The Origin of the Baseball Antitrust Exemption: *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*

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It is a pleasure to have the chance to speak to you this afternoon. It was back in December, if I recall correctly, when I finally decided on the topic of the talk that I am going to give this afternoon. It was a dark, cold day. I knew that the date of the speech was June 2[, 2008]. That brought to mind thoughts of spring. Thoughts of spring brought to mind thoughts of baseball. And thoughts of baseball brought to mind the case that I am going to talk about: *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,[1] a unanimous decision handed down by the Court on May 29, 1922—86 years ago last Thursday.

Of all the Court's antitrust cases, the *Federal Baseball* case may well be the most widely known, but what most people know about the case is not quite accurate. The case is generally known as having held that baseball has an "antitrust exemption." And critics of the decision—and they are legion—sometimes suggest that the decision was attributable to either (1) the Justices' affection for baseball and a desire to bend the rules to promote its well-being[2] or (2) the Justices' woeful ignorance about what professional baseball had become by 1922.[3] In truth, as we shall see, Justice Holmes' unanimous opinion for the Court represented a fairly orthodox application of then-prevalent constitutional doctrine.

I

To understand the *Federal Baseball* case, one must understand both the game and the relevant law as they were in 1922.

Antitrust

The law at issue in the *Federal Baseball* case was the Sherman Antitrust Act,[4] which Congress enacted pursuant to its authority under Article I, Section 8 of the Constitution to regulate commerce among the several states. President William Henry Harrison signed the Sherman Act into law on July 2, 1890. The bill had passed the House unanimously and passed the Senate with only one nay—and that from a Senator who "had taken no part in the debates on the bill."[5]

Despite its virtually unanimous congressional support, the Act's legislative history reveals competing strains of thought on the purpose of the legislation.[6] Some thought the Act should strike a blow at the cartelization of essential industries. Others wanted the Act to ensure a place in the national economy for smaller, higher-cost producers struggling to compete with more efficient, national concerns. The industrialization of the nineteenth century had unsettled the lives of different Americans in different ways, and the affected parties did not share the same vision for reform.

In order to accommodate these competing interests, the legislation was deliberately short on detail. Section 1 of the Act outlawed "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."[7] Section 2 made it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."[8] As others have observed, this language is too broad to be taken at face value.[9] After all, every contract restrains trade insofar as it imposes obligations on the parties to deal with each other on certain terms rather than with other parties on other terms. Yet it could not be the case that Congress intended to outlaw every contract and every business. The Clayton Act,[10] enacted in 1914, clarified the law somewhat by declaring certain arrangements *per se* unlawful, but the scope of federal antitrust in most contexts remained murky. Congress had left it to the Third Branch to develop workable, rational principles for identifying conduct within and without the scope of the Act.

That process played out slowly, in part because the Court in the early period shared some of the ideological differences of the Act's framers. The Court's leading antitrust hawk was Justice John Marshall Harlan. An old-fashioned moralist, Harlan has been aptly described as "a southern gentleman"[11] and "the last of the tobacco-spitting judges."[12] His colleague David Brewer joked that Harlan retired each evening at eight "with one hand on the Constitution and the other on the Bible, and so [slept] the sweet sleep of justice and righteousness."[13]

Although Harlan came from a slave-owning family, he became the Court's leading defender of the rights of African Americans and is perhaps best known today for his impassioned dissents in such cases as *Plessy v. Ferguson* and the *Civil Rights Cases*. Harlan saw enforcement of the antitrust laws as having a moral dimension. It is noteworthy that in the great *Standard Oil* case of 1911,[14] Harlan compared the Gilded Age trusts to antebellum slavemasters. He claimed that turn-of-the-century America risked being subjected to "another kind of slavery[:] . . . the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life."[15]

Justice Peckham largely shared that view. In the *Trans-Missouri Freight* case of 1897, he lamented that colossal business combinations were "driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings."[16] In Peckham's view, "[m]ere reduction in the price of the commodity dealt in might be dearly

paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital."[17]

Justice Holmes' worldview could not have been more different. Holmes, of course, is almost a mythic figure, remembered as "all things to all commentators."[18] On the one hand, there is the Holmes of the play and movie, *The Magnificent Yankee*. On the other, there is the revisionist picture of Holmes painted by, among others, one of my old professors, Grant Gilmore, who wrote that "[t]he real Holmes was savage, harsh, and cruel, a bitter and lifelong pessimist who saw in the course of human life nothing but a continuing struggle in which the rich and powerful impose their will on the poor and weak."[19] According to Professor Albert Alschuler of the University of Chicago Law School, Holmes' wartime experiences and the Social Darwinism of the time made him a moral skeptic and convinced him that life was a struggle in which might made right.[20] Consistent with this view, Holmes disdained the federal antitrust laws. In private correspondence, he referred to the Sherman Act as "a humbug based on economic ignorance and incompetence."[21]

