REGULATING THE BASEBALL MONOPOLY: ONE SUGGESTION FOR GOVERNING THE GAME

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(It is, as New York Yankee catcher Yogi Berra once observed, déjà vu all over again. On August 12, 1994 the Major League Baseball Players Association struck the business of baseball — the eighth work stoppage by players or owners in 22 years — leaving in the wake of the walkout a thrilling, record-breaking season, disgruntled fans and eco-

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nomic hardship for all associated with the sport: municipalities, vendors, players, owners and more. Certainly the players were not entirely at fault for this work stoppage, as the ownership cartel of baseball sought to tie a salary cap for players to revenue sharing and other inter-team financial reforms, a marriage of issues more from convenience than necessity. Obvious only by its absence from the debate is the surety that, at some time certain, an independent and unbiased authority will confirm that the parties reach accord in the larger public interest. This article suggests that baseball's stakeholders turn back the clock to revive an idea whose time has come, an idea which celebrates and promotes the public interest — the Major League Baseball Commission.)

I. INTRODUCTION

Professional baseball, alone among professional sports, enjoys unfettered immunity from federal antitrust laws.[2] Baseball's antitrust freedom has caused unremitting consternation for its critics, who argue the game should be subject to the same "pro-competitive" forces and "pro-competition" antitrust constraints as other sports or billion dollar businesses.[3] The remedy most often proposed to effect critics' desired changes in baseball is Congressional intervention to lift the antitrust exemption.[4]

The consequences of rescinding professional baseball's antitrust status[5] are subject to disagreement[6] and are beyond the scope of

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2. Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922)(holding that "exhibitions of baseball" are not considered commerce for the purposes of antitrust jurisdiction). *See also* Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1956). The Sports Broadcasting Act of 1961 confers limited antitrust immunity on professional baseball, football, basketball and hockey leagues to sell collective television rights. 15 U.S.C. § 1291 (1982).

3. *See, e.g.,* 139 Cong. Rec. S2416 (daily ed. March 4, 1993) (statement of Sen. Metzenbaum).

4. The most recent federal legislation that would lift the exemption in its entirety is The Professional Baseball Reform Act of 1993, introduced by Sen. Metzenbaum. S. 500, 103d Cong., 1st Sess., 139 CONG. REC. S2415 (daily ed. March 3, 1993). *See also* H.R. 1549, 103d Cong., 1st Sess., 139 CONG. REC. H1811 (daily ed. March 31, 1993) (companion legislation to S. 500). Sen. Metzenbaum narrowed his bill to cover only labor matters, but this modified legislation died in committee on June 22, 1994. Reps. Bunning and Synar introduced H.R. 4994, the Baseball Fans and Community Protection Act of 1994, a bill similar to Metzenbaum's narrow version, in the waning days of the 103d Congress in response to the strike, but the full House of Representatives did not act upon the legislation. *See also* Classen, *Three Strikes and You're Out: An Investigation of Professional Baseball's Antitrust Exemption*, 21 AKRON L. REV. 369 (1988) (calling for elimination of antitrust exemption); Berger, *After the Strikes: A Reexamination of Professional Baseball's Exemption from the Antitrust Laws*, 45 U. PITT. L. REV. 209 (1983) (noting absence of compelling public policy for retaining immunity).

5. J. RUBIN, SOME BACKGROUND INFORMATION ON THE APPLICATION OF ANTITRUST LAW TO PROFESSIONAL SPORTS, Cong. Research Service, Am. L. Division (Apr. 26, 1991). For the purposes of this article, however, the term "exemption" is used as a synonym for the

this analysis. Instead, this article addresses the following assertions: First, the history of governance in baseball demonstrates that the game functions best from a societal point of view when endowed with a strong central authority that offsets the game's antitrust exemption. Second, federal policymakers have given the ownership of baseball specific reasons to rely upon and exploit the monopolistic characteristics of their business. We should not be surprised, therefore, when Major League Baseball owners continue to act in ways antithetic to traditional notions of open and effective competition. Third, in the absence of Congressional or judicial action on this matter, the rationales for bringing baseball under antitrust jurisdiction are best served by subjecting the baseball business to oversight that accommodates the game's obvious monopoly and public interest implications. To sustain the game in the best interests of all its stakeholders, the owners should adopt a new oversight mechanism modeled after the state public utility commission experience.

Absent significant reform in self-governance, baseball faces continued travails in the various problems facing it today, including revenue sharing, franchise siting and labor relations. The public utility commission paradigm, refined over eight decades and numerous analogous matters, lends itself for resolution of these and other thorny issues. Moreover, a stronger and broader authority to regulate the game should alleviate societal (and Congressional) concern that the sport is conducted in the public interest.

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game's strict legal status, and to reflect the common usage of the term by discussants of this topic. One analyst noted:

> It is somewhat misleading to characterize the arrangement with respect to baseball as an "exemption." The fact that baseball is not covered by the federal antitrust prohibitions against, *inter alia*, restraints of trade and monopolization, is the result of an historical accident (and judicial interpretation) rather than of deliberate Congressional action to exempt the sport from the reaches of the antitrust laws (footnote omitted).

Id.

6. *Cf.* Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 656-66 (1989) (determining that Major League Baseball has maintained artificial ceilings on the number of franchises). *See also Baseball's Antitrust Exemption Hearing before the Subcomm. on Economic and Commercial Law of the House Committe on the Judiciary*, 103d Cong., 1st Sess. (Mar. 31, 1993) (statement of Allan H. Selig, President, Milwaukee Brewers Baseball Club, Chairman of Baseball's Executive Council) at 54-59.

II. DISCUSSION

A. Baseball Governance through History

No critique of baseball's problems and promise can ignore the game's long and venerated history, which informs and shapes any debate about the enterprise's future. How baseball arrived at its present self-governance and its unique legal status under federal antitrust law has everything to do with the current debate about reforming oversight. Briefly recounted, therefore, are the skeletal histories of the control of baseball and the game's journey to antitrust immunity.

1. From Amateurs to the 'Major Leagues'

Baseball's precise origins are forever veiled in the romantic mists of this nation's early history, but the game's differing forms of self-government are more clearly defined. On March 10, 1858 twenty-five amateur baseball clubs met at New York City to form the "National Association of Baseball Players," marking the first formal organization of the sport.[7] The National Association dictated that baseball operate as an amateur pursuit, but the league, administered by the players, could not police pay-offs to its members or the practice of "revolving," whereby better athletes changed clubs for higher wages after only a few games.[8]

In 1869 the Cincinnati Red Stockings renounced the amateur association and openly signed players to season contracts.[9] Cincinnati club leaders raised general admission prices to meet payroll and overhead costs, and agreed to *pro rata* liability if income from gate receipts failed to cover expenses.[10] A barnstorming tour by the Red Stockings in that same year proved a financial success, signalling the demise of the amateur National Association and the birth of professional organized baseball.[11]

Players continued their general control of the professional game through the "National Association of Professional Base-ball Players" (NAPBP) formed in 1871 by defectors from the amateur league.

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7. F. MENKE, THE ENCYCLOPEDIA OF SPORTS 62 (1977)

8. J. DWORKIN, OWNERS VERSUS PLAYERS, BASEBALL AND COLLECTIVE BARGAINING 14 (1981).

9. THE BASEBALL CHRONOLOGY 17 (1991); *see* D. VOIGT, AMERICAN BASEBALL (Vol. 1) 21-22 (1983) (Cincinnati was not the first club to employ professionals, but was the first all-salaried team). *Id.*

10. MENKE, *supra* note 7, at 63.

11. VOIGT, *supra* note 9, at 21-22; ENCYCLOPEDIA OF MAJOR LEAGUE BASEBALL TEAM HISTORIES - NATIONAL LEAGUE 181-82 (1991).

The NAPBP governed haphazardly until 1875 when William A. Hulbert, president of the Chicago White Stockings, embarked on a scheme to launch a new league based upon territorial monopolies and a restricted number of franchises.[12] Hulbert, a businessman first and baseball man second, secretly signed away from his Boston competition four stars, breaching the gentlemen's agreement that had acted as an informal reserve system.[13] News of baseball's first free agency raid sparked demands for Hulbert's expulsion from the game, but the resourceful Chicago businessman counterattacked with his plan for a "National Association of Professional Baseball Clubs."[14]

The NAPBC immediately attracted four cities from the tottering NAPBP, and on February 2, 1876 the remaining teams agreed to join Hulbert's owner-controlled league.[15] The NAPBC dominated the professional enterprise for the next 16 years, despite the emergence of the rival American Association (1882-1891), the Players (or Brotherhood) League (1890), and a host of minor leagues. Ironically, the Players League, formed to return control of the game to its "workers," solidified the National League owners' grip on the game. Players jumped the two established circuits in favor of higher wages, and both the Players League and American Association lost money during 1890.[16] The Players League folded after that one season, and the American Association ceased operations after the 1891 season. The National League also, lost money in 1890 and 1891, but its owners had sufficient reserves to continue. Thus, as of 1892 the Nationals stood alone as a 12-team, owner-controlled major league, the unintended beneficiaries of the failed labor uprising.

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12. A. ZIMBALIST, BASEBALL AND BILLIONS 3 (1992).

13. MENKE, *supra* note 7, at 72. The reserve clause made its first appearance in 1879 after a secret meeting of National League clubs. Then the teams could name and reserve from free agency up to five players at the end of each season. *Id.* Players gained the right to bargain with any club after expiration of a contract pursuant to an arbitration panel decision on December 23, 1975. Atlanta National League Baseball Club, Inc. v. Kuhn, 432 F.Supp. 1213, 1215 (N.D.Ga. 1977). This decision was enforced in Kansas City Baseball Corp. v. Major League Baseball Players Ass'n, 409 F.Supp. 233 (W.D.Mo.), *aff'd* 532 F.2d 615 (1976). For a history of the reserve clause from 1879 through 1984 *see* R. STEDMAN, PROFESSIONAL BASEBALL AND THE ANTITRUST LAWS: AN ARBITRATED IMPASSE? 7 (1984).

14. VOIGT, *supra* note 9, at 63-64 (noting that the NAPBC was the first organization to subordinate outright players to owners). A factual recitation in one court decision makes the interesting observation that "[t]he clubs were organized for profit, but not the leagues." National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc., 269 F. 681, 683; 50 App. D.C. 165 (Dec. 6, 1920). This confirms Hulbert's priority was his own pecuniary interest, and may have been the first inclination — that continues today — that owners were averse to revenue sharing.

15. *Id.* at 64.

16. *Id.* at 160-61, 166-67.

