BANG THE GAVEL SLOWLY: A CALL FOR JUDICIAL ACTIVISM FOLLOWING THE CURT FLOOD ACT

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I. INTRODUCTION

One often hears the phrase, "sports is a microcosm of society" while watching the news, listening to a game on the radio, or sitting in a college sociology class. Unquestionably, sports impacts upon American culture in several ways. These range from the jerseys children wear on their backs to extravagant tickertape parades through our cities.

While millions of Americans watch and adore their favorite teams every week, each season one issue always bothers sports fans: money. Go to any local bar and you will hear a number of patrons complaining that one player "is not worth the money he makes," or that it is unfair for the star quarterback to leave the home team and pursue bigger money elsewhere. The patrons reason that it is just a game, and that the salary he makes is already far too exorbitant. Unfortunately, this attitude towards professional athletes goes beyond the average fan; it permeates a player's league, his team's owner, and most importantly, our court system.

Baseball players, in particular, have encountered the greatest difficulties in attempting to expand their rights. Throughout the twentieth century, state and federal courts have consistently ruled against professional baseball players in suits challenging Major League Baseball's reserve system.[1] The reserve clause gives the club which first signs a player a continuing and exclusive right to that player's services.[2] All other teams recognize and enforce that club's right to that player.[3] Thus, once a player signs a contract, he must reach an agreement with that team because no other team can negotiate with him.[4]

Even more dramatic is the Supreme Court's creation of an antitrust exemption for professional baseball in the 1922 case of *Federal Baseball Club of Baltimore,*

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[1] *See* Joshua Hamilton, *Congress in Relief: The Economic Importance of Revoking Baseball's Antitrust Exemption*, 38 SANTA CLARA L. REV. 1223, 1231 (1998) (discussing the decision in *Flood v. Kuhn,* in which the Supreme Court ruled against Curtis Flood, a professional baseball player, in his antitrust suit challenging Major League Baseball's reserve system).

[2] *See* Michael L. Kaplan, *Annotation, Application of Federal Antitrust Laws to Professional Sports,* 18 A.L.R. FED. 489, 515 (1996).

[3] *See id.*

[4] *See id.*

Inc. v. National League of Professional Baseball Clubs.[5] This decision paved the way for the courts to enforce strict requirements on Major League baseball players' ability to freely contract with different major league teams. Although some progress was made in the courts, these changes have been extremely limited, helping businessmen more than the players themselves.[6]

Inspired by the St. Louis Cardinal player Curt Flood, the recent baseball strike of 1994, and the courts' insistence that congressional action effect change in baseball's reserve system, Congress passed the "Curt Flood Act of 1998" (the "Act").[7] In passing the Act, Congress amended the Clayton Act to repeal the anti-trust exemption that professional baseball previously enjoyed with respect to relations between Major League team owners and Major League baseball players.[8] Although extremely limited in scope, the Act provides Major League players the opportunity to challenge the League's labor practices with respect to their ability to bargain and contract with any team they choose.

This Note argues that by passing the Curt Flood Act, Congress shifted the burden from the legislature to the courts to provide Major League players with the freedom of contract. Specifically, this Note will show that Congress's partial repeal of Major League Baseball's antitrust exemption should lead to the reversal of previous court decisions limiting a Major League Baseball player's employment options, finally granting players their constitutionally protected "freedom to contract."

II. THE HISTORY OF BASEBALL'S ANTITRUST EXEMPTION

A. *Brief History of Antitrust Restrictions*

Baseball's judicially-created exemption from antitrust laws emanates from the Sherman Act.[9] In an effort to promote competition and prevent unlawful restraints of trade and monopolies, Congress passed the Sherman Act in 1890.[10] Section 1 of the Sherman Act states that "(e)very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal,"[11] while section 2 provides that "(e)very person who shall monopolize, or attempt to monopolize, or combine

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[5] *See* Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922).

[6] *See* Hamilton, *supra* note 1, at 1234 (discussing *Piazza v. Major League Baseball* and *Butterworth v. Nat'l League of Prof'l Baseball Clubs*, and noting that although limited progress against baseball's antitrust exemption was made, this exemption still applies to baseball's reserve clause).

[7] *See* 144 CONG. REC. H9942-03 (daily ed. Oct. 7, 1998).

[8] *See* 15 U.S.C. § 27 (1998).

[9] *See* Hamilton, *supra* note 1, at 1225.

[10] *See* 15 U.S.C. § 1 (1994).

[11] *Id.*

or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."[12] Section 1 of the Sherman Act intended to "prevent cartels, horizontal mergers of monopolistic proportions, and predatory business tactics, while section 2 of the Act intended to protect consumers by preventing one or a few large companies from dominating a market."[13] The Act assumes "that free competition among business entities will produce the best price levels."[14]

In *United States v. Socony Vacuum Oil Co.*,[15] the Supreme Court laid out the requirements for a per se violation of section 1 of the Sherman Act as "(a)ny combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce . . . ."[16] If the violation was not clear enough to form a per se violation, the Court applied the "Rule of Reason" analysis to determine if the activity in question is an "unreasonable" restraint of trade.[17] The Rule of Reason analysis considers "whether the restraint imposed . . . merely regulates and perhaps . . . promotes competition or whether it may suppress or even destroy competition."[18]

In some cases, the Court has found that some collaboration is needed in order to offer a public good.[19] In such a case, the Court applies the Rule of Reason to determine whether the benefit that the agreement provides to consumers outweighs restraint of trade.[20] The Court has found that such a balancing test is required in cases involving sports in order to have a competitive league and to offer a product to the public.[21] For example, in *NCAA v. Board of Regents of University of Oklahoma*, the Court encountered an agreement among NCAA colleges restricting the broadcasting frequency of a particular team's games on television.[22] Although the Court found that the agreement was not illegal per se, they held that the NCAA's television plan failed the Rule of Reason test.[23]

Because a league is required to have competition among NCAA schools, the Court did not find the combining of all member schools into a single athletic association to be a per se violation of antitrust laws.[24] However, the Court rejected the NCAA's argument that the plan promoted equality throughout the NCAA and

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[12] 15 U.S.C. § 2 (1994).

