubs (excluding the Player's former Club) which

(1) originally drafted negotiation rights with the Player but became ineligible to sign the Player because of exhausting the limit of Player signings permitted under paragraphs (a) and (b) above, and

(2) indicate at the time of drawing of lots that they continue to be interested in signing such Player.

If the above procedure fails to restore the number of Clubs eligible to sign the Player to 6 (or the number of Clubs drafting him if less than 6), then the additional Clubs shall be determined by lot from all the remaining Clubs (excluding the Player's former Club) which, at the time of drawing, indicate interest in signing the Player, in order to so restore the number of Clubs. This procedure shall be followed and implemented on a weekly basis (and on a more frequent basis after January 1 of each year) to restore to the Player the minimum number of Clubs required to be available to negotiate (and potentially sign a contract) with him.

(d) When a Player and one of the Clubs which has selected negotiation rights to him reach agreement on terms, the Club will immediately notify its League Office of that fact together with a summary of the terms to which the Player has agreed. The Players Association will then be advised by the League Office of these facts and will promptly seek confirmation of them by the Player. Upon obtaining such confirmation, the Players Association shall notify the League Office, and all other Clubs holding negotiation rights to that Player shall be advised that the Player has come to terms and is no longer a free agent.

(c) A Club which signs a contract with a Player who became a free agent pursuant to Section B(1) of this Article, shall not compensate the Player's former Club. A Club which signs a contract with a Player who became a free agent pursuant to Section B(2) of this Article, shall, except as provided in Section C(1)(d) above, and the last sentence of Section C(1)(e) above, compensate the Player's former Club by assigning to it a draft choice in the Regular Phase of the next June Major League Rule 4 Amateur Player Draft. If the signing Club is among the first half of selecting Clubs, then the choice to be assigned for the most preferred free agent Player signed by such Club shall be its second choice, with choices in the next following rounds to be assigned as compensation for the signing of other Players in descending order of preference. If the signing Club is among the second half of selecting Clubs, then such compensation shall begin with the Club's first choice. In determining the order of preference among Players for this purpose, the Player selected by more Clubs will rank higher and, if the number of selecting Clubs is the same, the Player first selected by that number of Clubs will rank higher.

(3) Conduct of Free Agents and Clubs Prior to Selection Meeting

(a) During the period beginning on the day the Player becomes a free agent and ending 3 days before the Negotiation Rights Selection Meeting, any Club representative and any free agent or his representative may talk with each other and discuss the merits of the free agent contracting, when eligible therefor, with the Club, *provided, however*, that the Club and the free agent shall not negotiate terms or contract with each other. Notwithstanding the foregoing, the free agent and his previous Club may engage in negotiations and enter into a contract during said period. Should they enter into a contract during said period, the free agent shall be deemed not to have

exercised his rights of free agency for purposes of Section E of this Article XVII, and the Club shall be deemed not to have signed a free agent for purposes of the quota provisions of this Article.

(b) During the period beginning 3 days before the Negotiation Rights Selection Meeting and ending with the conclusion of the Selection Meeting, free agents and Clubs may continue discussion as set forth in paragraph (a) above, but no terms shall be negotiated and no contracts shall be entered into.

(4) *Miscellaneous*

(a) Any Club selecting negotiation to and signing a contract with a Player under this Section C may not assign his contract until after the next June 15. However, notwithstanding the foregoing, such contract may be assigned for other Player contracts and/or cash consideration of \$50,000 or less prior to the next June 16 if the Player gives written consent to such transaction.

(b) If a maximum number of Clubs select negotiating rights for a player who has become a free agent pursuant to Section B and, subsequent to the Selection Meeting, the Player does not contract with a Major League Club but does contract with a National Association Club, such Player shall not be eligible for assignment to or to contract with a Major League Club until he has been subject to the draft of National Association players, as provided for in Major League Rule 5, following the next playing season.^o If the Player is not selected in such draft, a special Selection Meeting will be held for him during the first week of the next January pursuant to the procedures set forth in Section C.

(c) There shall be no restriction or interference with the right of a free agent to negotiate or contract with any baseball club outside the structure of organized baseball, nor shall there be any compensation paid for the loss of a free agent except as provided for in this Agreement.

^o If less than a maximum number of Clubs have selected negotiating rights for such a Player, the foregoing restriction on eligibility shall not apply, provided, however, that such Player shall not be eligible for assignment to or to contract with any Major League Club which has filled its quota for the signing of free agents until he has been subject to the Major League Rule 5 draft.

