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2022 MLB Lockout: Time to Re-Examine Baseball's Antitrust Exemption

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INTRODUCTION

The 2022 Major League Baseball (MLB) season is currently in jeopardy of a delayed start.[1] On December 2, 2021, at 12:01 a.m. EST, the collective bargaining agreement (CBA) between MLB and the Major League Baseball Players' Association (MLBPA) expired.[2] In response, MLB owners unanimously voted to institute a lockout, resulting in the ninth work stoppage in the history of MLB, and the first since 1994.[3] By failing to agree to a new CBA, the relationship between MLB and the MLBPA has once again become hostile and contentious.[4] That the relationship between

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[1] Tom Verducci, *The Start of the MLB Regular Season Is in Jeopardy*, SPORTS ILLUSTRATED (Feb. 4, 2022), https://www.si.com/mlb/2022/02/04/mlb-lockout-start-of-regular-season-in-jeopardy.

[2] James Wagner, *With No Deadline Deal, M.L.B.'s Lockout Begins*, N.Y. TIMES (Dec. 2, 2021), https://www.nytimes.com/2021/12/02/sports/baseball/mlb-lockout.html.

[3] *Id.* The 1994 work stoppage was different from the current MLB work stoppage, as it resulted from a players strike. While both result in a work stoppage, a strike is initiated by the labor, in this case the players, while a lockout is initiated by the owners. Of the nine work stoppages in the history of MLB, four have been due to a lockout, while the other five resulted from a player's strike. In addition to the current MLB lockout, the other instances of a lockout occurred in 1973, 1976, and 1990. Prior to the current MLB lockout, there was a work stoppage due to an MLB lockout in 1973, 1976, and 1990. In addition to the 1994 strike, the MLB had a work stoppage resulting from a players strike in 1972, 1980, 1981, and 1990.

[4] See JOHN HEYLAR, THE LORDS OF THE REALM: THE REAL HISTORY OF BASEBALL (1994), for an in-depth look at the relationship between owners and players and how it has changed over the twentieth century. *See also* Genevieve F. Birren, *A Brief History of Sports Labor Stoppages: The Issues, The Labor Stoppages and Their Effectiveness (Or Lack Thereof)*, 10 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 3 (2014). The failure to come to a new CBA, and the lockout resulting from the failure to do so, is nothing new for baseball. Prior to 2002, baseball had a labor stoppage during every CBA negotiation except the very first one. The 2002-2006 CBA was the first negotiated in over 30 years without a labor

MLB and the MLBPA has been overwhelmingly contentious throughout its history can largely be attributed to baseball's infamous antitrust exemption, which baseball has enjoyed since 1922.

It is pure happenstance, or perhaps, more accurately, poignant case of irony, that the 2022 MLB season will also mark the 100-year anniversary of baseball's infamous antitrust exemption. The legal basis for baseball's exemption from antitrust laws stems from three Supreme Court cases, which collectively are known as the "Baseball Trilogy."[5] This article will discuss the questionable legal basis underlying the judicially created exemption for baseball, focusing on the widespread misinterpretation of the Court's decision in 1922 in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.

I. THE FRAMEWORK OF BASEBALL'S ANTITRUST EXEMPTION

"Every other sport—like virtually every sort of business—is governed by the antitrust laws." [6]

A. The Sherman Antitrust Act

In 1890, Congress, pursuant to its powers under the Commerce Clause, enacted the Sherman Act with the intent of preventing unreasonable restraints on trade and promoting competition and free market principles.[7] Section 1 of the Sherman Act prohibits "contracts,

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stoppage. The 2007-2011, 2012-2016, and 2017-2021 CBAs were also reached without any stoppage.

[5] The "Baseball Trilogy" is comprised of three Supreme Court decisions that effectively constructed MLB's antitrust exemption: Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922); Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953); and Flood v. Kuhn, 407 U.S. 258 (1972).

[6] STUART BANNER, THE BASEBALL TRUST: A HISTORY OF BASEBALL'S ANTITRUST EXEMPTION xi (2013).

[7] The Antitrust Laws, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Feb. 9, 2022). *See also* N. Pac Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a

combinations ... and conspiracies in restraint of trade or commerce among the several States ..."[8] Section 2 of the Act prohibits monopolization of any "part of the trade or commerce among the several States."[9] The Sherman Act applies only to agreements or activities that have a substantial impact on or occur in the flow of interstate commerce.[10]

B. The Baseball Trilogy

Remarkably, the baseball antitrust exemption that is still effective today did not arise from a policy decision on behalf of the legislative or executive branch. Rather, the Supreme Court's decision in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs* established the framework of baseball's antitrust exemption.[11] However, despite a century's worth of judicial deference to the Court's decision in *Federal Baseball*, the decision by the Court did not exempt baseball from the antitrust laws but instead simply held that baseball is not governed by the Sherman Act because it is not a form of interstate commerce. In other words, the Court determined that Congress was unable to apply the antitrust laws to baseball because it fell outside of their powers granted to them by the Commerce Clause. The Court's decision in *Federal Baseball* has been widely condemned and labeled as an "aberration that makes little sense given the heavily interstate nature of the 'business of baseball' today."[12]

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comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . .").

