Grounding into a Double Standard: Understanding & Repealing the Curt Flood Act

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ABSTRACT

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

CONTENTS

INTRODUCTION .......................................................................................................................... 1
I. ANTITRUST REGULATIONS AND IMPACT ........................................................................ 2
II. ANTITRUST REGULATIONS & CHALLENGES IN SPORTS ............................................ 3
III. EXEMPTIONS IN SPORTS ................................................................................................. 5
IV. MAJOR LEAGUE BASEBALL’S EXEMPTION .................................................................. 7
   A. Case History Pre-Flood ................................................................................................. 7
   B. The Seminal Case of Flood v. Kuhn ............................................................................. 9
   C. The Downfall of Flood ............................................................................................... 11
   D. Contrary Congressional Action .................................................................................. 12
V. FLAWS IN REASONING .................................................................................................... 12
   A. The Societal Impact of Baseball between 1922-1998 .................................................. 13
   B. Faulty Interpretive Methodologies of Toolson and Flood by the Court ..................... 19
      i. Congressional Silence prior to Toolson ..................................................................... 20
      ii. Stare Decisis Principles .......................................................................................... 21
   C. Current Analogous Contradicting Case Law ............................................................... 22
VI. RECOMMENDATIONS ..................................................................................................... 23
CONCLUSION ........................................................................................................................... 24

† J.D. Candidate 2013, University of Massachusetts School of Law – Dartmouth. A thank you to my family and friends for all of their support while working on this piece. And a special thank you to Megan Brophy and Michael Buonocore for your kind words and willingness to help. Finally, a special thanks to Professor Dylan Malagrinò for your continued guidance and inspiration.
“Baseball is America’s pastime, but football is America’s passion.”

- Howie Long

INTRODUCTION

Major League Baseball’s statutory exemption to antitrust regulation under the Curt Flood Act, derived from case law, archaic societal viewpoints, and erroneous interpretation principles, should be repealed to place the MLB under the same scrutiny as every other professional league. Take, for example, that on October 3, 2011, 10.84 million viewers between the ages of 18 to 49 tuned in to watch the Monday Night Football game on ESPN between the Indianapolis Colts and the Tampa Bay Buccaneers.1 That same night, the New York Yankees baseball team was playing against the Detroit Tigers in an American League Divisional Series playoff game.2 Only 6.05 million viewers watched the Yankees play.3

This is one example of the disconnect between what Americans call their pastime and what it actually is. Major League Baseball, the dominant professional group for American baseball, holds a significant qualified immunity from antitrust regulation in the judicial system,4 despite evidence to the contrary.5 By analyzing how baseball inherited this exemption through an analysis of case law, societal context, and faulty logic, this paper will explain why the statutory exemption needs to be repealed, ultimately concluding all major sports should not be exempt from antitrust regulations, except in very limited circumstances.

2 Id.
3 Id.
5 See infra Part V.A.
This article will begin in Part I by addressing the purpose and impact of antitrust regulations. Part II will briefly explain how antitrust regulations impact professional sports leagues. Part III will address the courts and Congress’ willingness to grant various exemptions from antitrust regulations to activities carried out by professional sports leagues. Part IV delineates the history of how Major League Baseball’s statutory exemption, the Curt Flood Act, came to fruition. Part V, the major focus of this article, will address the fallacies in reasoning behind both the major court decisions and Congress’ improper codification of these decisions. Finally, Part VI will offer that Major League Baseball should be subject to antitrust regulations, just as any other league is.

I. **Antitrust Regulations and Impact**

Appreciating the gravity of antitrust regulations, and the threat of a suit filed for any alleged violation(s), greatly affects how leagues and teams behave when determining which actions to take regarding the League or players. Before looking specifically at antitrust regulations and their application to the MLB, a baseline understanding of why antitrust regulations exist is necessary. This primer will aid in comprehending how asinine the MLB’s exemption to the regulations is.