In 1900 Byron Bancroft (Ban) Johnson formed the American League, serving eight cities, most of which had hosted teams in Johnson's minor "Western League" or which had once housed National League teams.[17] Johnson petitioned for major league status from the National League, but was rebuffed.[18] For the next two years Johnson and his American League counterparts engaged in raids or bidding wars for National League stars. The National League attempted to staunch the flow by writing reserve clauses into players' contracts, but courts across the nation ruled the provisions illegal.[19] On January 9, 1903, the National League acquiesced to separate but equal leagues under the umbrella of "Organized Baseball," each with exclusive territories and limited franchises.[20]

2. The Rocky Road to Landis

That January 1903 meeting also produced the National Commission, a tripartite body to govern inter-league disputes.[21] The Commission consisted of the league presidents and a chairman, August Herrman, president of the Cincinnati Reds.[22] Until 1915, the National Commission faced few significant problems,[23] but the next five years saw several incidents erode the National Commission's authority and acceptance.

The first dispute involved George Sisler who, while a high

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17. E. MURDOCK, BAN JOHNSON: CZAR OF BASEBALL 44 (1982). Johnson's action was prompted in part by the National League's decision to reduce its size to eight teams, which left some "major league" cities - Baltimore, Washington, Louisville and Cleveland - unserved. *Id.*

18. *Id.* at 46.

19. George v. Kansas City American Assn. Baseball Club, 219 S.W. 134 (Mo. App. 1920); Kinney v. Federal League Baseball Club, N.Y. Sup. Ct. (1917); Weegham v. Killifer, 215 F. 289 (6th Cir. 1914); Griffin v. Brooklyn Base Ball Club, 68 App. Div. 556 (1902); Columbus Base Ball v. Reilly, 25 Ohio Dec. 272 (1891); Metropolitan Exhibition Co. v. Ewing, 42 F. 198 (C.C.S.D.N.Y. 1890); Metropolitan Exhibition Co. v. Ward, 9 N.Y.S. 779 (Sup. Ct. 1890). Club owners or management prevailed in Indianapolis Athletics Association Inc. v. Burke, No. 740, C.P. Pittsburgh, Pa. Aug. 12, 1915; Cincinnati Exhibition Co. v. Johnson, No. 612, C.P., Pittsburgh, Pa. Sept. 2, 1914; 190 Ill. App. 630 (1914); Cincinnati Exhibition Co. v. Marsans, 216 F. 269 (E.D. Mo. 1914); Philadelphia Baseball Club, Ltd. v. Lajoie, 202 Pa. 210, 51 A. 973 (1902); American Association Club of Kansas City v. Pickett, 8 Pa. C.C. 232 (1890).

20. MURDOCK, *supra* note 17, at 62-63.

21. *See* Charles O. Finley & Co., Inc. v. Kuhn, 569 F.2d 527, 532 (7th Cir. 1978) *cert. denied*, 439 U.S. 876 (1978); Pachman, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical And Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 Va. L. Rev. 1409, 1413-14 (Oct. 1990), (citing Major League Baseball News Release, The Commissionership — An Historical Perspective 4) (Citation omitted).

22. J. SPINK, JUDGE LANDIS AND TWENTY-FIVE YEARS OF BASEBALL 42 (1947).

23. VOIGT, *supra* note 9, at 310-11. In 1905, for example, the National Commission decided 73 cases unanimously. *Id.*

school student, signed a contract with Akron of the minor Ohio and Pennsylvania League.[24] Akron sold the contract to Columbus of the minor American Association, which in turn sold Sisler's rights to the major league Pittsburgh Pirates in 1913.[25] Upon graduation from the University of Michigan, Sisler signed a contract with the St. Louis Browns of the American League. Pittsburgh instructed him to report to the Pirates.[26] By a 2-1 vote, the National Commission awarded Sisler to St. Louis, citing Sisler's minority status when he signed with Akron and his lack of play for any alleged contractors as rationales for voiding the earlier agreement. That action prompted Barney Dreyfuss, president of the Pittsburgh franchise, to introduce a resolution for a neutral National Commission chairman at the first National League meeting following the decision.[27]

Dreyfuss' campaign was unsuccessful, but the cause of independent oversight was bolstered by another controversial decision in 1918 when the Commission awarded pitcher Scott Perry to the National League Boston Braves over the objection of the American League Philadelphia Athletics. Philadelphia procured a court injunction to retain Perry, the National League again lost out on a contested player, and the integrity of the National Commission was called into question by those supposedly bound by it.[28]

The National Commission's third predicament also came in 1918 when Chicago Cubs and Boston Red Sox players struck Game Five of the World Series for one hour seeking guaranteed purses in response to an owners' trial balloon to reduce playoff shares. Commission member Ban Johnson negotiated a settlement in the clubhouse with each club's captain, but the board was denounced for its handling of the situation.[29] A future president of the National League, for example, concluded that day the National Commission was outmoded and baseball needed a strong one-man administrator.[30]

Baseball's legal wrangles continued in 1919 when Boston traded to New York unhappy pitching star Carl Mays, to New York. Mays had to litigate American League president Johnson to ensure his play for the Yankees.[31] Johnson responded by convincing National

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24. SPINK, *supra* note 22, at 41.

25. *Id.*

26. *Id.* at 43.

27. VOIGT, *supra* note 8, at 310. Cincinnati's intra-league rivalry with Pittsburgh may have played a part in Herrman's decision, as may have Johnson's lifelong friendship with Herrman. *Id.*

28. *Id.*

29. MURDOCK, *supra* note 17, at 165-66.

30. *Id.* at 166.

31. American League Baseball Club, Inc. v. Johnson, 109 Misc. 138, 143; 179 N.Y.S. 498,

Commission Chairman Herrman to withhold the Yankees' share of the World Series purse.[32] Johnson backed down on February 10, 1920, after being hit with a restraining order barring him from using league funds to defend a $500,000 suit by the Yankees.[33] The National Commission was irreparably damaged, and could not weather the worse storm that was to hit later that year.

On September 28, 1920 a Chicago grand jury handed down indictments against eight stars from the Chicago White Sox for conspiring to throw the 1919 World Series.[34] Those charges rocked baseball and the nation, and calls were raised to clean up and regulate the game. Albert D. Lasker, a minority stockholder in the Chicago Cubs, advanced a plan for a board made up of three men with no connection to baseball to replace the National Commission.[35] Lasker's commission would have had sweeping authority over the game but was stalled by Ban Johnson.[36]

Johnson and four other owners opposed the Lasker plan, but the entire eight-team National League and three American League teams voted to create a new circuit — the National-American League — governed by an independent entity.[37] The "new" league approached Judge Kenesaw Mountain Landis to ascertain his interest in overseeing baseball as a one-man commission, and the jurist tentatively accepted the position.[38] On November 12, 1920 organized baseball voted unanimously to endorse Judge Landis as su-

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501 (Oct. 1919). The precise facts surrounding Mays' departure from the Boston team were hotly contested. At core, however, there was agreement that Mays left a July 13, 1919 game against Chicago after only two innings, after pitching poorly, and after having been hit in the head or shoulder by a ball thrown by his own catcher. Mays departed the clubhouse with permission of his manager, Mr. Barrow, ostensibly to seek medical assistance, but instead returned to Boston, then left on a fishing trip. Two weeks later, Boston owner Harry Frazee traded Mays (with his permission) to the Yankees, but Ban Johnson ordered Mays suspended, and his trade to New York cancelled. The Yankees sued for an injunction against Johnson, whose order was quashed by a New York court. The court ruled, and was affirmed, that President Johnson was "given no authority whatever to discipline the clubs which are members of the league." *Id.*

32. SPINK *supra*, note 22, at 51. Although the Yankees finished in third place, organized baseball's policy in 1919 allowed that third and fourth place teams receive a lesser percentage of World Series receipts than the first and second place teams. *Id.*

33. *Id.* According to *Sporting News* editor and Landis biographer J.G. Taylor Spink, Yankees' attorneys secured the first temporary restraining order against Johnson on September 5, 1919, which emergency remedy was made permanent on October 26, 1919. *See* American League Baseball Club of New York v. Johnson, 109 Misc. 138; 179 N.Y.S. 498 (Oct. 1919).

34. *See generally* E. ASINOF, EIGHT MEN OUT: THE BLACK SOX AND 1919 WORLD SERIES (1963)(discussing the Chicago White Sox Scandal).

35. SPINK, *supra* note 22, at 65.

36. MURDOCK, *supra* note 17, at 180-81. Johnson argued that disinterested outsiders with no knowledge of baseball could not effectively govern the game. *Id.*

37. J. SPINK, *supra* note 22, at 68-9.

38. *Id.* at 69.

preme ruler of all facets of the game.[39]

On January 12, 1921 the National and American Leagues executed the "Major League Agreement," which still operates as the governing charter of professional baseball. Article I of the original Agreement vested in the Commissioner extraordinary authority to regulate the game in its best interests.[40] The Agreement complemented the contract of Judge Landis, which contained a provision granting the Commissioner power equal to that of any owner.[41]

3. The Benevolent Despot

Among his more mundane tasks, Judge Landis drew up the World Series schedule beginning in 1921, selected the Series's official scorers and ruled on numerous player transfer disputes.[42] In more meaningful decisions, the judge established boundaries in 1921 on owners' outside business interests, donated all $120,000 in gate receipts from a 1922 World Series game to charity after an inexperienced umpire called the game prematurely on account of darkness, and decided on an early closing date for the 1926 season.[43]

Current assertions notwithstanding,[44] anecdotal and legal his-

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39. *See* Pachman, *supra* note 21, at 1415-16; Milwaukee American Ass'n v. Landis, 49 F.2d 298, 299, 301, 302-03 (1931). The respective league presidents were named to an Advisory Council, which was permitted to plead various causes before Judge Landis, but there is no doubt of Landis' unquestioned authority. Landis had gained national notoriety for his fiery and populist rulings, and his agreement to accept the role of Commissioner wilted the resolve of Johnson and his few supporters. *Id.*

40. MAJOR LEAGUE AGREEMENT, art. I, § 2 (1921). The functions of the Commissioner were described under the Major League agreement as follows:

> (a) To investigate, either upon complaint or upon his own initiative, any act, transaction or practice charged, alleged or suspected to be detrimental to the best interests of the national game of Baseball, with authority to summon persons and to order the production of documents, and, in case of refusal to appear or produce, to impose such penalties as are hereinafter provided.
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> (b) To determine, after investigation, what preventive, remedial or punitive action is appropriate in the premises, and to take such action either against Major Leagues, Major League Clubs or individuals, as the case may be.

Id.