[13] Hamilton, *supra* note 1, at 1225 (discussing Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself (1983)*).

[14] *Id.*

[15] *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[16] *Id.* at 224-26 n.59.

[17] *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

[18] Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

[19] *See* NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984).

[20] *See* Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979).

[21] *See NCAA*, 468 U.S. at 102.

[22] *See id.* at 91-94.

[23] *See id.* at 102.

[24] *See id.* at 102-03, 117.

permitted member colleges to focus on academics and not on profits.[25] Dismissing these arguments, the Court held that the restraint did not enhance competition and that less intrusive methods of increasing competition in the NCAA existed.[26] Specifically, the Court ruled that the restraint on television rights failed to produce "any greater measure of equality throughout the NCAA than would a restriction on alumni contributions, tuition rates, or any other revenue producing activity."[27] Unfortunately, the NCAA's reasoning has not carried over to those cases challenging Major League Baseball's anti-competitive activities.

B. Baseball's Exemption: Court-Created and Court-Defended

The Supreme Court created Major League Baseball's exemption from the Sherman Antitrust Act in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs.*[28] In *Federal Baseball Club of Baltimore, Inc.*, the plaintiff was one of eight teams that comprised the Federal League of Professional Baseball.[29] When the defendants purchased some of the clubs of the Federal League and induced all but the plaintiff to leave the Federal League in favor of the National League, Baltimore sued, alleging that the defendants were guilty of an illegal conspiracy in restraint of trade.[30] The plaintiff relied on six premises: (1) baseball constitutes interstate commerce; (2) an interstate relationship exists between clubs located in different states; (3) organized baseball generates an enormous amount of wealth; (4) baseball is an engagement in money-making; (5) gate receipts were divided by agreement between the home club and the visiting club; and (6) there is a great difference between playing baseball for sport and the business of baseball.[31] Writing for a unanimous Court, Justice Holmes rejected these arguments.[32] Instead, he reasoned that baseball is a business of purely state affairs. Further, the fact that people may cross state lines is "merely incident, not the essential thing" of the business.[33] The Court concluded that "personal effort, not related to production, is not a subject of commerce," and it does not become commerce because some transportation is involved.[34] Because baseball produced no product and was only a form of entertainment, it was not a subject of interstate commerce. Thus, the Court could not regulate it. This created baseball's Sherman Act exemption.

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[25] *See id.* at 102.
[26] *See id.* at 119.
[27] Hamilton, *supra* note 1, at 1228 (discussing *NCAA*, 468 U.S. 85 at 119 (1984)).
[28] *See id.*
[29] *See Fed. Baseball Club of Baltimore*, 259 U.S. at 207.
[30] *See id.*
[31] *See id.* at 201-06.
[32] *See id.* at 208.
[33] *Id.* at 208-09.
[34] *Id.* at 209.

C. Reach of Federal Club of Baltimore

The courts have vastly increased the general scope of the Commerce Clause[35] since the *Federal Baseball Club of Baltimore* decision, thereby eroding the basis of Holmes's logic. However, on two subsequent occasions, the Supreme Court has reaffirmed that baseball remains exempt from antitrust liability.[36] The two cases are *Toolson v. New York Yankees, Inc,*[37] and *Flood v. Kuhn.*[38] In each case, a player unsuccessfully challenged baseball's reserve system.[39]

In *Toolson v. New York Yankees,* the plaintiffs were professional baseball players who alleged that the reserve clause in their contracts violated the Sherman Act because it was an illegal restraint on trade.[40] Since the reserve clause gives one team controlling rights to determine a player's salary, the terms of his contract, and where and for whom he plays, a violation of the Sherman Act seemed obvious. However, the Court disagreed.[41]

The Court based its decision on *Federal Club of Baltimore,* noting that if there are evils which warrant antitrust laws to be applied to baseball, Congress must impose them.[42] The Court based its decisions on a 1952 report by the Subcommittee on the Study of Monopoly Power of the House of Representatives Committee on the Judiciary which said that "[u]nder judicial interpretations of (the commerce clause), the Congress has power to investigate, and pass legislation dealing with professional baseball . . . if that business is, or affects, interstate commerce."[43] Thus, the Court relied on stare decisis, but stated that it would defer to new congressional legislation.[44]

In *Federal Club of Baltimore,* the Court clearly based its decision on congressional inactivity. However, such reliance seems misplaced because the Supreme Court, not Congress, created baseball's antitrust exemption. *Toolson* implies that the Court may decide differently in the future if Congress were to repeal baseball's antitrust exemption.

The 1972 case of *Flood v. Kuhn* again presented the Court with a challenge to baseball's reserve system.[45] In 1969, the St. Louis Cardinals traded their twelve-

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[35] *See* United States v. Lopez, 514 U.S. 549 (1995) (stating "*Jones & Laughlin Steel, Darby,* and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause").

[36] *See* Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?,* 60 TENN. L. REV. 263, 265 (1993).

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

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

[39] *See* Hamilton, *supra* note 1, at 1230-31.

[40] *See Toolson,* 346 U.S. at 356.

[41] *See id.* at 357.

[42] *See id.*

[43] Hamilton, *supra* note 1, at 1230 (discussing *Toolson* and H.R. REP. NO. 82-2002, at 4 (1952)).

[44] *See Toolson,* 346 U.S. at 359.