Holmes was appointed to the Court in 1902 by President Theodore Roosevelt, and the first major antitrust case in which he participated was the famous *Northern Securities* case of 1904.[22] Two railroad barons, J. P. Morgan and James J. Hill, had created a new enterprise, the Northern Securities Company, to hold the stock of railroads that owned the track needed to provide service through Chicago to the West Coast. Critics saw this as a transparent attempt to monopolize the nation's transcontinental railroad system, and shortly after taking office, President Theodore Roosevelt ordered his Attorney General to bring suit to break up the company. The government was successful in the lower court, and when the case reached this Court it was said to be the most closely watched case since *Dred Scott*.[23] Justice Harlan, writing for a 5–4 Court, held that the Sherman Act reached the merger because the merger had a direct effect on interstate commerce.

Holmes dissented. He found the case indistinguishable from one of the Court's earlier antitrust cases, *United States v. E. C. Knight Co*, which repelled a Sherman Act attack against the merger of companies that together refined approximately ninety-eight percent of the nation's sugar.[24] According to Holmes, "[t]he point decided in [*E. C. Knight*] was that 'the fact . . . that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree.'"[25] Holmes also hinted at his feelings about antitrust, predicting that the Court's interpretation of the Sherman Act "would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms."[26] President Roosevelt, who, as noted, had appointed Holmes to the Court, was not pleased by Holmes' position. He later famously claimed that Holmes had displayed "all the backbone of a banana."[27]

Baseball

With this brief discussion of early twentieth-century antitrust jurisprudence, let me shift to baseball. According to legend, the first baseball game was played at Cooperstown, New York, in 1839,[28] two years before Justice Holmes was born. In fact, versions of the game date back much farther, but organized baseball did not emerge until the middle of the nineteenth century.[29] The first organized game is said to have been played in 1845 in Hoboken, New Jersey, at a place called the Elysian Fields.[30] The first game between college teams took place in 1859.[31] The first professional team, the Cincinnati Red Stockings, made its debut in 1869.[32] And in 1876, the National League of Professional Baseball Clubs, the ancestor of today's National League, was formed.

Thereafter, rival leagues periodically sprouted up. In the late nineteenth century, one of the great players of the day, Monte

Ward, a law school graduate, started the Players' League, but aggressive tactics by the National League drove the Players' League out of business.[33] A more formidable rival, the American League, was established in 1901. For a time, the two leagues competed for players, but in 1903, they signed a truce known as the National Agreement. Pursuant to the National Agreement, the two leagues agreed to recognize each other as equals and to honor each other's contracts and observe the reserve clause, which tied a player to his team. The agreement put in place the essential structure of professional baseball that lasted for decades, and it was followed by the emergence of the game as the true national pastime.

Baseball soon became big business. In 1910, President Taft threw out the first pitch at National Park, the home of the Washington Senators. In the early 1920s, Babe Ruth came on the scene, shattered home-run records, made fans forget the Black Sox scandal of 1919, and became a larger-than-life celebrity. In England, George Bernard Shaw asked, "Who is this Babe Ruth, and what does she do?"[34] In 1921, the Yankees drew 1.2 million fans, and their cross-town rivals, the Giants, drew nearly a million.[35] More than a quarter million fans bought tickets to watch the two teams face off in the 1921 World Series.

II

Like the American League before it, the Federal League got its start as an independent confederation of teams with no pretense of competing with major league baseball. It was founded in 1913 with six teams representing the cities of Chicago, Cleveland, Indianapolis, Pittsburgh, St. Louis, and Covington, Kentucky (which served the Cincinnati market). The league's schedule was drawn up to avoid competition with major league games, and the league's clubs took care not to recruit players under contract with the major leagues.[36] This business model proved modestly successful. Although we do not have attendance figures for the 1913 season, we know that they were strong enough to keep the league afloat despite a lackluster pennant race.[37]

The league soon abandoned its humble designs with the election of a new league president, James Gilmore, following the 1913 season. Gilmore, one of the financial backers of the Chicago club, had made his fortune in the coal and heating business,[38] and he lent the league his vigorous executive leadership. Under Gilmore, the league expanded from six to eight teams, adding franchises in Baltimore and Buffalo. The league also replaced the Cleveland club with a team in Brooklyn, slowly shifting its center of gravity eastward. The league was now home to the Baltimore Terrapins (or "Baltfeds"), the Brooklyn Tip-Tops (or "Brookfeds"), the Buffalo Blues (or "Buffeds"), the Chicago Wales (or "Chifeds"), the Kansas City Packers (or "Kanfeds"), the Pittsburgh Rebels (or "Pittfeds"), the St. Louis Terriers, and the Indianapolis Hoosiers (who were moved to Newark, New Jersey, and renamed the Peppers in 1915).