Antitrust regulations are grounded in the principle that in an open free-market, there should never be an instance when competition among economic rivals is inhibiting trade.6 The goal is to protect the consumer from groups of individuals either coming

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together or acting in a monopolistic capacity to unfairly restrain trade.\textsuperscript{7} The Sherman Act\textsuperscript{8} was enacted in 1890 with these goals in mind.\textsuperscript{9}

In any antitrust suit a plaintiff must initially show that the alleged conduct effects interstate commerce in some form.\textsuperscript{10} If the plaintiff can prove that the alleged restraint affects interstate commerce, the plaintiff then must satisfy 3 main requirements: 1) a collusive effort by two or more economic rivals, or “duality”; 2) an unreasonable restraint on trade; and, 3) damages.\textsuperscript{11}

Understanding the goals of antitrust regulation shows how it may affect a business. If a company, or companies, is aware that their actions may be subject to governmental oversight, the groups may or may not engage in such acts. The looming shadow of antitrust regulations curbs collusive conduct and helps maintain an open market. The next section will focus on how antitrust regulations affect professional sports entities’ decisions, and how a challenge to league activity would be brought.

\section*{II. Antitrust Regulations & Challenges in Sports}

The purpose of this section will be to show the relationship between the different groups in professional sports and how a viable claim to alleged infringing actions by the leagues would be brought. Knowing how to bring a claim is important, because it is these types of claims that Major league Baseball is immune from. This section will first address the connections between all parties involved in the production of professional sports.

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\textsuperscript{7} Monopolies are governed by 15 U.S.C. § 2 (1890). They will not be the focus of this article.
\textsuperscript{8} 15 U.S.C. § 1 (1890).
\textsuperscript{11} \textit{Bd. of Regents}, at 99-127.
\end{flushright}
Then, the steps needed to bring a suit for violation of antitrust regulations in the sports world will be explained.

The parties involved in professional sports can be classified into three different groups: the players, the teams, and the league. The players are legally connected to the club/team through the standard player contract. The players are legally involved with the league through the collective bargaining agreement. Finally, the team is connected to the league through the bylaws that each team votes on to adopt. The bylaws govern the rules and regulations that each team must conform to.

In most sports situations, players challenge actions by the league under 15 U.S.C. § 1. Potential § 1 violations occur when economic rivals come together to inhibit trade across interstate commerce. Sports leagues such as the MLB or NFL most frequently attempt to initially dismiss antitrust allegations with the affirmative defense that they are acting as a ‘single entity’ regarding the conduct at issue. Because § 1 challenges are premised on economic rivals coming together in a collusive effort, if the court determines that the groups involved are not independent, distinct identities, then there can be no collusive acts. Courts have frequently found that leagues do not act as single entities, but rather groups of individual organizations.

Since professional sports leagues are a combination of teams coming together to exhibit professional sporting events, some acts, which would normally violate antitrust

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12 This note will not discuss collective bargaining agreements and their policies.
14 Standard Oil of N.J. v. United States, 221 U.S. 1, 60-71 (1911).
16 See infra Part V.C.
regulations, are allowed.\textsuperscript{17} Even though the restrictive actions are carried about by a group of teams, as economic rivals,\textsuperscript{18} the conduct will not be in violation of § 1. One prime example is the creation and implementation of the rules of the game. Thus, normally, a § 1 claim would be appropriate to challenge the conduct, but because the act is reasonable to further the purpose and goal of the league, and the purpose is legitimately procompetitive, the restraint is allowed. Damages are always needed when bringing any antitrust lawsuit.

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

\textbf{III. E\textsuperscript{XEMPTIONS IN SPORTS}}

The courts and Congress have granted various exemptions that applies to all sports in an attempt to help the league function smoothly.\textsuperscript{19} Although it would be logical to assume that antitrust principles apply to all aspects of professional sports, this assumption is faulty. Sports have a combination of many different legal fields. Labor law dictates the relationship between the player and league, and what falls under the collective bargaining agreements. Any broadcasting rights also have to be subject to the standards of the Federal Communications Commission. The teams’ logos and symbols have intellectual property implications. A blind application of antitrust law would be inapposite of a holistic and comprehensive view of justice.

First, Congress has passed acts that specifically allow leagues to engage in activities that would normally be considered anticompetitive and, thus, make the league liable under antitrust law.\(^{20}\) Congress has also passed legislation relating to the unionization of labor groups, which allows the group to bargain and agree on individuals’ behalves.\(^{21}\)

However, the U.S. Supreme Court has also allowed for exemptions from antitrust law through nonstatutory exemptions.\(^{22}\) The most notable is the labor exemption, which allows for immunity from antitrust law if the conduct at question is one that governs a mandatory subject matter of a typical collective bargaining agreement (“CBA”), the subject was negotiated at arms length, and negotiated in good faith between the parties of a collective bargaining agreement.\(^{23}\) If these three requirements are met, then the issue or conduct is one to be decided by labor law, and not antitrust.