41. *Organized Professional Team Sports: Hearings on H.R. 10378 and S. 4070 before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess. at 23 (1958) (statement of Senator Kefauver). This contract provision was apparently removed from the contract of Commissioner Ford C. Frick, who served from 1951-1965. *But see Id. at* 149 (statement of Commissioner Frick: "To the best of my knowledge Judge Landis had no contract other than the contract expressed in the major-league agreement. Certainly in the major-league agreement that clause did not appear.")

42. SPINK, *supra* note 22, at 86-99. Judge Landis ruled baseball with an iron fist until his death on November 25, 1944. His decisions covered many routine as well as essential financial dealings. *Id.*

43. *Id.* at 112, 150.

44. *See Baseball's Antitrust Exemption, Can a Weak Commissioner Protect the "Best*

tory reveals that Landis was the omnipotent overseer of baseball. It is likely no coincidence that Congressional interest in repealing baseball's antitrust freedom waned during the judge's tsar-like reign. In the one court challenge to Landis, for example, his powers were affirmed *en toto*. In *Milwaukee American Ass'n v. Landis*[45] the court described "a clear intent upon the part of the parties to endow the commissioner with all the attributes of a benevolent but absolute despot and all the disciplinary powers of the proverbial pater familias."[46] The court found that the provisions of the code of baseball were "so unlimited in character that we can conclude only that the parties did not intend so to limit the meaning of conduct detrimental to baseball, but intended to vest in the commissioner jurisdiction to prevent ANY conduct destructive of the aims of the code."[47] Thus, summarized the court, Landis' decisions on all questions relating to the purpose of organized baseball and all conduct detrimental thereto, were "absolutely binding"[48] as the parties had waived recourse to judicial appeal.[49]

Interests of the Game"? Hearing before the Subcomm. on Antitrust, Monopolies and Business Rights of the Senate Judiciary Comm., Statement of Allan H. Selig, President of the Milwaukee Brewers Baseball Club and Chairman of the Major League Baseball Executive Council at 1-7 (Commissioner's powers to act in the "best interests of baseball" infrequently exercised and in recent years uncertain in scope); *see also* Allan H. Selig, *'Best Interests' Phrasing Best Viewed Narrowly,* NEW YORK TIMES, Mar. 6, 1994, at C9. "The truth is, the Major League Baseball Commissioner by definition has never been all-supreme or omnipotent except where public confidence and integrity are concerned . . . the notion of an almighty commissioner directing the business of baseball is incorrect. The source of this misunderstanding is the commissioner's 'best interests' powers [which has been interpreted] as giving the commissioner complete authority over all matters related to Major League Baseball. That interpretation is wrong." *But see* Ira Berkow,*As Innings Dwindle, Baseball Chief Balks,* NEW YORK TIMES, August 7, 1994, at 1, col. 2 ("No one could mistake [acting commissioner of baseball] Bud Selig for Judge Kenesaw Mountain Landis, baseball's first commissioner, whose iron-fisted control over the sport from 1920 to 1944 remains legendary . . . As successors go [acting commissioner] Selig appears toothless.") *Id.*

45. 49 F.2d 298 (1931).

46. Milwaukee American Ass'n v. Landis, 49 F.2d at 298, 299 (1931).

47. *Id.* (emphasis added).

48. *Id.* at 302.

49. *Kuhn*, 569 F.2d at 527, 533 n.14 (1978) (citing Art. VII, Sec. 1 of the original Major League Agreement:

> The Major Leagues and their constituent clubs, severally agree to be bound by the decisions of the Commissioner, and the discipline imposed by him under the provisions of this Agreement, and severally waive such right of recourse to the courts as would otherwise have existed in their favor.

Id.

The *Finley* court also cited with approval for the proposition of a strong Commissioner the concurrent "Pledge to Support the Commissioner":

> We, the undersigned, earnestly desirous of insuring to the public wholesome and high-class baseball, and believing that we ourselves should set for the players an example of the sportsmanship which accepts the umpire's decision without complaint, hereby pledge ourselves to support the Commissioner in his important and

After Landis' death the Major League Agreement was amended to limit the Commissioner's authority in two respects. First, owners deleted the provision by which they had waived their right of recourse to the courts to challenge decisions of the Commissioner.[50] Second, the owners exempted from the Commissioner's review all Major League Rules, joint actions and procedures of the Major Leagues, declaring them automatically not detrimental to baseball.[51] These 1944 amendments remained in effect until 1964 when the owners, following the recommendation of retiring Commissioner Ford Frick, removed the exemption of rules, procedures and actions from commissioner consideration. In addition, they restored the waiver of recourse to the courts provision and changed the standard by which a commissioner evaluated acts or practices from "detrimental to baseball" to "not in the best interest of the national game of Baseball."[52]

Thus did the Commissioner's power reattain a semblance of its zenith, as affirmed in 1978 decision in *Charles O. Finley & Co., Inc. v. Kuhn*.[53] In that case Oakland Athletics owner Charles Finley sued then-commissioner Bowie Kuhn to overturn Kuhn's disapproval of the assignment (for large cash sums) of Athletics players Joe Rudi and Rollie Fingers to the Boston Red Sox, and player Vida Blue to the New York Yankees.[54] Kuhn found the proposed transfers "inconsistent with the best interests of baseball, the integrity of the game and the maintenance of public confidence in it."[55] The United States Court of Appeals for the Seventh Circuit affirmed the trial judge's finding "that the Commissioner has the authority to

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difficult task; and we assure him that each of us will acquiesce in his decisions even when we believe them mistaken, and that we will not discredit the sport by public criticism of him or of one another.

Id. The owners' willingness in 1921 to act the role model for players in acceding to a strong central authority.

50. *Kuhn*, 569 F.2d at 534.

51. *Id.*

52. *Id.* The Supreme Court's observation in *Flood* that more than 50 bills were introduced in Congress between 1953 and 1972 bears out the inference that the stronger baseball's self-regulation, the less interest public policymakers have in removing the antitrust exemption to resolve supposed problems. *Flood* at 281. Similarly, since Fay Vincent was ousted as commissioner, Congress has renewed its interest in changing the sport's antitrust stature. *Id.*

53. 569 F.2d 527 (1978), *cert. denied*, 439 U.S. 876 (1978). In what might be viewed as a companion case, Commissioner Kuhn suspended Atlanta Braves' owner Ted Turner for one year, for violating Article 3(g) of the Major League Rules, which forbids negotiations between clubs and players who are not free agents. Atlanta National League Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213 (1977). There too the Commissioner's expansive powers were upheld, although the court did decide that the commissioner could not exact punitive sanctions not enumerated in Art. I, § 3 of the Major League Agreement. *Id.* at 1223.

54. *Kuhn*, 569 F.2d at 530-31.

55. *Id.* at 531.

determine whether *any* act, transaction or practice is upon 'not in the best interests of baseball,' and upon such determination, to take whatever preventive or remedial action he deems appropriate, whether or not the act, transaction or practice complies with the Major League Rules or involves moral turpitude."[56]

4. Changing the Ground Rules

The authority of the commissioner's faced its next significant challenge from the owners in the early 1990's when Commissioner Fay Vincent refused to limit his participation in labor disputes, and ordered realignment of the National League.[57] In the former instance, Vincent was accused of weakening the owners' bargaining power in that he could intervene at any time during labor negotiations with his own views and order the parties to consider his wishes.[58] Vincent, however, countered with Article 9 of the Major League Agreement, which stipulated that "no diminution of the compensation or powers of the present or any succeeding Commissioner shall be made during his term of office."[59] The owners did not attempt to remove Vincent based solely on his refusal to limit his charter authority over labor issues, but his "strict construction" defense fueled a "no-confidence" movement among the owners.[60]

However, a federal judge entered a preliminary injunction against Vincent's action on July 23, 1992.[61] Shortly after the

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56. *Id.* (emphasis in original) (footnote omitted).

57. *Id.* at 489. As regards realignment, Vincent ordered the Chicago Cubs and St. Louis Cardinals to the Western division and the Atlanta Braves and Cincinnati Reds to the Eastern Division to more closely comport with geographic rivalries. Helyar reports that the political rationale for certain clubs opposing realignment was money: "By the 1990's, the Tribune Company [owner of the Cubs] wouldn't dream of realigning. The Cubs liked to clothe their Eastern Division preference by referring to their great rivalry with the Mets. But this was assuredly about ratings. The Cubs' night games in the East started at six-thirty Chicago time. They provided good early prime-time programming and they led in nicely to WGN's high-rated *Nine O'clock News*." *Id.*

58. J. HELYAR, LORDS OF THE REALM, THE REAL HISTORY OF BASEBALL 480 (1994). Helyar provides a dramatic chronology of the issues and events leading to Vincent's resignation, including an exposition on the labor matter. *Id.* at 480-517.

59. MAJOR LEAGUE AGREEMENT, art. IX, "Limitations of Amendments" (1921) (reproduced at *Baseball's Antitrust Exemption Hearing, before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. (Mar. 31, 1993) Documents Relating To Baseball's Responses Questions for the Record, Allan H. Selig, President, Milwaukee Brewers Baseball Club, Chairman of Baseball's Executive Council) at 262. Helyar notes that one owners' attorney concluded from transcripts of the 1921 deliberations that culminated in the Major League Agreement that, while a commissioner's powers and compensation could not be diminished during his term, the agreement was silent as to his removal. HELYAR, *supra* note 58, at 509.

60. *Id.* at 506-17.

61. *See, e.g.*, Chicago National League Ball Club, Inc. v. Francis T. Vincent, Jr., No. 92 C

court decision on September 3, 1992, the owners voted 18-9, with one abstention, for a no-confidence resolution regarding Vincent.[62] He resigned on September 6, 1993.[63]

If the court decision and the no-confidence process were not enough to add to the new uncertainty surrounding the scope of the commissioner's powers, the owners amended the Major League Agreement in two ways which changed the job description for and severely curtailed the authority of the commissioner. First, the owners named the commissioner as their representative in all labor matters.[64] This effectively eliminated him as a threat to any ownership position in collective bargaining. Next and more importantly, the owners removed from the commissioner the ability to take independent action on matters regarding labor relations, the All-Star Game, the League Championship Series and the World Series, television or radio; expansion, sale or transfer of a club, relocation, and revenue sharing.[65] The owners suggested they "clarified, restored or augmented," but clearly did not weaken, the Commissioner's best interests powers in all matters which "implicate the integrity of baseball or the public confidence in the game."[66]

Any independent analysis of the status of the commissioner's authority cannot help but conclude that the position has been diminished greatly.[67] Executive Council chairman Bud Selig was

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4398 (Dis.Ct., ND Ill) (Preliminary injunction Withdrawn and Vacated., Sept. 24, 1992).

62. *Id.* at 516.

63. *Id.* at 517.