Like Gilmore, many of the league's backers came to baseball from the business world. The Brookfeds, for example, were controlled by baked-goods baron Robert B. Ward, while oil tycoon Harry Sinclair owned the Peppers. Other financial heavyweights backing the league included hotel magnate Edward Krause, brewer Otto Stiffel, and of course Gilmore himself. Their wherewithal gave the Federal League a sound financial footing.

Although captains of industry dominated the Federal League, it is important to note that two of the league's teams, the Baltfeds and the Buffeds, were publicly owned. Both signed up when the league expanded to eight teams before the 1914 season. The Baltfeds were formed to bring major league baseball back to Baltimore after the Orioles left the city in 1903 to become the New York Yankees. Some 600 Baltimore citizens claimed ownership in the club, most with just a handful of shares.[39]

In 1910, President Taft threw out the first pitch at National Park (pictured), the home of the Washington Senators. This was yet another sign that baseball had become the national pastime.

The Buffeds likewise raised capital by running ads in local newspapers. One ad promised that the Buffed organization would be "one of the greatest financial successes in the history of baseball."[40] The ad went on:

> If you want to be identified with this new project—and it seems to us that every live, red-blooded man, woman, and child should have such an ambition—you must obey that impulse NOW. Visit or telephone our temporary office . . . and make your application.
>
> DO IT NOW! TODAY IS THE LAST DAY![41]

The local public's stake in the Baltimore and Buffalo franchises shaped the vision that those two clubs had for the Federal League—a vision that their sister clubs may not have shared. Notably, the antitrust suit that came before this Court in the *Federal Baseball* case was originally filed by the Baltimore franchise.

Armed with fresh capital and a full complement of eight teams, in 1914 Gilmore's Federal League declared itself a major league and went into open competition with the National and American Leagues for fans and talent. On the surface, the gambit seemed successful. The league's attendance in the 1914 and 1915 seasons rivaled attendance in the big leagues.[42] Beneath the surface, however, the league's business model was cracking. League management had sought to win over big league fans by poaching talent from big league teams, but that talent did not come cheap—and often it would not come at all. Major league player salaries, long depressed by the anticompetitive effects of the reserve clause and the ineligible lists, ballooned in the face of competition from the Federal League. But most of the big league

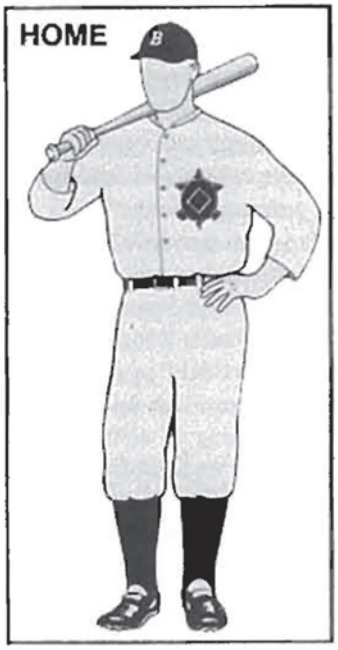
FEDERALS TO GIVE MAJORS A SURPRISE

President Gilmore's Baseball Announcement Is Awaited with Keen Interest.

On December 23, 1913, *The New York Times* noted that Federal League President James A. Gilmore was about to make a decision that would threaten major league baseball. Gilmore later announced he would turn his baseball teams into a major league and go into competition with the American and National Leagues by poaching players and fans.

players had no intention of defecting. They just used the threat of defection as leverage to renegotiate their contracts with the major league clubs. Players who did defect risked blacklisting; those willing to take that risk were generally in the twilights of their careers, with little to lose. As a result, the Federal League was forced to pay steep salaries to secure mostly aging talent. Coupled with the league's heavy capital expenditures (in only a couple of years, it erected eight new stadiums),[43] the salary wars put the Federal League in the hole. By the end of the 1915 season, the Baltimore Terrapins had lost $65,000, while the Brooklyn Tip-Tops had accumulated losses of $800,000, and the Buffalo and Kansas City franchises were insolvent.[44]