[45] *See* Hamilton, *supra* note 1, at 1230-31.

year veteran and all-star, plaintiff Curt Flood, to the Philadelphia Phillies.[46] In December of that year, Flood petitioned the Commissioner of Baseball, Bowie K. Kuhn, to allow him to become a free agent and to strike his own bargain with another major league team.[47] The petition read:

> After twelve years in the Major Leagues, I do not feel I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic rights as a citizen and is inconsistent with the laws of the United States and of the sovereign states. It is my desire to play baseball in 1970, and I am capable of playing. I have received a contract offer from the Philadelphia Club, but I believe I have the right to consider offers from other clubs before making any decisions. I, therefore, request that you make known to all Major League Clubs my feelings in this matter, and advise them of my availability for the 1970 season.[48]

When his request was denied, Flood brought suit alleging that the reserve clause was too restrictive and an unreasonable restraint on trade.[49]

The Supreme Court reached seven different conclusions: (1) professional baseball is a business engaged in interstate commerce;[50] (2) with its reserve system enjoying exemption from the federal antitrust laws, baseball is an exception and an anomaly;[51] (3) the *Federal Baseball Club of Baltimore* and *Toolson* cases have become aberrations confined to baseball;[52] (4) the cases are fully entitled to the benefit of stare decisis;[53] (5) the exemption rests on a recognition and an acceptance of baseball's unique characteristics and needs;[54] (6) baseball has been allowed to develop and expand unhindered by federal legislative action;[55] and (7) a judicial overturning of *Federal Baseball Club of Baltimore* would cause retroactivity problems.[56] The Court, like that of *Toolson*, reasoned that any change in baseball's antitrust exemption should come from congressional legislation.[57] Once again, the Court implied it would overturn Major League Baseball's reserve system if Congress repealed the antitrust exemption created by the Supreme Court.

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[46] *See Flood*, 407 U.S. at 264-65.

[47] *See id.* at 265.

[48] 143 CONG. REC. E389-01 (1997) (citing Barry Cooper, *Curt Flood's Famous Letter, A Signature Document*, THE ST. LOUIS AMERICAN, Jan. 23, 1997).

[49] *See Flood*, 407 U.S. at 265-67.

[50] *See id* at 282.

[51] *See id.*

[52] *See id.*

[53] *See id.*

[54] *See id.* at 282-83.

[55] *See Flood*, 407 U.S. at 282.

[56] *See id.* at 282-84.

[57] *See id.*

D. Exemption Expanded

Several cases before and after *Flood* have expanded baseball's antitrust exemption beyond the reserve clause.[58] In *Professional Baseball Schools & Clubs, Inc. v. Kuhn*,[59] a minor league franchise owner charged the major and minor leagues with antitrust violations because of player assignment and franchise location activities, among other things.[60] The Court found that "[e]ach of the activities appellant alleged as violative of the antitrust laws plainly concerns matters that are an integral part of the business of baseball."[61] Relying on the *Flood* decision, the Court dismissed the claim.[62]

Two other cases extended baseball's antitrust exemption beyond the reserve clause more explicitly. *State v. Milwaukee Braves, Inc.*[63] found that the Commerce Clause precluded Wisconsin from exercising its antitrust powers in order to force baseball to give the state a new team after the departure of the Milwaukee Braves.[64] In discussing the scope of baseball's exemption to federal antitrust laws, the court stated:

> We venture to guess that this exemption does not cover every type of business activity to which a baseball club or league might be a party . . . but it does seem clear that the exemption at least covers the agreements and rules which provide for the structure of the organization and the decisions which are necessary steps in maintaining it. The type of decision involved in this case . . . appears to be so much an incident of league operation as to fall within the exemption.[65]

In 1978, the Seventh Circuit held in *Finley & Co. v. Kuhn*[66] that the antitrust exemption includes the entire business of baseball and is not limited to the reserve clause.[67] In these cases, the courts made it clear that the antitrust laws affect not only the players themselves, but also prospective owners, umpires, and cities. More recently, however, the courts have been reluctant to extend the exemption beyond the reserve clause.

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[58] *See* John W. Guarisco, *"Buy Me Some Peanuts and Crack Jack," But You Can't Buy the Team: The Scope and Future of Baseball's Antitrust Exemption*, U. ILL. L. REV. 651, 658 (1994).

[59] Prof'l Baseball Sch. & Clubs, Inc. v. Kuhn, 693 F.2d 1085 (11th Cir. 1982) (per curiam).

[60] *See id.*

[61] *Id.* at 1086.

[62] *See id.*

[63] *See* State v. Milwaukee Braves, Inc., 144 N.W. 2d 1, 12 (Wis. 1966).

[64] *See id.* at 12.

[65] *Id.* at 15.

[66] *See* Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir. 1978).

[67] *See id.* at 541.

E. New Developments in Baseball?

Piazza v. Major League Baseball[68] is the only federal case to state that the antitrust exemption only applies to the reserve clause.[69] A group of investors, including Vincent Piazza, wanted to purchase the San Francisco Giants and move them to Tampa Bay.[70] The investors executed a letter of intent to Giants owner Robert Lurie to purchase the team for $115 million.[71] Lurie promised not to negotiate with any other investors and to use his best efforts to obtain approval of the sale from the rest of the Major League Baseball owners.[72] The owners rejected the deal and approved a sale for $100 million that would keep the Giants in San Francisco.[73] The investors sued, claiming that Major League Baseball violated sections 1 and 2 of the Sherman Act. Specifically, Major League Baseball had "monopolized the market for Major League Baseball teams and that [it] has placed direct and indirect restraints on the purchase, sale, transfer, relocation of, and competition for such teams."[74] The plaintiffs alleged that such actions unlawfully restrained and hindered their opportunities to engage in the business of Major League Baseball.[75]

