Antitrust and Baseball: Stealing Holmes

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I. Introduction

It happens every spring. The perennial hopefulness of opening day leads to talk of baseball, which these days means the *business* of baseball — dollars and contracts. And whether the latest topic is a labor dispute, alleged "collusion" by owners, or a franchise considering a move to a new city, you eventually find yourself explaining to someone — rather sheepishly — that baseball is "exempt" from the antitrust laws.

In response to the incredulous question ("Just how did *that* happen?"), the customary explanation is: "Well, the famous Justice Oliver Wendell Holmes, Jr. decided that baseball was exempt from the antitrust laws in a case called *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*,[1] and it's still the law." If the questioner persists by asking the basis for the Great Dissenter's edict, the most common responses depend on one's level of antitrust expertise, but usually go like this:

> **LEVEL ONE:** "Justice Holmes ruled that baseball was a sport, not a business."
>
> **LEVEL TWO:** "Justice Holmes held that personal services, like sports and law and medicine, were not 'trade or commerce' within the meaning of the Sherman Act like manufacturing. That view has been overruled by later cases, but the exemption for baseball remains."

The truly dogged questioner points out that Holmes retired some time ago. How can we have a baseball exemption now, when the annual salary for any pitcher who can win fifteen games is approaching the Gross National Product of Guam? You might then explain that the issue was not raised again in the courts until

the late 1940s, when there were several more cases challenging baseball's reserve clause on antitrust grounds. In fact, a Second Circuit panel including Learned Hand held in 1949 that an antitrust complaint against major league baseball could not be dismissed on its face, because the plaintiff might prove that the effect of radio, television, and other developments had transformed the game into an enormous interstate business.[2]

When one of those cases finally reached the Supreme Court in 1953, however, the Court did not agree with Judge Hand, holding in a *per curiam* opinion that Holmes' decision in *Federal Baseball* would be followed "[w]ithout reexamination of the underlying issues."[3] The Supreme Court also made it clear that the rule of *Federal Baseball* would be strictly limited to baseball, however, in a series of other decisions during the 1950s refusing to apply the same exemption to professional boxing and football. ("Oh, so baseball is exempt, but football isn't. *That* makes sense.")

The ballplayers gave it one more try in the early 1970s when Curt Flood flatly refused to be traded from St. Louis to Philadelphia and persuaded the Supreme Court to revisit the issue.[4] However, Justice Blackmun, in a giddy opinion that began with his listing eighty-eight of his favorite old-time ball players, pointed out that *Federal Baseball* had never been overruled, that those involved in professional baseball had relied on their exemption from the antitrust laws for fifty years, and that Congress had failed to remove the exemption during that time. Thus, he concluded, it was up to Congress, not the Supreme Court, to change the result in *Federal Baseball*. Congress has done nothing, so the exemption remains.

A. Brahmin Bashing

Plainly, *Federal Baseball* has left the antitrust lawyer's Justice Holmes a rather bedraggled figure. My colleague Joe Sims has provided a characteristically unvarnished summation of what I take to be the prevailing view of the baseball exemption:

> [I]n *Federal Baseball*, Justice Holmes (very wise in many respects, but not here) set forth a very limited view of interstate commerce. . . . *Federal Baseball*, which held that professional baseball was not in interstate commerce and thus not subject to the federal antitrust laws, is still the law today, enshrined on the throne of *stare decisis* by *Flood v. Kuhn*, even though it was described by Justice Douglas in his dissent in that case as "a derelict in the stream of the law."[5]

The reaction of others has ranged from thumping denouncement (Judge Jerome Frank of the Second Circuit called the decision, and I am not making this up, "an impotent zombi[e]"[6]) to gentle embarrassment on Holmes' behalf (Judge Henry Friendly, also of the Second Circuit, "acknowledge[d] . . . that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days. . . ."[7]) On the facts, one recent Holmes biographer calls *Federal Baseball* "remarkably myopic, almost willfully ignorant of the nature of the enterprise."[8] On the law, Justice Douglas was at his most dismissive when noting in *Flood v. Kuhn* that the "narrow, parochial view of commerce" reflected in *Federal Baseball* could not survive the Court's "modern decisions."[9]

For still others, the *Federal Baseball* decision is only Count I in a wide-ranging indictment of Holmes' antitrust expertise. Holmes' dissent in *Northern Securities Co. v. United States*,[10] has received similar failing marks. Hans Thorelli, the author of one of antitrust's weightiest tomes (the copy in my firm's library weighs a daunting 6.1 pounds), dismissed Holmes' opinion as follows:

> Undoubtedly Holmes was one of the great justices of this century, but

> it is doubtful whether he would have earned that reputation had he not in later cases reached beyond the level of sophistication evidenced in this dissent.[11]

Former Circuit Judge Robert Bork also has difficulty with Holmes in *Northern Securities*, not because he dissented (Judge Bork would have dissented too), but because he so clearly rejected Judge Bork's view of the original purpose of the Sherman Act.[12] Bork asserts instead that Holmes "mistook [Justice] Harlan's meaning" in the majority opinion, and thus simply raised some fundamental questions not unworthy of analysis, but irrelevant in *Northern Securities*.[13] When he had occasion to cite that dissent in an opinion of his own, Judge Bork characterized Holmes as "misconstruing the rule applied by the majority."[14]

Obviously, this is heavyweight criticism. These are famous judges and accomplished antitrust experts; their disdain for Holmes' antitrust opinions in general, and *Federal Baseball* in particular, is impressive. Placing the reputation of the author and the baseball opinion side-by-side, moreover, adds to the wonderment. This is *Holmes*, after all. Despite the trendy deconstructions of recent years, "Holmes remains the towering figure of American law."[15] Those are the words of antitrust's own towering figure, Richard A. Posner, who concludes his introduction to a symposium on the 100th anniversary of **The Path of the Law** with the observation that

"Holmes was the greatest legal thinker and greatest judge in our history."[16] Compare these sentiments to the derision heaped upon *Federal Baseball* (along with "zombie" and "derelict," it has been tagged with the law's most demeaning label: "limit[ed] . . . to [its] facts"[17]), and the contrast is compelling. If this critique is accurate, *Federal Baseball* represents our most exalted judge at his lowest moment.

B. When Did He Lose His Fastball?

Several springs ago, I set out to discover how this could have happened. How could Holmes be so wrong? Did his weak hold on

Eight new ball parks, including Chicago's Wrigley Field (pictured above), were constructed in 1913. Coal magnate James Gilmore (top) had persuaded a group of tycoons to finance them in order to transform the Federal League from a minor league in the Midwest into a third major league.

antitrust issues cause him to misapprehend the true interstate nature of professional baseball? Was he too old at eighty-one to see that big-league baseball was an essential thread in the American fabric, a cultural fixture embodying all the principles of healthy competition and sportsmanship that make it the quintessential national game?

At this point, something clicked. I had a mental picture of Holmes sitting across from the mountainous first Justice Harlan discussing the *Northern Securities* case, and saying: "Now, hang on there, J.M.; you're going too fast for me. Please repeat that last point." It didn't quite work. Most of these critiques acknowledge that Holmes was brilliant in some areas, but conclude that he was a dullard on the question of antitrust. In other words, Holmes, master of the common law of unfair competition and at the height of his powers on the Massachusetts Supreme Judicial Court when the Sherman Act was passed in 1890, just did not get it. Sure, he got lucky on some First Amendment cases, and was dead solid perfect on *Lochner*, but this antitrust stuff was too much for him.

Poor dumb Holmes.

And poor dumb Brandeis, too. The *Federal Baseball* decision was unanimous, after all. You are not as much to blame if you did not write the opinion, but it can't be one of your "happiest days" either. (Whether one praises or denounces Brandeis' responsibility for the Federal Trade Commission Act, he is seldom accused of being a dull tool.) Poor dumb Chief Justice Taft, as well. Taft is revered by most antitrust historians, including Judge Bork, for his opinion while still a Circuit Judge in the *Addyston Pipe* case[18]—one of the first decisions to make it clear that the Sherman Act had not unwittingly outlawed virtually all commercial arrangements. Such a prescient thinker must certainly have looked back with shame on his vote in *Federal Baseball* if it is as bad as the conventional wisdom holds.

If that is not enough to make you uncomfortable, consider this: Who is the antitrust oracle cited for the proposition that *Federal Baseball* is a "derelict in the stream of the law"? William O. Douglas. That is, the same Justice who was responsible (along with Justice Black) for the theories of the 1960s that led to such excesses as *Von's Grocery*,[19] in which the Court blocked a grocery store merger in Los Angeles because the post-merger store would have had a five percent share of the market. The same Justice who suggested that exclusive territories for paper routes might be illegal in *Albrecht v. Herald*,[20] a case generally perceived as a disservice both to the law of antitrust conspiracy and price fixing, and unanimously overruled by the Supreme Court in 1997.[21] In other words, this is the "trees have standing" Bill Douglas,[22] being widely quoted to bash *Holmes* on an *antitrust* issue. (And you thought the '69 Mets were surprising.)

That did it. I decided it was time to re-read *Federal Baseball*, *Toolson*, and *Flood v. Kuhn*. They in turn led me to read some other things. The result was a historical romp that ultimately focused on two of baseball's most fascinating eras, some thirty years apart. The featured baseball personalities are larger than life, ranging from Shoeless Joe Jackson and Babe Ruth to Casey Stengel and Stan Musial. The same holds for the judges, from Holmes and Hand to Frankfurter and Douglas. Most of the journey consists of simply following the progress of baseball in the antitrust courts from *Federal Baseball* in 1922 to *Flood* in 1972. With the knowledge gained along the way, we can step back and ask whether the antitrust laws could be applied to professional baseball now without repudiating *Federal Baseball*. We may find that the truth about the baseball "exemption" and the conventional wisdom are somewhat different; as different as Ty Cobb and Joe DiMaggio; as different as the telegraph and the television; as different as baseball in 1919 and baseball in 1949.

II. Antitrust in 1919

A. The Federal League

Since the predecessor of the current National League was founded in 1876, several rival leagues have sprung into existence. While most of these upstart leagues are gone, nearly all could be described as "successful," at least for many of those who made and controlled the investments. The story of the Federal League fits comfortably within the general pattern: A group of exceptionally wealthy men quickly formed a league to compete head-to-head with the National and American Leagues, easily lured many outstanding players with the promise of more money, and ultimately merged much of the new league and its assets with the existing league for hefty compensation.[23]

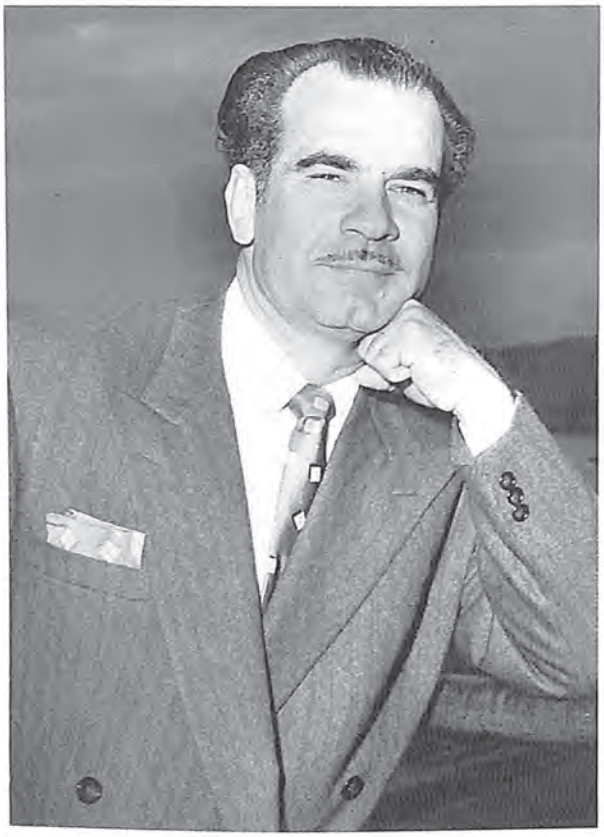
The Federal League was a minor league in the Midwest when coal magnate James A. Gilmore became its president in 1913. He soon persuaded a group of businessmen to convert the Federal League into a third major league. The group included cafeteria king Charles Weeghman (Chicago), oil tycoon Harry Sinclair (Newark), bakery executive Robert B. Ward (Brooklyn), and ice-and-fuel operator Phil Ball (St. Louis).[24] Eight new ball parks were erected in three months, one of which grew up to be Wrigley Field.

Many top players were enticed away by the Federal League's offers of more money, including Joe Tinker, Hal Chase, Mordecai "Three Finger" Brown, and Eddie Plank (baseball's winningest left-handed pitcher). For the National and American League players who did not jump, the resulting price wars for their services were fierce. For example, Ty Cobb's salary doubled, and Tris Speaker received the stunning sum of $18,000 per year to remain with the Boston Red Sox.[25] The cafeteria king, Weeghman, was especially driven to buy Washington's Walter Johnson (who had gone a mere 36-7 in 1913) for his Chicago Whales. His offer of a $16,000 salary and a $10,000 signing bonus was one that the financially strapped Clark Griffith, owner of the Senators, could not match. Griffith boldly went to Chicago and asked Charley Comiskey for the $10,000, on the grounds that Comiskey would not want the Big Train drawing crowds away from his cross-town White Sox. Comiskey complied, and Johnson remained a Senator. After two reasonably successful seasons,[26] the Federal League brought an antitrust suit against all the National and American League teams, which was heard by a federal judge with a name worthy of a power forward in the NBA: Kenesaw Mountain Landis. Perhaps auditioning for his future role as baseball's first commissioner, Landis simply sat on the case.[27] With the lawsuit standing still, and the over-supply of professional baseball failing to create its own demand in the mid-1910s, the Federal League suit was resolved by the "Peace Agreement" reached in December 1915. The agreement required the defendants to assume $385,000 in Federal League players' contracts; it allowed Weeghman to buy the Chicago Cubs, and Phil Ball the St. Louis Browns; it provided for substantial annual payments to several of the Federal League owners over many years; and it transferred two of the new Federal ball parks to organized baseball.

The Federal Baseball Club of Baltimore would have none of this treaty. That club was therefore excluded from the settlement, and it filed the antitrust suit that became *Federal Baseball*. The case was tried in Washington, D.C., during the spring of 1919. The jury came back on April 12, with a plaintiff's verdict for $80,000, which was trebled as provided in the statute.[28] In December 1920, however, the Court of Appeals, "after an elaborate discussion, held that the defendants were not within the Sherman Act."[29] The plaintiff chose to stand on the record and appeal directly to the Supreme Court.