The Federal League's end came swiftly. Its final days are vividly captured in the record and briefs filed with this Court in the *Federal Baseball* case. As late as November 1915, Gilmore, the president of the Federal League and a defendant in the suit, was writing member clubs about preparations for the 1916 season. In a letter dated November 21, 1915, Gilmore wrote Harry Goldman, the Baltimore club's secretary, asking him to prepare a rough budget for the Baltfeds' 1916 season.[45] Even as late as November 30, 1915, Gilmore was writing the club president, Carroll Rasin, to recommend a promising player for the club's 1916 roster.[46] Less than three weeks after that, on December 16, 1915, Gilmore sent another, more cryptic correspondence: an urgent telegram addressed to Rasin and Baltfed director (and future Hall of Famer) Ned Hanlon. It read simply: "'You and Hanlon be at Biltmore in morning. Important.'"[47]



The Baltimore Terrapins (or Baltfeds) were formed as a public company in 1913 to bring major league baseball back to Baltimore after the Orioles left the city in 1903 to become the New York Yankees. Members of the Federal League, the Terrapins were the original franchise to file the antitrust suit against major league baseball in the Supreme Court. Above is a Terrapins uniform; at left is the logo the players wore on their pockets.

Rasin, Hanlon, and the club's general counsel, Stuart Janney, took the midnight train to New York and, upon arrival the following morning, went straight to the Biltmore Hotel on Madison Avenue. Gilmore greeted them with the devastating news: The Federal League's 1916 season was "'all off.'"[48] The league had sued for peace with organized baseball. As a result of the truce, several Federal League owners accepted buyouts, a couple more were permitted to buy franchises in the major leagues, and three franchises—including the two that were publicly owned, Baltimore and Buffalo—were left to twist in the wind.

The details of the transaction were ironed out at meetings at the Biltmore and, later that evening, at the Waldorf-Astoria. The participants did posterity the good service of stenographically recording the Waldorf meeting, so we have a transcript of what transpired. Although the secondary literature has not reached consensus on why Baltimore opted out of the settlement, the Waldorf transcript implies that the club did not even have a seat at the table. That would make sense. The major leagues did not need to eliminate every franchise in order to hobble their competitor. Moreover, the Baltimore market did not appeal to organized baseball, which had already left the market once in 1903. Charles Comiskey, owner of the White Sox, expressed the view that Baltimore was "a minor league city, and not a hell of a good one at that."[49]

To settle the Baltfeds' claims against the rest of the league, its sister clubs offered the franchise $50,000 as its "equitable distribution" of the league's value, but that sum was a pittance compared to what other members of the league were getting. Robert Ward, owner of the Brooklyn Tip-Tops, received $400,000 for giving up his team. The Baltfeds said no thanks. Following the holidays, they convened an emergency meeting of their shareholders in Baltimore, at which management received authority to take the organization's grievances to court. The Baltfeds sold their remaining assets to raise money for legal fees and then filed suit in federal court.

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III

It should be noted that the *Federal Baseball* case was not the first antitrust action to arise out of the Federal League imbroglio. Well before the Federal League was disbanded, it brought its own suit against organized baseball in the Northern District of Illinois. The complaint, filed after the league's 1914 season, named as defendants the National League, the American League, all sixteen club presidents, and the National Commission. The plaintiffs alleged that the defendants had monopolized and conspired to monopolize the business of giving baseball exhibitions, in violation of Section 2 of the Sherman Act. They also alleged that the National Agreement amounted to a contract in restraint of trade, in violation of Section 1 of the Act.

A number of commentators have speculated that the Federal League filed suit in the Northern District of Illinois because that was where District Judge (and future baseball commissioner) Kenesaw Mountain Landis held sway.[50] Judge Landis, a Roosevelt appointee, had already burnished his reputation as a trust-buster. In 1907, he had ordered the Standard Oil Company to pay a fine of $29,240,000 for violations of the Elkins Act.[51] At the time, this was the largest fine ever levied in American history.[52]

Judge Landis was also a keen baseball fan, and he was apparently concerned that a decision adverse to the major leagues would undermine the game. During trial, he declared from the bench that "'any blows at . . . baseball would be regarded by this court as a blow to a national institution.'"[53] Judge Landis never ruled on the case before him. It languished on his docket until the end of 1915, when it was mooted by the peace agreement described above.

And that brings us to the *Federal Baseball* case. In September 1917, the Federal Baseball Club of Baltimore filed suit in the Supreme Court of the District of Columbia pursuant to Section 4 of the Clayton Act. The complaint named everyone in sight as a defendant: the National League of Professional Baseball Clubs and each of its eight member teams; the American League of Professional Baseball Clubs and each of its eight member teams; National League president (and former Pennsylvania governor) John K. Tener; American League President Bancroft Johnson; National Commission president August Herrmann; former league president James Gilmore; former Chifeds chief Charles Weeghman; and former Newark Peppers chief Harry Sinclair.