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

The importance of these exemptions is that they illustrate how certain league conduct can be immune from antitrust suits, aside from arguing the merits regardless of

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its meritorious or detrimental effects or regardless of its character. This recognition becomes critical as we now shift our focus into Major League Baseball’s exemption.

IV. MAJOR LEAGUE BASEBALL’S EXEMPTION

In 1998, Congress passed the Curt Flood Act, which codified a longstanding tradition of case law that held baseball exempt from antitrust liability. This section will explain how Major League Baseball became exempt through social bias and faulty interpretive methods. The section will start by discussing the historical cases that led to the legal decision, which bestowed the exemption upon the League, Flood v. Kuhn. After discussing Flood, this section will conclude by examining how Congress passed the Curt Flood Act, which codified the incorrect prior case decisions.

A. Case History Pre-Flood

The foundations for Major League Baseball’s antitrust exemption began in Federal Baseball v. National League in 1922. Federal Baseball was a challenge to the National and American League merger. The plaintiffs charged that the defendants came together as separate leagues to monopolize the business of baseball by the use of the reserve clause.

The reserve clause was a clause that gave the team the right to exercise their option to resign a player in perpetuity. The club could exercise the option and have the player re-sign with the team, or the club could assign the right to sign the player to

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27 Id. at 207.
28 Id.
another team. If the player did not want to resign with the team, despite the team’s wishes, the player would not be allowed to play in the league in the next season. As a result, clubs participating in the Federal Baseball League were unable to obtain players who had contracts with the National and American League.

The Supreme Court, led by Justice Holmes, held that baseball was not engaged in interstate commerce. By not being engaged in interstate commerce, the failure to satisfy the threshold question of whether an antitrust lawsuit can be brought dismisses the suit before the merits are tried. The Court’s justification was grounded in the principle that Major League Baseball was not primarily engaged in interstate commerce, but that the teams merely exhibited baseball games. Federal Baseball’s holding that baseball is a game laid the groundwork for later courts to hold that the commercial benefits that baseball received as a result of the exhibition of their games were ancillary.

This key factor is a foundational piece of understanding why the MLB is exempt from antitrust laws. This initial case prevented baseball from being considered a business. It was not until 1953 that the Supreme Court spoke again regarding Major League Baseball in Toolson v. New York Yankees. Toolson was traded from the Newark International Baseball Club to the Binghampton Exhibition Company, Inc. When Toolson refused to show up to Binghampton, he was placed on the “ineligible list” and thus no longer allowed to play professional baseball. When Toolson learned of his

30 Id.
31 Id.
32 Id.
34 Id.
35 Id.
38 Id.
banishment, he sued, arguing that Defendants were individual entities engaging in collusive activity unfairly restraining trade.\textsuperscript{39}

Although practical logic in 1953 should dictate the Court to conclude that the MLB was engaged in interstate commerce and subject to antitrust suits, the Court refused to overrule \textit{Federal Baseball}. With the 1950s being the heyday of the MLB,\textsuperscript{40} featuring players like Mickey Mantle, Yogi Berra, and Bobby Thompson,\textsuperscript{41} the Court listed four factors that were controlling.\textsuperscript{42}

First, Congress had had 30 years since the \textit{Federal Baseball} decision and did not pass any acts that placed the “business” of baseball, or the decisions of baseball made to assist in the exhibition of baseball games, within the purview of antitrust law.\textsuperscript{43} Next, in those 30 years, baseball had developed its game, basing decisions on the understanding that it would not be subject to antitrust laws.\textsuperscript{44} Third, the Court is not in a position to, “overrule the prior decision and, with retrospective effect, hold the legislation applicable.”\textsuperscript{45} Finally, the Court stated that if antitrust laws should apply to baseball, the first steps to enforce antitrust should first start with the Legislature.\textsuperscript{46}

\textbf{B. The Seminal Case of Flood v. Kuhn}\textsuperscript{47}

After these series of cases, no major controversy arose until 1969 when Curt Flood, an all-star caliber center fielder for the St. Louis Cardinals,\textsuperscript{48} one of the