B. *Federal Baseball:* The Opinion

The opinion in *Federal Baseball* was classic Holmes; after describing the "nature of the business" of organized baseball, he set out his legal analysis in a single, intense paragraph,



After World War II the leader of the Mexican League, a wealthy businessman named Don Jorge Pasquel (left), decided to turn the tables on the American leagues by recruiting their best talent by offering exorbitant salaries. When Pasquel tried to lure the great Stan Musial from St. Louis (below, sliding home), however, he so rattled the U.S. leagues that the president of the Cardinals, Sam Breadon, flew to Mexico City and somehow persuaded him to quit making such wild offers.

which I will quote momentarily in all its damning brevity. In that paragraph, he first addressed the issue found conclusive by the Court of Appeals, that is, whether the interstate aspects of organized baseball were sufficient to bring it within the Sherman Act, or were merely "incidental" to the concededly local exhibition itself. This analysis had been established by the Supreme Court in *Hooper v. California*.[30] I say the baseball exhibition itself was "concededly" local because the plaintiff was careful *not* to argue in its brief to the Supreme Court that the game itself was interstate commerce:

> The Court is not concerned with whether the mere playing of baseball, that is the act of the individual player, upon a baseball field in a particular city, is by itself interstate commerce. . . .
>
> The question . . . is whether the business in which defendants were engaged when the wrongs complained of occurred, *taken as an entirety*, was interstate commerce. . . .[31]

The plaintiff argued that, even if the exhibitions were not interstate, the interstate travel required to bring them about, as well as several other interstate "incidents" (*e.g.*, telegraph reports, baseball and equipment contracts, etc.), demonstrated the interstate nature of organized baseball.

In the remainder of the crucial paragraph, Holmes responded to the argument made by the plaintiff to counter the defendants' even broader assertion that "[p]ersonal effort, not related to production, is not a subject of commerce." That point is irrelevant, the plaintiff had argued:

> . . .[W]e are not concerned with any such question here. It may be passed by saying . . . that interstate commerce may be created by the mere act of a person in allowing himself to be transported from one State to another, without any personal effort.[32]

In other words, even if something is not commonly considered an item of commerce (*e.g.*, a person), it can affect interstate commerce simply by its interstate transport.

Holmes responded in a two and a half-page opinion, the essence of which is this:

> [1] The business is giving exhibitions of base ball, which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. According to the distinction insisted upon in *Hooper v. California*, 155 U.S. 648, 655, the transport is a mere incident, not the essential thing. [2] That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendants, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such

> commerce because the lawyer or lecturer goes to another State.[33]

As usual, the concepts are densely packed, the pace is quick, and the prose is free of patronizing words of transition (*e.g.*, "now I will turn from *Hooper v. California* to consider plaintiff's other argument . . . .") I have placed a [1] and [2] in brackets to indicate the point at which he turns to consider the second argument.

Plainly, it is the second argument that has been the principal source of derision among antitrust lawyers over the years. For its underlying assumption is the outdated notion that "services" should be treated differently under the antitrust laws than "manufactures." (Today, the antitrust economist would point out—while gesturing with an extinguished pipe—that one can measure the price elasticity of demand as effectively for legal services as for shoes.) Thus, that second, or alternative, argument is the one that rankles; those are the words from which Holmes fans avert their gaze.

If you think that describing Holmes' paragraph as a two-part argument in the alternative is contrived, rest assured that it has been so construed as far as I am aware by every commentator and Judge that has addressed the question. No less a student of Holmes than G. Edward White has written that the "critical paragraph" of Holmes' opinion

> made the following arguments in succession. . . . The transport [in interstate commerce] was merely 'incidental' to the exhibition. The exhibition, in fact, could not be called 'trade or commerce' at all . . . .[34]

He even describes the place in the paragraph where I have inserted a "[2]" as the "point . . . where Holmes sought to move on from his discussion of . . . interstate transportation" as incidentally affecting commerce, in order to make the additional point that the exhibition of baseball "would not be called trade or commerce as those terms were commonly understood."[35]

Nor is Professor White's reading new. Although Holmes' opinion was little noted when it came out, a rash of commentary appeared as the second series of cases culminating in the Supreme Court's 1953 *Toolson* decision moved through the courts. In a typical description, the *Harvard Law Review* had Holmes' opinion

> resting on dual grounds, holding that baseball was a local enterprise unchanged in character by the elements of interstate transportation incident to the exhibition, and that personal effort in the sport, since unrelated to production, was not a subject of commerce.[36]

When Learned Hand issued his 1949 opinion in favor of a ballplayer named Danny Gardella, a commentator could not resist pointing out that Holmes' opinion required any successful antitrust plaintiff to jump through two separate hoops:

> In order to bring "organized baseball" within the purview of [the antitrust] laws, two fundamental questions must be answered in the affirmative. (1) Is baseball an interstate activity? (2) Is baseball trade or commerce?[37]

Since both questions must be resolved in the plaintiff's favor, the author argued, giving a different answer to the first question, as did Learned Hand in *Gardella*, is insufficient to change the result in *Federal Baseball*:

> The rationale of the *Federal* [*Baseball*] case is that baseball is not trade or commerce, and it is submitted that the court's decision would have been quite the same had the facts shown

> that every ball park was located on a state line and the players had to pass from one state to another as they ran from first to second base.[38]

The judges, too, strained to find a graceful exit for Holmes with the common understanding that *Federal Baseball* had "decided that professional baseball was then neither 'commerce' nor 'interstate.'"[39] Justices like Sherman Minton[40] and Felix Frankfurter[41] would have accepted the result in *Federal Baseball* and applied it to other sports. Justices like William O. Douglas[42] and William Brennan[43] would have overruled it outright. Justices like Earl Warren[44] and Tom Clark[45] ultimately persuaded their Brethren to accept the holding of *Federal Baseball* but confine it to a single sport. Yet none of these judges questioned the prevailing reading of Holmes' opinion. Thus, when the Supreme Court last considered the question in *Flood v. Kuhn*, several Justices dissented, but none disputed Justice Blackmun's description of *Federal Baseball* as a dual holding that baseball "was not 'trade or commerce in the commonly-accepted use of those words' . . . ; nor was it interstate, because the movement of ball clubs across state lines was merely 'incidental' to the business."[46]

This is understandable. For Holmes *does* address a two-part argument, and the "trade or commerce" aspect of the opinion has stood as an enduring obstacle to those who would defend him. It has frustrated glib attempts to let Holmes off the hook with nice debating points or facile attempts to switch the burden of persuasion. (One could, for example, note that the trial court had directed a verdict for the plaintiff, and argue that the verdict would have had to be reversed anyway.[47]) But that is a good thing; this mission is not for sycophants. The reputation of *Federal Baseball* is as tarnished as it is because Holmes is said to have been wrong — dismally wrong — both on the law (antitrust) and on the facts (baseball). He failed to be precisely what he is given credit for being on other issues, that is, "a strikingly modern figure who anticipated the temper of an America which had not yet been born."[48] If a deeper understanding of *Federal Baseball* can be found — or at least an understanding of what went wrong — it will be worth the effort only if we keep our standards high. He must walk away under his own power or stand and take his medicine. This is Holmes, after all.

III. Antitrust in 1949

A. The Mexican League

As America's soldiers returned triumphant to home, hearth, and ballpark after World War II, the next serious competitive threat to major league baseball was launched by five dazzling brothers named Pasquel: Don Jorge, Alfonso, Gerardo, Bernardo, and Mario.[49] They controlled the Mexican League, which was eager to expand and improve its image. The eldest brother, Don Jorge Pasquel, had a personal fortune estimated at $30 million, and in 1946 he decided that it would be interesting to have his league — long drained of its best talent by American teams — return the favor. There was a collective gasp before the 1946 season when Luis Olmo of the Dodgers announced that he had signed a three-year contract to play in Mexico for $40,000.[50]

Despite the size of the offers, few of the early defectors were stars, or even players who were breaking their contracts, and the Mexican League threat was largely regarded as "a nuisance rather than a problem."[51] Then three New York Giants under contract for 1946, including starter George Hausmann, jumped to Mexico. Commissioner William "Happy" Chandler responded with a warning that those who did not report for the season would be suspended for five years. Neither the players nor the Pasquels desisted, however, and early in the season the Mexican League scored its finest catch to date by signing three St. Louis Cardinals. Most notable was pitcher Max Lanier, who had already won his first six starts.[52]

It was then that Don Jorge crossed the line.

He went after Stan the Man. Stan Musial was only twenty-five in 1946, and just back from a year in the Navy, but he had already proven that he was "the National League's greatest player and drawing card. . . ."[53] In his first four seasons, he led St. Louis to four pennants and three world championships; he won the batting title in 1943 and placed second in 1944. He was an all-star twice, and in 1943 was voted the league MVP. He would go on to play in ten more all-star games and win two more MVP awards (1946 and 1948). He placed second in MVP voting four more times, including 1957, the year he won his last batting title at age 36.[54] Beyond his talent on the field, however, Stan epitomized the postwar wholesomeness to which professional baseball had so longingly aspired. As he was intensely courted by the Mexican League that spring, St. Louis papers reported that the "apple-cheeked" father of two small boys and a baby girl was "moving his family from a crowded hotel to a furnished bungalow in southwest St. Louis."[55]

The Pasquels pursued Musial with purpose. When he rebuffed their initial offers, they offered more, until the amount reported grew to $130,000 for five years, with a $65,000 signing bonus. Don Jorge must have thought he was getting close, because he sent his brother Alfonso and player-manager Mickey Owen (formerly of the Dodgers) to St. Louis to close the deal, and he announced to the fans at Vera Cruz that Musial was on the way.[56] After a "long conference" in early June, however, Musial turned them down again.[57]

At that point, Sam Breadon, the President of the Cardinals, had had enough. He quickly traveled to Mexico City to have his own "long conference" with the Pasquels. Although Breadon's hope for complete secrecy was dashed when he ran into a vacationing Cleveland sportswriter in the hotel lobby, precisely what transpired at the meeting remains a mystery. We only know that Don Jorge came out and announced that he would no longer seek to lure players away from "my friend, Sam Breadon."[58]

After Breadon's meeting, two things combined to end the competitive threat from the Mexican League. First, the Pasquels stopped making wild offers. Second, most of the players who went to Mexico came back like a spiked volley ball, howling in protest over the conditions in the Mexican "show."[59] In all, only seventeen players broke their contracts in 1946.[60]

But the legal threat had just begun, for the circumstances of the Mexican League defections and blacklisting combined to create "an almost exact parallel to the Federal League controversy" of the teens.[61] And the returning (and suspended) players had little choice but to sue; by 1948, Max Lanier was pitching in Quebec and Mickey Owen was an auctioneer in rural Missouri. Thus did the case of Danny Gardella, an undistinguished former outfielder for the New York Giants, who was then supporting himself as a hospital orderly, come before the Second Circuit Court of Appeals.

B. Gardella's Helping Hand

The opinion in *Gardella v. Chandler*[62] fits well among the quirks and oddities that frequent the history of baseball's antitrust exemption. For one thing, the principal opinion — coming first and announcing the judgment in favor of the plaintiff — was the dissent by Judge Chase. For another, one of the two separate majority opinions was authored by the bombastic Jerome Frank, who waited no longer than the first sentence to characterize Holmes' *Federal Baseball* opinion as an "impotent zombi[e]."[63] And Judge Frank was only warming up at that point; he would ultimately liken the reserve clause to slavery, calling it "shockingly repugnant to moral principles that, at least since the War Between the States, have been basic in America."[64] Those who would defend it (such as his Brother, Judge Chase, apparently) must of necessity be "totalitarian-minded."[65]

The other majority opinion was written by the seventy-seven-year-old judicial icon, Learned Hand. Hand instantly focused on the

obvious difference between professional baseball in 1919 and 1949, to wit, the central role of broadcasting by radio and television. The business was no longer limited to giving exhibitions of baseball to patrons at a ballpark, Hand observed, but to viewers and listeners in other states as well:

> [T]he situation appears to me the same as that which would exist at a "ball park" where a state line ran between the diamond and the grandstand. Nor can the arrangements between the defendants and the companies be set down as merely incidents of the business, as were the interstate features in *Federal Baseball Club v. National League*, *supra*. On the contrary, they are part of the business itself, for that consists in giving public entertainments; the players are the actors, the radio listeners and the television spectators are the audiences.[66]

Far from an obstacle, Hand found the *Federal Baseball* opinion helpful in its recognition that the "incidents" to the exhibition *were* interstate in nature, even though insufficient then "to fix the business — at large — with an interstate character." Thus, on remand, the issue at trial would be

> whether all the interstate activities of the defendants — those, which were thought insufficient before, in conjunction with broadcasting and television — together form a large enough part of the business to impress upon it an interstate character.

Hand's next sentence concluded with an odd note of frustration: "I do not know how to put it in more definite terms."[67]

That frustration may have come from seeing his two Brethren reach out (in a case that asked only whether a complaint should be dismissed on its face) to declare the reserve clause *per se* legal on the one hand (Judge Chase) and a virtual violation of the Thirteenth Amendment on the other (Judge Frank). Nonetheless, an immediate question arises from Hand's analysis: what about the alternative argument in *Federal Baseball*? If, as Professor White and so many others have noted, *Federal Baseball* held "that baseball was *neither* a subject of commerce *nor* an interstate activity,"[68] how can the result change simply by raising the level of interstate activity until it is not incidental? Doesn't the second argument considered by Holmes mean that *Federal Baseball* would have come out the same way even if the bleachers had been in New Jersey?

Worse yet, Learned Hand did not even *address* the issue. This is especially disturbing when contrasted with the opinion by Judge Frank, who overcame the interstate commerce point much as Judge Hand did, but then noted that Holmes' opinion "assigned as a further ground of its decision that the playing of games, although for profit, involved services, and that services were not 'trade or commerce'."[69] Judge Frank handled this "further ground" by arguing that later decisions of the Supreme Court had "undeniably repudiated" this view, and that lower courts could therefore properly treat *Federal Baseball* as limited to its first ground — the "incidental" interstate aspects.[70] But that reasoning compels the conclusion that Holmes was simply wrong on the second point and overruled *sub silentio*. This kind of anticipatory overruling of the Supreme Court, moreover, is a dangerous practice for a lower court, as Judge Chase powerfully argued in his dissent.

As a judge, Learned Hand was a first-ballot hall-of-famer. Constitutional scholar Gerald Gunther has noted that "Hand is numbered among a small group of truly great American judges of the twentieth century."[71] What explanation can there be for his failure to step up to the controlling second argument, for his addressing only the easy and obvious point, and then expressing pique at his inability to resolve

the issue in "more definite terms"? Did he ignore the issue because he had too much respect for Holmes to concede that Holmes had been wrong, or at least hopelessly archaic, in *Federal Baseball*? Unless there is something more, *Gardella* leads us to conclude that the only way to reach the right result in 1949 without expressly rejecting Holmes in *Federal Baseball*, even for the inimitable Learned Hand, was to cut a jurisprudential corner.