64. *Baseball's Antitrust Exemption: Can a Weak Commissioner Protect the "Best Interests of the Game"? Hearing before the Subcomm. on Antitrust, Monopolies and Business Rights of the Senate Committee on the Judiciary*, 103d Cong., 1st Sess. (Mar. 21, 1994), [hereinafter *Antitrust*] (Statement of Allan H. Selig, President of the Milwaukee Brewers Baseball Club and Chairman of the Major League Baseball Executive Council.) *Id.* at 5 ("Rather than exclude the Commissioner from labor relations with the players as most predicted the owners would, the clubs gave the Commissioner the responsibility to carry out the labor relations policies of the clubs.") *Id.*

65. *Id.* at 2-3. Metzenbaum stated, "[i]t seems to me that all that is left for the Commissioner is a high salary, a plush limo and driver, and a big expense account. There is not much authority left in that office any longer." *Id.*

66. *Id.* (Statement of Allan H. Selig, President of the Milwaukee Brewers Baseball Club and Chairman of the Major League Baseball Executive Council) at 4. Moreover, Mr. Selig argued, "[o]ur nearly 30-year history of collective bargaining with the Players Association reveals that the Commissioner's undefined and uncertain role in that process has repeatedly stalled and impeded productive discourse between the clubs and players." To which Donald Fehr, Executive Director of the Major League Baseball Players Association responded: "With all due respect, this is a little much . . . For many, many years the owners were content to propagate the myth of the all-powerful commissioner, of the Commissioner as a sentry standing guard to protect the public. For Mr. Selig, on behalf of his fellow owners, to now come before the Congress and assert that the commissioner's powers were erroneous, and therefore the owners have not diminished the power, independence and authority of that Office, but have strengthened it is, at best, disingenuous." *Id.*, Statement of Donald M. Fehr at 3.

67. Gould, *In Whose "Best Interests"? The Narrowing Role of Baseball's Commissioner*, 12

simply wrong when he asserted before Congress (and in The New York Times) that the powers of the commissioner were ever in doubt[68] in fact, they became inconvenient for an ownership cartel that desired changes in its approach to labor and other issues. As Senator Metzenbaum and the players' chief negotiator Don Fehr have observed, there exists no longer a strong, autonomous central authority in baseball to offset or justify the antitrust exemption.[69] The owners' insensitivity to this point is not surprising, however, given the saga of the antitrust immunity, the history of which is as colorful and dramatic as for the game itself.

B. Federal Baseball: An Anomaly and Its Impact

The *Federal Baseball* case began its life well before the Supreme Court's famous (some would argue infamous) decision in 1922. The Federal League (formerly the United States League) demanded recognition as a major league in 1913 and, much like predecessors such as the American Association and the Players League, the Federals raided the major circuits for marquee players.[70] The bitter competition for players and fans escalated through January 1915 when the Federal League filed an 11-count antitrust action against organized baseball in the United States District Court for Northern Illinois.[71] The complainants were not deterred by a 1914 New York Supreme Court ruling that organized professional baseball, "though as complete a monopoly . . . as any can be made . . . is an amusement, a sport, a game . . . not a commodity or an article of merchandise."[72]

It was surely no coincidence that the presiding judge in that Illinois court was Kenesaw Mountain Landis, who had earned a national reputation as a "trustbuster."[73] The upstart Federal League may have been disheartened, however, by an early observa-

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ENTERTAINMENT AND SPORTS LAWYER 21 (Spring 1994)(arguing that despite baseball executives' public complaints to the contrary, it appears that the responsibilities of the office are shrinking.) *Id.*

68. Statement of Allan H. Selig, President of the Milwaukee Brewers Baseball Club and Chairman of the Major League Baseball Executive Council at 3. Selig stated that "[i]n practice [the commissioner's] powers were infrequently exercised and, especially, in recent years, uncertain in scope." *Id.*

69. *Id.*, Statement of Sen. Metzenbaum *supra* note 65, at 4; Statement of Donald M. Fehr *supra* note 66, at 2.

70. ZIMBALIST, *supra* note 12, at 8-9.

71. *Id.* at 9.

72. The American League Baseball Club of Chicago v. Harold H. Chase, [NO NUMBER IN ORIGINAL], Supreme Court of New York, Special Term, Erie County, 86 Misc. 441; 149 N.Y.S. 6, July, 1914.

73. HELYAR, *supra* note 88, at 7.

tion from Landis wherein the jurist noted that "any blow at this thing called baseball would be regarded by this court as a blow to a national institution."[74] The entire 1915 season passed without a decision from Landis and in December the Federal League backers executed the so-called "Peace Agreement" with organized baseball which dissolved the third league and compensated its owners "for expenses incurred in fitting up athletic grounds, etc."[75] The Baltimore Terrapins, however, were assigned a smaller share of the Federal League settlement proceeds, due in large part to certain major league owners' disregard for Baltimore as a top flight city.[76] Baltimore rejected its $50,000 offer and filed its own antitrust suit against Organized Baseball in 1916.[77]

The trial court awarded $240,000 in treble damages, costs and attorneys fees to Baltimore.[78] On appeal, however, the D.C. Court of Appeals reversed the earlier finding, holding that the business of baseball exhibitions for profit did not constitute trade or commerce within the meaning of the Sherman Act.[79] Thus, it followed that the Act did not apply to the business of baseball.[80] At the Supreme Court Justice Oliver Wendell Holmes affirmed the decision of the Court of Appeals.[81]

1. Federal Baseball's Tentative Progeny

Since *Federal Baseball*, the Supreme Court has touched upon baseball's status under federal antitrust laws on five occasions.[82]

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74. SPINK, *supra* note 22, at 35.

75. Hindman v. Pittsburgh Trust Co., 266 Pa. 204, 207; 109 A. 876 (1920).

76. *Id.*

77. National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc., 269 F. 681, 682; 50 App. D.C. 165, 166 (Dec. 6, 1920).

78. *Id.*

79. *Id.* at 684.

80. *Id.* at 684-85. "The business in which the appellants were engaged, as we have seen, was the giving of exhibitions of baseball. A game of baseball is not susceptible of being transferred. The players, it is true, travel from place to place in interstate commerce, but they are not the game. Not until they come into contact with their opponents on the baseball field and the contest opens does the game come into existence. It is local in its beginning and in its end. Nothing is transferred in the process to those who patronize it." *Id.*

81. *Federal Baseball* at 208-09. Judge Holmes stated that:

> The business is giving exhibitions of baseball, which are purely state affairs. It is true that in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. [But] the transport is a mere incident, not the essential thing . . . As it is put by the defendant, personal effort, not related to production, is not a subject of commerce. That which is its consummation is not commerce does not become commerce because the [interstate] transportation takes place.

Id.

82. Flood v. Kuhn, 407 U.S. 258 (1972); Radovich v. National Football League, 352 U.S. 445, *reh'g denied*, 353 U.S. 931 (1957); United States v. Int'l Boxing Club, 348 U.S. 236 (195-

Major League Baseball's antitrust freedom has survived each time. In *Toolson*, for example, the Court addressed the claims of baseball players who brought antitrust actions to protest the reserve system whereby players were bound to re-sign a contract with their existing clubs after each season. The Court refused to overturn *Federal Baseball*, on the basis of *stare decisis* and "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."[83] Attempts in 1923 and 1955 to extend the *Federal Baseball* reasoning and result to theater[84] and boxing[85] exhibitions were unsuccessful, and professional baseball's antitrust status was left undisturbed. In 1957, however, the Court in *Radovich v. National Football League*[86] specifically limited the rule "established [in *Federal Baseball* and *Toolson*] to the facts there involved, *i.e.*, the business of organized professional baseball."[87]

When the Court next addressed the exemption in *Flood*, Justice Harry Blackmun directly challenged the credibility of the *Federal Baseball* decision, noting several criticisms: professional baseball is a business engaged in interstate commerce; while its reserve system enjoys an exemption from federal antitrust laws, baseball is an anomaly, surviving the Court's expanding concept of interstate commerce only because of the benefit of *stare decisis;* other professional sports — football, boxing, basketball, hockey and golf — are not so exempt; and since 1922, baseball, with full and continuing Congressional awareness, has been allowed to develop and expand unhindered by federal legislative action, thereby implying to the Court that Congress has no intention to subject baseball's reserve system to the reach of antitrust statutes.[88]

Then, however, the Court affirmed its contention that any necessary remedy to the antitrust differential be provided by legislation rather than court decree.[89] Justice Blackmun clearly noted that Congressional rather than judicial action was needed.[90]

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5); United States v. Shubert, 348 U.S. 222 (1955); Toolson v. New York Yankees, Inc., 346 U.S. 356, *reh'g denied* 346 U.S. 917 (1953).

83. Toolson v. New York Yankees, 346 U.S. 356, 357 (1953).

84. Hart v. B.F. Keith Vaudeville Exchange, 262 U.S. 271 (1923); *see also* United States v. Shubert, 348 U.S. 222, 228 (1955).

85. United States v. Int'l Boxing Club, 348 U.S. 236, 241 (1955).

86. 352 U.S. 445 (1957).

87. *Id.* at 451 (holding that organized professional football not exempt from federal antitrust jurisdiction).

88. Flood v. Kuhn, 407 U.S. 258, 282-84 (1972). *See also* Piazza v. Major League Baseball, 831 F.Supp. 420 (E.D. Pa., 1993).

89. *Id.* at 274.

90. *Flood,* 407 U.S. at 283-84. As Justice Blackmun stated:

Only one federal decision has departed from the generally recognized breadth of organized baseball's antitrust exemption. In *Piazza v. Major League Baseball*,[91] the federal court ruled that the antitrust exemption extends only to the reserve system.[92] The court reasoned that the Supreme Court has largely abandoned the precedence of *Federal Baseball*.[93]

On September 28, Major League Baseball settled the *Piazza* case on undisclosed terms,[94] leaving unanswered the question of whether the *Piazza* result would survive federal appeal.[95] The

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> We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.

Id.

> Justice Blackmun further expounded:
> 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.

Id.

