FLOOD V. KUHN

Supreme Court of the United States, 1972
407 U.S. 258

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

For the third time in 50 years the Court is asked specifically to rule that professional baseball's reserve system is within the reach of the federal antitrust laws.[1]

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II.

The petitioner, Curtis Charles Flood, born in 1938, began his major league career in 1956 when he signed a contract with the Cincinnati Reds for a salary of $ 4,000 for the season. He had no attorney or agent to advise him on that occasion. He was traded to the St. Louis Cardinals before the 1958 season. Flood rose to fame as a center fielder with the Cardinals during the years 1958-1969. ...

But at the age of 31, in October 1969, Flood was traded to the Philadelphia Phillies of the National League in a multi-player transaction. He was not consulted about the trade. He was informed by telephone and received formal notice only after the deal had been consummated. In December he complained to the Commissioner of Baseball and asked that he be made a free agent and be placed at liberty to strike his own bargain with any other major league team. His request was denied.

Flood then instituted this antitrust suit in January 1970 in federal court for the Southern District of New York. The defendants (although not all were named in each cause of action) were the Commissioner of Baseball, the presidents of the two major leagues, and the 24 major league clubs. In general, the complaint charged violations of the federal antitrust laws and civil rights statutes [among other claims] ... The plaintiff sought declaratory and injunctive relief and treble damages. [In essence, Flood claimed that the reserve clause violated the antitrust laws because it prevented him from contracting with the team of his choice. Lower courts denied relief based on Supreme Court precedents holding baseball immune from the antitrust laws.]

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[1] The reserve system, publicly introduced into baseball contracts in 1887, see *Metropolitan Exhibition Co*. v. *Ewing,* 42 F. 198, 202-204 (CC SDNY 1890), centers in the uniformity of player contracts; the confinement of the player to the club that has him under the contract; the assignability of the player's contract; and the ability of the club annually to renew the contract unilaterally, subject to a stated salary minimum. ...

IV.

The Legal Background

A. *Federal Baseball Club v. National League,* 259 U.S. 200 (1922), was a suit for treble damages instituted by a member of the Federal League (Baltimore) against the National and American Leagues and others. The plaintiff obtained a verdict in the trial court, but the Court of Appeals reversed. The main brief filed by the plaintiff with this Court discloses that it was strenuously argued, among other things, that the business in which the defendants were engaged was interstate commerce; that the interstate relationship among the several clubs, located as they were in different States, was predominant; that organized baseball represented an investment of colossal wealth; that it was an engagement in moneymaking; that gate receipts were divided by agreement between the home club and the visiting club; and that the business of baseball was to be distinguished from the mere playing of the game as a sport for physical exercise and diversion.

Mr. Justice Holmes, in speaking succinctly for a unanimous Court, said:

> "The business is giving exhibitions of base ball, which are purely state affairs. . . . 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. . . . The transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendants, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.
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> "If we are right the plaintiff's business is to be described in the same way and the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States." 259 U.S., at 208-209.[10]

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[10] "What really saved baseball, legally at least, for the next half century was the protective canopy spread over it by the United States Supreme Court's decision in the Baltimore Federal League anti-trust suit against Organized Baseball in 1922. In it Justice Holmes, speaking for a unanimous court, ruled that the business of giving baseball exhibitions for profit was not 'trade or commerce in the commonly-accepted use of those words' because 'personal effort, not related to production, is not a subject of commerce'; nor was it interstate, because the movement of ball clubs across state lines was merely 'incidental' to the business. It should be noted that, contrary to what many believe, Holmes did call baseball a business; time and again those who have not troubled to read the text of the

In the years that followed, baseball continued to be subject to intermittent antitrust attack. The courts, however, rejected these challenges on the authority of *Federal Baseball*. In some cases stress was laid, although unsuccessfully, on new factors such as the development of radio and television with their substantial additional revenues to baseball. For the most part, however, the Holmes opinion was generally and necessarily accepted as controlling authority. And in the 1952 Report of the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, H. R. Rep. No. 2002, 82d Cong., 2d Sess., 229, it was said, in conclusion:

> "On the other hand the overwhelming preponderance of the evidence established baseball's need for some sort of reserve clause. Baseball's history shows that chaotic conditions prevailed when there was no reserve clause. Experience points to no feasible substitute to protect the integrity of the game or to guarantee a comparatively even competitive struggle. The evidence adduced at the hearings would clearly not justify the enactment of legislation flatly condemning the reserve clause."