\textsuperscript{39} Id.
\textsuperscript{41} Id. (Thompson is most noted for his “Shot Heard ‘Round the World” in the 1951 National League Playoff).
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} 407 U.S. 258 (1972).
historically best teams in Major League Baseball,\textsuperscript{49} was traded to the Philadelphia Phillies.\textsuperscript{50} Flood challenged the trade, and asked the Commissioner of Baseball to reconsider the trade and allow him to become a free agent.\textsuperscript{51} When the Commissioner refused, Flood brought suit, challenging the reserve clause.\textsuperscript{52}

Justice Blackmun delivered the majority opinion for the Court.\textsuperscript{53} After discussing the \textit{Federal Baseball} and \textit{Toolson} cases, Blackmun began to discuss cases in the time between the case at hand and \textit{Toolson}.\textsuperscript{54} Blackmun’s critical analysis was using \textit{United States v. Shubert},\textsuperscript{55} where the Defendant tried to use \textit{Federal Baseball}’s holding that exhibiting displays, here vaudeville shows, did not amount to interstate commerce. Justice Blackmun noted that Chief Justice Warren in \textit{Toolson} had held that the application of the exemption to antitrust for baseball was a very narrow application.\textsuperscript{56}

Justice Blackmun then went on to elucidate other cases of \textit{professional} sports leagues that were held to be under the purview of antitrust lawsuits.\textsuperscript{57} Further, Justice Blackmun noted the extensive amount of legislative proposals that had been introduced since \textit{Toolson} to expand the exemption, but failed to pass both houses.\textsuperscript{58}

\textsuperscript{48} \textit{Id.} at 264.
\textsuperscript{50} \textit{Flood}, at 265.
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{Id.} at 259.
\textsuperscript{54} \textit{Id.} at 274-282.
\textsuperscript{55} 348 U.S. 222 (1955).
\textsuperscript{56} \textit{Flood}, at 275-277.
\textsuperscript{58} \textit{Flood}, at 281 n.17.
Justice Blackmun then explicitly stated that, “... it seems appropriate to now say that: 1. Professional baseball is a business and it is engaged in interstate commerce.”

Ultimately, the majority did give Major League Baseball’s reserve clause exemption from antitrust lawsuits. Despite this holding, the majority did imply that only the reserve system is exempt from antitrust lawsuits.

C. The Downfall of Flood

The 1993 case Piazza v. Major League Baseball critically analyzed the Court’s decision in Flood and limited Major League Baseball’s exemption to only the reserve clause. Although the Piazza case was not a challenge to the reserve clause, Major League Baseball attempted to invoke their immunity from an antitrust suit based on the Flood decision. Judge Pavoda ruled that the Supreme Court in Flood undercut the reasoning of Federal Baseball by holding that Major League Baseball was engaged in interstate commerce, ultimately holding Major League Baseball liable to antitrust lawsuits.

Despite being from a federal district court in Eastern Pennsylvania, this holding is indicative of how evolving interpretations of Federal Baseball, Toolson, and Flood had become, signaling an end of the exemption era for Major League Baseball. After 70 years, the court system seemed willing to fully correct their mistake for good. The “business of baseball” seemed to be subject to the same antitrust scrutiny as any other sports league.

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59 Id. at 282.
61 Id.
62 Id. at 423-24.
63 Id. at 435.
64 Id. at 436.
D. Contrary Congressional Action

After years of punting by the Supreme Court, and the contrary, more recent case law of *Piazza*, Congress finally acted. Unfortunately, in 1998 the act was to codify Major League Baseball’s exemption to antitrust lawsuits.\(^{65}\) The Act, entitled the Curt Flood Act (a cruel slap in the face to the former all-star), grants the *business of baseball*, not just the reserve clause, an excessively broad exemption to Major League Baseball, and there are only a few exceptions to the exemption.\(^{66}\) Despite the small number of exceptions to the exemption, most issues arising out of conduct that concerns the “business of baseball” will be exempt from antitrust lawsuits under the Act.

This intentional walk for baseball was an unfortunate consequence of weighing societal value and poor judicial decisions, while undervaluing more recent, appropriate case law, and needs to be removed. The next section will explain all of the problematic reasoning behind the decisions above and examine contradictory case law that was carelessly dismissed.

V. FLAWS IN REASONING

This section will show that the Curt Flood Act is unacceptable because of the unique societal influence leading to its passage, the troubling interpretative methods employed by the Court, and the disregard of relevant contrary case law. First, an analysis of the historical viewpoints of baseball in a societal context, and how that shaped the holdings of the Court in *Federal Baseball, Toolson*, and *Flood*, which ultimately led to the passage of the Curt Flood Act. Next, the primary reliance on Congressional silence by


the Court in \textit{Toolson} will be deconstructed and analyzed. Then, the baseball-related decisions between \textit{Federal Baseball} and \textit{Piazza} will be used to indicate that the Act should never have been passed if \textit{stare decisis} was a driving factor in Congress passing the Act. Finally, this section will close by noting other professional sports league antitrust cases that indicate that the legal rationale for continued enforcement of the Act is illogical.