91. 831 F. Supp. 420 (E.D. Pa. 1993) (holding that motion for certification for immediate appeal denied) 836 F. Supp. 269 (E.D. Pa. 1993) (asserting that denial of motion to dismiss is interlocutory and generally not appealable except upon satisfaction of three statutory factors). *Piazza*, arose from an allegation by Vincent Piazza and Vincent Tirendi that Major League Baseball defamed them during their bid to bring baseball to Tampa Bay, Florida. Messrs. Piazza and Tirendi further alleged that Major League Baseball conspired in violation of the antitrust laws against the men's efforts to purchase the San Francisco Giants and relocate the team to Tampa Bay. *Id.*

92. *Id.*

93. *Federal Baseball*, 269 F. at 438. The court concluded:

> Applying [the] principles of *stare decisis* here, it becomes clear that, before *Flood*, lower courts were bound by both the *rule* of *Federal Baseball* and *Toolson* (that the business of baseball is not interstate commerce and thus not within the Sherman Act) and the *result* of those decisions (that baseball's reserve system is exempt from the antitrust laws). The Court's decision in *Flood*, however, effectively created the circumstance referred to by the Third Circuit as "result stare decisis," from the English system. In *Flood*, the Supreme Court exercised its discretion to invalidate the *rule* of *Federal Baseball* and *Toolson*. Thus no rule from those cases binds the lower courts as a matter of *stare decisis*. The only aspect of *Federal Baseball* and *Toolson* that remains to be followed is the result or disposition based upon the facts there involved, which the Court in *Flood* determined to be the exemption of the reserve system from the antitrust laws.

Id.

94. Hank Grezlak, *Baseball Settles With Businessman, Suit Alleged Defamation* THE LEGAL INTELLIGENCER Sept. 30, 1994, at 1. The publication reported that the settlement could have been more than $6 million. *Id.*

95. *Id.* One commentator familiar with the case intimated that Major League Baseball settled the case to avoid bad publicity and to avoid the risk that an appeals court might be influenced by the current mood in Congress. *Quoting* Thomas Reich, sports attorney and player agent. Further, a scholarly critique of *Piazza* concluded "that the exemption should be limited to antitrust violations involving the labor market in the context of player restraints." Lafferty, *The Tampa Bay Giants and the Continuing Validity of Major League Baseball's Antitrust Exemption: A Review of Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D.*

Florida Supreme Court, however, recently overturned a circuit court decision affirming a Florida district court, which had determined that "decisions concerning ownership and location of baseball franchises clearly fall within the ambit of baseball's antitrust exemption."[96] The Florida Supreme Court relied heavily on the *Piazza* reasoning,[97] but recognized that *Piazza* "is against the great weight of federal cases regarding the scope of the exemption."[98]

At best then, the fate of the conclusion that the game's antitrust exemption extends only to the reserve clause is uncertain. Major League Baseball's success rate at sustaining a broad antitrust exemption for its business is impressive and heretofore unbroken, and it might be ultimately disturbed only by Congressional intervention. Whither, then, Congress on the issue of baseball's blanket immunity? Those who believe the term "gridlock" gained currency only of late as regards our nation's capital would do well to contemplate the unparalleled inanition the federal legislature has displayed on this topic.

2. Congress' "Positive Inaction"

Until the 103d Congress, federal lawmakers — since the 1922 *Federal Baseball* decision — had considered dozens of pieces of legislation to remove organized baseball's antitrust immunity. Most, more than 50 bills, were introduced between 1953 and 1972.[99] Several more have been introduced since the early 1970's. None of these bills were even reported out of committee. Various explanations might be advanced for the dismal showing of reform legislation,[100] but more importantly Congress' unwillingness to act

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Pa. 1993), 21 FLA. ST. U.L. REV. 1271, 1272 (Spring, 1994).

96. Butterworth v. National League of Professional Baseball Clubs, CASE NO. 82,287 1994 Fla. Lexis 4 (Fl. Sup. Ct.) (Oct. 6, 1994). In the Florida action the Florida Attorney General advanced the same point found in *Piazza*, that the antitrust exemption extends only to the reserve system. *See, e.g.*, Reply Brief of Petitioner at 19, Butterworth v. National League of Professional Baseball Clubs, CASE NO. 82,287 (Fl. Sup. Ct.) (Dec. 13, 1993).

97. *Id.* at 10-18.

98. *Id.* at 16. The Florida Supreme Court also conceded that a court in Louisiana recently rejected the "cramped" albeit analytically impressive view of the *Piazza* court. *Id.* at 15-16, *citing* New Orleans Pelicans Baseball v. National Ass'n of Professional Baseball Leagues, Inc., No. 93-253, at 20 (E.D. La. Mar. 1, 1994).

99. *Flood*, 407 U.S. at 281.

100. One analyst concluded that Congress':

> failure to alter organized baseball's differential antitrust treatment arises because its large number of teams and highly integrated structure give it a comparative advantage in political lobbying over other professional sports. As a result, an economic theory of regulation combined with attention to institutional detail yields a consistent explanation for what appear to be inconsistent federal policies.

has suggested acquiescence to the Supreme Court's extension of antitrust immunity to the business of baseball.[101] This was also noted by the *Flood* Court.[102]

Congress' record on baseball seemed destined to continue through 1994. On June 23, 1994 the Judiciary Committee of the United States Senate voted 10-7 not to report out of committee S. 500, The Professional Baseball Reform Act of 1993.[103] In its original form this legislation, introduced by Senator Howard Metzenbaum of Ohio, would have removed entirely Major League Baseball's antitrust exemption.[104]

Senator Metzenbaum narrowed the legislation to cover only labor issues in hopes of securing additional votes on the Judiciary Committee, and to target the growing imbroglio between baseball owners and players which resulted in the eighth work stoppage in 22 years.[105]

When the strike hit, Congress reinitiated efforts to repeal or limit the antitrust exemption, and in the waning days of the session, activity toward this end flourished. First, Senator Exon objected to a unanimous consent request that would have allowed the Metzenbaum bill to be reintroduced.[106] Next, Representatives Bunning and Synar introduced new and narrow legislation — H.R. 4994 — in the House that would grant baseball players equal court access to that enjoyed by other professional athletes.[107] The House Judiciary Committee held two hearings on the bill, and vot-

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Ellig, *The Baseball Anomaly and Congressional Intent*, REGULATION ECONOMIC THEORY AND HISTORY 119 (1991).

101. Ankenbrandt v. Richards, 112 S.Ct. 2206, 2213 fn. 5, 119 L. Ed. 2d 468 (1992).

102. *Flood* at 283-84. The Court noted in *Flood*:

> Congress, by its positive inaction, has allowed those [immunity] decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.

Id.

103. 140 Cong. Rec. D 723, 725 (daily ed. June 23, 1994).

104. As discussed in note 4, Reps. Bunning and Synar introduced H.R. 4994 late in the session in response to the strike. This bill, like Sen. Metzenbaum's narrower version, would have limited the antitrust exemption to non-labor matters, thereby giving the players access to the courts to settle labor disputes. Although H.R. 4994 was not acted upon by the full House, mainly due to inadequate time, Rep. Jack Brooks, chairman of the powerful House Judiciary Committee (and its Subcommittee on Economic and Commercial Law which sponsored September 22, 1994 hearings on H.R. 4994) reminded owners that the Congress would reconvene well before 1995 spring training. Chairman Brooks also stated his conclusion that the antitrust exemption should be eliminated. Thus, if only for the moment, it appears the House of Representatives is poised to lift the immunity on a least a limited basis. Congressional passage of such or broader legislation would not obviate the oversight commission suggested herein.

105. Hal Bodley, *Baseball in the Strike Zone*, USA TODAY, August 12, 1994, at 1.

106. 140 Cong. Rec. S 13776, 13777.

107. 140 Cong. Rec. H 8695 (Aug. 18, 1994).

ed favorably, albeit not unanimously that the bill pass the full House. This marked the first time in over 70 years Congress acted at all on a baseball-related antitrust bill. Senator Metzenbaum then attached his narrow bill in the form of an amendment to the Senate version of the District of Columbia appropriations bill.[108] Metzenbaum ultimately withdrew his proposal when it became apparent he lacked support to defeat a potential filibuster against the amendment.

Lawmakers from both parties — Senator Orrin Hatch, Republican of Utah and second ranking minority member of the Senate Judiciary Committee, and Representative Jack Brooks, chairman of the House Judiciary Committee — also pledged to reexamine the issue early in 1995 when the 104th Congress convenes, if there is no settlement of the current labor dispute.[109] Although Congress is a notoriously fickle creature, baseball's exemption is obviously in more legislative jeopardy than ever before.[110] It is still uncertain, of course, whether Congress will act in 1995 to subject professional baseball to antitrust constraints. Practicality and politics join history as major obstacles to any such reform efforts.

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108. 140 Cong. Rec. S 13774 (Sept. 30, 1994).

109. Mark Maske, *Congress Halts Efforts on Antitrust Exemption*, WASHINGTON POST, October 1, 1994, at B3. *See also* Closing Statement of Chairman Jack Brooks, Subcommittee on Economic and Commercial Laws, Hearing on Baseball's Antitrust Exemption:

> As a result of the sorry spectacle the Nation was forced to endure for the last few months, and my very grave concerns for the future of the institution, I have come to the conclusion that legislation is now needed to restore the principles of competition and fair play to the business of baseball . . . I would remind the parties that the 104th Congress is scheduled to convene before spring training begins and well before the scheduled season opening on April 2 . . .
>
> We should never have reached this juncture. Time and time again in the past 20 years, the profit motive of Major League Baseball has pushed the limits of our tolerance and tampered with the unfettered joy we have for a pastoral sport that grabs us at youth and never lets go. That the barons of the game, the boys of summer and the men of october, now sit in this hearing room rather than pursuing their dreams of playing in a World Series is commentary enough.
>
> We in Congress must now step up to the plate.

Id.

110. Noted sportswriter Thomas Boswell opines that the most recent work stoppage was the result of manipulation of small market owners to force revenue sharing by large market owners. Thomas Boswell, THE WASHINGTON POST, August 11, 1994, at D1, col. 1 - D5, col. 2. Boswell presaged that the unintended consequence of the small market owners' action would be to revive the movement in Congress for repeal of the antitrust immunity as politicians respond to public pressure to resuscitate the 1994 season and playoffs.Whether owners will let the strike continue to that point is, of course, unpredictable, but an ancillary observation is that the "elegant trap" small market owners sprung on their larger counterparts to force revenue sharing, and which raises the specter of antitrust exemption removal, may ultimately and unwittingly play into the players' hands. The players may be able to de-link revenue sharing from a proposed salary cap, and at the same time further their efforts to repeal the exemption. *Id.*

For example, today's chief advocate for change, Senator Metzenbaum, indicated he will retire after his present term expires in 1994.[111] A key ally in Metzenbaum's crusade, Senator Connie Mack of Florida, might understandably consider other priorities now that Miami plays host to the Marlins.[112] Representative Mike Synar, a House advocate for repeal, lost his primary bid to return to Congress, and powerful House Judiciary chairman Brooks was defeated in the Republican takeover of Congress. Absent Metzenbaum, Synar, Brooks and a fully engaged Mack, the most recent failure to pass even Metzenbaum's watered down or the Bunning/Synar legislation bodes ill for consideration and passage of stronger law.