If so, *Federal Baseball* has claimed yet another great judge as a victim. If so, Holmes and his beleaguered opinion are in deeper than ever.

IV. From *Toolson* to *Flood*

The repercussions of Danny Gardella's success were swift and dramatic, both for baseball and the antitrust laws. The *Gardella* decision was issued on February 9, 1949, perhaps to coincide with the opening of spring training. Commissioner Chandler was suddenly inspired to "temper []justice with mercy," and issued a declaration of amnesty for all Mexican contract jumpers for the 1949 season.[72] Eight months later, during the 1949 World Series, the *Gardella* case was settled for $60,000 — an act that seemed to close the chapter on the Mexican League challenge to professional baseball.

The legal repercussions, however, were more significant. First, Congress began to look into the affairs of baseball. The Subcommittee on Study of Monopoly Power of the House Judiciary Committee would issue a report in 1952 concluding (unsurprisingly) that organized baseball was "intercity, intersectional, and interstate."[73] Accordingly, "with due consideration of *modern* judicial interpretation of the scope of the commerce clause," Congress could and should "legislate on the subject of professional baseball."[74] Many bills were introduced at that time and thereafter, which would have codified the holding in *Federal Baseball* by providing an express exemption.[75] None were enacted.[76]

The effect of *Gardella* was even more pronounced in the courts, where it generated a new supply of antitrust plaintiffs. When George Earl Toolson sued the Yankees, for example, he had not been blacklisted for going to Mexico; he was not even a Yankee. He had simply refused to accept a demotion from the Yankees' AAA farm team in Newark to their Class AA farm team in Binghamton. And although virtually all lower courts facing antitrust attacks on professional baseball quickly dismissed them on the authority of *Federal Baseball*,[77] it was *Gardella* that provided the essential "split" in Circuit Court authority and ultimately led to the Supreme Court's grant of *certiorari* in several cases, including *Toolson v. New York Yankees, Inc.*

The trial judge in *Toolson* had framed the issue as "whether the game of baseball is 'trade or commerce' within the meaning of the Anti-Trust Acts." He noted that *Gardella* was "[t]he only decision directly challenging [the] present day validity" of *Federal Baseball*, but he was entirely unimpressed

> by the opinion of Judge Frank wherein he assumes the role of crystal gazer in attempting to determine in advance that the Supreme Court is going to . . . reverse the Federal Baseball Club case.[78]

Thus, the issue was clearly framed for the Supreme Court in *Toolson*, and it had three obvious choices: (1) uphold the dismissal on the strength of *Federal Baseball*, as had every lower court except the Second Circuit, (2) reverse the dismissal based on the reasoning of Learned Hand in *Gardella*, or (3) overrule *Federal Baseball* for the reasons suggested by Judge Frank and others. But the Court took none of these courses. Instead, it took the first step in the greatest bait-and-switch scheme in the history of the Supreme Court.

Daniel Gardella, an undistinguished former outfielder for the New York Giants, was supporting himself as a hospital orderly when his case challenging the blacklisting of players who had joined the Mexican League came before the Second Circuit Court of Appeals in 1949.

A. The Bait

The *Toolson* decision was handed down *per curiam*. In a single paragraph, shorter even than the pivotal paragraph in Holmes' opinion, the Court noted that, due to *Federal Baseball*, "the business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation." Thus, "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation." The paragraph — and the opinion — then concluded with this stunning sentence:

> 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*, *supra*, 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.[79]

Well, now. You can stare at the *Federal Baseball* opinion as long as you like, but there is no suggestion — express or implied — that the Congress of 1890 intentionally *excluded* baseball from the Sherman Act. The *Toolson* Court seemed to imply that it had unearthed some previously unknown piece of legislative history, that may have gone like this:

> Senator Edwards: Surely the Senator from Ohio does not suggest that this Anti-Monopoly law — this Magna Carta of the working class — would be applied to the purveyors of our beloved national pastime! (The Louisville Colonels are white-hot, by the way.)
>
> Senator Sherman: Of course not, Senator.

If such a passage exists, neither the author of *Toolson* nor any one since has disclosed it.

Indeed, the last sentence of *Toolson* reads

like an oxymoron. How can one affirm *Federal Baseball* "so far as that decision determines that Congress had no intention of including the business of baseball" within the Sherman Act, when that decision "determined" no such thing? If that is the case, in the apt phrasing of a contemporary law review article, "*Toolson* would then seem to reaffirm nothing."[80]

Let us take some names here. The seven members of this *per curiam* majority were Earl Warren, Felix Frankfurter, Hugo L. Black, William O. Douglas, Robert H. Jackson, Tom Clark, and Sherman Minton. This is arguably as powerful a line-up as that of the 1995 Cleveland Indians, for whom the first baseman batted *eighth*.[81] As will become clear, however, not even all of these Justices realized the import of that mischievous last sentence in *Toolson*.

Justice Burton, joined by Justice Reed, dissented in *Toolson*. He made short work of the new notion that there had been any kind of congressional exemption exclusively for baseball: "The [*Federal Baseball*] Court did not state that even if the activities of organized baseball amounted to interstate trade or commerce those activities were exempt from the Sherman Act." Relying heavily on the changes in baseball since Holmes had written, especially radio and television ("[r]eceipts from these media of interstate commerce were nonexistent in 1929") and the elaborate system of minor leagues "throughout the United States, and even in Canada, Mexico and Cuba," Justice Burton pronounced it "a contradiction in terms to say that the defendants in the cases before us are not *now* engaged in interstate trade or commerce."[82]

Like Learned Hand, Justice Burton argued that the result he sought was consistent with *Federal Baseball*, because that case did not foreclose the eventuality that the interstate aspects of the business would someday become more than "incidental." Unlike Hand, however, Justice Burton could not bring himself to ignore the alternative "trade or commerce" argument (it was, after all, the sole basis of the lower court's opinion), and that is where he stumbled:

> Although counsel [in *Federal Baseball*] did argue that the activities of organized baseball, even if amounting to interstate commerce, did not violate the Sherman Act, the Court significantly refrained from expressing its opinion on that issue.[83]

Justice Burton did not cite anything in *Federal Baseball* to support this view, nor could he. For the notion that the Court "refrained from expressing its opinion" on the alternative argument is hard to square with the actual words Holmes used: "As it is put by the defendants, personal effort, not related to production, is not a subject of commerce."[84] Holmes even chose to "repeat the illustrations given by the Court below" to show that lawyers and Chautauqua lecturers do not engage in commerce simply by going to another state to provide their services.

Justice Burton elsewhere showed his lack of comfort with the second argument in *Federal Baseball* with his references to the "modern" definition of commerce, and to the facts and circumstances of baseball "now." He even included a footnote with a string-cite to the cases that later rejected the restricted view of commerce that prevailed in 1922 — the same cases relied on by Judge Frank in *Gardella*.[85] This demonstrates, once again, the stubbornness of the alternative argument for those who would attempt to preserve *Federal Baseball*'s reasoning while changing its result. Justice Burton's heart was in the right place, but we cannot evade the hard question by asserting — inaccurately — that Holmes evaded it.

B. The Switch

No doubt because it finds no support in the statute or in *Federal Baseball*, the *Toolson* Court's attempt to insert an express exclusion for baseball into the Sherman Act made no im-

The St. Louis Cardinals' decision to trade their star outfielder Curt Flood (pictured) to the Philadelphia Phillies was considered a tragedy by some, but did not raise a legal issue that would normally warrant Supreme Court review. Nonetheless, the Court agreed in 1972 to review baseball's antitrust exemption, thus affording some Justices the opportunity to change their positions on the question.

pression on the lower courts. Instead, they reacted to the news that *Federal Baseball* would not be disturbed by dismissing challenges to all forms of exhibitions for entertainment that they found indistinguishable in principle from *Federal Baseball*. Thus, the very next Term, the Court faced two such cases, one involving theatrical presentations booked in multi-state theaters (*Shubert*),[86] the other involving professional boxing (*International Boxing Club*).[87] Both opinions were written by Chief Justice Warren, whose apparent mission was to emphasize that, "[i]n *Federal Baseball*, . . . Justice Holmes was dealing with the business of baseball *and nothing else*." He explained, moreover, that *Toolson* was based on "a unique combination of circumstances," and was thus "a narrow application of the rule of *stare decisis*."[88]

In *Shubert*, moreover, the Court had as precedent another decision, also authored by Holmes only one year after *Federal Baseball*, concerning an interstate vaudeville circuit. In *Hart v. B.F. Keith Vaudeville Exchange*,[89] Holmes had applied precisely the same analysis as in *Federal Baseball*, but because the *Hart* complaint had been dismissed without a trial for lack of jurisdiction, the Supreme Court reversed and remanded it to the Southern District of New York on the ground that "what in general is incidental in some instances may rise to a magnitude that requires it to be considered independently."[90] Chief Justice Warren therefore argued in *Shubert* that *Federal Baseball* and *Toolson* could not have intended an antitrust exemption for "every business based on the live presentation of local exhibitions." Accordingly, "[i]f the *Toolson* holding is to be expanded — or contracted — the appropriate remedy lies with Congress."[91]

The defendants in *International Boxing Club* thought they had an even better case. For if the Court were drawing lines between different types of "live" exhibitions, surely it would agree that an athletic exhibition like boxing would be grouped with baseball rather than with a vaudeville act. Once again, however, those litigants and the lower courts that agreed with them failed to recognize that *Toolson* had tried to convert the reasoning of *Federal Baseball* into an express exemption rather than an application of a general interstate commerce test. "Surely there is nothing in the Holmes opinion in the [vaudeville] case," responded Chief Justice Warren in *International Boxing*, "to suggest, even remotely, that the Court was drawing a line between athletic and non-athletic entertainment."[92] Indeed, there was not — which is precisely why the theater defendants in *Shubert* were so vexed about losing. But what conclusion does that lead to? For the Chief Justice, it meant that the line had to be drawn even more arbitrarily, that is, between baseball and all live exhibitions that were *not* baseball.[93] This is an argument that works only if one takes seriously the last sentence of *Toolson*, attributing the baseball exemption to

congressional intent.

But not even everyone who voted for the *per curiam* opinion in *Toolson* believed that. Two of those Justices, Minton and Frankfurter, dissented in the boxing case. Justice Minton relied on the alternative argument in *Federal Baseball* in its purest form: "'Personal effort, not related to production, is not a subject of commerce,'" whether interstate or not.[94] In *Toolson*, he mistakenly thought, the Court had "reaffirmed the holding" of *Federal Baseball*.[95] Because no one was arguing that boxing matches were more like trade or commerce than baseball games, he reasoned that the result had to be the same. Justice Frankfurter, on the other hand, dissented because the holding in *International Boxing* made the Court's "narrow" application of *stare decisis* in *Toolson* too, well, *narrow*:

> I cannot translate even the narrowest conception of *stare decisis* into the equivalent of writing into the Sherman Law an exemption of baseball to the exclusion of every other sport different not one legal jot or tittle from it.[96]

In other words, the application of *stare decisis* should be based on a principle, even a narrow one, but not on the name of the game you play. These dissents demonstrate that not even those in the *per curiam* majority realized that the final sentence of *Toolson* could possibly be taken to mean what it said.

And the lower courts *still* did not get it. When an antitrust suit was brought against the National Football League shortly thereafter, the Ninth Circuit was sincerely perplexed. The court compared the results in *Federal Baseball* and *International Boxing*, groping for a principled distinction. Unable to use the level of interstate activity or the general category of sports as the basis, the lightning bolt finally struck: baseball is a *team* sport, while boxing is an *individual* sport. Thus, the Ninth Circuit held that *Federal Baseball* and *Toolson* must exempt from the Sherman Act all "team sports," which would include football.[97]

At this point, the Supreme Court apparently perceived a need to speak more plainly. The opinion of Justice Clark in *Radovich v. National Football League*, therefore, announced that henceforth the rule of *Federal Baseball* and *Toolson* would be confined "to the facts there involved, *i.e.*, the business of organized baseball." Justice Clark allowed that the baseball exemption might be considered "unrealistic, inconsistent, [and] illogical, . . . [and] were we considering the question of baseball for the first time upon a clean slate we would have no doubts."[98] The *Radovich* Court was willing to live with that mistake, but nothing more. Ultimately, the distinction between baseball and other businesses for which the lower courts had been searching came down to this and only this: "*Federal Baseball* held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication."[99]

With *Radovich*, the "bait and switch" was complete. Those courts and defendants lured by *Toolson* to apply *Federal Baseball* to a variety of indistinguishable businesses had been slapped down in every instance. Far from finding a rationale that would change the result in *Federal Baseball* in the 1950s while preserving Holmes' reasoning, the Court had issued a series of rulings that seemed to make the result judicially untouchable while publicly exposing Holmes' reasoning to even greater ridicule.

In retrospect, it is not hard to divine the plan that at least some of the Justices had in mind at the time of *Toolson*. No one could dispute that refusing to apply the antitrust laws to professional sports in the age of radio and television was, as Professor White puts it, "absurd."[100] Apparently recognizing that absurdity, moreover, Congress had held extensive hearings and considered numerous bills in the 1950s that would deal with the problem. At one such hearing, Congress heard testimony

from Casey Stengel, Ted Williams, Stan Musial, and Mickey Mantle. After Stengel offered a rambling, pages-long answer consisting of dizzying double-talk, the room dissolved in laughter when Mantle began by saying: "My views are just about the same as Casey's."[101] With Congress on the verge of acting, the *Toolson* Court must have found the following solution irresistible: instead of overruling Holmes and seeming to betray the baseball powers that be, why not find a way to limit the exemption to baseball alone, so that no other sport or business could claim it, and then let Congress remove the exemption for baseball? Then *Federal Baseball* would be neither overruled nor problematical; it would be moot.

Two things went wrong. First, Congress is Congress, and nothing happened. Second, when your solution is based on the absolute fabrication of an express exemption for baseball, the chance of a result that seems intellectually defensible depends inversely on how often and how publicly you have to explain yourself. Which brings us to the third and final time professional baseball was brought before the Court on this issue, in *Flood v. Kuhn*.[102]

C. Strike Three

Perhaps the clearest indication that no one, including the Supreme Court, found the state of the law after *Radovich* remotely satisfying is the decision to grant certiorari fourteen years later in *Flood v. Kuhn*.[103] Because, technically, there was nothing "cert-worthy" about the case. The question presented had been before the Court twice (and arguably five times) and there was no split in the Circuits to be resolved. And while the St. Louis Cardinals' decision to trade star outfielder Curt Flood to the Philadelphia Phillies was no doubt important — even tragic — to some, it was not a matter affecting national security or world peace. Indeed, all Justice Blackmun could say in describing the decision to hear the case was that the Court "granted certiorari in order to look once again at this troublesome and unusual situation."[104] But *Flood* did provide the opportunity for some members of the Court to change their positions on the question — which itself may be the best explanation for the grant of certiorari.