\textbf{A. The Societal Impact of Baseball between 1922-1998}

Baseball, no doubt, has an incredibly important place in our Nation’s history, both as a sport and as a cultural institution. Professional baseball games date back to the mid-19th century.\footnote{See \textit{History of the Game: Doubleday to Present Day}, MLB.COM, http://mlb.mlb.com/mlb/history/ (last updated June 6, 2011).} Baseball games and players have meant more to America than 9 innings and a stretch in the 7th inning. Jackie Robinson in 1947 became the first African American player to play in the MLB,\footnote{\textit{Biography}, JACKIEROBINSON.COM, http://www.jackierobinson.com/about/bio.html (last visited April 13, 2012).} which was 16 years before Martin Luther King, Jr.’s “I Have a Dream” speech. Baseball has produced players who have illnesses and surgeries named after them.\footnote{Lou Gehrig’s Disease, or ALS, and Tommy John Surgery, respectively.} Baseball has seen this country go through two World Wars, Korea, Vietnam, the Cold War, and 9/11.

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

Unfortunately, when the Supreme Court heard *Federal Baseball* in 1922 the Justices were likely just as enamored with baseball as the rest of the nation at the time. Society then might have been the roaring 20’s, but a staple in the American diet was talking about your baseball team after checking the box score on the back page of the daily newspaper. It was the only real game in town. Though the NFL did have its inaugural season in 1922, the first modern day Super Bowl wasn’t until 1967. At the time of the *Federal Baseball* decision, professional-level, organized baseball had 22 teams from Boston to St. Louis and had enamored Americans with 19 years of World Series’. Organized professional baseball had been around since the National League was formed in 1876 when the eldest of the sitting Justices in *Federal Baseball* was 35

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76 Peter Bendix, *The History of the American and National League, Part I*, BEYONDTHEBOXSCORE.COM (Nov. 18, 2008, 5:00 AM), http://www.beyondtheboxscore.com/2008/11/18/664028/the-history-of-the-america (noting that the World Series was the championship crowned after the National and American Leagues merged).
years old, and the youngest being just 14.\textsuperscript{77} Having established its reputation as “America’s Game,” baseball was likely idolized equally by the Supreme Court as well as the common man, bestowing a profound personal impact on both.

The crux of the argument of \textit{Federal Baseball} was that Major League Baseball was acting as a monopoly and excluding teams from joining that were in the Federal Baseball League.\textsuperscript{78} America was fresh out of fighting the First World War in 1919, and a decision to rule against baseball would not have been viewed well, as Americans were likely trying to rebuild the nation and regain a sense of normalcy. This position is only bolstered because of the powerful effects of the Standard Oil decision in 1911,\textsuperscript{79} which ultimately destroyed John Rockefeller’s oil empire.\textsuperscript{80} Perhaps the Court would not want a similar destruction of their beloved pastime, and knew that they should not risk a claim from even being brought against the sport. It is no reach of the imagination that baseball in 1922 held a similar place in the hearts of Americans as the American flag.\textsuperscript{81}

\textit{Toolson} in 1953 only buttressed this stance by the Court. As noted, American football was still 14 years from the first Super Bowl, and now there had been 30 years of baseball as the exclusive sports outlet for Americans. After two World Wars, and at the tail end of the Korean War, the Court was again asked to determine whether baseball players could bring an antitrust suit against the MLB, potentially changing how the League operates.

The opinion itself contained fewer than 200 words, and the Court refused to even view the facts. Instead, the Court relied on shaky interpretive methods, \textit{see, infra} § V(b),

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\textsuperscript{77} With Holmes oldest and McReynolds and Sutherland youngest, respectively.
\textsuperscript{79} Standard Oil of N.J. v. United States, 221 U.S. 1 (1911).
\textsuperscript{81} \textit{See} Halter v. State of Neb., 205 U.S. 34 (1907) (upholding laws prohibiting flag desecration).
\end{flushleft}
and punted to the legislature to act. Instead of viewing the facts, or hearing the claims, the Court likely understood the societal ramifications of taking away the blue-collar summer escape. Even in the dissent, Justice Burton recognized the “major asset which baseball is to our Nation, the high place it enjoys in the hearts of our people and the possible justification of special treatment for organized sports which are engaged in interstate commerce.” Baseball was still the great equalizer, and it could help scholar jurists in Washington, D.C. or coal workers in central Pennsylvania relate through discussion their favorite teams. Baseball was a uniting factor, and with over 60 years of near exclusive control over the sports pages, the Court could have been faced with the fallout like that of Nagasaki.