C. The Court granted certiorari, in the *Toolson, Kowalski*, and *Corbett* cases, and, by a short *per curiam* (Warren, C. J., and Black, Frankfurter, DOUGLAS, Jackson, Clark, and Minton, JJ.), affirmed the judgments of the respective courts of appeals in those three cases. *Toolson v. New York Yankees, Inc.,* 346 U.S. 356 (1953). *Federal Baseball* was cited as holding "that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws," and:

> "Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. 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. Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, supra*, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."

This quotation reveals four reasons for the Court's affirmance of *Toolson* and its companion cases: (a) Congressional awareness for three decades of the Court's ruling in *Federal Baseball*, coupled with congressional inaction. (b) The fact that baseball was left alone to develop for that period upon the understanding that the reserve system was not subject to existing federal antitrust laws. (c) A reluctance to overrule *Federal Baseball* with consequent retroactive effect. (d) A professed desire that any needed remedy be provided by legislation rather than by court decree. The emphasis in *Toolson* was on the determination, attributed even to *Federal Baseball*, that Congress had no intention to include baseball within the reach of the federal antitrust laws.

> decision have claimed incorrectly that the court said baseball was a sport and not a business." 2 H. Seymour, Baseball 420 (1971).

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[Justice Blackmun recounts three subsequent opinions. In *United States v. Shubert,* 348 U.S. 222 (1955), the Court reversed a dismissal of an antitrust suit against defendants engaged in theatrical attractions across the country, indicating that *Federal Baseball* and *Toolson* gave no general antitrust exemption for businesses built around local exhibitions. Similarly, the Court in *United States v. International Boxing Club,* 348 U.S. 236 (1955), reversed a district court for dismissing the antitrust complaint; the Court denied that *Federal Baseball* gave sports other than baseball an exemption from the antitrust laws. Finally, in *Radovich v. National Football League,* 352 U.S. 445 (1957), the Supreme Court reversed the lower courts for dismissing another antitrust complaint against a football league. Justice Clark's opinion for the Court noted that *Toolson* upheld baseball's immunity, "because it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity." The opinion said:]

> "All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years.
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> "Since *Toolson* and *Federal Baseball* are still cited as controlling authority in antitrust actions involving other fields of business, we now specifically limit the rule there established to the facts there involved, *i. e*., the business of organized professional baseball. As long as the Congress continues to acquiesce we should adhere to -- but not extend -- the interpretation of the Act made in those cases. . . .
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> "If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication. We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action."

Mr. Justice Frankfurter dissented essentially for the reasons stated in his dissent in *International Boxing*. Mr. Justice Harlan, joined by MR. JUSTICE BRENNAN, also dissented because he, too, was "unable to distinguish football from baseball." Here again the dissenting Justices did not call for the overruling of the baseball decisions. They merely could not distinguish the two sports and, out of respect for *stare decisis*, voted to affirm.

G. Finally, in *Haywood v. National Basketball Assn.,* 401 U.S. 1204 (1971), MR. JUSTICE

DOUGLAS, in his capacity as Circuit Justice, reinstated a District Court's injunction *pendente lite* in favor of a professional basketball player and said, "Basketball . . . does not enjoy exemption from the antitrust laws."

H. This series of decisions understandably spawned extensive commentary, some of it mildly critical and much of it not; nearly all of it looked to Congress for any remedy that might be deemed essential.