Justice Blackmun's opinion is memorable for the opening section, subtitled "The Game," wherein he describes the early history of baseball in the voice of a bedazzled schoolboy: "[t]he ensuing colorful days are well known."[105] At one point, he notes that there are "many names [of old-time players] . . . that have provided tinder for recaptured thrills" and he proceeds to list *eighty-eight* of them. At the end of the list, he writes, without apparent irony: "The list seems endless."[106] Only two other Justices in the majority joined Part I of the opinion.

The lengthiest portion of Justice Blackmun's opinion was his description of "The Legal Background." This contained lettered paragraphs A through I, describing in detail the leading Supreme Court cases, the legal commentary on them, and the numerous congressional investigations of baseball. It was followed by a brief, concluding section applying this background to the case at hand. The decision to reaffirm the rule of *Federal Baseball* and *Toolson* was based on three principal points:

(1) Congress has had the baseball "exemption" under consideration many times. It has had the opportunity to overrule Holmes legislatively, but has not done so. Thus, by its "positive inaction," Congress "has clearly evinced a desire not to disapprove [*Federal Baseball* and *Toolson*] legislatively."

(2) "[S]ince 1922, baseball . . . has been allowed to develop and to expand unhindered by federal legislative action." The Court has thus been concerned "about the confusion and the retroactivity problems that inevitably would result with a judicial overturning of *Federal Baseball*." This is yet another reason to prefer a legislative solution, which, "by its nature, is only prospective in operation."[107]

(3) Although the rule of *Federal Baseball* is "an anomaly" and "an aberration," it is "an established one . . . that has been with us now for half a century." To reject it now, more-

over, would require "withdrawing from the conclusion as to congressional intent made in *Toolson*." The question was no longer whether *Federal Baseball* was right or wrong, but who should overrule it: "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."[108]

Justice Blackmun concluded his opinion by adopting and quoting in full the last sentence of *Toolson*, and then adding these final words:

> And what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972; the remedy, if any is indicated, is for congressional, and not judicial, action.[109]

Justice Douglas's dissent was simply an updated version of Judge Frank's opinion in *Gardella*. The principal difference was that his first sentence converted *Federal Baseball* from a "zombie" to "a derelict in the stream of the law." Otherwise, he echoed Judge Frank by pointing out that Holmes' "narrow, parochial view of commerce" had been repudiated by "the modern decisions" of the Court.[110] The interesting question was how Douglas would handle his previous vote for the opinion in *Toolson*. His answer came in a disarming footnote:

> While I joined the Court's opinion in *Toolson* . . , I have lived to regret it; and I would now correct what I believe to be its fundamental error.[111]

Justice Brennan joined Douglas in this dissent, even though Brennan had dissented in *Radovich* on the ground that the rule of *Toolson* should apply not only to baseball but to football as well. In his case, however, no explanation or expression of regret was provided in *Flood*.

Chief Justice Burger offered a brief concurrence, even though he expressly agreed with Justice Douglas's dissent on two points: that *Toolson* was probably in error, and that the Court's reliance on "congressional inaction is not a solid base" for refusing to correct a mistake. Nonetheless, he joined the majority's opinion and result, but left these marching orders for the House and Senate members across the street:

> [T]he least undesirable course now is to let the matter rest with Congress; it is time the Congress acted to solve the problem.[112]

Since *Flood*, there has been no serious attempt to have the Court consider the question for a fourth time. The various opinions in *Flood* demonstrate, however, that the question for the Court by 1972 was no longer what *Federal Baseball* actually meant, but how the mistake that had been made should be corrected. The "least undesirable" solution decreed was congressional action. Yet, despite the virtual injunction from Chief Justice Burger in his *Flood* concurrence, Congress has failed to remove the exemption for more than twenty-five years.

So who is ultimately responsible for this "troublesome and unusual situation"? There is no doubt where the *Radovich* Court laid the blame: "But *Federal Baseball* held the business of baseball outside the scope of the Act. No other business . . . has such an adjudication."[113] Nor is there doubt about Justice Blackmun's view: "It is an aberration that has been with us now for half a century."[114] Nor is Justice Douglas hard to read: "In 1922 the Court had a narrow, parochial view of commerce," he wrote, while citing the "regret[ful]" decision in *Toolson* only once, in a footnote.[115] For these Justices, the problem, in all its aberrant glory, begins and ends with Holmes.

To determine whether this historical judgment is correct, it is time to return to our original question: could the antitrust laws have been applied to baseball in 1949 or thereafter with-

out overruling *Federal Baseball*? By tracing the exemption all the way through to the decision in *Flood*, we have now accumulated the evidence necessary to answer that question. For the answer lies in understanding *Federal Baseball* the way Holmes understood it, and that is something that no judge who has discussed the issue has managed to do — no judge, that is, except one.

V. Wrong on the Facts

One thing that the progression from *Toolson* to *Flood* makes plain is that Holmes' opinion has been battered and mocked much more for the alternative argument about "trade or commerce" than for the conclusion that the interstate aspects of the business were merely "incidental" to the game. This is because such a conclusion, even if wrong when made, is at least not immutable; it can change when the facts do. The presence of radio and television in the later cases, therefore, made it largely unnecessary to dwell on the first argument.

But Holmes has not gone unscathed on that point by any means. Some have argued that Holmes was not only "sophistic" in his view of trade or commerce, but "remarkably myopic, almost willfully ignorant of the nature of" professional baseball.[116] As Professor White asks rhetorically in his book, **Creating the National Pastime**, "How could anyone fairly characterize baseball games as 'purely state' or 'local' affairs?" There is the sense that Holmes has let us down by failing to perceive the cultural importance that baseball had, or clearly would have, in America. In attempting to explain this myopia, Professor White finds in the decision of the D.C. Circuit in *Federal Baseball* "the persistent belief that baseball was not just a 'business,' but a 'game.'"

> It was easy to think of buying a product as part of one's "business." It was much harder to think of watching a baseball game in the same manner.

Professor White finds "astonishing [the] inability of the Supreme Court of the United States to grasp the practical meaning" of organized baseball's structure. In contrast, he argues, "[t]hose closest to baseball, and most directly affected by its decisions, knew full well that it was a *business*, and a buyer's monopoly at that."[117]

Among the statements for which Holmes is revered, rather than ridiculed, is this: "It is most idle to take a man apart from the circumstances which, in fact, were his."[118] We will therefore attempt to place Holmes and *Federal Baseball* in context as a means of addressing this critique.

A. Primitive Baseball

In evaluating the place of professional baseball in the American culture when *Federal Baseball* was decided, two points should be considered. The first, and less important, is that the game at that time was still quite primitive in many respects in comparison even to 1949. When we hear the stories of the (now) famous players from that era, we tend to envision them playing in stadiums and circumstances essentially as they exist now — the uniforms are a little baggier, perhaps, and we see things in black and white, rather than in color, but that's about it. Yet there were fundamental differences affecting everything from the rules (the spitball was not banned until 1921), to the equipment (today, World Series announcers point out that the American and National Leagues have different strike zones; in the teens, they used different baseballs[119]). Indeed, some of the most basic trappings of the baseball "experience" were simply not yet born.

Take the high-collared uniforms, for example. Not only did they lack the player's names, they did not even have numbers. Nor were the starting lineups announced, because there were no sound systems. (John McGraw's remarks at his twenty-fifth anniversary celebration on July 19, 1927, were not amplified, because the Polo Grounds did not have a speaker system until 1930.[120]) Accordingly, you

could not tell the players even *with* a scorecard. As for music, playing the Star-Spangled Banner was not traditional, but a recent innovation by one team, the Boston Red Sox, introduced in 1918 by its show-producer owner, Harry Frazee. The famous tune, "Oh, Take Me Out to The Ball Game," had been written in 1908, but the composer had never even seen a ball game.[121]

Or take something as fundamental as the name of the team. In that era, the team name was as variable as the whim of a local sportswriter. At the beginning of the teens, the Red Sox were called the Pilgrims.[122] When four of the Dodgers got married in the same year the team became the "Bridegrooms." The Indians were known for several years as the Cleveland "Naps" in honor of their player manager, Napoleon Lajoie.[123] When the Indians won the 1920 World Series, they defeated the Brooklyn "Robins," then named for their own manager, Wilbert Robinson. (Brooklyn's all-time low on the name parade came in 1915 when the team was called the "Tip-Tops."[124] Honestly.)

Of greater importance than the primitive trappings, however, is the second point: the health of professional baseball in 1919 was not good. The teens had been baseball's most lackluster decade. Attendance had been dropping since the close pennant races of 1908 and 1909. By 1915, one of baseball's early publications, the *Reach Guide*, was speculating about the reasons for professional baseball's general malaise and the fans' waning interest. Among the possible reasons given were "excessive player salaries" and "movies."[125]

One of the reasons *not* given was that the game may have been getting a little boring. Baseball historian Bill James notes that the pitchers gained "control" beginning around 1913.[126] The team batting averages for the decade hovered around .250 and the most home runs hit in a year from 1909 to 1918 were twelve.[127] In fact, When Boston pitcher Babe Ruth hit 29 home runs in 1919, he broke the American League record by thirteen.[128] The pitchers' statistics were correspondingly colossal. When the Federal League was wooing Walter Johnson, he was a 36-game winner. Smokey Joe Wood was 34-5 in 1912, for a winning percentage of .872.[129] The lowest earned run average in history was recorded in 1914 by Dutch Leonard (1.01). To underscore the dominance of pitching in the teens, compare the 1915 rookie season statistics of Boston's Babe Ruth with those of the Dodgers' Fernando Valenzuela in 1981. Valenzuela's record was 13-7, with a 2.48 earned run average. The Babe was better on both counts (18-6 and 2.44), and batted .315 for good measure. The result: Valenzuela won the Cy Young Award and was named Rookie of the Year, while Ruth was not even carried on Boston's 1915 World Series roster. Given the dominance of the pitchers, it is no surprise that the longest game in baseball history was played on May 1, 1920, — a less than riveting, 26-inning, 1-1 draw that was called on account of darkness.[130]

Boring or not, there is no question that professional baseball was poorly positioned to withstand the distraction and financial hardships inflicted by World War I. In 1918, the owners agreed in July to shorten the season; the World Series was completed by September 11,[131] and the owners promptly cut all players from their rosters to save on the balance of salaries due (agreeing, of course, not to sign each others' free agents). In 1919, the owners agreed again to shorten the season, delay spring training, and trim each team's roster to 21 players in order to save more money.[132] Attendance nosed up slightly in 1919, but the improvement was grudging and short-lived.

At that point, as the *Federal Baseball* appeal worked its way through the appeals court in 1920 and the Supreme Court in 1921, professional baseball was traumatized by two additional events: The Black Sox scandal and the death of Ray Chapman.

1. The Black Sox Scandal

In 1919, players on the Chicago White Sox

threw the World Series. The story of the scandal has been chronicled most notably in Eliot Asinof's famous "Eight Men Out."[133] The mastermind was a New York gambler named Arnold Rothstein. Eight White Sox players, who included Shoeless Joe Jackson, pitcher Eddie Cicotte, and third baseman Buck Weaver, were subsequently indicted and tried, but all were acquitted. In the meantime, however, former federal judge Kenesaw Mountain Landis was appointed baseball's first Commissioner, and he banned all eight of the indicted players from organized baseball for life.[134]

The story from the players' perspective was more pathetic than villainous. They were manipulated by the gamblers during the scandal and manipulated by White Sox owner Charles Comiskey afterward. Only two of the players actually received any of the promised bribe money — Jackson and Cicotte.[135] Cicotte was thirty-five in 1919, but arguably the best left-handed pitcher in baseball. He had nonetheless suffered the penury of his owner for years. In addition to paying him half of what other pitchers made, Comiskey had him pulled from the starting rotation two years earlier after winning twenty-nine games, ostensibly to "rest" him for the World Series. In fact, however, Cicotte had an incentive clause that would have paid him $10,000 for winning thirty games.[136] By 1919, Cicotte knew he was too old to recoup the money he had lost in salary. When Comiskey cut salaries in connection with the war-shortened season, Cicotte and several other players agreed to the scam.[137]

In recent years, there have been revisionist attempts to clear Shoeless Joe Jackson of the charges. One such attempt is found in the movie, "Field of Dreams," in which the ghost of the deeply Southern and deeply uneducated Shoeless Joe is played with perfect diction by New Yorker, Ray Liotta. All of these efforts are complicated by Joe's written confession at the time. Buck Weaver, on the other hand, protested his innocence for decades, and the evidence supports his claim that he only listened to the plan without assent and thereafter played all-star baseball for the entire Series.[138] That was enough to warrant expulsion in the view of Commissioner Landis, however, who correctly perceived the danger that this scandal presented for baseball. From his position as owner, Comiskey decided that the best management of the problem would be for the players to be banned, but acquitted of the criminal charges.[139] During the trial, therefore, Jackson's written confession disappeared. A few years later, when Jackson brought a civil suit against the White Sox, the confession conveniently resurfaced — in Comiskey's lawyer's briefcase.

The timing of the scandal could not have been worse, as baseball struggled to right itself after the war. This conduct rubbed the public's nose in organized baseball's worst-kept secret: that it was badly corrupted by gambling. Gamblers had been present since the first league had been established in the 1870s, and a major scandal involving the Louisville Club had been exposed in 1876. Since then gambling had been unmentioned, but largely tolerated. In 1917 and 1918, for example, first baseman Hal Chase had repeatedly been caught soliciting others to throw games, but repeatedly let off.[140] Asinoff notes that "[b]y 1919, gamblers openly boasted that they could control ball games as readily as they controlled horse races."[141] Publicity such as the Black Sox scandal tends to injure an enterprise seeking to become the cultural cornerstone of American life.

And consider the timing in connection with *Federal Baseball*. The rumors that the World Series had been thrown persisted through the 1920 season, casting a cloud over a close pennant race between the White Sox, Indians, and Yankees. The indictments came down dramatically in September of 1920, just as the D.C. Circuit was preparing its opinion in *Federal Baseball*, which was issued in December. During the 1921 season, the last full season before the Supreme Court ruled in *Federal Baseball*, baseball news was overshadowed as the Black Sox trial dragged on in June, July, and August.[142] Thus, even if the members of

Ted Williams and Babe Ruth (left to right), two of baseball's greatest hitters, met for the first time in 1943 at Fenway Park. Many of baseball's most colorful and beloved characters, including Casey Stengel (opposite page, upper right) and Mickey Mantle (opposite page, lower right, running home), were called to testify before Congress on the antitrust exemption.

the unanimous Supreme Court in *Federal Baseball* were paying attention to baseball at this time, they would doubtlessly have shared the assessment of this period advanced by Stephen Jay Gould:

> The game had been in trouble for several years already. Attendance was in decline and rumors of fixing had caused injury before. The Black Sox Scandal seemed destined to ruin baseball as a professional sport entirely.[143]

2. The Pitch That Killed[144]

Only one major leaguer in the history of baseball has been killed by a pitch. His name was Ray Chapman, and he played shortstop for the Cleveland Indians. On August 16, 1920, Cleveland played in New York during a crucial series in a tight pennant race. The Yankees' best pitcher, Carl Mays, beaned Chapman behind the left ear, and Cleveland's rising star was dead several hours later.