The final obstacle to repeal or limitation of the antitrust exemption is in the form of retiring Majority Leader George J. Mitchell of Maine. Mitchell has long been touted as the front runner for the baseball commissioner's slot, and there can be no overestimating the senator's influence on Capitol Hill should he take the job in January 1995.[113]

The business of baseball therefore stands for the foreseeable future in its own enviable Catch-22: the Court will continue to defer to Congress and not enforce federal antitrust laws against the game even in the face of radically changed circumstances suggesting the enterprise qualifies for ordinary antitrust treatment. Congress has not and seemingly cannot act to remove the questionable immunity, and repeated legislative failure to do so, under principles of statutory construction, reinforces the Court's stasis.

It is no wonder, then, that owners exhibit a certain, well-deserved contempt for threats to their unique sovereignty, and why they feel no compunction about minimizing the role and authority of the oversight entity which, arguably, once guided them in the public interest. There are, however, good public policy reasons for reexamining the type and quality of leadership for our national pastime. These reasons arise and propagate from the ignoble erosion of the commissioner's powers and questionable legal underpinnings for the exemption.

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111. Congress Daily at 1, (June 29, 1993).

112. *But see* Mack and Blau, *The Need for Fair Play: Repealing the Federal Baseball Antitrust Exemption*, 45 FLA. L. REV. 201 (Apr. 1993).

113. In fact, The Washington Post reported that "during the last-minute flurry on Capitol Hill to strip baseball of its antitrust exemption, some senators were calling Mitchell 'Mr. Commissioner' and adopting the attitude that, by not moving against the owners, they were protecting him in his new career." Mark Maske, *Designated Hitters*, WASHINGTON POST, October 3, 1994, at A17.

C. Reigning in the "Horsehide Cartel"

The facts suggest that baseball is, acts as, and will continue to act as a legal and economic monopoly. Recognizing that federal policymakers, be they legislators or jurists, will not change the game's fundamental status, we turn to the problems plaguing the sport, and consider which options best address public criticisms and the need for reform. Do there exist processes or protections which will challenge alleged abuses within the constraints of the blanket immunity? Ironically, the very legal infirmities and economic advantages which so annoy the game's detractors may hold the answer to this question.

1. Matching Goals and the Means to Achieve Them

As mentioned above, many critics of baseball argue or imply that removal of the antitrust differential would solve many, if not all, of the problems commonly arising from it.[114] In at least two circumstances, however, this assumption may not prove out. Some commentators have concluded that the most essential of critics' goals — more franchises in heretofore unserved communities[115] and better competitive balance among existing teams — would not necessarily be met by lifting the exemption. Thus, blind removal of the exemption might not enable more efficient or desired franchise decisions, but instead hinder those decisions as baseball becomes embroiled in inevitable lawsuits by disappointed cities.[116]

Similarly, the one study of competitive balance as between the baseball system with its free competition for players and strong

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114. *See supra* note 4. *See also Baseball's Antitrust Exemption Hearing before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. (Mar. 31, 1993), Statement of Professor Stephen F. Ross, University of Illinois at 165-171. Professor Ross identifies five abuses which might be limited by lifting the antitrust ban: artificial limits on expansion, tax subsidies, constrained free television viewership, tolerance of inefficient management and labor instability. *Id.*

115. *Baseball's Antitrust Exemption Hearing before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. (Mar. 31, 1993) *On the Scope and Implications of Baseball's Antitrust Immunity*, Statement of Gary R. Roberts, Vice Dean, Tulane Law School at 88.) In the case of franchises, Professor Gary Taylor of Tulane Law School testified before Congress that:

> there is no sensible set of principles under current antitrust doctrine to explain when or why a joint venture partnership like a sports league (even if it happens to have monopoly market power) might violate section 1 of the Sherman Act if it grants or rejects a proposal to expand its membership, to allow a change in ownership of a member franchise, or to allow the relocation of a member franchise's home games.

Id.

116. *Id.*

commissioner versus professional basketball with its salary cap and weak commissioner, revealed that baseball's small market clubs win more than their National Basketball Association counterparts.[117] Here too, therefore, lifting the antitrust exemption might cause exactly the opposite reaction than critics intend or want.

These results are not all that surprising if viewed through the perspective that restricted franchises and competitive disparities are the effects or symptoms of monopoly power, NOT the causes of that power that antitrust doctrines are meant to remedy. Those monopoly powers are inherent in the "enormous market power [and] highly decentralized structure of a sports league."[118] Thus, unless Congress were to lift the exemption and, say, the Department of Justice were to coordinate a national antitrust policy for baseball, the game would likely be subject to "misdirected, confusing, and politically motivated ad hoc regulation by federal courts" and "home town judges."[119] All of this, with no guarantee that baseball would behave in more socially desirable ways defined as more franchises and better competitive balance.

A mechanism does exist which concedes that Congress is unlikely to lift the antitrust immunity yet which advances a central purpose of the antitrust laws, *i.e.*, provide for "a sufficiently competitive market structure and market conduct to insure that private enterprise performs in a socially acceptable manner."[120] The basic goals of monopoly regulation are in the manner of substitutes for competition in those markets where monopolists operate overtly or with government sanction.[121] So long as Congress, the Su-

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117. Gramlich, *A Natural Experiment in Styles of Capitalism: Professional Sports*, 34 QUARTERLY REVIEW OF ECONOMICS AND FINANCE 121 (Summer 1994).

118. *Baseball's Antitrust Exemption Hearing before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. (Mar. 31, 1993) *On the Scope and Implications of Baseball's Antitrust Immunity*, Statement of Gary R. Roberts, Vice Dean, Tulane Law School at 90.) Professor Roberts makes a strong case for subjecting baseball (or any professional sports league) to the "single entity" theory, wherein leagues are "treated as single firms incapable of internally conspiring within the meaning of section 1" of the Sherman Act. *Id.* at 89-90. *See also* Roberts, *The Single Entity Status of Sports Leagues Under Section 1 of the Sherman Act: An Alternative View*, 60 TUL. L. REV. 562 (1986). For a spirited opposition to Roberts' approach *see* Goldman, *Sports, Antitrust, and the Single Entity Theory*, 63 TUL. L. REV. 751 (1989).

119. *Baseball's Antitrust Exemption Hearing before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. (Mar. 31, 1993) *On the Scope and Implications of Baseball's Antitrust Immunity*, Statement of Gary R. Roberts, Vice Dean, Tulane Law School at 89, 90. Buttressing Professor Taylor's prediction is the *Butterworth* case, wherein the Florida Attorney General seeks to maintain a state antitrust action against baseball, due in large part to the spurning of St. Petersburg as the new home of the San Francisco Giants.

120. W. MUELLER, MONOPOLY AND COMPETITION 132 (1970).

121. J. BONBRIGHT, A. DANIELSEN & D. KAMERSCHEN, PRINCIPLES OF PUBLIC UTILITY

preme Court or Major League Baseball refuse to address the root cause of what many perceive as the game's "socially unacceptable" behavior[122] and institutional instability[123] — baseball's legal and economic monopoly — the most appropriate treatment for baseball is monopoly-style regulatory oversight, expressly designed to accommodate the sport's antitrust status and resultant cartel stature.

2. Measuring Baseball by Public Utility Regulatory Principles

Should, therefore, organized professional baseball be regulated as a public utility? While baseball is at once a game and a business, it should not be confused with regulated necessities such as basic telecommunications or energy services. Thus, expenditure of public monies on its regulation would be difficult to justify, although some commentators have suggested governmental sports authorities to oversee baseball and other professional sports.[124] An alternative to public oversight, perhaps more workable, is private regulation following the public utility commission model. Before embarking on a radical shift in the governance of the game, however, utility regulatory experience should be weighed to understand the possible "fit" between it and baseball's need for reform.

The history of monopoly and public utility regulation in this country is well-documented and need not be reproduced here.[125]

RATES 8 (2nd. ed. 1988). *See* P. GARFIELD AND W. LOVEJOY, PUBLIC UTILITY ECONOMICS 1 (1964).

122. Senator Metzenbaum summarized the public's grievances against the owners to include (1) ouster of former commissioner Fay Vincent, (2) placing owners' financial interests ahead of the best interests of the sport, (3) threats to desert franchised cities unless subsidized by tax monies, (4) restrictions on player mobility, (5) migration away from free broadcast television coverage to pay cable coverage, and (6) use of accounting gimmicks to show artificial losses in order to leverage players, cities and fans. Senator Metzenbaum also criticized the January 1994 revision of the Major League Agreement, which, according to Metzenbaum, weakened the Commissioner by prohibiting independent participation in labor relations, All-Star, Championship League Series or World Series matters, television or radio issues, expansion, sale or transfer issues, relocations, and revenue sharing discussions. 139 Cong. Rec. S 2416, 2417-18 (daily ed. March 4, 1993) (statement of Sen. Metzenbaum).

123. Andrew Zimbalist identifies as the five extant problems confronting baseball today: labor relations, revenue inequality among the teams, relations with the minor leagues, relations with the host clubs, and the future of television and radio broadcasting. ZIMBALIST, *supra* note 12, at 169 (1992).

124. ZIMBALIST, *supra* note 12, at 182-86; *Baseball's Antitrust Exemption Hearing before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. (Mar. 31, 1993) *On the Scope and Implications of Baseball's Antitrust Exemption*, Statement of Gary R. Taylor, Vice Dean and Professor of Law, Tulane Law School at 94, 114, 221.

125. *See, e.g.*, C. PHILLIPS , JR., THE ECONOMICS OF REGULATION, chapter one (rev. ed. 1969).

Suffice to say that in 1934 the Supreme Court held in *Nebbia v. New York*[126] that there exist no constitutional barriers to regulation of any industry where in the judgment of the legislature regulation would serve the public interest and is not formed capriciously or in a discriminatory fashion.[127] Those entities which deserve public oversight have evolved over time.[128]

The fundamental standards used to determine public utility status overarch a "constellation of characteristics"[129] that suggest a regularized creature. James A. Bonbright, noted economist in the public utility field, identified two primary societal or economic indicia of a regulated utility: The first is the special public importance or necessity of the types of service supplied . . . [and the] second is the possession of specific physical and human assets like utility plants, distribution networks, and technical expertise that lead almost inevitably to monopoly or at least to ineffective forms of competition.[130]

Professor Bonbright's observations complement court decisions which establish baseball as a peculiar business and which, concomitantly, nominate the game for some form of regulatory oversight. What Bonbright termed "special public importance" is directly com-

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126. 291 U.S. 502 (1936). *See* Wolff v. Court, 262 U.S. 522 (1923) (listing three businesses which qualify for public oversight, which list deemed not exclusive).