Just as Toolson in 1953 was coming off of the Korean War, Flood was granted certiorari during Vietnam in 1972. However, the rise in popularity of other sports such as football seemed to influence the Court’s decision in Flood. Flood was still a challenge on the reserve clause in the standard baseball player contract, just like Federal Baseball and Toolson. Interestingly, as the rise in other sports’ popularity increased, the holding in Flood narrowed the exemption that baseball enjoyed. In fact, in the opinion, the Court quickly outlines other sports that did not share the exemption, something that they did not do in Federal Baseball or Toolson. Flood seemed to be indicative of baseball losing its grip on its antitrust exemption.

Today, baseball, and specifically Major League Baseball, does not conjure up the notions of yesteryear in the hearts of fans like it used to. Starting with the lockout of 1994

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84 Id. at 276-81.
to 1995, Major League Baseball has seen a downward spiral that it cannot seem to shake. The homerun sluggers of Barry Bonds, Mark McGwire, and Sammy Sosa of the late 1990s and early 2000s are just now getting their claims adjudicated about their proliferated steroid use and subsequent lying to grand jury’s and Congress. Roger Clemens is still facing trial for perjury charges for steroid use. While in other sports, if these sure-fire Hall-of-Fame caliber players were facing these types of charges and allegations it would be national news. Between the Mitchell Report, President George W. Bush’s statements during his 2004 State of the Union, and Congress proposing and enacting six different bills regarding mandatory minimum drug testing in professional sports, America has become numb to the bad acts of baseball players.

Take, for instance, that in 2012 the reigning National League MVP Ryan Braun had, for the first time ever, his appeal sustained to avoid a 50 game suspension for testing positive for performance enhancing drugs. What makes the situation worse is that

93 Manfred, Jr., supra note 91.
Braun could not prove that the test was faulty, but only could show that the depositing procedures by the specimen collector were not followed by the policy and procedures of the program, though they were in accordance with accepted practices.\(^95\) Braun’s critics say that he got off on a technicality, and that justice was not done.\(^96\)

Disappointingly, Ryan Braun, Barry Bonds, etc., are not the only MLB players, past or present, that have had allegations mounted against them. Other current players have admitted serious hardcore drug use such as crack cocaine,\(^97\) managers getting DUIs,\(^98\) and even players from foreign countries using false identities, and then being deported.\(^99\) This has taken its toll on the reputation of Major League Baseball.

Although the argument could be made that revenue has increased, so has inflation. The perception that Baseball is “Americas Pastime” grounded the Court’s decision in \textit{Federal Baseball}. The MLB “exhibiting” games that just so happened to cross state boarders and have fans pay money to see the exhibitions clearly shows that something else was at play. It is hard to imagine that Justice Brandeis or then Chief Justice-turned-President Taft would hold baseball not to be interstate commerce today, since the primary

\(^{95}\) \textit{Collector Says He Acted as Instructed}, ESPN, (Feb. 29, 2012, 11:14 AM), http://espn.go.com/mlb/story/_/id/7625905/milwaukee-brewers-ryan-braun-case-sample-collector-says-followed-protocols (containing the statements by the collector of Ryan Braun’s sample saying he acted in accordance with the policies and procedures of the testing program).

\(^{96}\) \textit{See}, \textit{e.g.}, \textit{The Herd with Colin Cowherd}, ESPN RADIO (Feb. 29, 2012) (comparing the Braun situation to being pulled over by a cop doing 100 mph, but instead of writing 2012 on the ticket, writing 2011).


purpose of the league was to exhibit games. Applying those same societal standards to today’s games, the NFL would be the most appropriate organization to have immunity from antitrust. Yet, the 1957 Court in *Radovich v. NFL* explicitly held that the NFL does not have any broad immunity like baseball, and has continued to refuse to apply any similar immunity to the NFL since.