The death of a young ballplayer would be devastating under any circumstances, but the circumstances in this case — including the personalities of the two protagonists — heightened the tragedy. In 1920, Ray Chapman was a golden boy, well on his way to owning the town of Cleveland. Young and classically good looking, he was reputed to be the fastest man in baseball. He was also an outstanding fielder who had been made the protege of Cleveland's already legendary player-manager, Tris Speaker. By all reports Ray was unerringly affable and charming. As the 1920 season got underway, moreover, he had just married the beautiful daughter of one of Cleveland's richest men.

The man who threw the pitch, Carl Mays, was a different story. Mays had come to Boston as a pitcher along with Babe Ruth in 1914 (they rode the same train together from Baltimore).[145] By 1919, Mays had established himself as one of the premier right-handed pitch-

ers in the American League. He had an underhanded delivery, snapping the ball from near his shoe tops at the release. Unlike Chapman, however, Mays was not considered charming. Although he apparently did not drink, smoke, or curse, he was such an unrelenting jerk that he was thoroughly disliked, even by his own team. His universal lack of popularity was so obvious that Mays would discuss it in interviews.

Nor did Mays' conduct make his reputation a mystery. When Mays decided in mid-1919 that the floundering Red Sox were not providing enough run support, he walked out on his team and his contract. Despite the supposedly impregnable reserve clause, the ambitious owners of the Yankees quickly offered him another contract, which touched off a dispute so bitter that some owners threatened to dissolve the league. After several lawsuits, countersuits, and injunctions, the matter was finally settled on the eve of the 1920 season. As a result, Mays stayed in New York, where he was rejoined that year by Babe Ruth.

Another reason Mays was unpopular was that he beaned people. Despite his outstanding record, he was virtually always at the top

of the list for hit batsmen.[146] When Chapman died, the Yankees' owner noted that "[i]t is unfortunate that it should have been Mays who pitched the ball, too, because of the tremendous publicity he has already had."[147] As for the pitch that hit Ray Chapman, the case against Mays is necessarily circumstantial, but impressive. First, he was a low-ball pitcher, who seemed to go high only when someone's head was in the way. Second, he was fiercely, and justly, proud of his control (continually making the point to interviewers). Third, he was usually among the league leaders in fewest walks.[148] In fact, he still holds the record for pitching the most innings (26) in a World Series without allowing a walk. As if to ensure his place in history, Mays offered this assessment of what happened: "It was the umpire's fault."[149]

Chapman's death, followed one month later by the Black Sox indictments, provided grisly confirmation of the worst image of professional baseball and its participants. Regarded as lower class ruffians, the players of the teens have been described by one of the preeminent baseball historians in crisp terms: "Shysters, con men, carpet baggers, drunks and outright thieves."[150] Today, individual names do provide "tinder for recaptured thrills," in the words of Justice Blackmun, but the image of the entire enterprise as shabby and probably corrupt would die hard, especially for the older generation. When Yogi Berra took up the game decades later, his parents were ashamed.[151] Despite the exciting pennant race of 1920 (Cleveland replaced Chapman with a minor league shortstop named Joe Sewell, who is now in the Hall of Fame, and came back to win the pennant and the World Series), attendance dropped significantly in 1921.[152] Professional baseball was at its nadir.

B. Postwar Bliss—and Broadcasting

But turn now to February of 1949, when *Gardella* was decided, and we approach baseball's historical summit. Postwar America felt good about itself and even better about baseball. The age of DiMaggio, Williams, and Musial was in full flower. The American League race in 1948 had been riveting, as Lou Boudreau and Cleveland's incomparable pitching narrowly edged the storied Yankees and the ever-tragic Red Sox. Those three teams alone drew more fans in 1948 than had the entire American League in 1920.[153] The following "Summer of '49"[154] would become the stuff of baseball legend, with the Yankees taking the pennant from the Red Sox on the final day of the season. That summer produced perhaps the finest moment for baseball's finest symbol, Joe DiMaggio. Due to a second, career-threatening foot operation, he played for the first time that season in late June, in a crucial series against the Red Sox in Boston. Leading the Yankees to a three-game sweep, Joe batted .455 (5 of 11), with four home runs and nine RBIs. As he rounded third on one homerun, Casey Stengel came out of the dugout and bowed in the "we are not worthy" salute.[155] America agreed. That Yankees team commenced a run of five consecutive world championships that may never be duplicated. To take the pennant back in 1954, the Indians had to win a record 111 games; the Yankees won a mere 103.[156]

By 1949, baseball had not only a new generation of players, but a new generation of fans. That generation, moreover, followed the game in a fundamentally different way than its predecessors — by listening to the radio. It is difficult to overestimate the role of broadcasting in the rise of baseball (as well as other sports) in the American cultural consciousness. In David Halberstam's words, "Radio made the games and the players seem vastly more important, mythic even." Radio coverage began to define the game in the 1940s, but was still not universal. In 1946, New York sportscasters made their coverage comprehensive, providing the first live broadcasts of away games.[157] For baseball and radio, all the stars were in alignment:

> [R]adio as a prime instrument of sports communication, and Mel Allen as one of its foremost practitioners, ascended at the very moment that Joe DiMaggio did.[158]

By the end of the decade, television was not far behind. The first World Series games were televised in only five cities in 1947, when Gillette paid $175,000 for the rights. Fans did not have to own a T.V. to see the games; city taverns bought them and aggressively promoted televised sports as part of their postwar strategy to resist the advent of (1) suburbia and (2) canned beer. By 1949, comedian Fred Allen asserted that the only New Yorkers who had not watched television were children too young to frequent saloons.[159] For the 1949 Series, Gillette paid $800,000 for the television rights, and an estimated ten million watched.[160]

In deciding whether Holmes failed to grasp the true (or at least imminent) nature of professional baseball, we must keep in mind that broadcasting is not just the obvious reason that professional baseball games are today "interstate." It is the reason that we now perceive baseball and other professional sports as a ubiquitous, permeating cultural feature of everyday life. Only with broadcasting can there be a collective American experience — from sea to shining sea — based on a single moment of a single game. Because of broadcasting, Bobby Thompson's home run to win the pennant for the Giants in 1951 truly was a "Shot Heard 'Round The World"[161] — or at least around America. By the late 1940s, therefore, we can say that major league baseball had genuinely become an experience that was not only seen but heard. It is no accident that every movie made about baseball, from 1949's "It Happens Every Spring" to the dopey (but fun) "Major League," shows scenes of live baseball action from the perspective of the play-by-play announcer in the booth. The filmmakers understand that it is not the same for American audiences to see a swing and a miss without hearing "swing and a miss." Strictly speaking, broadcasting may not be part of the game, but it is a principal reason why the game is part of us.

Holmes and his Brethren did not have this perspective. As for broadcasting, although the first experimental transmission fom a ballpark occurred in August of 1921, the "incalculably positive" impact of regular radio broadcasts[162] was still more than a decade away. Most teams did not broadcast even home games until the early 1930s, and "[a]s late as 1939 none of the New York clubs broadcast any of their games."[163] As for iconography, far from boasting an all-American hero like Joe DiMaggio, the era of *Federal Baseball* was symbolized by the peerless and ruthless Tyrus R. Cobb. While he truly did dominate (in 1919, he won the batting title for the eleventh time in twelve years), his penchant for fighting, cheating, and beating up fans (he once kicked a hotel chambermaid down a flight of stairs) left him generally despised.[164] At the end of one season, when Cobb was locked in a tight race for the batting crown with Napoleon LaJoie, an opposing manager pulled his infield back so that LaJoie could "beat out" six bunts for infield hits. Cobb, being Cobb, won the title anyway.[165]

For the Justices who decided *Federal Baseball*, therefore, the game of baseball had a secure place in the culture as a means of local recreation — there were hundreds of amateur leagues, virtually all contained within their home state[166] — but the enterprise known as organized baseball was more than arguably corrupt, declining, and possibly near extinction. Their mental image of baseball, if they had one, was likely to be the game in which Ty Cobb, dusted off by a Carl Mays pitch aimed at his head, retaliated by pushing a bunt toward first base and then spiking the covering Mays so badly that he could not walk.[167] The Justices may have been grateful that such a spectacle had been witnessed only by a local audience.

C. The "Business" of Baseball

Those who are disappointed or embarrassed by Holmes' conclusion that the interstate aspects of organized baseball at the time of *Federal Baseball* were "incidental" do not grasp the simplicity of the analysis of both Holmes and the D.C. Circuit Court of Appeals. "Trade" and "commerce" were terms of art at that time. To determine whether the defendant baseball clubs were engaged in *interstate* trade or commerce, the first step for the Court of Appeals was to determine just what it was that the defendants were selling. This is what contemporary antitrust lawyers would call defining the product market. The answer for both courts was this: they were selling baseball games, or as Holmes put it "giving exhibitions of base ball."[168] If the next question is whether the game, from the first pitch to the last out, was an interstate event or an intrastate event, it is hard to argue against the view that the game was "local in its beginning and in its end."[169] The game — the relevant product — was produced and consumed in its entirety in one place, at one time, in one state.

If we recognize how firmly this analysis focused on the actual experience of the fan "consuming" the exhibition as it was exhibited, we will understand why so many have wrongly suggested that Holmes' opinion ignored the nature of this "business." For the *Federal Baseball* opinion described the business in *precisely* the terms Holmes is claimed to have been unable to grasp. He referred to organized baseball as a "business" on five separate occasions in two and one-half pages. He noted that "the scheme requires constant traveling on the part of the clubs, which is provided for, controlled and disciplined by the [leagues]." He further noted that the traveling was interstate: "[T]hese clubs . . . play against one another in public exhibitions for money, one or another club crossing a state line in order to make the meeting possible." Indeed, he even acknowledged that "to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States,"[170] thereby granting the plaintiff its point that the quality of the games was directly affected by the out-of-state "identity" of the opponent.

But the fact remains that, when the game with the out-of-state rival was actually played (*i.e.*, produced and consumed), business was being transacted on an interstate basis in only the most indirect and subtle way. When the Dodgers played the Redlegs in Cincinnati, for example, the fans in Brooklyn could care deeply, but they could not partake. The most they could do was to read of the results after the fact in newspaper or telegraph reports. To participate in any meaningful way in the "essential" part of the business (the game), you had to be in Ohio. The only interstate aspect of the "exhibition" itself was the implicit effect it would have on the importance of the games played in other states. In other words, what happened in Ohio in May could make the game played in New York in September vastly more important and exciting. (As current fans are painfully aware, this is a point that seems entirely lost on players today.) But, at least until broadcasting was widely available, the September game in New York would still be a "local" exhibition, consumed only by those who were there. If one accepts any analysis that attempts to distinguish between the incidental and the essential, the amount of genuine interstate commercial exchange that took place in a baseball park in Holmes' day must be below the line.

Accordingly, if your task in the spring of 1919 (as, say, trial counsel for the plaintiff in *Federal Baseball*) was to produce evidence that the interstate aspects of producing this local exhibition were more than incidental, you were in trouble. In the 1970s Justice Douglas would point out in *Flood v. Kuhn* that "[b]aseball is today big business that is packaged with beer, broadcasting and with other industries."[171] But we know that broadcasting was not part of the business when *Federal Baseball* was decided, and beer was *illegal*

(ouch). (The Eighteenth Amendment was ratified on January 29, 1919, and the Volstead Act was held constitutional in January 1920.) Could you make it seem important to a court that the balls, bats, and uniforms of the visiting team may have crossed a state line? (Not really.) If the visiting team's equipment had been hijacked, would the game have been canceled? (Doubtful.)

The lawyers for the *Federal Baseball* plaintiffs seem to have understood the challenge before them. In their brief to the Supreme Court, therefore, they strenuously argued that the interstate aspects of baseball were not simply important, but the heart of the enterprise. There was even a spiritual aspect: "The personality, so to speak, of each club in a league is actually projected over state lines and becomes mingled with that of clubs in all the other States."[172] The main activity of each club, according to the plaintiff, was not playing ball, but *traveling*. Thus, although the plaintiff grudgingly admitted that each club had "a local legal *habitat* . . . it [was] primarily an ambulatory organization."[173] My favorite exposition of this theme is as follows:

> [T]hroughout the playing season the ball teams, their attendants and paraphernalia, are in constant revolution around a pre-established circuit. *Their movement is only interrupted to the extent of permitting exhibitions of baseball* to be given in the various cities.[174]

Drat those interruptions. Holmes and his Brethren were unlikely to be moved by an argument that made the game itself "incidental."

I suspect that what bothers most modern readers of *Federal Baseball* is Holmes' failure to reject the incidental effects analysis altogether, overrule *Hooper v. California sua sponte*, and declare (as the current Court might) that any interstate aspect of any business, no matter how incidental, renders that business subject to any statutory imposition Congress cares to impose.[175] But the "house-that-jack-built" reasoning underlying that view, while perhaps inevitable today with the revolution in communication technology, has no more claim to intellectual rigor than the incidental effects analysis, which at least was designed to preserve some distinction between interstate and local businesses. Thus, when Professor White finally asks in frustration how "anyone [could] conclude, whatever the legal nomenclature, that major league baseball teams were not engaged in interstate commerce,"[176] we see that he has lost sight of the controlling issue. It was not whether baseball was a business, or was a monopsony (a "buyers' monopoly"), but whether that business should be characterized as intrastate rather than interstate. The plaintiff in *Federal Baseball* knew that that was the issue, and argued it under the prevailing standard. There was no request that the Court adopt a different analysis, much less overrule binding Supreme Court precedent.

This is now, but that was then. Holmes was analyzing a record made in 1919 about the nature of the business in 1914 and 1915. The broadcasting, front offices, and minor league structures of today did not exist. The issue in *Federal Baseball*, everyone agreed, was whether this "popular" business was interstate or local. Everyone also agreed that the question turned on the difference between incidental and non-incidental effects. That was precisely the way in which Learned Hand, with the benefit of twenty-seven years of additional antitrust law, would frame the issue in 1949. In 1922, the answer was clear.