The Baltimore club accused the defendants of conspiring to destroy its franchise by monopolizing the baseball business and restraining trade therein. The case was tried to a jury before the Honorable Wendell P. Stafford. Judge Stafford instructed the jury that organized baseball was engaged in interstate trade and commerce and that, by means of the National Agreement and the reserve system, it had created a monopoly in that business.[54] He left it to the jury to determine whether the Baltimore club had suffered damages as a result of that monopoly. The jury found that it had and returned a verdict in the plaintiff's favor. It fixed the club's damages at $80,000. Pursuant to Section 4(a) of the Clayton Act, that amount was trebled, and the club received a judgment of $240,000 plus its counsel fees.

Organized baseball appealed to the United States Court of Appeals for the District of Columbia Circuit, and the D.C. Circuit reversed. The court accepted that Sections 1 and 2 of the Sherman Act outlawed the monopoly or restraint of trade or commerce among the States.[55] It framed the issue on appeal as follows: "Did the giving of exhibitions of baseball, under the circumstances disclosed in the record, constitute trade or commerce within the meaning of the Sherman Act? If it did not, then the act does not apply, and the appellee has no right to invoke its provisions."[56]

To answer that question, the court looked to the definitions of the terms "trade" or "commerce" in *Webster's Dictionary*. It also

considered how those terms had been defined in this Court's precedent, including Chief Justice Marshall's famous opinion in *Gibbons v. Ogden*[57] and Chief Justice Fuller's opinion in the *E.C. Knight* case mentioned earlier.[58] "Through these definitions," the D.C. Circuit reasoned, "runs the idea that trade and commerce require the transfer of something, whether it be persons, commodities, or intelligence, from one place or person to another."[59] Applying that standard, the court concluded that the Baltimore club was engaged in the purely intrastate business of baseball exhibitions:

> 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.[60]

The court thus distinguished between the baseball exhibitions and the interstate movement of players and equipment, which was merely incidental to the games themselves. Since the reserve system and ineligibility lists had at most an indirect effect on the movement of the players and their equipment across state lines, they did not offend the Sherman Act.[61]

Although the D.C. Circuit's analysis may seem pat and formalistic in light of modern doctrine, it was in line with this Court's analysis in the *E.C. Knight* case. It focused not on whether the defendant's conduct violated the substantive prohibition of the antitrust laws, but on whether the conduct sufficiently partook of interstate commerce to be prohibited by Congress at all. The parties focused on the latter issue when the case came before this Court on writ of error. The Court having not yet imposed page limits, the plaintiffs in error filed a 200-page brief, 40 pages of which were devoted to addressing the scope of the "trade or commerce" reached by the Sherman Act. Fewer than twenty pages addressed the substantive antitrust question.

Moreover, the author of the D.C. Circuit's opinion was no antitrust slouch. The opinion was written by Chief Justice Constantine J. Smyth. Prior to joining the Court, Smyth had spent four years as Special Assistant to the Attorney General, overseeing the government's prosecution of antitrust cases.[62]

Justice Holmes' unanimous opinion for the Court found Smyth's analysis persuasive. Like Smyth, Holmes focused his inquiry on whether the business of baseball was interstate "trade or commerce" within the meaning of the Sherman Act. He took the D.C. Circuit's starting point as his own because, in his words, "[t]he decision of the Court of Appeals went to the root of the case and if correct makes it unnecessary to consider other serious difficulties in the way of the plaintiff's recovery."[63] After briefly reviewing the facts, he declared that "the Court of Appeals was right."[64]

Holmes' opinion in the *Federal Baseball* case was tightly written. His analysis of the question presented—a question to which the parties had devoted about 400 pages of briefing—consumed all of two paragraphs. He agreed with the D.C. Circuit's characterization of the business in question as "giving exhibitions of base ball," a business that to his eye was a "purely state affair[]."[65] The fact that players and their accoutrements had to cross state lines to play did not transform the essential intrastate nature of the games themselves. "It is true," Holmes wrote, "that in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business."[66]

In support of this reasoning, Justice Holmes relied on the Court's analysis in *Hooper v. California*,[67] an 1895 decision in

which the Court had held, over Justice Harlan's dissent, that the sale of maritime insurance in California on behalf of an out-of-state carrier was not interstate commerce. "The business of insurance," the Court had written in *Hooper*, "is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse."[68] The *Hooper* case was the same precedent on which the D.C. Circuit had chiefly relied, and it was the only precedent that Holmes cited.