The District Court for the Eastern District of Pennsylvania held that although lower courts are bound by Supreme Court decisions, the standard established by the Court in a previous case can be altered by determining that the standard is "unsound in principle or unworkable in practice."[76] In examining *Flood*, the *Piazza* court found that *Flood* invalidated *Federal Baseball Club of Baltimore* and *Toolson* by holding that baseball is interstate commerce, in direct contrast with Holmes's opinion in *Federal Baseball Club of Baltimore*.[77] The *Piazza* court went further and stated that the antitrust exemption now only applies to the reserve clause.[78] As a result, lower courts were no longer required to follow the broad rule established in *Toolson* and *Federal Baseball Club of Baltimore*.[79]

The owners' decision to block the sale of the Giants led to another suit, *Butterworth v. National League of Professional Baseball Clubs*.[80] After Robert Lurie sold the team to a group of San Francisco investors, Florida Attorney General

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[68] 831 F. Supp. 420 (E.D. Pa. 1993).

[69] *See* Hamilton, *supra* note 1, at 1233.

[70] *See Piazza*, 831 F. Supp. at 421.

[71] *See id.* at 422.

[72] *See id.* (holding that the moving of a franchise requires approval of two-thirds of the owners).

[73] *See id.* at 423.

[74] *Id.* at 423-24.

[75] *See id.*

[76] *Piazza*, 831 F. Supp. at 438 (quoting Planned Parenthood v. Casey, 947 F.2d 682, 691-92 (3d Cir. 1991)).

[77] *See id.* at 437-38.

[78] *See id.* at 438.

[79] *See* Hamilton, *supra* note 1, at 1233.

[80] *See* Butterworth v. Nat'l League of Prof'l Baseball Clubs, 644 So. 2d 1021 (Fla. 1994).

Robert Butterworth issued antitrust civil investigative demands ("CIDs") to the National League of Professional Baseball Clubs and to its president, William D. White.[81] The Florida Supreme Court overruled the circuit court order to quash the CIDs, which had reasoned that "decisions concerning ownership and location of baseball franchises clearly fall within the ambit of baseball's antitrust exemption."[82] The Supreme Court, relying on the reasoning in *Piazza*, found that since *Flood* overruled *Federal Baseball Club of Baltimore* court's holding that baseball is not interstate commerce, the precedential effect of that case and *Toolson* are limited to their facts.[83] Like the *Piazza* court, the *Butterworth* court concluded that baseball's antitrust exemption only applies to the reserve clause.[84]

Although these two cases provided some hope for baseball players, that hope was tempered for two reasons. First, the Supreme Court had not addressed baseball's antitrust exemption in light of *Piazza* and *Butterworth*.[85] In the absence of a Supreme Court mandate, lower federal courts ignored *Piazza* and *Butterworth*, and continued to broadly interpret baseball's exemption.[86] The lack of unity on the antitrust exemption's scope did not enable one to determine how the Supreme Court would rule if presented with these lower court cases.[87] Second, although relaxation of the antitrust exemption could indirectly benefit the players, every decision noted that the exemption unquestionably applied to the reserve clause. These rulings were of paramount concern to the players, because it is the reserve clause which places the greatest restraint on their individual freedom.

III. REPEAL OR REINFORCE THE EXEMPTION?

A. Reasons to Keep the Exemption

First, the exemption creates a competitive league. Courts have acknowledged that some enterprises should receive leeway in antitrust liability in order to provide the public with a good product.[88] A strong argument could be made that in an enterprise whose financial success is at least somewhat tied to the competitiveness

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[81] *See id.* (A CID may be given by the Attorney General of Florida to anyone he has reason to believe may have information relevant to a civil antitrust proceeding). *See also* Hamilton, *supra* note 1, at n.90.

[82] *Butterworth*, 644 So. 2d at 1022.

[83] *See id.* at 1025.

[84] *See id.*

[85] *See* Hamilton, *supra* note 1, at 1234.

[86] *See id.* (Hamilton discusses McCoy v. Major League Baseball, 911 F. Supp. 454, 457 (W.D. Wa. 1995), in which the court recognized that baseball's antitrust exemption applied to all aspects of the business of baseball. The *McCoy* court summarized *Flood*, saying that the business of baseball is not within the scope of federal antitrust laws. Further, the court noted that the Supreme Court retains the exclusive privilege of reversing itself on this issue).

[87] *See* Hamilton, *supra* note 1, at 1234-35.

[88] *See NCAA*, 468 U.S. at 117.

of all the members of that enterprise, courts and the government should impose restrictions on the participants that may help keep the group healthy.

Second, there is concern among minor league baseball owners that a repeal of the antitrust exemption would fail to adequately represent their interests.[89] The owners are concerned that a lack of antitrust protection would endanger both the relationship between major and minor league clubs, and the work rules and employment terms affecting both major and minor league baseball players.[90] Also, owners fear minor league players or amateurs would attempt to attack minor league issues by asserting that these issues also indirectly affect major league employment terms.[91]

Third, a repeal of baseball's antitrust exemption could destroy the statutory labor exemption from antitrust laws and hinder the power of the players' union.[92] This exemption allows unions to enter agreements which may eliminate competition from other unions, thus granting one union a virtual monopoly over activities in a particular industry.[93] Congress extended this exemption to encompass collective bargaining in the National Labor Relations Act.[94] Collective bargaining arose from the National Labor Relations Act and allows a majority of workers in a single industry to be represented by a union, which then bargains for the rights of those workers.[95] Collective bargaining is an essential tool for Major League players which was implemented due to the impracticability of having each player individually bargain with the owners. Thus, if the antitrust exemption is lifted, and collective bargaining is no longer protected by Congress, there is a fear that negotiations between players and owners will actually worsen rather than improve.