I. Legislative proposals have been numerous and persistent. Since *Toolson* more than 50 bills have been introduced in Congress relative to the applicability or nonapplicability of the antitrust laws to baseball. A few of these passed one house or the other. Those that did would have expanded, not restricted, the reserve system's exemption to other professional league sports. And the Act of Sept. 30, 1961, Pub. L. 87-331, 75 Stat. 732, and the merger addition thereto effected by the Act of Nov. 8, 1966, Pub. L. 89-800, § 6 (b), 80 Stat. 1515, 15 U. S. C. §§ 1291-1295, were also expansive rather than restrictive as to antitrust exemption.

V.

In view of all this, it seems appropriate now to say that:

1. Professional baseball is a business and it is engaged in interstate commerce.

2. With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball.

3. Even though others might regard this as "unrealistic, inconsistent, or illogical," see *Radovich, 352 U.S., at 452*, the aberration is an established one, and one that has been recognized not only in *Federal Baseball* and *Toolson*, but in *Shubert, International Boxing*, and *Radovich*, as well, a total of five consecutive cases in this Court. It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs.

4. Other professional sports operating interstate -- football, boxing, basketball, and, presumably, hockey and golf are not so exempt.

5. The advent of radio and television, with their consequent increased coverage and additional revenues, has not occasioned an overruling of *Federal Baseball* and *Toolson*.

6. The Court has emphasized that since 1922 baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action. Remedial legislation has been introduced repeatedly in Congress but none has ever been enacted. The Court, accordingly, has concluded that Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes. This, obviously, has been

deemed to be something other than mere congressional silence and passivity.

7. The Court has expressed concern about the confusion and the retroactivity problems that inevitably would result with a judicial overturning of *Federal Baseball*. It has voiced a preference that if any change is to be made, it come by legislative action that, by its nature, is only prospective in operation.

8. The Court noted in *Radovich* that the slate with respect to baseball is not clean. Indeed, it has not been clean for half a century.

This emphasis and this concern are still with us. 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.

Accordingly, we adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball. We adhere also to *International Boxing* and *Radovich* and to their respective applications to professional boxing and professional football. If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court. If we were to act otherwise, we would be withdrawing from the conclusion as to congressional intent made in *Toolson* and from the concerns as to retrospectivity therein expressed. Under these circumstances, there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency.

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[W]hat 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.

MR. CHIEF JUSTICE BERGER, concurring.

I concur in all but Part I of the Court's opinion but, like MR. JUSTICE DOUGLAS, I have grave reservations as to the correctness of *Toolson v. New York Yankees, Inc.,* 346 U.S. 356 (1953); as he notes in his dissent, he joined that holding but has "lived to regret it." The error, if such it be, is one on which the affairs of a great many people have rested for a long time. Courts are not the forum in which this tangled web ought to be unsnarled. I agree with MR. JUSTICE DOUGLAS that congressional inaction is not a solid base, but the least undesirable course now is to let the matter rest with Congress; it is time the Congress acted to solve this problem.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

This Court's decision in *Federal Baseball Club v. National League, 259 U.S. 200*, made in 1922, is a derelict in the stream of the law that we, its creator, should remove. Only a romantic view[1]

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[1] While I joined the Court's opinion in *Toolson v. New York Yankees, Inc.,* 346 U.S. 356, I have lived to regret it; and I would now correct what I believe to be its

of a rather dismal business account over the last 50 years would keep that derelict in midstream.

In 1922 the Court had a narrow, parochial view of commerce. With the demise of the old landmarks of that era, the whole concept of commerce has changed.

Under the modern [commerce clause] decisions, the power of Congress was recognized as broad enough to reach all phases of the vast operations of our national industrial system. An industry so dependent on radio and television as is baseball and gleaning vast interstate revenues (see H. R. Rep. No. 2002, 82d Cong., 2d Sess., 4, 5 (1952)) would be hard put today to say with the Court in the *Federal Baseball Club* case that baseball was only a local exhibition, not trade or commerce.