Justice Oliver Wendell Holmes, Jr.'s unanimous opinion giving major league baseball a monopoly in 1922 was tightly written but is not considered his finest effort.

IV

So what should we think about Holmes' opinion in the *Federal Baseball* case? To many, the answer is "not much." It has been pilloried pretty consistently in the legal literature since at least the 1940s. Commentators have called it: "[b]aseball's most infamous opinion";[69] a "clearly wrong" decision based on a "curious and narrow misreading of the antitrust laws and/or [an] utter misunderstanding of the nature of the business of baseball";[70] a "remarkably myopic" decision, "almost willfully ignorant of the nature of [baseball]";[71] and a "simple and simplistic" decision that forms "a source of embarrassment for scholars of Holmes."[72] One commentator speculated that the Court simply "exempted baseball from the antitrust laws because it was the national pastime."[73]

The decision has also been criticized from the bench. Judge Jerome Frank of the Second Circuit derided it as an "impotent zombi [sic]" void of vitality in light of the Court's more recent decisions.[74] Another jurist from that court, Judge Henry Friendly, declared that "*Federal Baseball* was not one of Mr. Justice Holmes' happiest days."[75]

Members of this Court have not been much kinder. The Court has had at least two opportunities to overrule the *Federal Baseball* case, first in the 1953 case of *Toolson v. New York Yankees, Inc.*[76] and then again in the 1972 case of *Flood v. Kuhn*.[77] Both times it let the case stand, both times over withering dissents. Justice Harold Burton, dissenting in *Toolson*, criticized the *Federal Baseball* case's understanding of professional baseball as a "purely state affair[]":

> In the light of organized baseball's well-known and widely distributed capital investments used in conducting competitions between teams constantly traveling between states, its receipts and expenditures of large sums transmitted between states, its numerous purchases of materials in interstate commerce, the attendance at its local exhibitions of large audiences often traveling across state lines, its radio and television activities which expand its audiences beyond state lines, its sponsorship of interstate advertising, and its highly organized "farm system" of minor

> league baseball clubs, coupled with restrictive contracts and understandings between individuals and among clubs or leagues playing for profit throughout the United States, and even in Canada, Mexico and Cuba, it is a contradiction in terms to say that the defendants in the cases before us are not now engaged in interstate trade or commerce as those terms are used in the Constitution of the United States and in the Sherman Act.[78]

Justice William Douglas was even more unsparing with his criticism in *Flood*. He characterized the *Federal Baseball* case as a "derelict in the stream of the law that we, its creator, should remove. Only a romantic view of a rather dismal business account over the last 50 years would keep that derelict in midstream."[79] Justice Douglas added that although he had joined the Court's opinion in *Toolson*, he had "lived to regret it."[80]

Even those who signed onto the Court's opinions in *Toolson* and *Flood* regarded *Federal Baseball* as a relic. Justice Harry Blackmun, the author of the Court's opinion in *Flood*, called the *Federal Baseball* case an "aberration," albeit "an established one."[81] In one of the other sports antitrust cases that came before the Court, Justice Tom Clark dismissed Holmes' decision as "unrealistic, inconsistent, . . . illogical," and "of dubious validity."[82] In short, as one recent historian put it, "[t]he critiques of [the] decision are legion and its fans few."[83]

Only very recently have some scholars given Holmes' opinion less caustic reviews. For example, Jerald Duquette's 1999 work on baseball and antitrust finds Justice Holmes' reasoning "consistent with Progressive Era jurisprudence regarding the treatment of 'incidental' interstate transportation."[84] Perhaps the best defense of Holmes was published by this Society: in "Antitrust and Baseball: Stealing Holmes," Kevin McDonald argued that the *Federal Baseball* case was "scorned principally for things that were not in the opinion, but later added by *Toolson* and *Flood*."[85]

This assessment seems to me to be accurate. In 1922, the Court saw the Commerce Power as a limited power that did not extend to all "economic . . . activities that have a substantial effect on interstate commerce."[86] This approach forced the Court to draw fine—some would say arbitrary—lines. Those who think poorly of this entire enterprise will obviously think poorly of the *Federal Baseball* case as well. But that decision is no less defensible than Holmes' *Northern Securities*[87] dissent or the Court's decisions in cases such as *E.C. Knight* and *Hooper*.