Finally, repeal of the exemption would be disadvantageous to the fans. John Guarisco argues that although Major League players would undoubtedly benefit from a repeal of the antitrust exemption, baseball fans would pay the price.[96] First, an increase in salaries can lead to an increase in ticket prices.[97] Second, acknowledging the fact that owners only have a fixed amount of income, awarding one player a generous salary requires cutting costs in other areas.[98]

This repeal can affect the fan in a number of ways. Paying high salaries can lead to an increase not only in ticket prices, but concession stand prices and parking fees as well. Also, paying a large amount of money to one player may lead to another player leaving the team for a different market which can afford to pay him a higher

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[89] *See* 144 CONG. REC. H9942-03, H9943 (1997).

[90] *See id.*

[91] *See id.*

[92] *See* Hamilton, *supra* note 1, at 1236.

[93] *See id.* (citing Brown v. Pro Football, Inc., 518 U.S. 231 (1996)).

[94] *See* 29 U.S.C. §§ 101-15 (1994).

[95] *See* 29 U.S.C. §§ 151-69 (1994).

[96] *See* Guarisco, *supra* note 58, at 674.

[97] *See id.* (The strength of this relationship is dependent on the extent to which owners' revenue streams derive from other sources). *See also* Ben Brown, *Supply and Demand Sets Ticket Prices*, USA TODAY, May 11, 1993, at 8C.

[98] *See* Guarisco, *supra* note 58, at 674.

salary.[99] This result hurts the fan both because she may have especially liked the departed player and because the loss of that player may affect the success of the entire team.[100] Finally, a related effect of revoking baseball's antitrust exemption is that the bond between the player and his community may be weakened based on the amount of time he must devote to finding a new team.[101]

B. Reasons to Revoke the Exemption

Perhaps the most influential reason for revoking baseball's antitrust exemption is that the exemption restrains a player's ability to freely contract with any team he chooses. Justice Peckham, writing for the Supreme Court in *Lochner v. New York*, stated that "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[102] Although the holding of *Lochner* has long been overruled its spirit has remained, and although everyone must admit that the government is permitted to restrict contractual obligations in some form, that restriction must be strongly justifiable and necessary.

This notion is expressed by Peckham in a case previous to *Lochner*, *Allegeyer v. Louisiana*,[103] in which he argued:

> The "liberty" mentioned in [the Fourteenth Amendment] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; *to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.*[104] (emphasis added).

The Fourteenth Amendment clearly applies only to state action and not to private organizations such as Major League Baseball.[105] However, because courts have held that the due process clause announced in the Fourteenth Amendment applies with equal strength to the Fifth, an argument can be made that professional baseball players may evoke the Fifth Amendment.[106] In fact, in addition to their antitrust claims, the plaintiffs in *Piazza* brought federal claims alleging that their First and Fifth Amendment rights had been violated and that they were deprived of their

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[99] *See id.*
[100] *See id.*
[101] *See id.*
[102] Lochner v. New York, 198 U.S. 45 (1905).
[103] Allegeyer v. Louisiana, 165 U.S. 578 (1897).
[104] *Id.*
[105] *See* Jonak v. John Hancock Mut. Life Ins. Co., 629 F. Supp. 90, 93 (D. Neb. 1985).
[106] *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

privileges and immunities guaranteed by Article IV, section 2 of the Constitution.[107]

The restriction on contractual rights inherent in baseball's reserve system is fortified by the antitrust exemption. As previously noted, the reserve clause gives the club that originally signs a player continuing and exclusive rights to that player's services.[108] These rights to the player are enforced by the other teams, which are not allowed to bargain with him. Thus, once that player signs an original contract with a team, he has no option but to come to a later agreement with that same team.[109] A more practical example may help illustrate this argument.

Imagine a recent graduate of the University of Michigan Business School looking for a job with a large accounting firm. She settles on Price Waterhouse Coopers, but after two years at their New York office, decides she would like to explore other options. After sending out dozens of resumes and receiving no responses, her manager in New York informs her that Price Waterhouse Coopers has exclusive rights to her services. She cannot even negotiate a possible contract anywhere else. In fact, the only way she can get out of her current job in the next four years is if the company trades her. This is the situation in which professional baseball players find themselves during their first six years in the Major League.

A second argument for abolishing the antitrust exemption is that it provides the owners with a significant advantage over the players at the bargaining table.[110] Since most owners operate their teams at a loss, and all of the losses that owners sustain due to work stoppages can be written off their taxes against earnings from other business, the owners are able to hold fast during strikes.[111] Owners can even survive an imposed "lock-out," under which the owners refuse to allow the players to work for them.[112] The result is that baseball owners can hold out until the players accept terms that the owners find acceptable. Under such a system, the player's choice is either to negotiate a contract on unequal grounds with the team's owner or simply not play.

The antitrust exemption provides the owners with even more leverage in the bargaining process and further discourages them from accepting reasonable terms.[113] Although this leverage has been reduced through the collective bargaining process, players' perceptions of what the exemption does remains a

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[107] *See* Hamilton, *supra* note 1, at n.82 (discussing plaintiffs' claims in Piazza v. Major League Baseball, 831 F. Supp. at 423).

[108] *See* Hamilton, *supra* note 1, at n.52 (discussing Michael L. Kaplan, *Annotation, Application of Federal Antitrust Laws to Professional Sports*, 18 A.L.R. Fed. 489, 515 (1996)).

[109] *See id.*

[110] *See id.* at 1243.

[111] *See id.*

[112] *See* Hamilton, *supra* note 1, at 1243. (In 1990, the owners imposed a thirty-two day lock-out until a new collective bargaining agreement was reached. *See* Baseball Strike 1994: Baseball Labor Chronology (visited Mar. 16, 1997).
<http://www.nando.net/newsroom/ap/baseball/strike/history.html>).