[8] Sherman Antitrust Act, 15 U.S.C. § 1 (2018).

[9] 15 U.S.C. § 2 (2018).

[10] *See Antitrust Enforcement and the Consumer*, U.S. DEP'T JUST., https://www.justice.gov/atr/file/800691/download (last visited Feb. 10, 2022) (explaining the Antitrust Division's and Federal Trade Commission's antitrust enforcement powers).

[11] *Federal Baseball*, 259 U.S. at 208–09.

[12] *See, e.g.*, BANNER, *supra* note 7, at xi ("Scarcely anyone believes that baseball's exemption makes any sense."); G. EDWARD WHITE, CREATING THE NATIONAL PASTIME 70 (1996)

In 1953, the modern version of baseball's antitrust exemption was officially established as a result of the Court's decision in *Toolson v. New York Yankees, Inc.*[13] The Court in *Toolson* upheld the exemption, reasoning that its abrogation was not of judicial concern, and was solely reserved for Congress.[14] Additionally, the Court in *Toolson* explicitly rejected the opportunity to take another look at the underlying rationale and basis for the decision in *Federal Baseball*—that baseball was not a form of interstate commerce.[15] Like *Federal Baseball*, Toolson has been excoriated by legal scholars and judges.[16] In fact, two justices issued a scathing dissent in *Toolson*, notably pointing out that although unlikely, even if Justice Holmes' rationale was correct in *Federal Baseball*, there was no question that it no longer made any sense over 30 years later.[17]

In 1972, the Supreme Court completed the "Baseball Trilogy" with their decision in *Flood v. Kuhn*. In *Flood*, the Court finally admitted what had undoubtedly been true for quite some time, specifically that "professional baseball is a business, and it is engaged in interstate commerce."[18] However, despite this admission, the Court in *Flood* upheld baseball's antitrust exemption. Given the Court's ruling in *Flood*, the legal exemption for baseball's antitrust exemption appears to be significantly weakened, if

(discussing Federal Baseball as "remarkably myopic, almost willfully ignorant of the nature of the enterprise"); Kevin McDonald, *Antitrust and Baseball: Stealing Holmes*, 23 J. SUP. CT. HIST. 89, 90 (1998) ("The reaction of others ranged from thumping denouncement ... to gentle embarrassment on Holmes' behalf …").

[13] *Toolson*, 346 U.S. at 356–57.

[14] *Toolson*, 346 U.S. at 357. "We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation." *Id.*

[15] *Id.*

[16] *See e.g.*, Salerno v. Am. League of Prof'l Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970). Judge Friendly criticized the decisions in *Federal Baseball* and *Toolson*: "We freely acknowledge our belief that Federal Baseball was not one of Mr. Justice Holmes' happiest days [and] that the rationale of Toolson is extremely dubious."

[17] *See Toolson*, 346 U.S. at 362–65 (Burton, J., dissenting) (Justices Reed and Burton pointed out the traveling between states, expenditures of large sums between states, and the audience for baseball, which expanded beyond state lines with the help of radio and television.)

[18] *Flood*, 407 U.S. at 282.

not nonexistent.

II. BASEBALL'S ANTITRUST EXEMPTION IN DANGER?

With the ruling in *Flood* the only factors keeping the exemption are *stare decisis* and the fact that Congress, outside of the Curt Flood Act in 1998, has yet to act with any legislation that would completely remove the exemption.[19] However, recently Congress has had two bills introduced that would remove MLB's antitrust exemption by repealing Section 26(b) of the Clayton Act.[20] Both bills have been referred to their respective Committee on the Judiciary, where they still sit at this point in time.[21]

Additionally, in *NCAA v. Alston*, dicta in the unanimous Supreme Court decision seemingly provided an invitation for a challenge to be brought against baseball's antitrust exemption.[22] In *Alston*, Justice Gorusch, writing for the Court, referred to MLB's antitrust exemption as "unrealistic, inconsistent, and aberrational."[23] In the opinion, Justice Gorsuch also seemingly invited legislators to address the problem with MLB's antitrust exemption but also that the Court may decide to abolish the judicially created exemption if legislators chose not to address it.[24]

Whether it be Congressional action or a decision by the Supreme Court, it seems that the MLB's antitrust exemption is in serious danger. By taking action, either Congress or the Supreme Court will be fixing a decision that was wrong at the time and has been followed for nearly a century.

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[19] *Id.* at 282–83.
[20] Competition in Professional Baseball Act, S. 1111, 117th Cong. (2021); Competition in Professional Baseball Act, H.R. 2511, 117th Cong. (2021); 15 U.S.C. § 26(b).
[21] H.R. 2511; S. 1111.
[22] NCAA v. Alston, 141 S. Ct. 2141, 2159–2160 (2021).
[23] *Id.* at 2159.
[24] *Id.* at 2160.