It is a different time. The 50-year-old of today was born in 1962. Today’s average man was raised during the NFL boom. It is unlikely that they share the same notions that baseball as a game is America’s Pastime; if they do, it is simply a notion, a phraseology that goes in one ear and out the other. All of the recent polls indicate that football is the predominant favorite American sport. Thus, in viewing the societal context of today versus *Federal Baseball, Toolson*, and *Flood*, it is clear that those attitudes of patriotism and baseball as a symbolic stand-in are no longer applicable.

**B. Faulty Interpretive Methodologies of Toolson and Flood by the Court**

The interpretive methods by the *Toolson* and *Flood* courts were fallacious. This section will explain first that the Supreme Court’s reliance on Congressional inaction, or silence, to rule in favor of the MLB in *Toolson v. NYY*. By analyzing this factor, it will be shown that the interpretive methods relied on were flawed. Then, a critical missed distinction of reason versus result *stare decisis* will be analyzed to show that both *Toolson* and *Flood* were inappropriate. The Court inappropriately relied on these *stare decisis* principles, and then Congress looked to these faulty decisions to pass the Curt Flood Act.

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103 Carrol, *supra*, note 70.
i. Congressional Silence prior to Toolson

In the Toolson decision, the Supreme Court listed four factors of why Federal Baseball was going to be upheld. The first of these factors was that, “Congress has had the ruling under consideration but has not seen fit to bring such [baseball] business under these [antitrust] laws by legislation having prospective effect.” While there are some positive benefits to defer to legislative inaction, Congressional inaction in Toolson could hardly be considered a strong controlling factor in the case.

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

Also, the Court didn’t recognize one of their fellow Justices and his view on legislative silence:

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

Thus, the Court was aware in 1946 of the dangers of relying on legislative silence.

Though the debate continues, the overwhelmingly dominant current theme is that

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105 LINDA JELLUM & DAVID HRICK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES, 253-64 (2006) (noting that the potential benefits may include: indication of awareness and subsequent acquiescence by the legislature, implications of separation of powers, agreement by Congress on the underlying policies of a decision).
106 Toolson, at 358-359 (Burton, J. dissenting) (citing H.R.REP. NO. 2002 (1952)).
Legislative silence is one of the least reliable methods of interpretation. Applying the heavy reliance on legislative silence in such an important case today with facts that clearly indicate that the group is engaged in interstate commerce would be absurd.

ii. *Stare Decisis* Principles

Aside from legislative silence, the Court in *Flood* applied the principles of *stare decisis*. In doing so, the Court reaffirmed more than 50 years of case law. However, as noted in Part IV, supra, *Piazza v. MLB* in 1993 critically analyzed the Court’s decision in *Flood* and their improper reliance on *stare decisis*. Again, Major League Baseball was sued for violating antitrust regulations unrelated to the reserve clause.

In addressing the MLB’s contention that they were exempt from antitrust lawsuits, Judge Pavoda in *Piazza* echoed the *Flood* Court’s holding that Major League Baseball was engaged in interstate commerce essentially cancelled out *Federal Baseball* and *Toolson*. Quoting *Planned Parenthood of Southeastern Pa. v. Casey*, the court of *Piazza* used the principle of *stare decisis*, a heavily relied upon interpretation principle in *Toolson* and *Flood*, as having two major aspects.

The *Piazza* court stated that when examining a case, “... the Court provides the legal standard or test that is applicable to laws implicating a particular ... provision.” This is the foundation that gets applied to the particular case at hand. The reasoning, thus, leads to the second aspect of *stare decisis*, the result. This seems logical. However,

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111 Id. at 436.
112 Id. at 437-438 (citing 947 F.2d 682, 691-92 (3d. Cir. 1991)).
113 Id. at 437.
114 Id.
according to the *Piazza* court, the Supreme Court in *Flood* did not use the reasoning of the case.\(^{115}\) Instead, the Court applied “result *stare decisis,*” and effectively “invalidated the *rule* of *Federal Baseball* and *Toolson.*”\(^{116}\)

The *Piazza* court concluded that the Supreme Court’s invalidation of the reasoning in *Flood* meant that the *stare decisis* principle was not controlling. Combining this ruling with the theories that discredit the use of legislative inaction suggests that the Court in *Flood* was wrong in holding that there should be a continued exemption to the “business of baseball.” It also helps bolster the proposition that Congress wrongly relied on the *Flood* decision, reinforcing its need for repeal.