127. *Nebbia*, 291 U.S. at 508; *see* A. KAHN, THE RATIONALE OF REGULATION AND THE PROPER ROLE OF ECONOMICS 7 (Vol. 1) (1988). Further, "there is no closed class or category of business affected with the public interest." *Nebbia*, 291 U.S. at 536. Rather, "[t]he phrase 'affected with the public interest' can, in the nature of things mean no more than that an industry, for adequate reason, is subject to control for the public good . . . ." *Id.* In short, that an industry ought to be regulated for the public good is sufficient reason for government to invoke such oversight.

128. This is not to suggest that all monopolies are presumptively public utilities, or that all public utilities are monopolies. As regards the latter point, many states are moving aggressively toward promoting competition in heretofore protected areas of utility operations, including basic exchange telephony (*see, e.g.,* In the Matter of the Application of MFS and Telenet of Maryland, Inc. for Authority to Provide and Resell Local Exchange and Interexchange Telephone Service, Maryland Public Service Commission, Case No. 8584, Order No. 71155 (Apr. 25, 1994) and retail electric service (*Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring of California's Electric Service Industry and Reforming Regulation*, California Public Utilities Commission, Docket No. R.94-04/I94-04 (Apr. 20, 1994)). Rather, the point is that until federal policymakers move to eliminate baseball's antitrust differential, it will resemble that core of industries American society decides to subject to greater oversight than general industry. But as one commentator noted:

> [T]here remains a core of industries, privately owned and operated in this country, in which, at least in principle, the primary guarantor of acceptable performance is CONCEIVED to be (whatever is in truth) not competition or self-restraint but direct government controls - over entry (and in many instances exit), AND price, AND conditions of service - exercised by administrative commissions constituted for this specific purpose.

Id.

129. BONBRIGHT, *supra* note 121, at 8.

130. *Id.* at 14-15.

parable to the Supreme Court-espoused principle from *Munn v. Illinois*[131] that certain private property is "affected with a public interest"[132] and thus "ceases to be *juris privati* only . . . and must submit to [control] by the public for the common good.[133] Baseball qualifies first for utility-like status as a direct result of the Supreme Court's unwitting companions to *Nebbia* and *Munn* — *Federal Baseball* and *Toolson* — which afforded the game extraordinary freedom from antitrust constraints. There can be no greater endorsement of baseball's special public importance or that the game is affected with the public interest than the enduring anomaly that permits the business to operate outside the sphere of federal antitrust laws which govern virtually all other interstate industries (and all other professional sports).[134]

Arising from *Federal Baseball* and *Toolson*, perhaps not surprisingly, are court decisions which have resulted in both horizontal[135] and vertical[136] control over the territories, facilities mer-

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131. 94 U.S. 113 (1877).

132. *Id.* at 126.

133. *Id.* For a more recent confirmation of this principle, *see generally* Delaware River Port Authority v. Tiemann, 403 F. Supp. 1117 (D.N.J. 1975) (holding that when private property is devoted to a public use, it becomes subject to public regulation). This article does not argue for public regulation of baseball, but an argument can credibly be made for that position. *See* note , *supra.*

134. *See* H.R. Rep. No. 604, 68th Cong., 1st Sess. (1924). This Report, entitled "Monument to Symbolize the National Game of Baseball," commended the American League for its offer of $100,000 to erect a monument to baseball in Washington, D.C., in East Potomac Park (where city league softball is now played). The soaring language of the Report matches the noble purpose of a monument never erected:

> In all ages the sculptor has been summoned to embody in stone or bronze the ideals of the people. Conspicuous among these ideals have been manly courage, physical prowess, struggle and victory, the joy and glory of life. Thus, Greece, finest of the ancient civilizations, in order to typify her spirit, turned often to the heroes of her games for enduring figures that while pleasing to the eye and responding to the sense of the beautiful should stir youth to emulation in those activities that bring health and strength. Some of these figures are among the most prized of the world's inheritances from the Greece of old.
>
> To like end we may welcome the impulse that would place in the Nation's Capital a worthy embodiment of our most typical sport, that which we call "the national game." It is the most typical not simply because it is most played and watched, but because it best reflects the American nature. On the one hand, it has no element of brutality; on the other, no element of effeminacy. It calls for quick, sharp action, the keen eye, the strong arm, the fleet foot, the instant response to critical need, the matching of wits, the cool judgment, the team play, and, above all, the friendly democratic rivalry in the open that Americans most admire and enjoy. To symbolize these things in some fitting work of art is worth while.

Id. at 2. Small wonder, then, Congress has yet to recant its endorsement of such a lofty enterprise as our national sports heritage.

135. Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 541 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978) (asseting that exemption covers alleged conspiracy to eliminate Oakland, California franchise); Portland Baseball Club, Inc. v. Kuhn, 368 F. Supp. 1004 (D. Or. 1971), *aff'd*

chandise and personnel that constitutes the broad business of baseball, and as described in Bonbright's second criteria sustain the game's actual business monopoly.[137] In all important respects, with explicit public understanding and endorsement, baseball continues to exist as complete a *de facto* monopoly as any can be made,[138] and thus is highly qualified for utility-like oversight of its operations.

D. The Major League Baseball Commission

> *I have the highest regard for the commissioner of baseball. I think he is a very fine man. However, I feel that the ballplayers themselves should have a say in the selection of a commissioner who is supposedly representing the players and representing the owners, representing all of baseball.*
>
> —*Jackie Robinson*[139]

History shows that professional baseball operated under a three-member commission from 1903 until 1921. However, that

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491 F.2d 1101 (9th Cir. 1974) (*per curiam*) (holding that exemption covers league realignment and territorial rights); State v. Milwaukee Braves, Inc., 31 Wis. 2d 699, 144 N.W.2d 1 (determining that exemption covers relocation of franchise and league membership), *cert. denied* 385 U.S. 990 (1966), *reh'g denied*, 385 U.S. 1044 (1967).

136. Professional Baseball Schools & Clubs, Inc. v. Kuhn, No. 80-1274 Civ-T-H (M.D. Fla. Jan. 29, 1982), *aff'd*, 693 F.2d 1085 (11th Cir. 1982) (*per curiam*) (stating that exemption covers player assignment system and franchise location system); Moore v. National Ass'n of Professional Baseball Clubs, No. C78-351 (N.D. Ohio filed July 7, 1976) (holding that exemption covers relations with umpires; Salerno v. American League of Professional Baseball Clubs, 310 F. Supp. 729 (S.D.N.Y. 1969), *aff'd*, 429 F.2d 1003 (2d Cir. 1970) (*per curiam*) (asserting that exemption covers discharge of umpires); *but see* Postema v. National League of Professional Baseball Clubs, 799 F. Supp. 1475 (1992) (determining that exemption does not extend to labor relations with non-players such as umpires), *rev'd on other grounds*, 998 F.2d 60 (2nd Cir. 1993).

137. *Baseball's Antitrust Exemption Hearing before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. (Mar. 31, 1993) Questions for Gary R. Roberts, Vice Dean, Tulane Law School at 220-21; *Id.*, Testimony of Stephen F. Ross, Professor, University of Illinois, at 163.

138. The American League Baseball Club of Chicago v. Harold H. Chase, [NO NUMBER IN ORIGINAL], Supreme Court of New York, Special Term, Erie County, 86 Misc. 441, 461; 149 N.Y.S. 6, 17, July, 1914. Baseball also likely qualifies as a "pure monopoly," i.e., an industry consisting of one firm (Major League Baseball) protected by high (in this case judicial) barriers to entry. G. OTTOSEN, MONOPOLY POWER 6 (1990).

139. *Organized Professional Team Sports: Hearings on H.R. 10378 and S. 4070 before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess. at 296 (1958) (statement of Jackie Robinson). Robinson continued:

> As it stands now, the owners select the commissioner, and I sometimes feel he is under the owners' thumb. I think if the ballplayers did have an opportunity to express themselves as far as the commissioner is concerned, that it might have a different effect upon the thinking of the ballplayers themselves, even though I don't believe many commissioners have done a finer job than Mr. Frick has done. In this way the commissioner would have more control over the owners.

Id.

National Commission suffered from a lack of independent authority and fell to internecine bickering just when it could have rescued the game from decay. Fortunately, however, the sport can learn from the failings of the National Commission and cull the successes of the Landis era to fashion a new oversight body. Baseball should adopt the 1920 Lasker plan and amend its operating charter to create an independent commission to regulate all facets of the game.

1. Justifying Regulatory Oversight: Due Process and Integrity

Many benefits await Major League Baseball should it reform its charter to create a strong commission to oversee the game. First, owners and players seem doomed to repeat their troubled history regarding a host of conflicts because each seeks to exert total control over the enterprise.[140] There presently exists no forum other than the courts in which these parties can rely upon equal representation and equitably divided decision-making power, thus perpetuating the uneasy symbiosis that breeds hostility, litigation and impasse. A governing authority whose members are drawn from management AND labor offers owners and players equal say (and thus no less vested interest) in the decisions which affect them.

Similarly, an independent tribunal returns to baseball's governance the autonomy upon which Judge Landis so strongly insisted in 1921, but which the owners eliminated in January 1994. No matter what prose the owners use to cloak their actions or motives, it is undeniable that the commissioner's powers and integrity have suffered since the ouster of Fay Vincent, so much so that the position appears largely irrelevant to substantial portions of the baseball business. The commissioner is now the mouthpiece for the owners and concepts such as independence and due process[141] have been sacrificed upon the altar of financial expedience. A new

140. The national press has been replete with references to the most recent strike, and the basic issues involved mirror work stoppages past. In general, the owners sought to tie a salary cap for players to revenue sharing amongst themselves, under the principle that baseball needs competitive balance and to reform its financial picture in its entirety. *See generally* Bryan Burwell, *Owners Are Fighting Socialism, Not Players*, USA TODAY, August 12, 1994, C1-3. ("This strike is a result of a catfight between the haves and have-nots . . . between those baseball businessmen who run a successful business and many of those who don't have a clue.") Players responded by denouncing the salary cap, and requesting that the minimum salary rise from $109,000 to $175,000. *Id.*

141. For an argument in favor of an independent tribunal overseeing sports leagues to assure due process rights of affected stakeholders and resolve the growing tendency toward judicial intervention in sports league conflicts *see* Conway, *Sports Commissioners or Judges: Who Should Make the Call When the Game is Over?*, 24 SUFFOLK U. L. REV. 1042, 1070-71 (1990).

body, constituted from those most vested in the game, will return integrity so sorely missing from the oversight position.