VI. Wrong on the Law

A. Whose Alternative Argument?

If Courts had construed the incidental effects analysis of *Federal Baseball* as the sole ground of decision, both the opinion and its holding would long ago have faded away. Whether Holmes was right or wrong is immaterial, the next court would have said, for the

facts have changed, and under *Federal Baseball* that means the result must change as well. Let us turn, then, to the alternative argument on "trade or commerce," which has shown such a sheer face to those who would attempt to help Holmes climb from the reputational hole dug by his baseball opinion. Very few have even argued that finding baseball subject to the antitrust laws today could be made consistent with *Federal Baseball*. Justice Burton tried in his dissent in *Toolson*, but ultimately had to (1) mischaracterize Holmes' opinion and (2) still cite the cases said to "repudiate" Holmes' view of interstate commerce. The only other person to make the effort, the great Learned Hand, seemed to leave his bat on his shoulder, simply blinking as the hard issue went by.

The beginning of wisdom here comes in considering the other Holmes decision mentioned above in the discussion of *U.S. v. Shubert*. The case was called *Hart v. B.F. Keith Vaudeville Exchange*. It involved an interstate vaudeville circuit and was decided in 1923, in the next Term after *Federal Baseball*. On the facts, there was no obvious distinction from *Federal Baseball*, just a dispute over whether the "transportation of large quantities of scenery, costumes and animals" was "merely incidental" to the performance. The District Court had dismissed the complaint on its face. Noting that "[t]he jurisdiction of the District Court is the only matter to be considered on this appeal," Holmes reversed for a unanimous court. The issue was not whether the plaintiff ultimately would prevail on his cause of action, but whether the antitrust laws applied at all:

> The bill was brought before the decision of the *Base Ball Club Case*, and it may be that what in general is incidental in some instances may rise to a magnitude that requires that it be considered independently.[177]

There are several ways to interpret the result in *Hart*, coming only one year after *Federal Baseball*. One is that the result turns purely on the difference between the concepts of "jurisdiction" and "cause of action." Jurisdiction considers only whether the court has power to act on the controversy; cause of action considers whether the plaintiff has a right to actual relief on the stated claim.[178] Recall that *Federal Baseball* came to the Court after a full trial and verdict. In *Hart*, however, as in most all of the cases we have discussed, the Court dismissed the complaint *ab initio* on the ground that the antitrust laws confer no jurisdiction over baseball. Was Holmes saying in *Hart* that the plaintiff had a right to claim that the antitrust laws governed the dispute, even though the claim would later have to be dismissed under *Federal Baseball* as a matter of law? Or was he leaving open the possibility that the plaintiff in *Hart* could somehow prevail on the merits? The first option seems overly formalistic, especially for Holmes. The second seems flatly inconsistent with the alternative argument in *Federal Baseball*.

For Holmes, the distinction between jurisdiction and cause of action was real, but not mindlessly formal. He had made the point ten years earlier in *The Fair v. Kohler Die & Specialty Co.*[179] *The Fair* was brought under the federal patent law, and Holmes defined jurisdiction as the "authority to decide the case either way." He also noted two ways in which a complaint could be dismissed on a motion for lack of jurisdiction: (1) "if it should appear that the plaintiff was not really relying on the patent law," or (2) "if the claim of right were frivolous." In the latter instance, "the jurisdiction would not be denied, except, possibly, in form." In other words, if it were clear that the claim raised was not "a substantial claim under an act of Congress," a federal court would not be required to engage in the charade of taking jurisdiction where later dismissal was inevitable. In *The Fair*, jurisdiction was proper because the claim advanced was "made in good faith and [was] not frivolous."[180]

In finding antitrust jurisdiction over the vaudeville circuit in *Hart*, therefore, Holmes adhered to the distinction set forth in *The Fair*. He agreed that the holding in *Hart* did *not* repudiate those cases dismissing claims for want of jurisdiction that were "absolutely devoid of merit."[181] That was not the case in *Hart*, however:

> It is enough that we are not prepared to say that nothing can be extracted from this bill that falls under the act of Congress, or at least that the claim is not wholly frivolous.[182]

Thus, *Hart* cannot be read to mean that the plaintiff would inevitably lose anyway because the local exhibition — consisting exclusively of "personal effort" — was not trade or commerce as a matter of law. *Hart* means that a plaintiff satisfying the"incidental" effects test potentially could win on the merits.

But how can that result be squared with the alternative argument in *Federal Baseball*? Recall that Justice Minton began his dissent in *International Boxing* with these words:

> To make a case under the Sherman Act, two things among others are essential: (1) there must be trade or commerce; (2) such trade or commerce must be among the States.[183]

No one on the Supreme Court has ever disputed this reading of *Federal Baseball*, which went on to be the express (and unchallenged) interpretation of Justice Blackmun in *Flood v. Kuhn*.[184] If this reading is right, baseball's "personal effort" will always be personal effort; thus, it will never be trade or commerce. Was Justice Minton just wrong?

He was, actually. He and many others misread *Federal Baseball* in a small way with large consequences. Holmes did address a two-part alternative argument in *Federal Baseball*, but it was an alternative argument that worked in

Ray Chapman (above) was the rising star of the Cleveland Indians in 1920 when he was killed by a pitch that struck him behind the left ear. The Yankees' best pitcher, the universally disliked Carl Mays (right), threw the ball, the only lethal pitch in the history of major league baseball.

favor of the *plaintiff*, not the defendant; it gave the plaintiff two chances to *win*, not to lose. We can see the alternative argument Holmes was responding to by looking at the briefs before the Supreme Court. The defendants in *Federal Baseball* made the argument that personal effort was not commerce, and the plaintiff had responded that the claim was irrelevant. Whether or not the personal effort involved in baseball was "an article of commerce," plaintiff argued, "interstate commerce may be created by the mere act of a person in allowing himself to be transported from one State to another, without any personal effort."[185] Holmes was expressing his opinion on that argument in the second half of his dense paragraph in *Federal Baseball*.

In doing so, Holmes recognized that the plaintiff's argument had two parts: in addition to arguing that the interstate "incidents" were sufficient to stamp the whole business as interstate, plaintiff argued that crossing a state line to engage in an activity that was not otherwise trade or commerce was enough to "create" interstate commerce. Wrong, said Holmes: "That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place."[186] All this exchange establishes is that the plaintiff had made its own formalistic argument — that crossing a state line could change something that was not commerce at all into interstate commerce — and Holmes rejected it. It is only because others have misread this passage as a pronouncement that baseball could never be subject to the Sherman Act that the subsequent mistakes of *Toolson* and *Flood v. Kuhn* have loomed so large.

Understanding the alternative argument in *Federal Baseball* in this way explains a lot. For one thing, it explains the result in favor of the vaudeville plaintiffs in *Hart*. For another, it answers an obvious question that no judge has ever posed, to wit, if baseball could never be trade or commerce, why did Holmes place that argument second? We know that he was a practical guy who wrote standing up and tried to get to the point as quickly as he could. It is hard to imagine that he would order his arguments in this way: "Let's see, one ground of decision means that baseball by definition can never, ever be subject to the Sherman Law; the other is a fact-intensive analysis requiring evidence of interstate aspects of the business and a careful balancing to determine whether those aspects are incidental or not. I guess I'll lead with the incidental balancing test."

Holmes was not wasting our time. The plaintiff could prevail by showing that the interstate aspects of the baseball business were more than incidental. If so, the alternative argument rejected in *Federal Baseball* would neither hinder the plaintiff nor save the defendant. In fact, if the plaintiff did not raise the point, there is no reason why a court who read *Federal Baseball* accurately would have to address the alternative argument — at all.

B. "Just The Smartest Guy Who Ever Lived"

In his justly famous lecture series on the law of evidence, the late Irving Younger discussed a session of the Practicing Law Institute concerned with restating the law on Burdens of Proof and Presumptions. The issue had been studied for some time. When a proposal was made to re-submit the issue to committee for more fruitless debate, committee member Learned Hand rose to oppose the effort. Painting a verbal picture of the moment as only he could, Younger described the great judge's majestic ascent to address the room. "He looked like God incarnate; he spoke like God incarnate — just the smartest guy who ever lived —".[187]

Is it possible that Learned Hand saw what so many others missed? If he read Holmes correctly, he could easily have decided *Gardella* exactly as he did — seeming to ignore the "alternative" argument, and recognizing that the advent of radio and television broadcasting had fundamentally changed the calculus regarding the "incidental" interstate aspects of baseball.

There are several reasons to think he had it right. First, the conventional wisdom that read Holmes' opinion as an alternative argument in favor of the defendant was not yet firmly in place. In fact, it was *Gardella* itself that occasioned a spate of commentary popularizing the fallacy, which continued to grow as more decisions applying the antitrust laws to professional sports were handed down during the 1950s. With no clear consensus embracing the wrong interpretation, it is far less surprising that Hand did not address what was then only the second ground for his concurring panel-member, Jerome Frank. Second, Hand and Holmes knew each other well, communicated during the period in which *Federal Baseball* came down, and conceivably could have discussed the controlling issues. Hand had encountered Holmes on a train in June of 1918, and they began a lengthy exchange of correspondence, largely on the First Amendment.[188] In February of 1923, during the Term following *Federal Baseball*, Holmes attended a meeting of the American Law Institute at which he saw Hand. Holmes described the meeting in a letter to Pollock, referring to Hand as "a good U.S. District Judge, whom I should like to see on our bench."[189]

Third, and most important, Learned Hand was no stranger to this issue or to Holmes' analysis. Shortly after Holmes saw Hand in 1923, two things happened. First, Hand was elevated to his seat on the Second Circuit, where he would remain until 1961. Second, the Supreme Court handed down its decision in *Hart v. B.F. Keith Vaudeville Exchange*. As I noted above, *Hart* had come to the Supreme Court from the Southern District of New York, to which it was remanded. Upon completion of the subsequent trial in *Hart*, the District Court found for the defendants, "principally upon the [factual] determination . . . [that] the parties were [not] engaged in interstate commerce."[190] The plaintiff appealed again, and the Second Circuit affirmed in an opinion by Judge Manton. On the evidence submitted, the court concluded that "the transportation in interstate commerce of artists or actors and the costumes and paraphernalia used by them is but incidental of the main purpose to entertain or act upon the vaudeville stage."[191] The remaining members of the panel were Charles Hough and Learned Hand.

To Learned Hand, therefore, the analysis in *Gardella* was exceptionally straight-forward. The controlling issue was whether the interstate aspects of the business were incidental. The facts had changed radically since 1922, principally due to the role of broadcasting. When he said "the players are the actors, the radio listeners and the television spectators are the audience,"[192] he was speaking in terms equally applicable to *Hart* as to *Federal Baseball*. He was simply holding that the same trial that took place in *Hart* should take place in *Gardella*. It would not occur to someone who saw the issue so plainly that there was a need to address any "further ground" that Judge Frank had discovered in *Federal Baseball*, or to argue over the merits of the reserve clause. He would not have felt it necessary to labor peripheral arguments to which the responses were (to the smartest guy who ever lived) so obvious. This explains the odd note of frustration in Hand's opinion; this explains why Learned Hand simply did "not know how to put it in more definite terms."[193]

VII. Stealing Holmes: Why *Flood* Was Wrong

What has been discussed so far should enable us to put in perspective — and to be more precise when we discuss — baseball's "exemption" from the antitrust laws. There is no statutory exemption for baseball in the antitrust laws. There is a judicially created exemption, but it did not originate with *Federal Baseball*. The Second Circuit's decision in *Gardella* made the point; it could not have been much of an exemption if the first circuit court to revisit the issue in the 1940s found that it did not exist.

It was the decision in *Toolson* that first created an exemption meant exclusively for base-

ball and no other business. The attempt by the *Toolson* majority to attribute that exclusive exemption to the actual intent of Congress, however, was so baseless that no one took it seriously. Thus, it took several years and several more opinions before the message could sink in — even for some of the Justices in the *Toolson* majority. And even after the Court put its foot down in *Radovich*, holding that not even football could have the same exemption as baseball, *certiorari* was still granted in *Flood v. Kuhn* for the simple reason that the law on this question was embarrassing.

Given the state of things when *Flood* was decided in 1972, however, is it not fair to say that the ship had sailed? The Court missed its chance, perhaps, to apply Holmes' opinion properly in *Toolson*, and improved nothing by its embrace of illogic and inconsistency in the boxing and football cases, but how could that be undone so much later in *Flood*? Surely, one may argue, it will not help the Court's stature with the legal community or the general public to add fickleness to long-standing error.

But, wait a minute. Such sentiments implicitly accept the grounds put forth in *Flood* to justify the result. If we look harder, however, we will see that none of the three bases for the decision withstands scrutiny:

(1) The first was Congress's "positive inaction" over the years, which the Court said "clearly evinced a desire not to disapprove" the baseball exemption. The opinion in *Flood*, however, did not even respond to the ineluctable argument on this point by the dissent in both *Toolson* and *Flood*: Congress had repeatedly considered and failed to pass bills that, far from "repealing" the exemption, would have *granted* some or all of it to baseball. The failure to pass an exemption is weak evidence of a specific intent to preserve it.

More fundamentally, however, the notion that subsequent congressional inaction should cause the Court to avoid correcting its own mistakes is, as Justice Scalia has put it, "a canard."[194] Since the Constitution was ratified, we have always had a single Supreme Court (which can thus begin sentences with the words: "One hundred years ago, we held . . . "), but we have had many, many Congresses — over one hundred at last count. At this writing, both houses of Congress are controlled by the same party. Suppose that a differently constituted Congress passed a law in the 1970s, which was egregiously misinterpreted by the Supreme Court in the 1980s. Should today's Congress be permitted to carve that bad decision in stone by considering a bill to disapprove the Court's decision, and then failing to act? Or should a President with a veto-proof minority be able to achieve the same result? As often as not, we are grateful when Congress fails to act. It is dangerous to attempt to ascribe discernible intent to such failures.