[113] *See id.* at 1244 (citations omitted).

crucial factor in the success of negotiations.[114] Thus, if the players believe that the antitrust exemption provides the owners with an unfair advantage, then its existence can impede progress in negotiations.[115] This notion is supported by the head of the players' union Donald Fehr's statement that the players would end their 1994 232-day strike if Congress repealed baseball's antitrust exemption.[116]

A third argument for the revocation of baseball's antitrust exemption is that the competitive nature of baseball and capitalism should encourage, not discourage, baseball in an unrestricted, open market.[117] Joshua Hamilton argues that the best way to promote competition on the field is to encourage capitalism off it.[118] This argument counters the idea that the league can maintain its competitive nature only by regulating Major League Baseball. Hamilton argues that the antitrust exemption that owners enjoy does not force them to operate in a purely capitalistic manner.[119] Specifically, Hamilton argues that it is economically unfair to allow the owners to collectively block a single owner who is experiencing financial failure in his present city from moving to a different city in order to better his financial situation. This results in a less competitive league in general because the single owner is unable to improve the competitiveness of his team.[120] Although tradition is an important part of baseball, it should not permit owners to conspire to block relocations in order to increase their own market share.[121] Hamilton urges that baseball owners should be subject to the Rule of Reason, under which the courts would factor in the tradition of a franchise in their reasonableness analysis, thus achieving a compromise between tradition and economic factors.[122]

IV. THE CURT FLOOD ACT OF 1998

A. A Brief History

In November 1996, the Major League Baseball Players' Association (MLBPA) and the baseball owners reached an agreement-in-principle for a new collective bargaining agreement.[123] Prior to the 1996 Collective Bargaining Agreement, and after *Toolson*, over fifty bills were introduced in Congress relating to baseball's antitrust exemption. None of these bills dealt with the reserve clause.[124] The 104th

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[114] *See id.*

[115] *See id.*

[116] *See id.* (citations omitted).

[117] *See id.* at 1249.

[118] *See* Hamilton, *supra* note 1, at 1249.

[119] *See id.*

[120] *See id.*

[121] *See id.* at 1250.

[122] *See id.*

[123] *See* Hamilton, supra note 1, at 1240 (citing *Baseball Labor Agreement Now Official*, NEWSDAY, Mar. 15, 1997, at A34).

[124] *See id.*

Congress introduced two bills which would either completely repeal the exemption or restrict it to the reserve clause; neither one made it to the floor for a vote.[125] However, baseball's new collective bargaining agreement, along with the residual effects of the 1994 baseball strike, assured that some type of legislation dealing with the antitrust exemption would be enacted by Congress.

Among numerous other items, the new agreement stated that owners and players would work with Congress to grant Major League Baseball players the same coverage under the antitrust laws that other professional athletes enjoy.[126] The two sides also stipulated that the application of antitrust laws to anything other than the labor laws, such as broadcasting rights, the draft, and franchise movements, would be unaltered.[127] Originally, the bill was to be called the Curt Flood Act of 1997.[128]

B. What the Act Says

The Curt Flood Act of 1998 is an amendment to the Clayton Act.[129] The purpose of the Act, as stated in the Congressional Record, is 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.[130]

Coverage for the players under the Act is found in 15 U.S.C. § 27 Section (a) and its limited nature is expressed in 15 U.S.C. § 27 Section (b). Section (b) lists six specific areas that are not covered by this legislation, including franchise expansion, broadcasting, other major league employees (e.g. umpires) and persons not involved in the business of Major League Baseball.[131] This section further stipulates that the Act will in no way affect the operations of Minor League Baseball, including granting players equal footing in antitrust suits, and that these limitations are merely illustrative, not conclusive.[132]

The Act further states that only a major league player has standing to sue under the Act and offers four definitions of "player."[133] These definitions include: 1) a person under a player's contract or someone who is playing at the major league

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[125] *See* S. 627, 104th Cong. (1995); S. 415, 104th Cong. (1995); H.R. 386, 104th Cong. (1995).

[126] *See* Hamilton, *supra* note 1, at 1240-41(citations omitted).

[127] *See id.* at 1241 (citations omitted).

[128] *See id.*

[129] *See* 15 U.S.C. § 12.

[130] S. 53, 105th Cong. § 2 (1998).

[131] *See* 15 U.S.C. § 27 (b) (1998).

[132] *See id.*

[133] *See* 15 U.S.C. § 27 (c).

level; 2) one who enjoyed the just mentioned status at the time of an injury; 3) one who attains this status and seeks to bring an action for an alleged violation of the antitrust laws; and 4) a person satisfying the original criteria who was playing Major League Baseball at the conclusion of the last full season immediately preceding the expiration of the last collective bargaining agreement.[134]

"Person," as defined in the Act, means "any entity, including an individual, partnership, corporation, trust or unincorporated association or any combination or association thereof," but does not include the National Association of Professional Baseball Leagues.[135] Again, the Act clarifies that coverage extends only to players at the Major League level and those matters which "directly relate to or affect employment of Major League Baseball players to play baseball at the Major League level."[136] The scope of the Act is further narrowed when it states that baseball's nonstatutory labor exemption to antitrust laws will be unaffected.[137] The only indication of any leeway in the Act is found in its last clause, which states that "the scope of the conduct, acts, practices, or agreements covered by subsection (b) shall not be strictly or narrowly construed."[138] However, it remains clear that the scope of the entire Act is extremely narrow and in no way completely repeals baseball's antitrust exemption.

C. What the Act Accomplishes

Throughout floor debate in the House, the representatives continually emphasized that the scope of the Act is very limited.[139] Congressman Henry Hyde stated that the Act only covered "the narrow issue of the labor relations of major league players at the major league level . . . ."[140] The essential function of the Act is encompassed in the standing provision, which gives Major League players the same right to sue under the antitrust laws challenging Major League Baseball's employment terms that other professional athletes enjoy.[141] Although the Act's scope is narrow, it accomplishes a number of changes.

