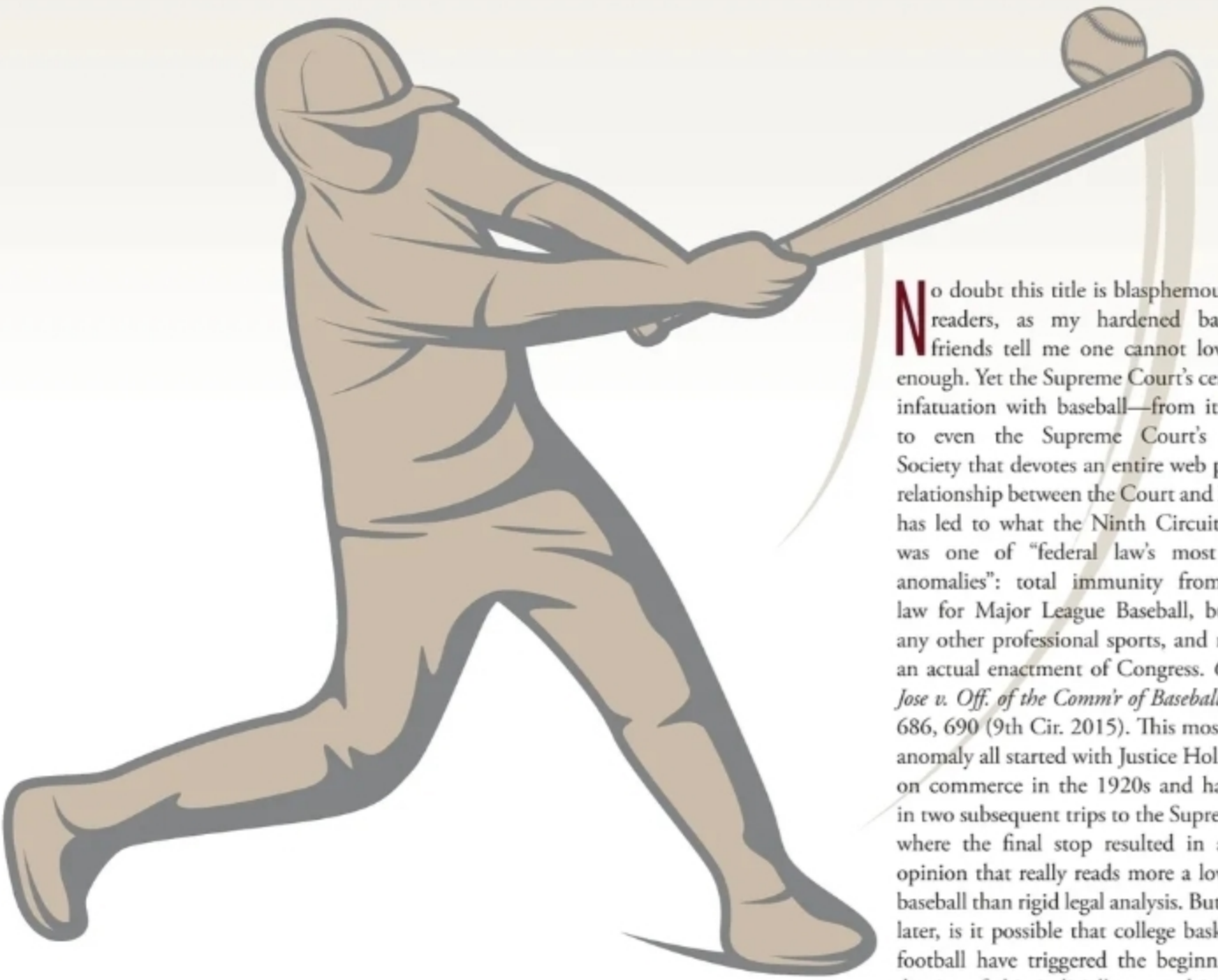
EVERYONE LOVES BASEBALL, BUT DOES THE JUDICIARY LOVE IT TOO MUCH?

by PETER R. AFRASIABI



No doubt this title is blasphemous to many readers, as my hardened baseball fan friends tell me one cannot love baseball enough. Yet the Supreme Court's century-long infatuation with baseball—from its opinions to even the Supreme Court's Historical Society that devotes an entire web page to the relationship between the Court and Baseball—has led to what the Ninth Circuit remarked was one of "federal law's most enduring anomalies": total immunity from antitrust law for Major League Baseball, but not for any other professional sports, and not due to an actual enactment of Congress. *City of San Jose v. Off. of the Comm'r of Baseball*, 776 F.3d 686, 690 (9th Cir. 2015). This most enduring anomaly all started with Justice Holmes riffing on commerce in the 1920s and has endured in two subsequent trips to the Supreme Court, where the final stop resulted in a majority opinion that really reads more a love letter to baseball than rigid legal analysis. But, a century later, is it possible that college basketball and football have triggered the beginning of the demise of this judicially created immunity, a coming end to this longstanding love affair? Let's start at the beginning though.