C. **Current Analogous Contradicting Case Law**

Finally, looking back to the *Piazza v. MLB*, supra, the court held that only the reserve system was exempt and that the “business of baseball” was well within the purview of antitrust regulations.\(^{117}\) Other case law since the passing of the Curt Flood Act has held other sports entities subject to the Sherman Act.

First, and most importantly, the 1957 case of *Radovich v. NFL*, supra, refused to allow the NFL an exemption similar to Major League Baseball.\(^{118}\) Most recently, in *American Needle, Inc. v. National Football League*\(^{119}\) the Supreme Court held in a *unanimous* decision the NFL, America’s most popular sport,\(^{120}\) and the NFLP is subject to antitrust laws and is not considered a single entity.\(^{121}\) Other case law has established

\(^{115}\) *Id.* at 438.
\(^{116}\) *Id.*
\(^{117}\) *Id.* at 440.
\(^{118}\) 332 U.S. 444 (1957).
\(^{119}\) 130 S.Ct. 2201 (2010).
\(^{120}\) See, *supra*, § IV(A).
that the NHL cannot shield itself through a single entity defense. The Court’s holding in these cases showed its unwillingness to grant any other major sports league an exemption from antitrust lawsuits.

VI. RECOMMENDATIONS

This section will take the analysis of Section V and offer a new proposal to Major League Baseball’s exemption to antitrust regulation under the Curt Flood Act. After combining all of the fallacies, it will be offered that the MLB no longer deserves a position to enjoy such an exemption.

As Section V discusses, flawed reasoning and influences over Congress led to the unfortunate passage of the Curt Flood Act. By straying from the fundamental basis of antitrust regulations, which place great emphasis on consumer impact, the Act instead prioritizes the effects on Baseball. Combining the MLB’s inability to regulate themselves and the game’s loss of credibility in the national spotlight, it is time to repeal the Curt Flood Act.

The repeal of the Act would put the MLB under the same scope as any other professional sports league. Making the MLB subject to the same standards as other leagues would not impose any kind of an undue burden on the MLB. Further, it could perhaps be beneficial to the MLB by fostering greater competition between the clubs.

Removing the clubs’ immunities from antitrust regulations would enhance the open market, and would force the owners to seek out more competitive prices for different things. This competition would help cut costs, thus increasing payroll. By

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123 The courts have distinguished the NFL, MLB, NBA, and NHL, as “major sports leagues.” See N. Am. Soccer League v. Nat’l. Football League, 670 F.2d 1249, 1253 (2d. Cir. 1982).
enhancing the clubs’ freedom to open bidding on outsourced contracts, similar to the NFL’s methods, costs of certain things, like hats, or bats, may decrease because the bidding company would want to secure the job. The lower the expenditures, the higher the revenue produced. Money saved by the clubs could go to sign free agent players, or pay their current athletes higher salaries, thus preventing any loss of a player because a team could not afford to keep him. This would also have the added benefit of driving ticket/gate prices down, increasing attendance. Increased revenue from greater attendance would in turn lead to further positive affects including enhancing the competition between the clubs. All of these measures would ensure that the consumer is getting the best product available, reinforcing the purpose of antitrust regulation.

However, this would not mean that every action that Major League Baseball makes would be subject to antitrust regulations. By repealing the Act, Congress would leave the current legal landscape to its own devices. The courts have been willing to take a case-by-case basis, and the results have been appropriate to foster and enhance the goals of antitrust regulations. The end result of repealing the Act would be to allow the courts to determine what type of actions are unreasonable restraints on trade made between colluding economic rivals.

**CONCLUSION**

Ultimately, however, the Curt Flood Act must be repealed. The Act was passed after a series of illogically based decisions, which led to an illogically based Act. An act aimed at protecting a game with an inflated sense of it’s own relevance in modern

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society. Baseball is an important sport in America, but it is not the most important sport. Continuing the MLB’s exemption is preposterous, and needs to end.

The Supreme Court’s holdings in *Federal Baseball, Toolson, and Flood* were fundamentally flawed. The decisions were not legally sound, had a heavy societal influence, and had faulty interpretive methods. In relying on these decisions, Congress turned a blind eye to contradicting case law and currently continues to allow an outdated, poorly based exemption stand. It is time to recognize these fallacies and correct the situation by repealing the MLB’s broad antitrust exemption, making it subject to the same regulations imposed on other professional sports.