(2) The Court in *Flood* expressed its concern about the "confusion and the retroactivity problems" that could come from changing the rules now, when baseball "has been allowed to develop and to expand unhindered" since "1922."[195] The first problem with this ground is one of logic. The *Flood* Court was, by its own terms, dealing with an "anomaly" — that baseball is exempt while other sports are not. But why would football and boxing have relied on the rule of *Federal Baseball* over the years any less? We would expect those sports *not* to have relied only if there were any basis to suspect that the exemption was exclusive to baseball, and we know that that proposition did not exist until it sprang fully formed from the last sentence of *Toolson*. The Court nonetheless turned a deaf ear to any claims of reliance in the boxing and football cases. On the other hand, if we grant that assumption and say that other sports would have known that *only* baseball was exempt, the conundrum simply shifts: if other professional sports have never relied on an antitrust exemption, they seem to have developed nicely. Why would it be so confusing and disruptive in 1972 to have baseball play by the same antitrust rules as football?[196]

Another fundamental flaw in this "retroactivity" concern is that its factual premise is probably false. Prior to *Toolson*, just what was

the expectation of organized baseball regarding its supposed antitrust immunity? In the late 1940s, a leading sportswriter, Lee Allen, was commissioned to write a history of baseball. The result, **100 Years of Baseball**, was published in 1950, after the *Gardella* decision, but before *Toolson*. From that perspective, Allen reached this conclusion about baseball's legal immunity:

> In three quarters of a century, the validity of the reserve clause has sometimes been affirmed in court, but usually it has been denied. The issue is not yet settled, and it is likely that many additional lawsuits will be filed before it is.[197]

During that same window of time — between *Gardella* and *Toolson* — Commissioner "Happy" Chandler testified before Congress in 1951, offering a number of reasons for reinstating and granting amnesty to the Mexican players. His reason for settling the *Gardella* case, however, was simply this: "[T]he lawyers thought we could not win the Gardella case."[198]

(3) The final argument in *Flood*, based on the weight of judicial precedent discussing *Federal Baseball*, had two aspects. First, the baseball exemption is an *established* "aberration" that "has been with us now for half a century." Second, applying the antitrust laws to baseball now would require "withdrawing from the conclusion as to congressional intent made in *Toolson*."[199] Taking the easier point first, the "conclusion as to congressional intent" in *Toolson* was a fabrication; no one has ever tried to defend it, and it could hardly be described as time-honored. *Flood* provides no reason why "withdrawing" from that conclusion would be inappropriate from any jurisprudential perspective. Turning to the first point, the so-called "aberration" could hardly be given a fifty-year pedigree. The baseball exemption became an aberration only when it became clear that the same exemption would *not* apply to others similarly situated. That did not happen until *Shuster* and *International Boxing* in 1954, and the point was not truly driven home until *Radovich* was decided in 1957.

Thus, none of the grounds assigned in *Flood v. Kuhn* stands up. What the opinion in *Flood* reflects in every corner and crevice, moreover, is the Court's perceived need to enlist Holmes in support of the result. To be persuasive, in other words, the reasoning set out in *Flood* must be attributed to Holmes. Otherwise, the "retroactivity" and the "established aberration" arguments won't work. To sell the notion of entrenched principles that could not be abandoned without disruption, "fifty years" and "half a century" sound properly dramatic. Thus, the opinion explicitly referred to the age of *Federal Baseball* no fewer than five times in its last three and one-half pages ("for half a century," "since 1922," "half a century," "50 years after," "in 1922").[200] Justice Douglas was an unwitting ally in this effort, because his misreading of *Federal Baseball* as turning on the "trade or commerce" point also required that the clock be turned back to 1922 and all eyes fixed on Holmes. (He understandably preferred that to even the mildest inspection of the opinion he joined in *Toolson*.) In contrast to five decades, the nineteen years that had passed since *Toolson*, or (more accurately) the fifteen years since *Radovich*, would have sounded feeble. (Elvis has been dead for more than twenty years, and I have unopened boxes in the garage that are fifteen.)

The most egregious example of falsely enlisting *Federal Baseball* to the result in *Flood* came in the final sentence, where the Court insisted that there be a congressional rather than a judicial solution to the anachronistic baseball exemption. That sentence makes the claim that this stated preference for legislative action was "what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953." As to *Federal Baseball*, that statement is obviously false. There was no suggestion in *Federal Baseball* that Congress might choose

to bring a business under the antitrust laws unless and until it affected interstate commerce.

The last sentence in *Flood* was therefore equally as unrooted in the words of *Federal Baseball* as the last sentence in *Toolson*. Just as *Toolson* had tagged Holmes with an express congressional intent that did not exist, so *Flood* tagged him with a preference for congressional action that he did not mention. Both *Toolson* and *Flood* were wrongly decided. Both have been caught stealing Holmes.

VIII. Conclusion

Soon after I began practicing law, I worked with a colleague who was one of the legends of the District of Columbia bar, H. Chapman Rose. Then in his mid-seventies, "Chappie" told fascinating stories of his year as the last law clerk to serve Oliver Wendell Holmes, Jr. At the time, Holmes was over ninety, and Chappie spent some of his time reading aloud to him. One day the selection was **Lady Chatterly's Lover**. After a time, however, Holmes raised his hand: "Sonny, we will not finish this book. Its dullness is unredeemed by its pornography."[201]

Another story Chappie would tell has also been chronicled by Holmes' biographers. It was Holmes' description of Ralph Waldo Emerson, upon reading a paper the very young Holmes had prepared as a critique of Plato. Emerson had simply said: "When you strike at a king, you must kill him."[202] This discussion of Holmes' baseball opinion has been written with the conviction that Emerson's words, if ever true, are sadly untrue today. Now, dismissiveness has replaced analysis. The popular culture encourages us to feel intellectually superior to those in the past who did not speak precisely in our words. It requires too much work to appreciate how those who came before us could take seriously concepts we now view as trite (like the difference between interstate and local commerce). Thus, Holmes never had a chance; he has been left to dangle in the wind not because anyone has understood him fully in his terms, but because — as William Paley said in the eighteenth century — "who can refute a sneer?"[203]

I am not referring to the scholars and judges mentioned in this article, who (for better or worse) thought thoroughly and hard about *Federal Baseball*. We are particularly indebted to Professor White for his engrossing book on baseball.[204] But for the general population of lawyers and (I love this term) non-lawyers, Holmes' baseball opinion merits only condescension — the knowing snickers of those who do not know. As we have seen, moreover, *Federal Baseball* is scorned principally for things that were not in the opinion, but later added by *Toolson* and *Flood*.

The alternative standard I propose — the *challenge*, if you will — is the one so well articulated by Allan Bloom in an essay on Shakespeare:

> Every rule of objectivity requires that an author first be understood as he understood himself; without that, the work is nothing but what we make of it.[205]

And "we" have made a mess of *Federal Baseball*. Congress, as always, has legislation under consideration to "repeal" the baseball exemption. While I expect any such bill to be written in impenetrable prose, with several special-interest ornaments, my proposal would be simple:

> No business, industry, service, or other commercial activity is exempt from the antitrust laws unless expressly so provided by act of Congress. The decision in *Toolson v. New York Yankees* is expressly disapproved.

Note: *The author is grateful for the support and help of his friends and colleagues, especially Joe Sims, Don Ayer, Joe Migas, Feroz Moideen, Dave Rutowski, Jana Crouse, and Marybeth McDonald.*

Author's Note

This article was completed several months before the end of the historic 1998 baseball season — a year that featured the unthinkable seventy home runs of Mark McGwire and the overwhelming MVP season of Sammy Sosa, as well as a perfect game and near-perfect season by the New York Yankees. As if that were not enough history to make, October of 1998 also brought the final passage and signing of Public Law 105-297, the "Curt Flood Act of 1998." This Act works a partial repeal of baseball's antitrust exemption, such that a major league player — and *only* a major league player — may now file an antitrust suit.

I regret to report that the Curt Flood Act of 1998 is not as short as my legislative proposal. In fact, it is over 1,200 words long, adding a new Section 27 to the Clayton Act with no fewer than eighteen separate sections and subsections. The Act describes the purpose of Section 27 as follows:

> It is the purpose of this legislation to state that major league baseball players are covered under the antitrust laws (*i.e.*, that major league baseball players will have the same rights under the antitrust laws as do other professional athletes, *e.g.*, football and basketball players), along with a provision that makes it clear that the passage of this Act does not change the application of the antitrust laws in any other context or with respect to any other person or entity.

P.L. 105-297, Sec. 2. In other words, a major league player can now sue under the antitrust laws, but the "exemption" is undisturbed with respect to such matters as team relocation, league expansion, and the minor leagues. (The Act goes to nearly comical lengths of definition and loop-hole plugging to ensure that it applies only to *major* league players — bush-leaguers need not apply. We cannot have our federal courts clogged with Toledo Mud Hens bringing monopolization claims, after all.)

As the commentary accompanying the statute, not to mention the text itself, makes clear, this partial application of antitrust to baseball is designed specifically to give the players' union another bargaining chip in negotiations with the owners. The idea is that, when the negotiations get tough, the players can bring an antitrust suit to increase their leverage. The tricky part is that the antitrust exemption for labor agreements protects the owners unless the union is decertified before the suit is brought (if there is no union, the owners can't claim the labor exemption).[1] Decertification is no small thing, and such a decision is obviously controlled by the union. Thus, the relief granted by the Curt Flood Act can *only* redound to the benefit of the union, because the union has effective control over whether any major league player will ever successfully invoke the "right" the statute provides. In the meantime, all of the other potential plaintiffs — another owner, a competitive league, or a hapless minor-leaguer like our old friend, George Toolson — are simply left out in the cold.

The news stories, legislative reports, and public statements occasioned by the Curt Flood Act are peppered not only with the usual gaffes about Holmes and *Federal Baseball*, but also with novel historical propositions that are more than a little dubious. As to the gaffes, the following is typical:

> The legislation reverses what Sen. Orrin Hatch, R-Utah, a chief backer, called an "aberrant" 1922 Supreme Court decision that exempted baseball labor relations from antitrust laws on the grounds that it is a game and not a business.[2]

As to revisionist history, both the Senate Re-

port and the players association have pointed to another benefit of this "repeal": preventing strikes.[3] In the view of hall-of-fame pitcher, Jim Bunning, then a House member from Kentucky, "the Curt Flood Act . . . gets at 'the root cause' of eight baseball strikes and stoppages in 30 years."[4] Finally, the White House statement upon the signing of the bill spends most of its effort lauding the "courageous baseball player and individual, the late Curt Flood, whose enormous talents on the baseball diamond were matched by his courage off the field. . . . His bold stand set in motion the events that culminate in the bill [the President has] signed into law."[5]

Let's take these points one at a time. First, the notion that Holmes said baseball was exempt because it is a "game," not a business, is so groundless that even Justice Blackmun spent time debunking it in *Flood v. Kuhn*:

> It should be noted that, contrary to what many believe, Holmes did call baseball a business; time and again those who have not troubled to read the text of the decision have claimed incorrectly that the court said baseball was a sport and not a business.[6]

As we have seen, moreover, Holmes did not use the word "exempt," did not suggest that baseball was different from any other sport with respect to antitrust, and did not imply that his conclusion reached about the interstate nature of the business could not change as soon as the facts did. It should not be surprising that, when Learned Hand reached exactly that conclusion in 1949, he did not even face the argument that there was any special "exemption" for baseball. As we also saw, not even those closest to baseball in the early 1950s thought they had any special exemption — or even a reasonable chance to overturn Learned Hand's decision in *Gardella*. Rather, the baseball "exemption" discussed so blithely today was invented by the last sentence of *Toolson* in 1954, and was not rendered "aberrant" until the boxing and football cases were decided later that decade.

The second proposition — that the exemption has been the cause of strikes and work stoppages— is a bit of special pleading by the players' union that naturally appealed to politicians wishing to appear to be "doing something" about the 1994-95 baseball strike. When this argument found its way into the Senate committee report of the "Major League Baseball Reform Act of 1995," however, it was promptly refuted by the minority reports of both Republicans and Democrats,[7] which pointed out that there is no historical evidence for this alleged connection between strikes and antitrust. Take the record in baseball itself. Thomas Boswell has noted that the first "significant work stoppage" in baseball did not occur until 1981.[8] The Committee Report does not suggest why the antitrust exemption, which the Report dates back to Holmes, took sixty years to stop play. Then consider the plethora of work stoppages in other, non-exempt sports, such as the NHL and (as this is written) the NBA. Not even Jim Bunning can explain how those crafty NFL owners got away with using scab players (and having the games count in the standings) during a football strike, when the players had the weapon of antitrust litigation available.

Turning to the White House's effusive "thank you" to Curt Flood for setting "in motion the events that culminate[d]" in the Curt Flood Act of 1998, let us be clear. Curt Flood was a fine man and a spectacular ballplayer. He took a stand and, unlike many in our times, accepted the full consequences. It neither questions his courage nor demeans his memory to suggest that Justice Blackmun's opinion in *Flood v. Kuhn* probably delayed any repeal of baseball's antitrust exemption — especially the kind of partial appeal reflected in the 1998 statute— by as much as a generation.

In sum, I would draw two initial conclu-

sions from consideration of the Curt Flood Act of 1998. First, the Act could be a poster child for the proposition that a subsequent Congress should *not* be entrusted to repair judicial mistakes in statutory construction. It has all the marks of bad legislation on it, from special interest pleading to unprincipled compromises (one explanation for the exclusion of the minor leagues was that the Chairman of the House Judiciary Committee is a minor league fan who wanted his favorite teams unaffected[9]). Far from removing *Toolson*'s erroneous exemption of baseball from the antitrust laws, this Act works a small repeal of only arguable utility for those who need protection the least — transforming the rule of *Toolson* into a judicial exemption that inexplicably applies to some ballplayers, but not to others.

But such a result should not be surprising. We have been shown time and again that the people involved in the legislative process simply cannot help themselves. They live in the now. They pass (or fail to pass) legislation in response to the ability of *current* constituents and interest groups to reward them in the appropriate political coin. It is chimerical to expect them simply to restore the original intent of a prior Congress to a statute that a court has misread. If the correct answer to a statutory question is "black," but a court wrongly reads it as "white," the legislature will inevitably cure the mistake by enacting some shade of mottled gray.

The second (and highly satisfying) conclusion I draw from the Curt Flood Act of 1998 is that it provides unwitting support for my thesis here: that no "exemption" can be pinned on Holmes, and that you can "repeal" the exemption, in whole or in part, without rejecting the reasoning of *Federal Baseball*. Congress has now illustrated the point by enacting a law for the purpose of repealing baseball's antitrust exemption that, by its terms, does not overrule Holmes' holding. The plaintiff before Holmes, you will recall, was the Federal Baseball Club of Baltimore, not a major league ballplayer and hence not affected by the Curt Flood Act of 1998. Thus, those who have announced in the press and in committee reports that the statute works "an explicit reversal"[10] of *Federal Baseball* have not even read the statute they are citing. Is that too much to ask?

Of course it is. But take heart. The cases, the statutes, the *words* are there to be read and understood by those who are unembarrassed by accuracy for the sake of accuracy. Let us take solace in knowing that, even as the reasoning of *Federal Baseball* remains misunderstood, its holding remains undisturbed. And if we are the only ones who know, that's OK too.

Endnotes

[1] 259 U.S. 200 (1922). *Federal Baseball* is "still the law" despite the recent passage of the Curt Flood Act of 1998, which purports to work a partial repeal of baseball's antitrust exemption. The new statute is discussed in the Author's Note at the end of this article.

[2] *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949).

[3] *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953).

[4] *Flood v. Kuhn*, 407 U.S. 258 (1972).

[5] Joe Sims, **Antitrust in the Health Care Field: The First Decade (1977-1987)**, (unpublished manuscript, on file with author). Before the Nat'l Health Lawyers Assoc. Tenth Annual Seminar on Antitrust in the Health Care Field (Jan. 29, 1987).