The Supreme Court and Baseball

Justice Holmes first addressed baseball in *Federal Baseball Club v. Nat'l League of Prof. Baseball Clubs*, 259 U.S. 200 (1922). There, the plaintiff (a local Baltimore team) alleged that the defendants—the other teams and league that covered a seven-state area—destroyed the then-named "Federal League" by buying up some of the constituent clubs and in one way or another inducing all those clubs except the plaintiff to leave their league. Plaintiff also alleged that the reserve clause system—a contractual system that denied players the ability to leave their team on a nearly perpetual basis and allowed the team to sell or trade the payer at its whim—also violated the Sherman Act. Plaintiff secured an antitrust verdict for $80,000.

Before the Supreme Court, the case was analyzed for whether baseball touched interstate commerce for, if it did not, then the Sherman Act would not apply. "The business is giving exhibitions of baseball, which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business." *Id.* at 208-09. From this premise, Justice Holmes writing for a unanimous court concluded that baseball did not touch interstate commerce. "If we are right the plaintiff's business is to be described in the same way and the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States." *Id.* at 209. The reserve system and conduct thus could not be challenged under the Sherman Act, owing to the then-narrow conception of commerce for purposes of Congress' commerce clause power.

In the 1950s, the Supreme Court again took up the question of whether the antitrust laws had to apply to baseball in *Toolson v. New York Yankees*, 346 U.S. 356 (1953). There, Toolson was a pitcher in a farm team that served the Yankees. He thought he could play in the major leagues, but his reserve clause contract denied him the ability to negotiate and go

to another team. His minor league team was dissolved and then he was traded to another team. He refused to play for the new team, and sued, arguing that his reserve clause violated the Sherman Act. In a 7-2 decision, the Court wrote: "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." *Id.* at 357.

The dissent stung. "Whatever may have been the situation when the *Federal Baseball Club* case was decided in 1922, I am not able to join today's decision, which, in effect, announces that organized baseball, in 1953, still is not engaged in interstate trade or commerce . . . it is a contradiction in terms to say that the defendants in the cases before us are not now engaged in interstate trade or commerce as those terms are used in the Constitution of the United States and in the Sherman Act." *Id.* Thus, over a generation later, baseball's exemption from antitrust laws was solidified, and, regardless of the original foundation, the Court said it was for Congress to legislate away what the 1922 Court had done.

A generation later, Curt Flood took the issue to the Supreme Court again in the early 1970s. *Flood v. Kuhn*, 407 U.S. 258 (1972). Flood was a well-regarded

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player who had played twelve seasons for the Cardinals, participating in three World Series, and was the co-captain of the team between 1965 and 1969. Despite this, Flood was traded to the Philadelphia Phillies in October 1969. The Cardinals did not consult Flood before the trade—because of the reserve clause in his contract that gave them control over where he played and when—and management only informed him about the trade after it was finalized. Flood sought to challenge the reserve clause, again raising the issue of the Sherman Antitrust laws as applied to baseball. *Id.* at 264-65.

Flood hired then-retired former Supreme Court Justice Arthur Goldberg to argue his case. And Justice Blackmun wrote the majority opinion, the first words setting the stage for the obvious outcome. "I. The Game. It is a century and a quarter since the New York Nine defeated the Knickerbockers 23 to 1 on Hoboken's Elysian Fields June 19, 1846, with Alexander Jay Cartwright as the instigator and the umpire. . . . Then there are the many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season: Ty Cobb, Babe Ruth, ..." The names listed go on for over a page in the U.S. reports. When an opinion starts that way without even addressing the actual plaintiff, Flood, it is pretty clear what is coming next.