D. Right to Require Assignment of Contract

(1) *Eligibility.* Any Player who signed a contract on or after August 9, 1976, and has 5 or more years of Major League service, may elect, at the conclusion of a season, to require that his contract be assigned to another Club. A Player who requires the assignment of his contract pursuant to this Section D shall not be entitled to receive a Moving Allowance. A Player shall not be eligible to require the assignment of his contract if his contract covers the next succeeding season, provided, however, that if his contract has been assigned by the Club which originally executed it, the Player shall be eligible to require the assignment of his contract notwithstanding the fact that it covers the next succeeding season. (See also Attachment 15).

(2) *Procedure.*

(a) *Notice.* A Player may exercise his right to require the assignment of his contract by giving notice as hereinafter provided within the 15 day period beginning on October 15 (or the day following the last game of the World Series, whichever is later). Election to require the assignment of his contract shall be communicated by telephone or any other method of communication by the Player to the Players Association. Written notice thereof shall then be given within the specified time limits by the Players Association, on behalf of the Player, to a designated representative of the Player Relations Committee, and shall become effective upon receipt.

(b) *Player Veto Rights.* At the time notice is given as provided in paragraph (a) above, the Player may also designate not more than 6 Clubs which he will not accept as assignee of his contract, and the Player's Club shall be bound to assign his contract thereafter to a Club not on such list.

(c) *Free Agency if Assignment Not Made.* If the Player's Club fails to assign his contract, as set forth in this Section D, on or before March 15, the Player shall become a free agent immediately eligible to negotiate and contract with any Club without any restrictions or qualifications. The Player shall be deemed not to have exercised his right of free agency or his right to demand a trade, for purposes of Section E of this Article XVII, and the Club signing him shall do so without regard to the quota and compensation provisions of this Article. A Player who becomes a free agent pursuant to this paragraph shall not be entitled to receive termination pay. Such a free agent shall receive transportation and travel expenses in the same manner as he would if he had been unconditionally released except he shall be limited to receiving travel ex-

penses to his new club if he reports to it directly, provided such expenses are less than to his home city.

(3) *Retraction by Player.* A Player who has elected to exercise his right to require an assignment of his contract may retract such election on or before March 15, by sending a telegram to his Club, provided that such telegram must be sent prior to the time a telegram is sent to him by his Club notifying him that his contract has been assigned. If such a Player has 10 or more years of Major League service, the last 5 of which have been with one Club, he shall, upon such retraction, be deemed to relinquish his right to approve any assignment of his contract to another Major League Club which is completed within 60 days after such retraction or until March 15, whichever is later. A Player who retracts his election shall be deemed not to have exercised his right to require an assignment for purposes of Section E of this Article XVII.

E. Repeater Rights

(1) *Free Agency.* Any Player who becomes a free agent pursuant to Section B of this Article or whose contract was assigned as a result of a trade required pursuant to Section D of this Article shall not subsequently be eligible to exercise his right to become a free agent until he has completed an additional 5 years of Major League service.

(2) *Trade Demand.* Any Player who became a free agent pursuant to Section B of this Article or whose contract was assigned as a result of a trade required pursuant to Section D of this Article shall not subsequently be eligible to exercise his right to require the assignment of his contract until he has completed an additional 3 years of Major League service.

F. Outright Assignment to National Association Club

(1) *Election of Free Agency.* Any Player who has at least 3 years of Major League service and whose contract is assigned outright to a National Association Club may elect, in lieu of accepting such assignment, to become a free agent. A Player who becomes a free agent under this Section F shall immediately be eligible to negotiate and contract with any Club without any restrictions or qualifications. Such Player shall not be entitled to receive termination pay. Such a free agent shall receive transportation and travel expenses in the same manner as he would

if he had been unconditionally released except he shall be limited to receiving travel expenses to his new club if he reports to it directly, provided such expenses are less than to his home city.

(2) *Procedure.* Not earlier than 4 days prior to the contemplated date of an outright assignment, the Club shall give written notice to the Player, with a copy to the Players Association, which shall advise the Player that he may either (a) accept the assignment or (b) elect to become a free agent. The Player shall also be informed in the notice that, within 3 days after the date of the notice, he must advise the Club in writing as to his decision. If the Club fails to give written notice, as set forth herein, to the Player prior to the date of such assignment, the Player may, at any time, elect to become a free agent pursuant to this Section F, provided, however, that if the Club subsequently gives such written notice to the Player, he shall, within 3 days thereafter, advise the Club in writing as to his decision.

G. Individual Nature of Rights

The utilization or non-utilization of rights under this Article XVII is an individual matter to be determined solely by each Player and each Club for his or its own benefit. Players shall not act in concert with other Players and Clubs shall not act in concert with other Clubs.