Baseball is today big business that is packaged with beer, with broadcasting, and with other industries. The beneficiaries of the *Federal Baseball Club* decision are not the Babe Ruths, Ty Cobbs, and Lou Gehrigs.

The owners, whose records many say reveal a proclivity for predatory practices, do not come to us with equities. The equities are with the victims of the reserve clause. I use the word "victims" in the Sherman Act sense, since a contract which forbids anyone to practice his calling is commonly called an unreasonable restraint of trade.

If congressional inaction is our guide, we should rely upon the fact that Congress has refused to enact bills broadly exempting professional sports from antitrust regulation.[3] H.R. Rep. No. 2002, 82d Cong., 2d Sess. (1952). The only statutory exemption granted by Congress to professional sports concerns broadcasting rights. 15 U. S. C. §§ 1291-1295. I would not ascribe a broader exemption through inaction than Congress has seen fit to grant explicitly.

There can be no doubt "that were we considering the question of baseball for the first time upon a clean slate" we would hold it to be subject to federal antitrust regulation. *Radovich v. National Football League*. The unbroken silence of Congress should not prevent us from correcting our own mistakes.

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fundamental error.

[3] The Court's reliance upon congressional inaction disregards the wisdom of *Helvering v. Hallock,* 309 U.S. 106, 119-121, where we said:

"Nor does want of specific Congressional repudiations . . . serve as an implied instruction by Congress to us not to reconsider, in the light of new experience . . . those decisions . . . . It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. . . . Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of . . . Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

This is a difficult case because we are torn between the principle of *stare decisis* and the knowledge that the decisions in *Federal Baseball Club v. National League* and Toolson v. New York Yankees, Inc. are totally at odds with more recent and better reasoned cases.

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Has Congress acquiesced in our decisions in *Federal Baseball Club* and *Toolson*? I think not. Had the Court been consistent and treated all sports in the same way baseball was treated, Congress might have become concerned enough to take action. But, the Court was inconsistent, and baseball was isolated and distinguished from all other sports. In *Toolson* the Court refused to act because Congress had been silent. But the Court may have read too much into this legislative inaction.

Americans love baseball as they love all sports. Perhaps we become so enamored of athletics that we assume that they are foremost in the minds of legislators as well as fans. We must not forget, however, that there are only some 600 major league baseball players. Whatever muscle they might have been able to muster by combining forces with other athletes has been greatly impaired by the manner in which this Court has isolated them. It is this Court that has made them impotent, and this Court should correct its error.

We do not lightly overrule our prior constructions of federal statutes, but when our errors deny substantial federal rights, like the right to compete freely and effectively to the best of one's ability as guaranteed by the antitrust laws, we must admit our error and correct it. We have done so before and we should do so again here. See, *e. g., Blonder-Tongue Laboratories, Inc*. v. *University of Illinois Foundation,* 402 U.S. 313 (1971); *Boys Markets, Inc*. v. *Retail Clerks Union,* 398 U.S. 235, 241 (1970).[4]

To the extent that there is concern over any reliance interests that club owners may assert, they can be satisfied by making our decision prospective only. Baseball should be covered by the antitrust laws beginning with this case and henceforth, unless Congress decides otherwise.[5]

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[4] In the past this Court has not hesitated to change its view as to what constitutes interstate commerce. Compare *United States v. Knight Co.,* 156 U.S. 1 (1895), with *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219 (1948), and *United States v. Darby,* 312 U.S. 100 (1941).

[5] We said recently that "in rare cases, decisions construing federal statutes might be denied full retroactive effect, as for instance where this Court overrules its own construction of a statute . . . ." *United States v. Estate of Donnelly,* 397 U.S. 286, 295 (1970). Cf. *Simpson v. Union Oil Co. of California,* 377 U.S. 13, 25 (1964).