First, the Act provides more personal autonomy for Major League players by allowing them to command higher salaries because they will be able to market themselves more freely.[142] Tied to this change is the notion that this freedom will provide the players with more leverage at the bargaining table.[143] Previously, the

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[134] *See* 15 U.S.C. § 27 (c) (1-4).

[135] 15 U.S.C. § 27 (d) (1).

[136] 15 U.S.C. § 27 (d) (2).

[137] *See* 15 U.S.C. § 27 (d) (4).

[138] 15 U.S.C. § 27 (d) (5).

[139] *See* 144 CONG. REC. H9942-03 (daily ed. Oct. 7, 1998).

[140] 144 CONG. REC. H9942-03, H9943 (daily ed. Oct. 7, 1998) (statement of Rep. Hyde).

[141] *See id.* at H9944.

[142] *See* Guarisco, *supra* note 58, at 674.

[143] *See* Hamilton, *supra* note 1, at 1243 (discussing "huge advantage" owners enjoy in bargaining with the players due to the exemption).

players were limited in the terms they could demand for the first six years of their careers; the Act should change that.

Arguably, the players already enjoy the freedom to contract because the restriction on free agency has been a subject of collective bargaining. Thus the argument is that the players agreed to limit themselves and their contractual freedom because they consented to a collectively bargained agreement. The problem with that theory is that unlike other Americans who have an enormous selection of corporations to choose from when contracting, Major League players have only one. They must play under Major League Baseball's rules; there is no other competing league. This is the nature of most sports and part of the sacrifice each athlete must make to enjoy the fruits of his labor. However, it is absurd to argue that these players have contractual freedom equal to that of all other Americans because they consented to a contract with their only possible employer.

Probably only a select few players, or none at all, will challenge baseball's reserve system in a court utilizing this Act. Players seem to recognize that the success of baseball is somewhat dependent on team stability and competitiveness and that these factors may be enhanced by the reserve system. Nevertheless, player challenges to sport leagues' operating systems have been made in the past and probably will occur again in the future.[144] The next time that happens, Major League players will not have to fight the antitrust exemption as well as the League.

A second effect of the Act is that it is the first step towards completely repealing baseball's antitrust exemption. In his remarks on the House floor, Congressmen Clay noted that baseball is the sole American industry exempt from antitrust laws without being subject to other regulatory supervision.[145] Congressmen Bunning, a former Major League pitcher and member of the Baseball Hall of Fame, stated that although the scope of the Act is narrow, the entire exemption should be repealed.[146] Bunning characterized the exemption as "anti-competitive and anti-American."[147] Although full repeal of baseball's antitrust exemption probably will not occur any time soon, Congress has acknowledged that the exemption is not set in stone and is available for criticism, change, and possibly repeal.

One final result the Act produced, wholly unrelated to baseball, is the resolution of whether Congress or the Supreme Court should lift baseball's antitrust exemption. For years, courts have declined to fiddle with the exemption, urging that if any change is to be made, such change should come from the Legislature,

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[144] *See* Flood v. Kuhn, 407 U.S. 258 (1972); Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987). There the plaintiff, O. Leon Wood, was selected in the 1984 college draft by the Philadelphia 76ers basketball team, who could only offer him a one-year contract at a predetermined minimum salary under the salary cap provision included in the then-existing collective bargaining agreement. *Id.* at 958. Wood declined to sign the contract and sued, claiming that the salary cap and the college draft violated the Sherman Act. *Id.* On appeal, the Second Circuit affirmed for defendant-NBA, holding that where a claim seeks to subvert federal labor policies, there is no need to analyze possible antitrust violations. *Id.* at 559-60.

[145] *See* 144 CONG. REC. H9942-03, H9946 (1998).

[146] *See id.* at H9945.

[147] *Id.*

not the Judiciary.[148] Although the Court's reluctance to change an exemption it created seems somewhat strange, the Court has argued that it would be shunning its responsibility to maintain set standards by revoking a decision that has become an integral part of baseball in the face of Congress's apparent approval of *Federal Club of Baltimore*.[149] The debate about who should institute a change in the laws of baseball slowed progress in this area. With this legislation, it is now clear that the playing field belongs to Congress.

D. What the Act Does Not Do

As previously discussed, the scope of the Act is extremely narrow. Although it does provide the players with some leverage and more freedom, much of the antitrust exemption has been left largely unchanged.

First, the Act does not affect the rights of minor league baseball players. In fact, the desire to maintain the minor leagues unchanged was a driving force behind keeping the antitrust exemption. Both the language of the Act and the floor debate indicate such motivation.[150] Sections 27 (b) (1), (2), (c) (3) and (d) (1) specifically state that the Act does not apply to the minor leagues and the rest of the Act implies such by constantly using the words "major league" in all relevant clauses.[151] Congressmen Boehlert stated that the future of minor league baseball depends on the maintenance of the antitrust exemption as it relates to that league.[152] Several other congressmen also stressed the importance of the exemption remaining in minor league baseball, although none really offered any substantial reason.[153] Thus, the rights of minor league players remain restricted by the exemption. Nevertheless, maintaining the exemption may be beneficial to minor league baseball. The fact that the minor league consists of approximately 150 teams and the absence of minor leaguers negotiating million-dollar salaries like the major league athletes supports this belief.

A second area left unaltered by the Act is the owners' ability to control franchise movement. Section 3 of the Act specifically states that this legislation does not reach the issue of franchise relocation. As previously discussed, one argument against the exemption is that it allows Major League owners to block franchises from moving to a more profitable city without offering any valid justification. Hamilton argues that by allowing the owners to operate in a non-capitalistic manner, the exemption encourages an anti-competitive league.[154] He also argues that the exemption allows owners to block franchise moves in order to increase their own financial position.[155] The Act does nothing to remedy this apparent

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[148] *See Toolson*, 346 U.S. at 356; *Flood*, 407 U.S. at 258.