[6] *Gardella v. Chandler*, 172 F.2d 402, 409 (2d Cir. 1949).

[7] *Salerno v. American League*, 429 F.2d 1003, 1005 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971).

[8] G. Edward White, **Creating the National Pastime** 70 (1996).

[9] *Flood v. Kuhn*, 407 U.S. at 286.

[10] 193 U.S. 197, 400 (1904).

[11] Hans B. Thorelli, **The Federal Antitrust Policy** 474 (1955).

[12] Robert H. Bork, **The Antitrust Paradox** 31 (1978).

[13] *Id.*

[14] *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 1986-1 Trade Cas. (CCH) ¶ 67,121 at 62,774 (1986).

[15] Richard A. Posner, "Foreword: Holmes," 63 *Brook. L. Rev.* 7, 7 (1997).

[16] *Id.* at 17.

[17] *Radovich v. Nat'l. Football League*, 352 U.S. 445, 451 (1957).

[18] Bork, note ____, at 30 ("the Addyston opinion of 1898 may well have been the highwater mark of rational antitrust doctrine").

[19] *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

[20] *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (Douglas, J., concurring).

[21] *State Oil v. Khan*, 118 S. Ct. 275 (1997).

[22] *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting).

[23] Lee Allen, **100 Years of Baseball** 180-88 (1950). Similar circumstances attended the birth of the Union Association, *id.* at 74-83, the Player's (or Brotherhood) League, *id.* at 103-14, the American Association, *id.* at 64-73, and of course the surviving American League, *id.* at 142-51. *See also* Hy Turkin & S.C. Thompson, **The Official Encyclopedia of Baseball** 16-20 (revised edition 1956).

[24] Bob Broeg & William J. Miller, Jr., **Baseball from a Different Angle** 224 (1988); Turkin & Thompson, *supra* note 23, at 36.

[25] Broeg & Miller, *supra* note 24, at 225.

[26] *See National League of Prof'l Baseball Clubs v. Federal Baseball Club of Baltimore, Inc.*, 269 F. 681, 682 (D.C. Cir. 1920).

[27] Roger I. Abrams, **Legal Bases, Baseball and The Law** at 55 (1998); Allen, *supra* note 23, at 185.

[28] *Federal Baseball Club of Baltimore, Inc. v. National League of Prof'l Baseball Clubs*, 259 U.S. 200, 208 (1922); *The New York Times*, Apr. 13, 1919, at 21.

[29] **Federal Baseball**, 259 U.S. at 208.

[30] 155 U.S. 648 (1895).

[31] **Federal Baseball**, 259 U.S. at 201 (emphasis added).

[32] *Id.* at 203.

[33] *Id.* at 208-209.

[34] White, *supra* note 8, at 79.

[35] *Id.* at 79.

[36] "The Supreme Court 1953 Term," 68 *Harv. L. Rev.* 104, 136 (1954).

[37] John Eckler, "Baseball — Sport or Commerce?," 17 *U. Chi. L. Rev.* 56, 65 (1949).

[38] *Id.* at 66.

[39] "Recent Cases," 105 *U. Pa. L. Rev.* 110, 111 (1956).

[40] *United States v. Int'l Boxing Club of New York, Inc.*, 348 U.S. 236, 251 (1954) (Minton, J., dissenting).

[41] *Id.* at 248 (Frankfurter, J., dissenting).

[42] *Flood v. Kuhn*, 407 U.S. 258, 286 (1972) (Douglas, J., dissenting).

[43] *Id.*

[44] *United States v. Shubert*, 348 U.S. 222 (1954).

[45] *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957).

[46] *Flood v. Kuhn*, 407 U.S. at 270 n.10 (quoting 2 Harold Seymour, **Baseball** 420 (1971)).

[47] White, *supra* note 8, at 71-72; *N.Y. Times* article, April 12, 1919, p. 12, col. 2.

[48] Anthony J. Sebok, "Introduction," 63 *Brook. L. Rev.* 1, 3 (1997).

[49] Allen, *supra* note 23, at 291.

[50] *Id.*

[51] *Id.* at 291-92.

[52] *Id.* at 291-93.

[53] *Id.* at 293.

[54] Bill James, **The Bill James Historical Baseball Abstract** 570 (Villard 1988).

[55] "Musial calls 'Strike 3' on Pasquels," *St. Louis Post-Dispatch*, Jun. 7, 1946, at 8C.

[56] "Card Stars Not to Jump," *N.Y. Times*, May 29, 1946, at 26:7.

[57] "Musial Calls 'Strike 3' on Pasquels," *St. Louis Post-Dispatch*, Jun. 7, 1946, at 8C.

[58] Allen, *supra* note 23, at 293.

[59] *Id.* at 294.

[60] White, *supra* note 8, at 292.

[61] *Id.*

[62] *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949).

[63] 172 F.2d at 409.

[64] *Id.* at 409.

[65] *Id.* at 410.

[66] *Id.* at 407, 408.

[67] *Id.* at 407, 408.

[68] White, *supra* note 8, at 293-94 (emphasis added).

[69] 172 F.2d at 412.

[70] *Id.*

[71] Gerald Gunther, **Learned Hand, The Man and the Judge**, xv (1994).

[72] Dan Abramson, "Baseball & the Court," *Constitution*, Vol. 4/No. 3, at 74 (Fall 1992); *see also* Burt Solomon, **The Baseball Timeline**, 493 (1997).

[73] *Toolson v. New York Yankees*, 346 U.S. 356, 358 (1953) (Burton, J. dissenting) (citing H.R. Rep. No. 2002, "Impact of Antitust Laws on Organized Baseball" 82d Cong., 2d Sess. 4, 5).

[74] *Id.*, 346 U.S. at 361 (emphasis added).

[75] *Flood v. Kuhn*, 407 U.S. 258, 281 (1972).

[76] *See* the **Author's Note** on the partial repeal in the Curt Flood Act of 1998, infra at p. ??.

[77] *Toolson*, 101 F. Supp. 93, 94 (S.D. Cal. 1951).

[78] 101 F. Supp. at 94, 95.

[79] 346 U.S. at 357.

[80] "Recent Cases," 105 *U. Pa. L. Rev.* 110, 112-13 n. 24 (1956).

[81] His name was Paul Sorrento.

[82] 346 U.S. at 360, 359 n. 3, 358, 358 (emphasis added).

[83] 346 U.S. at 360.

[84] 259 U.S. at 209.

[85] 346 U.S. at 361, at 358 and 365, 358 n.2.

[86] *U.S. v. Shubert*, 348 U.S. 222 (1955).

[87] *U.S. v. International Boxing Club of New York, Inc.*, 348 U.S. 236 (1955).

[88] *Shubert*, 348 U.S. at 228 (emphasis added), 229, 230.

[89] *Hart v. B.F. Keith Vaudeville Exchange*, 262 U.S. 271 (1923).

[90] 262 U.S. at 274.

[91] 348 U.S. at 230.

[92] 348 U.S. at 242-43.
[93] *Id.* at 243.
[94] 348 U.S. at 251.
[95] *Id.*
[96] 348 U.S. at 250.
[97] *Radovich v. National Football League*, 352 U.S. 445, 447 (1957).
[98] *Id.* at 451, 452.
[99] 352 U.S. at 452.
[100] G.E. White, *supra* note 8, at 297.
[101] Abramson, *supra* note 72, at 74.
[102] *Flood v. Kuhn*, 407 U.S. 258 (1972).
[103] 404 U.S. 880 (1971) (certiorari).
[104] 407 U.S. at 269.
[105] *Id.* at 261.
[106] *Id.* at 263.
[107] *Id.* at 261, 258, 283.
[108] *Id.* at 282, 284
[109] 407 U.S. at 285.
[110] *Id.* at 286.
[111] *Id.*
[112] *Id.*
[113] 352 U.S. at 452.
[114] 407 U.S. at 282.
[115] 407 U.S. at 286 & n.1.
[116] G.E. White, *supra*, n. 8 at 70.
[117] *Id.* at 82, 83, (emphasis added).
[118] Richard A. Posner, ed. **The Essential Holmes** at 207 (1992) (excerpt from address on John Marshall).
[119] Broeg & Miller, *supra* n. 24 at 15.
[120] Charles C. Alexander, **John McGraw** 2 (Viking 1988).
[121] Broeg & Miller, *supra* note 24, at 9.
[122] Mike Sowell, **The Pitch That Killed** 10 (1989).
[123] *Id.* at 69.
[124] Solomon, *supra* note 72 at 202.
[125] James, *supra* note 54 at 101.
[126] *Id.* at 86.
[127] *Id.*
[128] Dan Shaughnessy, **The Curse of the Bambino** 29 (1990).
[129] James, *supra* note 53 at 91.
[130] B.R. Sugar, **Baseball's 50 Greatest Games** 177-78 (1986).
[131] Solomon, *supra* note 72 at 222.
[132] *Id.* at 225.
[133] Eliot Asinof, **Eight Men Out** (1963).
[134] **Eight Men Out** at 5.
[135] White, *supra* note 8, at 101-02.
[136] Asinof, *supra* note 133, at 21-22.
[137] *Id.* at 16-17.
[138] G.E. White, *supra* note 8, at 105.
[139] *Id.* at 95-96.
[140] Solomon, *supra* note 72, at 219-20; Asinof, *supra* note 130, at 14-15.
[141] Asinof, *supra* note 133, at 13.
[142] *Id.* at 239 & 270.
[143] Stephen Jay Gould, "Introduction," Asinof, **Eight Men Out** xviii (1988).
[144] Sowell, *supra* note 122.
[145] Sowell, *supra* note 122 at 3.
[146] *Id.* at 20-21.
[147] *Id.* at 188.
[148] *Id.* at 20.
[149] *Id.* at 197.
[150] James, *supra* note 54 at 87.
[151] David Halberstam, **The Summer of '49** at 80-81 (1989).
[152] James, *supra* note 54 at 129.
[153] *Compare* Halberstam, *supra* note 151, at 12 with James, *supra* note 54, at 129.
[154] Halberstam *supra* n. 151.
[155] Solomon, *supra* note 72, at 494.
[156] *Id.* at 548.
[157] Halberstam, *supra* note 151, at 23.
[158] *Id.* at 150.
[159] *Id.* at 207.
[160] *Id.* at 252.
[161] Ray Robinson, **The Home Run Heard 'Round the World** (1991).
[162] White, *supra* note 8, at 207.
[163] *Id.* at 206-07 & 218.
[164] Sugar, *supra* note 130, at 180.
[165] *Id.*
[166] James, *supra* note 54, at 69 & 88; Shaughnessy, *supra* note 128, at 21.
[167] Sowell, *supra* note 122, at 21-22.
[168] 259 U.S. at 208.
[169] 269 F. at 685.
[170] 259 U.S. at 208.
[171] 407 U.S. at 287.
[172] 259 U.S. at 203.
[173] *Id.*
[174] *Id.* at 204 (emphasis added).
[175] *See, e.g., McLain v. Real Estate Bd.*, 444 U.S. 232 (1980).
[176] White, *supra* note 8, at 81.
[177] 262 U.S. at 273-274.
[178] *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) (explaining the difference between "jurisdiction," "standing," "cause of action," and "relief").
[179] 228 U.S. 22 (1913).
[180] *Id.* at 25-26.
[181] 262 U.S. at 274.
[182] *Id.*
[183] 348 U.S. at 251.
[184] 407 U.S. at 270 n.10.
[185] 259 U.S. at 203.
[186] *Id.* at 209.
[187] Irving Younger, **Basic Concepts In The Law of Evidence**, Tape No. 11, "Burdens of Proof and Presumptions" (Na-

tional Institute for Trial Advocacy).

[188] G.Edward White, **Justice Oliver Wendell Holmes, Law and the Inner Self**, 424-25 (1993).

[189] Holmes to Pollock (2/24/23), quoted in Richard A. Posner, **The Essential Holmes** at 216-17.

[190] *Hart v. B.F. Keith*, 12 F.2d 341, 344 (2d Cir. 1926).

[191] *Id.* at 343.

[192] 172 F.2d at 408.

[193] *Id.*

[194] *Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) ("vindication by congressional inaction is a canard").

[195] 407 U.S. at 283.

[196] Although it is beyond the scope of this article, one historical irony of the baseball "exemption" is the lack of practical impact it has had, in large part due to the labor exemption from the antitrust laws. This is why, from issues of free agency to league organization, the various professional sports have such striking similarities — and why more recent attempts by lower federal courts and state courts to limit the reach of the baseball exemption to the reserve clause have had little practical effect as well. *E.g.*, *Piazza v. Major League Baseball*, 831 F. Supp. 420, 438 (E.D. Pa. 1993); *Butterworth v. National League of Professional Baseball Clubs*, 664 So. 2d 1021 (Sup. Ct. Fla. 1994).

[197] Allen, *supra* note 23, at 72.

[198] White, *supra* note 8, at 295.

[199] 407 U.S. at 284.

[200] 407 U.S. at 282-285.

[201] Rose family anecdote, as conveyed to the author.

[202] Catherine D. Bowen, **Yankee From Olympus, Justice Holmes and His Family** 128 (1944).

[203] William Paley, **The Principles of Moral and Political Philosophy**, Vol. II, book V, ch. 9 (1785).

[204] White, *supra* note 8.

[205] Allan Bloom, "Political Philosophy and Poetry" (1964), reprinted in **Giants and Dwarfs: Essays 1960-1990** 61 (1990).

Endnotes (to Author's Note)

[1] *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996).

[2] J. Abrams, "Congress sends baseball antitrust bill to president" [AP wire story] October 7, 1998.

[3] *E.g.*, S. Ross "Clinton signs bill removing baseball antitrust exemption for labor matters." [AP Wire story] October 28, 1998.

[4] M. Deibel, "U.S. Deletes Part of Baseball's Antitrust Status," Scripps Howard News Service, October 9, 1998.

[5] Statement By the President, MZ Presswire, October 29, 1998.

[6] *Flood v. Kuhn*, 407 U.S. 250 at 270 n.10 quoting H. Seymour, *Baseball* 420 (1971).

[7] Report 104-231, Major League Baseball Reform Act of 1995, S.627, 104th Congress, 2d Sess. (February 6, 1996) at 19 (Sen. Specter) & 26 (Sens. Brown and Feinstein).

[8] T. Boswell "NBA Steals Wrong Play From Baseball," *Washington Post*, Sports, at C1 (November 6, 1998).

[9] "Baseball's Exemption: Striking Out?" *Congressional Quarterly Weekly*, August 15, 1998 at 2222.

[10] *See, e.g.*, Report No. 105-118, Curt Flood Act of 1997, S.53, 105th Cong., 1st Sess. at 7 (October 29, 1997) (Congressional Budget Office Cost Estimate) ("If enacted, S.53 would represent an explicit reversal of . . . *Federal Baseball*").