Remarkably, the majority acknowledged that baseball was a business in interstate commerce

as commerce was then understood. That alone should have required reversing *Federal Baseball/Toolson*. But the love of baseball was too strong, and so the Court affirmed the now admitted aberrational immunity on the theory that baseball is somehow uniquely special: "It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of stare decisis, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and *an acceptance of baseball's unique characteristics and needs*. . . . If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress, and not by this Court." *Id.* at 282 (emphasis added).

Justices Douglas, Brennan, and Marshall dissented, Justice Douglas calling it "a derelict in the stream of the law that we, its creator, should remove. The equities are with the victims of the reserve clause. I use the word 'victims' in the Sherman Act sense, since a contract which forbids anyone to practice his calling is commonly called an unreasonable restraint of trade." *Id.* at 286. Justice Marshall separately dissented, focusing also on the plaintiff. "To non-athletes, it might appear that petitioner was virtually enslaved by the owners of major league baseball clubs who bartered among themselves for his services. But athletes know that it was not servitude that bound petitioner to the club owners; it was the reserve system." *Id.* at 289. Both dissents at least focused on the actual plaintiff Flood and his (and other players') sufferings under the reserve system. (By the late 1970s, the reserve system ended as the era of free agency began, but it was too late for Flood who was released in 1971, his playing career over.)

Post-*Flood* Lower Court Struggles

After *Flood*, many cases have been brought challenging various acts by Major League Baseball as being anti-competitive. A few courts try to construe the judicially-created-and-continually-blessed exemption narrowly even if it requires leaps of linguistic gymnastics. *Postema v. Nat'l League of Pro. Baseball Clubs*, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992) (holding that the exemption does not encompass "[a]nti-competitive conduct toward umpires" because umpires are "not an essential part of baseball."); *Piazza v. Major League Baseball*, 831 F. Supp. 420, 437 (E.D. Pa. 1993) (finding *Flood* "confin[ed] the precedential value of *Federal Baseball* and *Toolson* to the precise facts there involved").

Others note the immunity is broad and that it is what it is until the Supreme Court revisits. *Charles O. Finley v. Kuhn*, 569 F.2d 527, 541 (7th Cir. 1978) ("the Supreme Court intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws"; Baseball Commissioner's refusal to allow contracts to be assigned to other teams upheld and antitrust challenges denied); *City of San Jose*, 776 F.3d at 690 (denial of Oakland A's ability to relocate to San Jose challenged as antitrust violation; challenge rejected given antitrust exemption).

Congress and the Supreme Court Each Point the Finger at the Other

As noted, *Flood* said that the issue was for Congress. But when Congress took up the issue of addressing the right of *players* to bring antitrust claims by enacting a law clarifying that they had such Sherman Act rights—even naming the law after Curt Flood—Congress went to great lengths to make clear that they were not going to touch the state of the law as created by the Court. *See* 144 Cong. Rec. 18,175 (1998) (statement of Sen. Orrin Hatch) ("[W]hatever the law was before the enactment of this legislation, it is unchanged by the passage of the legislation."); S. Rep. No. 105-118, at 6 (1997) (Senate committee report noting that "the passage of this bill does not affect the applicability or nonapplicability of the antitrust laws in any other context beyond that specified in subsection 27(a)").

Thus, the Court and Congress are like two players on the field, throwing the ball back and forth to each other, no one willing to hold onto it. *Everyone* loves baseball, it appears.

How Has This Endured?

The Supreme Court's Historical Society has an entire web page devoted to the Court and Baseball, tracing the myriad justices who have adored baseball, their favorite teams, and their throwing of pitches at games. It does not have a similar page tracing the Court's relationship with basketball, football, or (heaven forfend!) soccer. Justice Alito, a Phillies fan, even apparently invited the Phillies green Muppet-like mascot to attend his welcome dinner at the Supreme Court when he joined. Justice Stevens threw out the opening pitch at a Cubs game, as have Justices Sotomayor and Alito at other teams. Long ago, President-then-Justice Taft apparently started the opening pitch tradition. Baseball indeed runs deep in the Court's blood. *See* Supreme Court Historical Society, *Supreme Court and Baseball*, located at https://supremecourthistory.org/scotus-scoops/supreme-court-and-baseball/ (last viewed June 1, 2023).