2. Public Participation: Tax Subsidies and Social Responsibility

Next, a tripartite commission, with an at-large member, assures the public that it has a say in the decisions which shape the game. This is no idle point. The public directly supports the game of baseball not just through the nearly $2 billion[142] they contribute in gate receipts, peanuts and Crackerjack, but through tax subsidies in two ways. First, municipalities often issue bonds and offer tax breaks to attract or maintain professional sports teams. From 1988 through 1992 alone municipal bond issues for stadiums totalled $2.746 billion.[143] Assuming baseball was "responsible" for just one-quarter of this amount (as one of the four major sports that would create the need for a new or improved stadium) means a local tax subsidy for the game of $685 million for 1988-1992.

Second, federal taxpayers subsidize baseball operations through player contract amortization and associated tax write offs. Economist Andrew Zimbalist explains that owners routinely assign 50% of a franchise's value (or purchase price) to player contracts, which are then amortized over five years.[144] By charging players' salaries off as expense, and given the corporate tax rate of 34%, the federal government essentially pays ⅓ of 50% of the purchase price of a franchise.[145] In dollar terms, the federal taxpayers' subsidy has been at least $314 million since 1970.[146] Having paid at least a billion dollars in tax subsidies ($685 million for stadium bonds and $314 million on federal tax breaks) on the owners' behalf should buy the public a seat at the conference table where baseball

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142. TIME, Aug. 22, 1994, at 71.

143. BOND BUYER 1993 YEARBOOK at 159.

144. ZIMBALIST, *supra* note 12, at 34-35. A player contract is treated as an intangible asset, and therefore the annual deduction by which its cost is recovered is labelled amortization. *Id.*

145. *Id.* Zimbalist identifies the phenomenon which exploited the 50% corporate tax rate, but the formula and results are sound (and conservative) when plugging in the present 34% corporate tax rate. *Id.*

146. This figure was derived by applying the 34% tax rate against 50% of the sum of franchise sales data contained at *Baseball's Antitrust Exemption Hearing before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. (Mar. 31, 1993), Documents Relating to Baseball's Responses to Questions for the Record, at 269-71. The $314 million figure is extremely conservative given that a majority of the sales occurred when the federal corporate tax rate was substantially higher than 34%, and the figure further does not account for inflation. Thus, the actual federal tax break accorded to owners since 1971 is more likely to be in the few to several BILLIONS of dollars range.

decisions are made.

There survives, too, in public utility regulation the concept of "rights and duties" for the monopoly franchisee that bears application to baseball. Once a public utility receives its sanction for operation (typically known as a "certificate for public convenience and necessity),[147] that enabling authority "normally sets forth a number of obligations or duties expected from that utility as well as certain rights accorded to it."[148] The "special public importance" and horizontal and vertical integration accorded to baseball by *Federal Baseball*, *Toolson*, other federal decisions and Congress' inaction approximate a national certificate of public convenience and necessity for the game (what with the sport's territorial exclusivity, tax advantages and national stature), and arguably society would be within its expectations to exact certain responsibilities — and participation — in exchange.

Finally, allowing the public through its at-large member to govern baseball would quell current unrest that evinces itself in opinion polls and lawsuits. The national press confirms that the public blames both the owners and players for the current state of the game,[149] which may also reflect public frustration at their lack of input toward solutions. Further, fans have attempted to mobilize against players and owners, but without apparent success.[150] Nonetheless, owners and players would do well to consider public sentiment rather than risk further alienation of their customer base.[151]

3. Addressing Specific Problems

Finally there are the practical benefits which accompany regulatory oversight of baseball. The public utility commission model has evolved to meet very complex issues in the utility industry, and

147. *See, e.g.*, VA. CODE § 56-49.

148. J. SUELFLOW, THE ECONOMICS OF PUBLIC UTILITIES 11 (1973).

149. Walter Shapiro, *Bummer of '94*, TIME, Aug. 22, 1994, at 71. According to the magazine's poll "Who is more to blame for the strike?" 29% of respondents believed players were more at fault, 34% believed owners were more to blame, and 15% believed players and owners were equally at fault. *Id.*

150. *See The Fans Go to Bat Vs. Strike, Aim Petition Drive at Legal Exemption*, THE WASHINGTON POST, August 18, 1994, at B4, col. 1. In a related case, a Florida sports pub unsuccessfully sued the owners, players and the local cable system to enjoin the 1994 strike; *see* Glory Days Sports, Inc. v. Major League Baseball, Major League Baseball Players Ass'n and Continental Cablevision, 94-767-CIV-J-16 (M.D. Fla. 1994).

151. It was not all that long ago (1992), reminds John Helyar, that "eighteen of twenty-six teams were beginning to see declines in their attendance figures." HELYAR, *supra* note 58 at 495. The most recent work stoppage can only jeopardize attendance gains.

seems well prepared to face the challenges baseball offers. For example, discussions of revenue sharing among ownership's large (profitable) and small (unprofitable) teams[152] remind the utility analyst of rate design, whereby a static amount of revenues is spread across classes of customers who have varying costs of service.[153] To the extent, therefore, that owners desire to share equitably at least some portion of their revenues, the utility commission model stands ready to assist them. Labor relations in baseball tend toward financial analyses rather than working conditions, and are reminiscent of negotiated settlements between utility management and labor that are scrutinized (for rate purposes[154]) for public interest ramifications by utility commissions. The labor contracts are also analogous to contracts between the utility and outside suppliers (say, independent power producers) that are sometimes certified for resolution to a public utilities commission.[155] It is not difficult to imagine, therefore, the Major League Baseball Commission reviewing (as would a binding arbitrator) by a constant public interest standard the terms and conditions of competing contract proposals. Franchising issues — expansion and relocation — are very

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152. Financial World magazine disputes owners' claims that 10-14 clubs are (or need to be) in financial crisis. Financial World "believes that there are only five teams — Selig's Milwaukee Brewers, the Seattle Mariners, the San Diego Padres, the Pittsburgh Pirates and the Kansas City Royals — that would have difficulty competing in a free market. These teams should be allowed to move to cities that are swelling with support, such as St. Petersburg, Fla., where they could thrive." Financial World, Sep. 1, 1994, at 20. The article continues that "[s]tadium revenues have replaced media revenues as the single most important determinant of profitability." *Id.* Thus, the five teams that are truly at risk must convince local taxpayers to fund new stadiums which can be exploited for the growing revenue stream, or move to a locale which will accommodate them. *Id.*

153. *See, e.g.*, In the Matter of the Application of the Chesapeake and Potomac Telephone Company for Authority to Establish a Revenue Requirement and to Increase and Restructure Its Schedule of Rates and Charges, District of Columbia Public Service Commission, Formal Case No. 926, Order No. 10353 at 141-169 (Dec. 21, 1993) (stating that regulatory authority decision describing collection of $15.8 million in new revenues from limited rate classes which do not include residential customers, a traditional, inelastic, and residual source of utility revenues).

154. Wages and salaries are analyzed as operating expenses for rate-making purposes in virtually all rate proceedings. *Id.* If found acceptable for ratemaking, labor costs "may be classified as legitimate above-the-line expenses [included in rates]; however if the expenditure is found to be exorbitant or for some other reason unnecessary, the item is a below-the-line [kept out of rates] income deduction." *Id.* This is not to suggest that the proposed Major League Baseball Commission should decide which or how much of players' salaries are recovered through revenues derived from baseball operations. Rather, the point is that the utility commission structure is familiar with assessing issues related to labor costs. Of course, given this expertise, owners and players could certify salary disputes — presently settled through binding arbitration — to the new regulatory body as well.

155. *See, e.g.*, Investigation of Standard Long-term Rates for Cogeneration and Small Power Production, Maine Public Utilities Commission, Docket No. 81-276 (Feb. 10, 1984) (order directing the electric utility to enter a purchase power agreement pursuant to Commission-determined terms and conditions).

familiar to utility regulators who have for decades examined the concepts of existing franchise rights, financial ability, natural monopoly, cost of service, and quality of service when deciding on territorial issues.[156]

Certainly there are many models for organized baseball to choose from when it creates the enabling legislation for the Major League Baseball Commission. All 50 states and the District of Columbia (and several federal agencies) have statutes which empower utility commissions and broadly define the public interest and utility obligations. Rules to govern due process and Commission activities are easily drawn from existing examples.[157] And there are some 80 years of case law in the public utility arena to complement baseball's history in formulating decisions which accommodate the game's needs and a larger public interest.

III. CONCLUSION

The game now finds itself in a posture similar to nearly three-quarters of a century ago: the owners are fighting, work stoppages threaten the game, taxpayers suffer, fans are disgusted and public opinion shapers are calling for reform of the institution.[158] Federal officials, however, seem unable to craft responsive policies to ensure reforms in the public interest. If baseball's stakeholders — owners, players and fans — truly want to reform the game, they should consider a regulatory mechanism that accommodates the

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156. In Archibald v. Public Utilities Commission, 65 PUR NS 366, 369 it was noted that
> [t]he theory of regulated monopoly is based upon the fact that, except as shown, it is better to have fewer utilities who can make a reasonable return upon their investments and thus give the public better and more expeditious service, than to throw the doors open so that, although the number of operators may be increased, service to the public may become disorganized.

Id.

This sentiment is repeated often in early regulatory history, which should give comfort to the owners that their preexisting interests will weigh primarily in any Major League Baseball League Commission decision-making. *See also* Eagle Bus Lines v. I.C.C., 5 PUR 3d 475, 477 (1954) (where one carrier is operating in the field, the commission can grant a certificate of convenience and necessity to another only where the first carrier is not rendering adequate service and the commission determines the first carrier is unable to provide service); Dover v. Delaware Power & Light Co., 3 PUR 3d 181, 190 (1953) The court asserted that "[t]he petition . . . is that this commission exercise its power to permit the company to operate as a regulated monopoly in an area not heretofore served by it . . . The primary consideration is the public convenience and need, and this a fact question to be determined after an analysis of the benefits to accrue from granting the certificate in relation to any possible harm which might result from granting the certificate."

157. *See, e.g.*, 15 D.C.M.R. § 100 *et seq.* (1991).

158. Frank Sullivan, *Gray '90s*, WASHINGTON CITY PAPER, May 13-19, 1994, at 10.

sport's unique antitrust status, natural monopoly and public utility tendencies, and stature as our national pastime. Baseball should adopt a trilateral governing body modelled after the public utility commission. This board, with diverse membership, offers owners, players, fans and the larger public unprecedented and dynamic participation in assessing the game's status and directing its future. Moreover, the Major League Baseball Commission might well act to assuage Congressional and other critics who despair at the sport's anticompetitive and antisocial proclivities. The Major League Baseball Commission — an idea born in the early part of this century out of similar circumstances facing the game today — merits serious consideration as a principled alternative to abandoning Organized Baseball's antitrust immunity and continuing the unacceptable behaviors owners and players currently display.