There is some irony in the outcome of the *Federal Baseball* case. In law, the view of baseball as a local affair prevailed. The argument that baseball was a big interstate business lost. But the real losers in the case were local people. The local interests were those connected with the Baltfeds, a ball club owned by some 600 citizens of Baltimore. The city felt slighted when the soon-to-be Yankees left town, and so the local political machinery stepped in and joined a renegade league to bring baseball back. For the people of Baltimore who backed the team, baseball, like politics, was local.

ENDNOTES

*Justice Alito delivered this speech as the Supreme Court Historical Society's 2008 Annual Lecture. The Justice expresses his gratitude to James Hunter, one of his law clerks for the October 2007 Term, and Linda Corbelli, one of the Court's librarians, for their invaluable assistance.

[1] 59 U.S. 200 (1922).

[2] *See infra* note and accompanying text.

[3] *See infra* notes and accompanying text.

[4] An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies, ch. 647, 26 Stat. 209 (1890).

[5] 1 **The Legislative History of the Federal Antitrust Laws and Related Statutes** 25 n. 1.163 (Earl W. Kintner ed., 1978).

[6] *See generally* Thomas D. Morgan, **Cases and Materials on Modern Antitrust Law and Its Origins** 25–29 (2d ed. 2001).

[7] Sherman Act § 1, 26 Stat. at 209.

[8] *Id.* § 2, 26 Stat. at 209.

[9] *See, e.g.*, Alan J. Meese, "Price Theory, Competition, and the Rule of Reason," 2003 *U. Ill. L. Rev.* 77, 83 & n. 28 (2003).

[10] An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies, and for Other Purposes, ch. 323, 38 Stat. 730 (1914).

[11] Jonathan Lurie, "Book review," 38 *Am. J. Legal Hist.* 378, 378 (1994).

[12] Louis R. Cohen, "A Biography of the Second Justice Harlan," 91 *Mich. L. Rev.* 1609, 1610 n. 4 (1993) (quoting Holmes' description of Harlan in Paul E. Freund et al., **Constitutional Law: Cases and Other Problems**, at xxxix–xl (1977)).

[13] *Id.*

[14] 221 U.S. 1 (1911).

[15] *Id.* at 83 (Harlan, J., concurring in part and dissenting in part).

[16] *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323 (1897).

[17] *Id.*

[18] G. Edward White, "Looking at Holmes in the Mirror," 4 *L. & Hist. Rev.* 439, 440 (1986), *cited in* Alfred S. Neely, "A Humbug Based on Economic Ignorance and Incompetence—Antitrust in the Eyes of Justice Holmes," 1993 *Utah L. Rev.* 1, 6 n. 20.

[19] Grant Gilmore, **The Ages of American Law** 48–49 (1977).

[20] Albert W. Alschuler, **Law Without Values: The Life, Work, and Legacy of Justice Holmes** 58–59 (2000).

[21] Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Apr. 30, 1910), *in* 1 **Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock** 1874–1932, at 163, 163 (Mark DeWolfe Howe ed., 1944).

[22] *N. Sec. Co. v. United States*, 193 U.S. 197 (1904).

[23] R. Blake Brown & Bruce A. Kimball, "When Holmes Borrowed from Langdell: The 'Ultra Legal' Formalism and Public Policy of *Northern Securities* (1904)," 45 *Am. J. Legal Hist.* 278, 287–88 (2001) (citing "The Hearing in the Northern Securities Case," 77 *The Nation* 499, 499 (1903)).

[24] 156 U.S. 1, 17–18 (1895).

[25] 193 U.S. at 402 (Holmes, J., dissenting).

[26] *Id.* at 411.

[27] C. D. Bowen, **Yankee from Olympus** 370 (1944), *cited in* Morgan, *supra* note, at 80 & n. 10.

[28] Geoffrey C. Ward & Ken Burns, **Baseball: An Illustrated History** 3 (2007).

[29] *See id.* at 3–4.

[30] *Id.* at 4–5.

[31] *Id.* at 15.

[32] *Id.* at 20.

[33] *See id.* at 39–40.

[34] *Id.* at 153.

[35] Baseball Chronology.com, Major League Baseball Attendance for 1921, http://www.baseballchronology.com/Baseball/Years/1921/Attendance.asp (last visited April 5, 2009).

[36] *See* Marc Okkonen, **The Federal League of 1914–1915: Baseball's Third Major League** 3 (1989).

[37] *See id.* at 5.

[38] *Id.*

[39] *See* Br. for the Appellee at 3, 5, *Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Balt., Inc.*, 269 F. 681 (D.C. Cir. 1921) (No. 3368); Br. on Behalf of Defendants in Error at 42, *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922) (No. 204).

[40] Buffalo Federal League Baseball Company, Inc., "Share in the Profits of the Game You Patronize" (undated 1914 newspaper advertisement), *reprinted in* Okkonen, *supra* note, at 11.