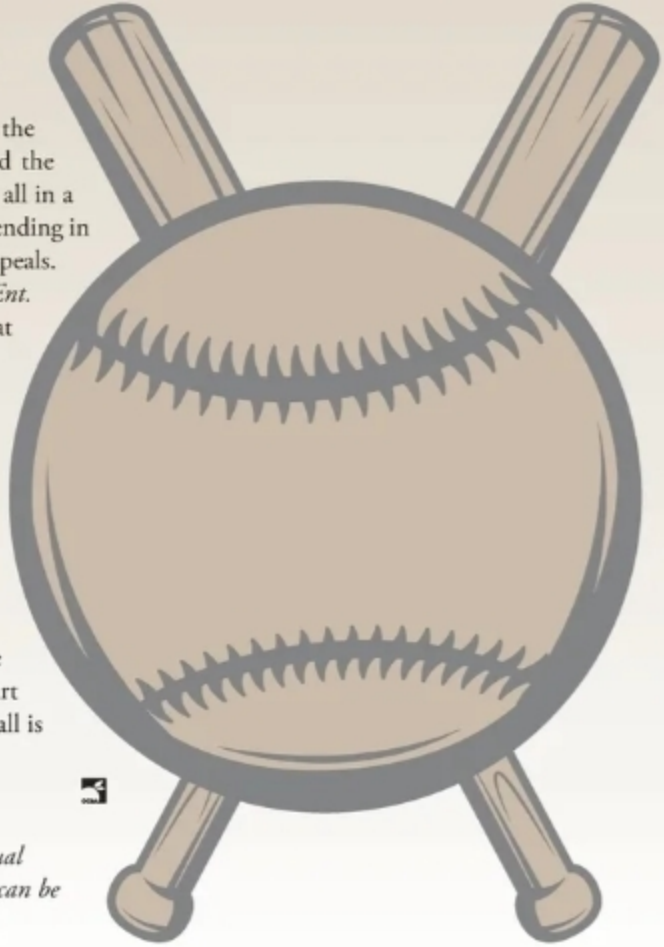
That baseball touches interstate commerce is not just obvious but admitted by *Flood*. All that really remains is the Court's slavish adherence to stare decisis, even when it notes in the same breath that it makes little sense, rooted in an ill-explained claim that baseball is different. This is what Professor John Tehranian coined "romantysis" rather than proper legal "analysis" in his article deconstructing the basis of the long-standing rulings. *See* John Tehranian, *It'll Break Your Heart Every Time: Race, Romanticism and the Struggle for Civil Rights in Litigating Baseball's Antitrust Exemption*, Hofstra L. Rev. Vol.46 Issue 3, Article 8 (2018). The question a century on from this grant of immunity: Will Justice Blackmun's 1972 decision still receive the same stare decisis shade today? His 1973 *Roe* decision did not garner the same deference of stare decisis last term after all.

The Basketball/Football *NCAA* Decision

The Supreme Court's most recent foray into sports was the unanimous 2021 decision striking the NCAA's rules that denied student-athletes the right to monetize their name and image as anticompetitive. *NCAA v. Alston*, 141 S. Ct. 2141 (2021). The student basketball and football plaintiffs prevailed, ending the long-standing NCAA rules. And this unanimous decision expressly rejected the NCAA's long-standing argument, echoing the ideas underpinning *Flood*, that there was something so uniquely special about education and sports that should cause courts to ignore the antitrust laws. "Unlike customers who would look elsewhere when a small van company raises its prices above market levels, the district court found (and the NCAA does not here contest) that student-athletes have nowhere else to sell their labor. . . . [I]t is unclear exactly what the NCAA seeks . . . .To the extent it means to propose a sort of judicially ordained immunity from the terms of the Sherman Act for its restraints of trade—*that we should overlook its restrictions because they happen to fall at the intersection of higher education, sports, and money—we cannot agree*." *Id.* at 2159 (emphasis added).

Back to baseball: In 2023, the Minor Leagues are asking to end the antitrust immunity once and for all in a case against the Major Leagues pending in the Second Circuit Court of Appeals. *Nostalgic Partners et al v. Sports Ent. Inc.*, Appellant Brief, 22-2859 at 43 (2d Cir. 2022) ("dispatch this case to the Supreme Court with a message attached: Enough already."). If one reads the tea leaves of the unanimous *NCAA* decision, and considers the shrinking majorities over the last century—9-0 to 7-2 to 5-3 in the trilogy of baseball cases—it seems likely that the day is coming when the Court will abandon the idea that baseball is somehow unique.

But, then again, this is love.



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