[149] *See Flood*, 407 U.S. at 282.

[150] *See* CONG. REC. H9942-03 (1998); 15 U.S.C. § 27 (1998).

[151] *See* 15 U.S.C. § 27 (1998).

[152] *See* 144 CONG. REC. H9942-03, H9945 (1998).

[153] *See id.*

[154] *See* Hamilton, *supra* note 1, at 1249.

[155] *See id.*

injustice. As a result, cities seeking to entice a team to relocate will continue to lose potential jobs, improved business, and a sense of pride and unity that comes with having a home team.

Finally, the Act does not truly affect the business of baseball. Throughout the floor debate, the congressmen repeatedly affirmed that the only area to be impacted by the Act is agreement between Major League owners and their players on employment terms.[156] The Act still leaves areas such as expansion, broadcast rights, and other non-player employment terms unresolved. The result is that owners will still be able to operate in virtually the same manner as they do now. Most of the questions raised by the reasons offered to repeal the antitrust exemption will remain unanswered. In all likelihood, the exemption will continue to provide the owners with leverage over their players. For the fans, ticket prices will remain unchallenged and television contracts will not be subject to scrutiny. Perhaps the only positive note in the narrow nature of the Act is that it has left the labor exemption utilized in collective bargaining intact. Thus, players and owners can continue to negotiate in the most efficient manner without fear of reprisal.

Overall, the Act accomplishes little. Only one aspect of baseball's antitrust exemption has been lifted. However, the effects of this change may be great.

E. What Does This Act Mean for the Courts?

For decades, the courts have largely deferred to Congress when deciding cases involving baseball's antitrust exemption. Now, the courts must evaluate such controversies in light of the narrowly tailored Curt Flood Act. Although the Act is limited, it seems clear that if a court is now presented with a controversy similar to either *Flood* or *Toolson*, the verdict would come out differently.

In both of those cases, plaintiffs' challenges to the reserve system were rejected based on the courts' reliance on the antitrust exemption, which they felt only Congress could repeal.[157] If a court was now faced with a challenge to free agency, it could no longer rely on the antitrust exemption to provide the answer. Rather, the court would be forced to decide the case on its merits.

In the spirit of the freedom to contract, courts should find in favor of potential plaintiffs. Without the antitrust exemption, owners should not be permitted to enforce a strict reserve system. Rather, players should now be permitted to choose their employers just like any other American. The Curt Flood Act is a response to a judicial call for congressional action. The Act makes clear that baseball players are now on even footing with the owners, who may no longer justify an unfair reserve system. Congress has given the courts the tools to make the correct decisions and expand baseball players' freedom to contract. It is now up to the courts to employ these new devices.

Of course, courts are not always required to find in favor of plaintiffs challenging baseball's reserve system. Perhaps the biggest obstacle to such a suit is

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[156] *See* 144 CONG. REC. H9942-03 (1998).

[157] *See Toolson*, 346 U.S. at 357; *Flood*, 407 U.S. at 282-84.

that the structure of the reserve system now allows collective bargaining. A court could reason that it should not rule against a system which the players themselves created. However, it is not difficult to imagine a set of circumstances where judicial action would be appropriate. For example, a player could demonstrate his personal objection to the bargaining agreement by voting against the agreement. A clearer case can be made under facts similar to those of *Wood v. National Basketball Association*. There, the plaintiff was a college player selected in the NBA draft who argued that the NBA's salary cap and draft violated the Sherman Act.[158] Under the Curt Flood Act, a plaintiff in a similar situation as Wood could now make a much stronger argument against baseball than Wood could against basketball. Since the plaintiff would not have played in the league yet, he could not be considered among those who negotiated a collective bargaining agreement.

The Act makes clear, however, that the narrow interpretation *Piazza* and *Butterworth* gave to baseball's exemption is inaccurate. In both of those cases, the courts found that baseball's antitrust exemption only applied to the reserve clause.[159] Although these decisions still limited player freedom, proponents of eliminating baseball's antitrust exemption saw them as significant steps toward that end. The Act, however, signifies the exact opposite conclusion. By limiting the Act's scope to only the reserve clause, Congress has put federal courts on notice that all other parts of Major League Baseball are still subject to the antitrust exemption.

Thus, a team owner could not allege antitrust violations if the majority of the owners refused to allow him to move his franchise. Further, the exemption still applies to all television and radio contracts that owners enter into. Ticket and concession prices also remain protected under the Act. Overall, the Act has not placed Major League Baseball into the capitalistic marketplace under which all other American industries must operate.

V. CONCLUSION

Curt Flood paved the way for player progress in negotiating with Major League owners. Unfortunately, his dream of an unrestricted free agency system was never realized during his lifetime. However, Congress has made this goal more attainable with the passage of the Curt Flood Act. Although extremely limited in scope, the Act does put baseball players on the same ground as other professional athletes in contract negotiations with their respective owners. More importantly, the Act prevents owners from imposing an unfair reserve system and hiding behind the shield of an antitrust exemption. The result is that players have made great strides in achieving the freedom to contract that all other professionals outside the sports world enjoy. Clearly, the players will never experience true freedom to contract until the exemption is completely lifted.

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[158] *See* Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987).

[159] *See Piazza*, 831 F. Supp. at 438; *Butterworth*, 644 So. 2d at 1025.

Many players may believe that they must sacrifice some of their contractual liberty in order to maintain a competitive league. Regardless of these possibilities, the Curt Flood Act has at least given Major League Baseball Players a fighting chance in antitrust litigation against Major League owners, rather than forcing them to step up to the plate without a bat.