[41] *Id.*

[42] David S. Neft et al., **The Sports Encyclopedia: Baseball** 68 (5th ed. 1982).

[43] Gary Hailey, "Anatomy of a Murder: The Federal League and the Courts," *in* **The National Pastime: A Review of Baseball History** 62, 63 (Merritt Clifton ed., 1985).

[44] *See id.* at 66.

[45] Br. on Behalf of Plaintiff in Error at 79, *Fed. Baseball Club of Balt.*, 259 U.S. 200 (citing Record at 325).

[46] *Id.* (citing Record at 326).

[47] *Id.* (quoting Record at 301).

[48] *Id.*

[49] App. to Br. on Behalf of Defendants in Error at 155, *Fed. Baseball Club of Balt.*, 259 U.S. 200.

[50] *See, e.g.*, J. Philip Calabrese, "The Racial Re-integration of Major League Baseball," 11 *Seton Hall J. Sport L.* 1, 24 (2001); Jason M. Pollack, Note, "Take My Arbitrator, Please: Commissioner 'Best Interests' Disciplinary Authority in Professional Sports," 67 *Fordham L. Rev.* 1645, 1650 (1999).

[51] *See United States v. Standard Oil Co. of Ind.*, 155 F. 305, 321 (1907).

[52] *See* Shayna M. Sigman, "The Jurisprudence of Judge Kenesaw Mountain Landis," 15 *Marq. Sports L. Rev.* 277, 295 (2005).

[53] Benjamin G. Rader, **Baseball: A History of America's Game** 109 (1992), *quoted in* Jerold J. Duquette, **Regulating the National Pastime: Baseball and Antitrust** 17 (1999).

[54] *See* G. Edward White, **Creating the National Pastime: Baseball Transforms Itself, 1903–1953**, at 71–72 (1996).

[55] *Fed. Baseball Club of Balt.*, 269 F. at 684.

[56] *Id.*

[57] 9 Wheat. (22 U.S.) 1 (1824).

[58] *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895); *see also supra* text accompanying notes 24–25.

[59] *Fed. Baseball Club of Balt.*, 269 F. at 684.

[60] *Id.* at 684–85.

[61] *See id.* at 687–88.

[62] Jeffrey Brandon Morris, **Calmly to Poise the Scales of Justice: A History of the Courts of the District of Columbia Circuit** 71, 78 (2001).

[63] *Fed. Baseball Club of Balt.*, 259 U.S. at 208.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 208–09.

[67] 155 U.S. 648 (1895).

[68] *Id.* at 655.

[69] Eldon L. Ham, "Aside the Aside: The True Precedent of Baseball in Law," 13 *Marq. Sports L. Rev.* 213, 215 (2003).

[70] Paul Finkelman, "Baseball and the Rule of Law Revisited," 25 *T. Jefferson L. Rev.* 17, 30 (2002).

[71] White, *supra* note, at 70.

[72] **Baseball and the American Legal Mind** 75–76 (Spencer Weber Waller et al. eds., 1995).

[73] Roger I. Abrams, "Blackmun's List," 6 *Va. Sports & Ent. L. J.* 181, 183 (2006–2007); *see also* Roger I. Abrams, **Legal Bases: Baseball and the Law** 60 (1998).

[74] *Gardella v. Chandler*, 172 F. 2d 402, 408–09 (2d Cir. 1949) (Frank, J., concurring).

[75] *Salerno v. Am. League of Prof'l Baseball Clubs*, 429 F. 2d 1003, 1005 (2d Cir. 1970).

[76] 346 U.S. 356 (1953) (*per curiam*).

[77] 407 U.S. 258 (1972).

[78] 346 U.S. at 357–58 (1953) (Burton, J., dissenting) (citation omitted).

[79] 407 U.S. at 286 (Douglas, J., dissenting).

[80] *Id.* at 286 n.1.

[81] *Id.* at 282 (Blackmun, J.).

[82] *Radovich v. Nat'l Football League*, 352 U.S. 445, 450, 452 (1957).

[83] **Baseball and the American Legal Mind**, *supra* note, at 78 n. 1.

[84] Duquette, *supra* note, at 18.

[85] Kevin McDonald, "Antitrust and Baseball: Stealing Holmes," 1998 *J. Sup. Ct. Hist.* 89, 122 (1998).

[86] *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (citing *Perez v. United States*, 402 U.S. 146, 151 (1971) and *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (internal quotation marks omitted)).

[87] *N. Sec. Co. v. United States*, 193 U.S. 197 (1904).